IS IT TIME TO SCRAP STARE DECISIS?

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On March 5, 2025, the U.S. Court of Appeals for the District of Columbia Circuit delivered the Trump Administration a win by granting its request to pause a trial court's order, pending appeal, that prevented the President from firing Hampton Dellinger, the Special Counsel.[1] The lawsuit challenged the legality of statutory job protections for the head of the Office of Special Counsel ("OSC"), an independent watchdog created to root out public corruption, shield federal employees from adverse personnel practices like retaliation for whistleblowing, and investigate unlawful partisan activity among certain government officials.[2] Congress adopted a law establishing the OSC in the aftermath of the Watergate scandal, and in doing so, made the conscious decision to insulate the agency from political pressures related to its investigations and prosecutions. Among the ways that Congress sought to preserve OSC independence was by restricting the President from removing its head except in cases of "inefficiency, neglect of duty, or malfeasance in office."[3] The Circuit's March decision effectively concluded the case in which a series of emergency rulings had already made it up to the Supreme Court.[4] Dellinger unexpectedly resigned as Special Counsel shortly after the order issued,[5] which mooted the case and any further appeal.[6] In declining to fight the appeal, he may well have thought it better to vacate the office with a favorable district court order as the case's one and only legal opinion on the merits.[7] Thus, as a matter of strategy, this short-term loss for him

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1. Dellinger v. Bessent, No. 25-5052, 2025 U.S. App. LEXIS 6914 (D.C. Cir. Mar. 5, 2025).
2. *Id.*
3. 5 U.S.C. § 1211.
4. Dellinger v. Bessent, No. 25-5052, 2025 U.S. App. LEXIS 6914 (D.C. Cir. Mar. 5, 2025).
5. Eileen Sullivan, *Government Watchdog Ends Fight to Keep His Job After Trump Firing*, N.Y. TIMES (Mar. 6, 2025), https://www.nytimes.com/2025/03/06/us/politics/hampton-dellinger-firing.html [https://perma.cc/52QF-5THD].
6. Bessent v. Dellinger, No. 24A790, 2025 U.S. LEXIS 961, at *1 (U.S. S. Ct. March 6, 2025) (denying as moot the application to vacate the district court's order).
7. Mia Venkat, Juana Summers, Sarah Handel & Alejandra Marquez Janse, *Former Government Watchdog on His Decision to End Legal Fight Challenging His Firing*, NPR (March 7, 2025), https://www.

and thousands of recently terminated federal employees may have seemed like a long-term win, as it staved off a path that would ultimately lead to the Supreme Court,[8] which has at least suggested that the OSC's independent structure may raise some constitutional issues that potentially make the agency vulnerable to legal challenge.[9]

Yet the cause of agency independence would receive only the shortest of reprieves. The day after the D.C. Circuit decision, and shortly before Mr. Dellinger's resignation, the federal trial court in DC issued its own order.[10] Facing a similar presidential removal attempt of Gwynne Wilcox, a member of the National Labor Relations Board ("NLRB"), the trial court ordered Wilcox's reinstatement.[11] The Trump Administration immediately vowed to appeal the trial court's decision,[12] resulting in a ping-pong series of interim court orders—a three-judge appeals panel staying the trial court ruling,[13] followed by the Circuit Court *en banc* ruling to vacate the stay,[14] and, ultimately, Chief Justice John Roberts's re-imposition of the stay pending the Court's consideration and disposition of the interlocutory appeal.[15] Separately but relatedly, and not two weeks after purporting to fire Wilcox, the President took similar action to remove Alvaro Bedoya and Rebecca Kelly Slaughter as members of the independent Federal Trade Commission ("FTC").[16] Like Wilcox before them, the two Democratic members filed suit to be reinstated, arguing that the terminations are "indefensible under governing law" and contravene "bedrock, binding precedent" regarding independent agency employment protections.[17] That these terminations came to pass should not be surprising, however, because in February, after less than one month on the job, the Acting Solicitor General had declared that the Department of Justice would not defend the job tenure

kpbs.org/news/politics/2025/03/07/former-government-watchdog-on-his-decision-to-end-legal-fight-challenging-his-firing [https://perma.cc/WRY5-8QE3]; Statement by Hampton Delinger (March 6, 2025), https://assets.bwbx.io/documents/users/iqjWHBFdfxIU/rbmcNtJtQf9k/v0 [https://perma.cc/JNK4-8RHG].

8. Statement by Hampton Delinger, *supra* note 7 ("I think my odds of ultimately prevailing before the Supreme Court are long.").

9. Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 221 (2020) (distinguishing OSC's structure from that of the CFPB, which the Court invalidated, while still noting that the OSC's "single-leader office [was] created nearly 200 years after the Constitution was ratified, [and] drew a contemporaneous constitutional objection from the Office of Legal Counsel under President Carter and a subsequent veto on constitutional grounds by President Reagan.").

10. Wilcox v. Trump, No. CV 25-334 (BAH), 2025 WL 720914 (D.D.C. Mar. 6, 2025).

11. *Id.*

12. Gary Grumbach & Dan Mangan, *Trump Appeals Order Reinstating Fired NLRB Member, Judge Tells Him 'President is not a King,'* CNBC (Mar. 6, 2025), https://www.nbcphiladelphia.com/news/business/money-report/judge-reinstates-nlrb-member-trump-fired-a-president-is-not-a-king/4127066/ [https://perma.cc/JYG8-S7FA].

13. Harris v. Bessent, Nos. 25-5037, 25-5055, 25-5057, 2025 WL 980278 (D.C. Cir. Mar. 28, 2025).

14. Harris v. Bessent, Nos. 25-5037, 25-5055, 25-5057, 2025 U.S. App. LEXIS 8151 (D.C. Cir. Apr. 7, 2025) (en banc).

15. Trump v. Wilcox, No. 24A966, 2025 U.S. LEXIS 1984 (May 22, 2025).

16. Jody Godoy, *Trump Fires both Democratic Commissioners at FTC*, REUTERS (Mar. 19, 2025), https://www.reuters.com/world/us/trump-fires-both-democratic-commissioners-ftc-sources-say-2025-03-18/ [https://perma.cc/F8W7-HNSQ].

17. Complaint at 3, Slaughter v. Trump, No. 1:25-cv-00909 (D.D.C. Mar. 27, 2025).

protection regime for the members of the NLRB, the FTC, and another independent commission in court, arguing that they are unconstitutional.[18]

The latter cases (or ones similar to them) may soon appear on the Supreme Court's docket. When they do, the President's lawyers will ask the Court to reconsider *Humphrey's Executor*,[19] a 90-year old decision that upheld the constitutionality of for-cause job protections for the heads of independent agencies and commissions like the OSC,[20] NLRB, CPSC, and FTC, the latter of which being the exact commission that was challenged as unconstitutional—unsuccessfully—in *Humphrey's Executor*. A decision by the Court to overrule *Humphrey's Executor* should be seen as a flashing red light that signals its dogged commitment to advance the "unitary executive theory," the idea that because "all executive authority is centralized in the President,"[21] the President possesses virtually untrammeled authority to terminate executive and independent agency personnel.[22] It should also be understood as another step in the Trump Administration's persistent efforts to dismantle the administrative state,[23] as well as the Court's own.[24] Perhaps most importantly, though, overruling *Humphrey's Executor* would represent the latest battle in the Court's unrelenting war on *stare decisis* and precedent.[25] When it eventually occurs—when that metaphorical bomb finally drops—it just may be appropriate to ask ourselves an important question: is it time to abandon *stare decisis*?

18. Letter to Sen. Richard Durbin from Acting Solicitor Gen. Sarah M. Harris (Feb. 12, 2025). Consistent with the rapid-fire nature of surprise action by the second Trump Administration (pun intended), the President announced the termination of the Democrats on the Consumer Product Safety Commission ("CPSC"), the third independent agency mentioned in the Acting Solicitor General's letter, as this Article was undergoing final edits. *See* Jaclyn Diaz, *Trump Fires All 3 Democrats on the Consumer Product Safety Commission*, NPR (May 9, 2025), https://www.npr.org/2025/05/09/nx-s1-5393374/trump-consumer-product-safety-commission-cpsc-firing [https://perma.cc/FY78-GE9G].

19. Humphrey's Executor v. United States, 295 U.S. 602 (1935).

20. Given OSC's design, including its stewardship by a singular director and its investigatory and prosecutorial function, that office may be more akin to the independent counsel established by the Ethics in Government Act of 1978. About OSC, US OFFICE OF SPECIAL COUNSEL, https://osc.gov/Agency (last visited May 25, 2025) [https://perma.cc/S8M9-ZXXQ]. A decision to challenge OSC may, therefore, include a request that the Court reconsider *Morrison v. Olson*, 487 U.S. 654 (1988), which upheld that authorizing provision of the Ethics in Government Act as constitutional. As a result, opting to pursue such a challenge to OSC would still implicate stare decisis.

21. Christopher S. Yoo, Steven G. Calabresi & Laurence D. Nee, *The Unitary Executive During the Third Half-Century, 1889-1945*, 80 NOTRE DAME L. REV. 1, 3 (2005).

22. Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 HARV L. REV. 1756, 1758 (2023) ("Without removal, there is no unitary, responsible Chief Executive.").

23. *See, e.g.*, Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017); *see also* Nancy LeTourneau, *Bannon's Goal: A Deconstruction of the Administrative State*, WASH. MONTHLY (Feb. 24, 2017), https://washingtonmonthly.com/2017/02/24/bannons-goal-a-deconstruction-of-the-administrative-state/ [https://perma.cc/YU95-TKSC] (quoting Trump advisor Steve Banon as describing a key "line of work" for the first Trump Administration as the "deconstruction of the administrative state").

24. *See, e.g.*, Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1 (2020); *see also* Jimmy Hoover, *Attacks on Federal Agencies Continue in Supreme Court Petitions*, LAW.COM (July 9, 2024), https://www.law.com/nationallawjournal/2024/07/09/attacks-on-federal-agencies-continue-in-supreme-court-petitions/?slreturn=20250415152950 [https://perma.cc/YPZ3-A3H8].

25. *See infra* notes 36–70 and accompanying text.

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The doctrine of *stare decisis* is central to law, and U.S. constitutional law especially. A Latin phrase meaning "stand by things decided,"[26] the doctrine instructs courts to respect legal precedent by applying in cases before them the holdings and rationales set forth in earlier decisions that raise similar questions and present comparable facts.[27] Critically, *stare decisis* is neither a liberal nor conservative concept. Rather, it imbues the law with fundamental values that legitimize legal regimes and should be prized by those in both camps and everyone in between. Conservatives are inclined to highlight that *stare decisis* promotes stability, as consistency in judging allows Americans to anticipate how courts will decide future cases.[28] It thereby encodes reliable legal defaults and permits us to plan and conduct ourselves accordingly.[29] Liberals, on the other hand, are prone to emphasize the doctrine's tendency to foster equality, as it helps to eschew the patent unfairness that stems from treating like cases differently.[30] In reality, though, these justifications are just two sides of the same coin; *stare decisis* is integral because it instantiates values central to the rule of law, providing for clear, predictable rules that are uniformly applicable.

Stare decisis has yet another key benefit: its promotion of judicial restraint.[31] It acts as a check on courts, keeping them honest—and modest—by admonishing jurists to contain themselves when tempted to toss out a rule that emerged from the considered judgment of their predecessors.[32] This quality, likewise without an ideological bent, is especially critical in the U.S. system. Because our federal judges are not elected, but appointed to the bench for life,[33] and more consequentially, because they have the final say over what the law means,[34] *stare decisis* serves as an accountability measure. It cabins arbitrary judicial decision making in a way that comports with our common law constitutional tradition through which law develops steadily over time.[35] *Stare decisis* thus establishes a baseline for Americans to judge the work of judges. By calling for the Court to treat like cases alike, it both constrains the unelected high priests of the Constitution and forces them to heed the vital notions that justice is blind, and that the law will be applied without fear or favor.

26. *Stare Decisis*, BLACK'S LAW DICTIONARY (11th ed. 2019).

27. *See* Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 763 (1988).

28. *See, e.g.*, *Constitutional Stare Decisis*, 103 HARV. L. REV. 1344, 1347 (1990); Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 763 (1988).

29. *Id.*

30. *Id.* at 1349; Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 3 (2012).

31. *See, e.g.*, Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 277–82 (2005).

32. *See id.*

33. U.S. CONST. art. III, § 1.

34. Marbury v. Madison, 5 U.S. 137, 147 (1803).

35. *See generally* David A. Strauss, C*ommon Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

So why, then, consider scrapping *stare decisis*—this theory that has such clear and beneficial attributes? Because it's just that: a theory. In practice, *stare decisis* is failing to meet its stated objectives because it requires forbearance and presupposes that courts will not overhaul precedent simply because they can. Among the many tragedies of constitutional practice today is that this long-standing legal theory is being pitted against unilateral disarmament, a core tenet of game theory.[36] A hallmark of the current Supreme Court is a slash-and-burn approach to judging, rooted in ideological, even partisan warfare that seeks to dictate certain outcomes irrespective of their immediate or long-term consequences. One bloc of justices readily engages in a distinct form of constitutional hardball by disregarding legal precedent while the other respects it,[37] which undermines the agreement that *stare decisis* imposes on the field of constitutional law: that the Court will decide a case, then, when presented with a legal question left open by that case, it can offer a resolution that fits within those more limited confines.[38] So, while the more principled justices behave in ways that preserve *stare decisis*—even voting to rule in ways that, but for precedent, they might not—those justices who seek to aggrandize their own power and reach outcomes through motivated reasoning are content to frog march the doctrine to the gallows. The end result is a gruesome sight, with the ideals of equal justice under the law and judicial restraint left hanging.

Of course, courts should not adhere to precedent invariably. As the Supreme Court reminds us (with increasing frequency), "*stare decisis* is not an inexorable command."[39] On occasion, there will be some "special justification" for overruling precedent, where extenuating circumstances demand a departure from settled law.[40] Over time, the factual premises of a case can change, as might the rules governing closely related areas of law.[41] The Court could also find that in retrospect, its reasoning underlying the resolution of an earlier case was exceptionally poor or that few people actually rely on the rule and, therefore, that displacing it would not have a widespread, detrimental impact.[42] But when those conditions are not present—and they generally are not—*stare decisis* advises the justices to stick to the prior ruling.

Historically, the Supreme Court has sought to exercise judicial restraint, setting aside precedent in the most extraordinary of circumstances. In 1941, it

36. *See* Richard H. Fallon Jr., *Constitutional Precedent Viewed through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1113 (2008) ("Although I shall stress the character of constitutional law and adjudication as practices in the philosophical sense, it is also important to my analysis that many of the central philosophical ideas are at least loosely consistent with the insights of rational choice and game theoretic models that characterize social phenomena as multiplayer 'games' in which the participants adjust their conduct in response to the actual and anticipated reactions of others."); *cf.* Jason Marisam, *The Endless Election Law War*, 101 TEX. L. REV. ONLINE 232, 239 (2025); Joshua Braver, *Court-Packing: An American Tradition?*, 61 B.C. L. REV. 2747, 2789–91 (2020).

37. Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523 (2004)

38. *See supra* notes 26–27.

39. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 218 (2022).

40. Arizona v. Rumsey, 467 U.S. 203, 212 (1984).

41. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–55 (1992).

42. *Id.*

unanimously decided *United States v. Darby Lumber Co.*,[43] overruling *Hammer v. Dagenhart*,[44] an earlier case supported by exploitative corporations and recalcitrant state officials that prevented Congress from adopting child labor regulations and instituting a national minimum wage. More famously, it issued the unanimous 1954 *Brown v. Board of Education* opinion[45] that overruled *Plessy v. Ferguson*[46] and invalidated the Jim Crow "separate but equal" doctrine that sanctioned U.S. racial apartheid. In other words, the Court took into account the *stare decisis* considerations and values that ungird the principle and, accordingly, dispensed with these revanchist decisions that supported manifest injustices. *Stare decisis*, then, was not ignored, but understood to permit exceptions to sustaining precedent on remarkable occasions.

That is *not* what the current Supreme Court is doing. Instead, the Court has drawn on "the judicial Power" in ways that reflect its antipathy towards *stare decisis*.[47] This becomes patently obvious from just three recent examples, undoubtedly among this generation's most consequential decisions, each of which decided along ideological and even partisan divides. In the 2023 case *Students for Fair Admissions v. Harvard*,[48] the Court reversed a line of cases going back 45 years to uproot the settled understanding of the Fourteenth Amendment and federal higher education law. In the 1978 *Bakke* opinion[49]—issued not 25 years after *Brown*—a majority of the justices agreed that, given the country's compelling interest in fostering a diverse educational setting and subsequent workforce, universities may consider an applicant's race as one of several considerations in admissions decisions.[50] The Supreme Court reaffirmed that principle several times, most recently in the 2016 *Fisher* case challenging the University of Texas system.[51] Yet when then-swing Justice Anthony Kennedy left the bench two years later, a consolidated conservative majority pounced. The conservative wing was giddy about Kennedy's retirement and the opening that it created to disrupt the judicially imposed equilibrium established by Supreme Court precedent and eliminate affirmative action policies that were otherwise being settled by the states.[52] Indeed, this time it could not even wait 25 years from 2003, the year that Justice Sandra Day O'Connor, the Court's swing justice and deciding vote to uphold the University of Michigan Law School admissions plan, had expressed her bemusing optimism that "the use of racial

43. United States v. Darby, 312 U.S. 100 (1941).
44. Hammer v. Dagenhart, 247 U.S. 251 (1918).
45. Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).
46. Plessy v. Ferguson, 163 U.S. 537 (1896).
47. U.S. CONST. art. III, § 1.
48. Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 600 U.S. 181 (2023).
49. Regents of Univ. of California v. Bakke, 438 U.S. 265 (1978).
50. *Id.*
51. Fisher v. Univ. of Texas at Austin, 579 U.S. 365 (2016).
52. Edwin Rios, *'A Cautionary Tale': Colleges in States with Affirmative Action Bans Report Racial Disparities*, THE GUARDIAN (June 30, 2023), https://www.theguardian.com/law/2023/jun/30/affirmative-action-ban-state-colleges-racial-disparities-supreme-court#:~:text=Representatives%20from%20that%20school%20wrote,The%20statewide%20affirmative%20action%20ban [https://perma.cc/9DVC-J5H5].

preferences will no longer be necessary to further the interest" in diversity.[53] But with the deathblow of affirmative action in 2023 came a mocking pat on the head. At no point in the *SFFA* decision did the Court have the gumption to say that it was reversing its previous decisions.[54] Instead, its "stealth overruling of *Grutter* was laden with irony."[55] The Chief Justice bewilderingly "structured the *SFFA* majority opinion as if he was adhering to the principles developed . . . in *Grutter*" and its progeny, which *upheld* similar admissions programs, while effectuating a silent yet remarkable legal volte-face by overruling them implicitly.[56] In fact, the Court employed the same tactic in the 2013 *Shelby County v. Holder* decision[57] that eviscerated the Voting Rights Act, suggesting that such legal grand wizardry may be surreptitiously overruling the Reconstruction itself,[58] with the Justices evading full public accountability for their decrees even as they displace important pillars of our multiracial democracy.[59] One may disagree or not with the Court's bottom line, that "universities have for too long . . . concluded, wrongly, that the touchstone of an individual's identity is . . . the color of their skin."[60] One may be insulted by its galling invocation of *Brown* more than a dozen times in support of that claim.[61] One may be surprised (or not) by the maximalist interpretations of the *SFFA* ruling,[62] the Trump Administration's

53. Grutter v. Bollinger, 539 U.S. 306, 343 (2003).

54. *See, e.g.*, Bill Watson, *Did the Court in* SFFA *Overrule* Grutter*?*, 99 NOTRE DAME L. REV. REFLECTION 113 (2023).

55. Vinay Harpalani, *Roberts Rules of (Dis)Order: Doctrinal Doublespeak on Affirmative Action and Stare Decisis*, 77 SMU L. REV. 61, 70 (2024). *See* Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1, 14 (2010) (differentiating "stealth overruling . . . from its close cousin, overruling *sub silentio*" on the basis of awareness and intent, where "overruling *sub silentio* [ ] could imply an accidental or unknowing treading on precedents," while "[t]he hallmark of stealth overruling is that the Justices are perfectly aware that they are overruling but hide the fact that they are doing so."); Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1903 (2014) ("[T]he story of Citizens United is a story of narrowing as much as it is a story of overruling. Indeed, the lesson of the Court's recent campaign-finance cases is that narrowing and overruling naturally go hand in hand to form a continuous method of gradually eradicating erroneous decisions. In short, courts can and should engage in legitimate narrowing until they reach a point when they can do so no more.").

56. *Id.* at 70–71.

57. Shelby County v. Holder, 570 U.S. 529 (2013); *see* Richard L. Hasen, *Shelby County and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. 713, 730–31 (2014).

58. *See* Wilfred Codrington III, The United States Needs a Third Reconstruction, THE ATLANTIC (July 20, 2020) (highlighting the Supreme Court's critical role in facilitating the end of the first and second Reconstruction projects, most notably by advancing a jurisprudence that de-centers, disempowers, and disregards the Reconstructions' intended beneficiaries "in the name of states' rights and constitutional color blindness," and to vindicate white "claims of 'reverse discrimination' in the fields of education and employment."). To this end, this Court's jurisprudence on race may be for constitutional law what W.E.B. DuBois said the Dunning school of history was for the academy and beyond: "propaganda against the Negro" that amounts to "one of the most stupendous efforts the world ever saw to discredit human beings, an effort involving universities, history, science, social life and religion." W. E. BURGHARDT DU BOIS, BLACK RECONSTRUCTION IN AMERICA, 1860-1880 (1935).

59. Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1, 14 (2010) ("The likely motive [for stealth overruling] . . . is avoiding publicity" though "the motive need not define the act itself.").

60. Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 600 U.S. 181, 231 (2023).

61. *See, e.g.*, Grutter v. Bollinger, 538 U.S. 306, 331 (2003).

62. *See* Nancy Leong, *Diversity Messaging After Affirmative Action*, 109 MINN. L. REV. 1059 (2025).

stretching of the opinion to provide cover for unwarranted ideology-based government restrictions and reprisal,[63] or by the ramifications that it has had in higher education[64] and beyond.[65] Yet however one feels about the merits of the case, the Court's disdain for precedent is palpable.

At least in *Loper Bright Enterprises v. Raimondo*,[66] the 2024 blockbuster administrative law case, the Court acknowledged that it was overruling *Chevron v. Natural Resources Defense Council*[67] and, with it, 40 years of precedent.[68] But that is just about as far as the compliments go in that case. Among the conservative legal movement's most significant recent "structural" wins at the Court, the *Loper Bright* ruling killed the *Chevron* doctrine, which governed federal regulatory decision-making and the allocation of decisional authority between the courts and administrative agencies. The rule under *Chevron*, backed by then-Associate Justice Antonin Scalia,[69] instructed federal judges, who preside over matters of general jurisdiction, to defer to the reasonable understanding of agency experts and specialists when defining truly ambiguous legal terms.[70] Unsurprisingly, when movement conservatives successfully advocated for the rule in the 1980s (and when Scalia expressed his support), it shifted power to the Reagan and Bush Administrations, enabling agencies overseen by their cabinets to use their discretion in furtherance of a deregulatory agenda.[71] Now, with movement conservatives dominating the high Court, *Loper Bright* shifts specialized policy to courts—and ultimately the Supreme Court—to advance the same laissez faire, corporate-backed, deregulatory agenda. Justifying its choice to toss the law, the Court argued that *Chevron* was a hollow decision that had not been applied in about a decade.[72] To the extent that it holds water, however, the "argument is a bootstrap," as Justice Kagan explained—a problem of the Court's own making.[73] The reason that the "Court ha[d] 'avoided deferring under *Chevron* since 2016' [is] because it ha[d] been preparing to

63. *See, e.g.*, Memorandum from Secretary of Defense (Jan. 29, 2025) (purporting to "[r]estor[e] America's [f]ighting [f]orce" by, among other things, "abolish[ing] DEI offices and any vestiges of such offices that subvert meritocracy, perpetuate unconstitutional discrimination, and promote radical ideologies related to systemic racism and gender fluidity."); Exec. Order No. 14,279, 90 Fed. Reg. 17529 (Apr. 23, 2025); Gregory Svirnovskiy, *Trump Floats Going After More Schools' Tax-Exempt Status*, POLITICO (May 7, 2025), https://www.politico.com/news/2025/05/07/trump-taxes-harvard-universities-00334582 [https://perma.cc/W438-ENRD].

64. *See, e.g.*, Andy Rose, *Harvard University Renames its DEI Office as its Battle with the Trump Administration Expands to More Fronts*, CNN NEWS (Apr. 29, 2025); Leong, *supra* note 62, at 1066 (chronicling a sharp decline in "diversity messaging" or "public signaling about racial diversity" following *SFFA*, a response not required by the decision).

65. Exec. Order No. 14,151, 90 Fed. Reg. 8339 (Jan. 20, 2025); Exec. Order No. 14,173, 90 Fed. Reg. 8633 (Jan. 21, 2025).

66. Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024).

67. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

68. *Loper Bright Enters.*, 603 U.S. at 412 ("*Chevron* is overruled.").

69. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L. J. 511 (1989)

70. *Chevron*, 467 U.S. at 844.

71. Mila Sohoni, Chevron*'s Legacy*, 138 HARV. L. REV. F. 66, 84, 85 (2025).

72. *Loper Bright Enters*, 603 U.S. at 375.

73. *Id.* at 473 (2024) (Kagan, J., dissenting).

overrule *Chevron* since around that time."[74] The Court then accelerated *Chevron*'s demise by actively deciding to "stop applying [*Chevron*] where one should; throw some gratuitous criticisms [of *Chevron*] into a couple of opinions, [and] issue a few separate writings 'question[ing the decision's] premises.'"[75] It should, therefore, be no surprise that by employing "self-help" techniques like these, the conservative bloc was eventually able to manufacture adequate "justification for overruling the decision."[76] Astoundingly, the Court has been using these tools to effectuate reversal through incrementalism with great frequency.[77] Moreover, if feverishly whittling away at the rule over time and then burning its remains because it curiously seemed to have less basis were not cynical enough, consider that *Chevron* was overruled despite a well-established legal norm that should have kept it even more secure. When a statute is at issue, the Court should be even more insistent on abiding by precedent because Congress—an elective and politically accountable body—can adopt a new law to supersede the ruling.[78] Notably, while studies show that congressional staffers are well aware of *Chevron* and drafted legislation understanding it as the legal backdrop,[79] at no time during the 40 years that *Chevron* was law did Congress adopt legislation to alter the rule that it put in place.[80]

Of course, no discussion of *stare decisis* would be complete without mention of *Dobbs v. Jackson Women's Health*,[81] the 2022 decision that overruled *Roe v. Wade*[82] and *Planned Parenthood v. Casey*[83] and, with them, the right of countless Americans to make their own reproductive decisions. Legal scholar Melissa Murray observed in leadup to that decision "the symbiosis of abortion and precedent," insightfully revealing the ways that the doctrine of *stare decisis* has shaped—and has been shaped by—the legal fight over abortion and reproductive rights.[84] In snuffing out *Roe* and *Casey*, the Supreme Court unmistakably elevated the burden for advocates making legal arguments that rely on *stare decisis*. The *Dobbs* ruling, more than any other in modern times, signaled that it's open season on any precedent. Critically, Justice Samuel Alito's majority opinion showcased the most superficial of *stare decisis* analyses.[85] In

74. *Id.*

75. *Id.*

76. *Id.*

77. *See* Duncan Hosie, *Stealth Reversals: Precedent Evasion in the Roberts Court and Constitutional Reclamation*, 58 U.C. DAVIS L. REV. 1323, 1405–06 (2025).

78. *Loper Bright Enters.*, 603 U.S. at 471–73 (Kagan, J., dissenting). *See* Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 317 (2005); William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361 (1988).

79. *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons*, 65 STAN. L. REV. 901, 993–994 (2013) (survey indicating that *Chevron* ranked first among legal cannons known to legislative drafters and accounted for in their drafting practices).

80. *Loper Bright Enters*., 603 U.S. at 471–73 (Kagan, J., dissenting).

81. Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

82. Roe v. Wade, 410 U.S. 113 (1973).

83. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992).

84. Melissa Murray, *The Symbiosis of Abortion and Precedent*, 134 HARV. L. REV. 308 (2020).

85. *See Dobbs*, 597 U.S. at 252.

particular, its stilted, one-sided discussion of the doctrine's "reliance" factor so utterly disregards the millions of child-bearing aged people who have come to *rely* on access to safe abortions that it would have earned him a B- on a first-year law school exam.[86] In the abortion context, at least, respect for *stare decisis* called for the justices to adhere to *Casey*'s legal framework, interpreting the "viability" and "undue burden" standards in each case on the understanding that the practical meaning of those concepts might change over time.[87] In other words, the constitutional default would have them acknowledge the Overton window and argue about terms within it, not shatter it and fabricate an entirely different one, and expect the country to respect the new status quo. Perhaps the most disturbing aspect of this chapter in the saga was that the Court's conservatives loathed the *Roe* and *Casey* precedents so much that they were content to let Texas enact a measure, "[t]he clear purpose and actual effect of" which, according to Chief Justice Roberts, was "to nullify this Court's rulings"—the law of the land at the time.[88] *Stare decisis* mattered so little to the conservatives that, as they mulled the end of *Roe* and *Casey*, they remained shamefully idle when faced with a former confederate state's direct attack on federal supremacy.[89] Rather than uphold the Constitution, Atlas shrugged.[90]

The basis for my present skepticism of *stare decisis* stems from its disregard in constitutional practice. This is, to be sure, distinct from that of the most dogmatic conservatives, like Justice Clarence Thomas, who disclaims the doctrine's authoritativeness and has consistently rejected calls for compliance with it.[91] Thomas argues that originalism, his preferred—shapeshifting and deeply flawed—method of constitutional interpretation demands it.[92] In his own

86. *Id; see* Nina Varsava, *Precedent, Reliance, and* Dobbs, 136 HARV. L. REV. 1845 (2023) (critiquing the reliance analysis in *Dobbs* as excessively and unjustifiably narrow in focus, including for excluding more "intangible" reliance interest considerations factored into earlier cases that sought to overruling precedent, as well as for falling short under the terms of the *Dobbs* majority's own framework); William N. Eskridge Jr., *Reliance Interests in Statutory and Constitutional Interpretation*, 76 VAND. L. REV. 681, 734 (2023) (arguing that there is "no room for doubt that private, societal, and public reliance interests play a prominent role in the Supreme Court's law of interpretation—and that *Dobbs* was flat wrong to say that only classic private (contract and property) reliance has pressed the Court to follow and not throw over long-standing precedents, rules, and legal practices.").

87. *See Casey*, 505 U.S. at 852.

88. Whole Woman's Health v. Jackson, 595 U.S. 30, 61 (2021) (Roberts, C.J., concurring in part).

89. That the Supreme Court would permit a state formerly part of the purported Confederacy to ignore its interpretation of the Fourteenth Amendment further supports my earlier contention that the Court is steadily nullifying Reconstruction. Scholars have examined the profound historical and philosophical ties between reproductive autonomy, racialized chattel slavery in the U.S., and the amendments that were intended to eliminate the incidents and badges of that peculiar institution. *See, e.g.*, Serena Mayeri, *The Critical Role of History after Dobbs*, 2 J. AM. CONST. HIST. 171 (2024); Michele Goodwin, *Distorting the Reconstruction: A Reflection on Dobbs*, 34 YALE J.L. & FEMINISM 30 (2023); Michele Goodwin, *Involuntary Reproductive Servitude: Forced Pregnancy, Abortion, and the Thirteenth Amendment*, 2022 U. CHI. LEGAL F. 191 (2022).

90. *See generally* AYN RAND, ATLAS SHRUGGED (1957).

91. *See, e.g.*, Gamble v. United States, 587 U.S. 678, 720 (2019) (Thomas, J., concurring).

92. *See generally* Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009); *see also* Harry Litman, *Originalism, Divided*, THE ATLANTIC (May 25, 2021), https://www.theatlantic.com/ideas/archive/2021/05/originalism-meaning/618953/ [https://perma.cc/2A6B-Q5T8]; David H. Gans, *This Court Has Revealed Conservative Originalism to be a Hollow Shell*, THE ATLANTIC (July 20, 2022),

words, Thomas's disavowal of *stare decisis* stems from a belief that Article III "requires adherence to . . . the original understanding of the relevant legal text," which may or "may not align with [previous] decisions made by the Court."[93] Accordingly, he contends the justices need not demonstrate some "special justification" to overrule precedential decisions that conflict with his chosen approach to judging, but instead should view themselves as writing on a *tabula rasa*—as if no previous rulings constrained them.[94] As a consequence, Thomas has openly mused about overruling *New York Times v. Sullivan*[95] (protecting journalists and news reporting from frivolous libel suits for slight misstatements about public figures), *Gideon v. Wainwright*[96] (mandating government-provided counsel for indigent defendants facing criminal prosecution instead of expecting the poor to pay for lawyers themselves), and *Obergefell v. Hodges*[97] (guaranteeing marriage equality for same-sex adults in loving and consensual relationships). As for the nearly century-old precedent affirming the constitutionality of statutory limits on presidential removal power, critically, Thomas has called it "erroneous," adding plainly that if presented with the opportunity "[i]n a future case," he would vote to "repudiate what is left of" *Humphrey's Executor*.[98] Whether the *stare decisis* considerations would call for these decisions to be overturned—and to be clear, they do not—is of no importance to him. For Thomas, it is far more significant that a convention of wealthy white men, many of whom held Black people in captivity and all of whom considered women as diminished in capacity and to be of lesser social and political stature, could not have drafted the Constitution in anticipation of those decisions and, in 1791 or 1868, would have probably disagreed with them.[99]

Justice Thomas is, at least, upfront and direct about what he seeks to do—or undo—and forthright regarding his contempt for the idea that the Court is bound to uphold established precedent. The others in the Court's conservative wing act as if they respect *stare decisis* generally but ignore it only on occasion to sweep away clear constitutional aberrations.[100] In fact, they are doing the exact opposite. This Court's assault on *stare decisis* may not be obvious by quantitative metrics,[101] but from a qualitative perspective, it has undoubtedly suffered major

https://www.theatlantic.com/ideas/archive/2022/07/roe-overturned-alito-dobbs-originalism/670561/ [https://perma.cc/6WN5-NCWP].

93. *Gamble*, 587 U.S. at 720 (Thomas, J., concurring).

94. *Id.*

95. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

96. Gideon v. Wainwright, 372 U.S. 335 (1963).

97. Obergefell v. Hodges, 576 U.S. 644 (2015).

98. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 239 (2020) (Thomas, J., concurring).

99. *See generally* Jamal Greene, *Originalism's Race Problem*, 88 DENV. U. L. REV. 517 (2011); *see also* Guy-Uriel E. Charles, & Luis Fuentes-Rohwer, *Race, Originalism, and Skepticism*, 25 U. PA. J. CONST. L. 1241 (2024). Indeed, it is likely that many of those men would have not anticipated *Brown* and would have disagreed with the decision, a problem that, despite attempts of originalism's adherents, the interpretive theory has yet to grapple with in a satisfactory way. *See* Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1882 (1995).

100. *See supra* notes 51–54 and accompanying text.

101. Recent reporting suggests that this Court has *not* overruled precedent more than its predecessor Courts. Given the nature of the enterprise, however, there is some dispute about metrics. *Compare, e.g.*, Adam Liptak,

blows. Even if the Court does not overhaul precedent especially frequently by recent historical standards, it disregards *stare decisis* to overrule some of the most substantive, impactful, and long-standing of its decisions,[102] often through the operose and meticulous employ of the "self-help" tactics that Justice Kagan so trenchantly described.[103] Indeed, the conservative faction has shown itself all-too-eager to cast doubt on legal precedent that it dislikes to erode the basis for it being cited as authoritative in future cases. And unfortunately, this is precisely what the Court has done over just the last half decade with respect to precedent safeguarding agency independence and, more immediately, statutory for cause removal protections. It has intentionally and assiduously polluted the jurisprudential grounding for them in targeted ways, manufacturing later reason to extirpate the deep doctrinal roots for the good government policy—and without any new legal basis for doing so.[104] Even as the Chief Justice recently issued a ruling that preserved *Humphrey's Executor*, the opinion in *Seila Law v. Consumer Financial Protection Bureau* nevertheless confined that case's holding sharply as only authorizing statutory "for-cause removal protections [for] a multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions and was said not to exercise any executive power."[105] Then, consistent with Kagan's prescient critique, Roberts suggested that two independent agencies—OSC and the Social Security Administration—may well be constitutionally infirm, while still distinguishing their structure from that of the agency it declared unconstitutional in *Seila Law*.[106] He described yet another agency's single-director structure as "a source of ongoing controversy," coyly adding that it had been "recently held

The Supreme Court's Mixed Record on Adhering to Precedent, N.Y. TIMES (June 29, 2024) ("[B]y standard political science measures, the court led by Chief Justice John G. Roberts Jr. since 2005 is not out of line with earlier courts in its treatment of precedent.") *with id*. (Professor Barry Friedman questioning whether historical figures about adherence to precedent are accurate given the Court's ability to mask departures therefrom); *compare*, *e.g.*, Jonathan H. Adler, *The Stare Decisis Court?*, THE VOLOKH CONSPIRACY (July 8, 2018) (asserting that the Court under Roberts has overturned precedent less than the three Courts that preceded it) *with id*. ("[O]ne can argue that the . . . decision in *Shelby County v. Holder* departed from prior precedent on the scope of federal power under the Reconstruction Amendments without overruling any prior precedents . . . but this sort of change in the law would not show up in this analysis."). There are, moreover, a range of difficult questions that complicate the task of quantifying, measuring, and cataloguing precedent and derogation therefrom. One example pertains to a hot-button issue in federal courts: What is the precedential weight of emergency docket orders and opinions? *See, e.g.*, Trevor N. McFadden & Vetan Kapoor, The Precedential Effects of the Supreme Court's Emergency Stays, 44 HARV. J.L. & PUB. POL'Y 827 (2021). Another relates to the very nature of precedent: What elements of a ruling are afforded binding authority as precedent? *See, e.g.*, Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179 (2014). And, of course, a separate question that must be grappled to make apples to apples comparison concerns the Court itself. What constitutes "this" Court (or even the "X" Court, where "X" is any chief justice) is difficult to confine and even conceptualize given the flux in membership.

102. *See, e.g.*, Loper Bright Enters. v. Raimondo, 603 U.S. 369, 479 (Kagan, J., dissenting) (offering part of "a small volume" comprising her "own defenses of stare decisis[,]" specifically "to this Court's reversals of settled law").

103. *See supra* text accompanying notes 73–76.

104. *See* Andrea Scoseria Katz & Noah A. Rosenblum, *Removal Rehashed*, 136 HARV. L. REV. F. 404 (2023).

105. Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 216 (2020).

106. *Id.* at 221–222.

unconstitutional by the Fifth Circuit"[107]—a ruling that it would affirm the following year.[108] And to top it off, Roberts inserted an egregious albeit portentous footnote—an "easter egg" for constitutional litigators[109]—both wholly unnecessary to the resolution of the case then before the Court, yet virtually guaranteed to appear in some future opinion further restricting statutory tenure protections or disallowing them outright. In it, he mused ominously that "[t]he Court's conclusion that the FTC did not exercise executive power has not withstood the test of time." [110] Given as much, is there any realistic possibility of Commissioners Bedoya and Slaughter prevailing before the justices when the challenge to their statutory tenure protections inevitably reaches the Supreme Court? In the face of such deliberate maneuvering aimed at weakening agency independence, it is difficult to envision that *Humphrey's Executor*'s nine-decade old scheme can survive.

In short, the majority is pulling the wool over our eyes. By flying under the radar in terms of number of cases overruled, while deviating from the course of precedent in the most fraught, politically and culturally significant cases, the justices can rhetorically endorse *stare decisis* while actually thumbing their noses at it when presented with opportunities to reverse the most consequential of settled questions of constitutional law. On this view, doctrinal shifts, breaks, and U-turns are driven by an empowered judicial supremacy—an Imperial Supreme Court[111] seeking to outstrip the legacy of recent ones that have sought to aggrandize power.[112] The Court's end, at least with respect to the presidential removal powers question, is to advance a maximalist theory of the executive in a realm that is neither historically required nor normatively desirable.[113] And among the most serious casualties, however, is the inability of *stare decisis* to do its job in constitutional law, giving credence to one commentator's warning a half decade ago: "that if the court's conservative majority wanted to move fast and break things, they would have few practical checks on their ability to do so."[114] Only, in their overarching desire to be portrayed as "institutionalists" to the general public and within the legal profession,[115] enough justices among that

107. *Id.* at 222.

108. Collins v. Yellen, 594 U.S. 220, 251 (2021) (invalidating the Federal Housing Finance Agency structure because a "straightforward application of our reasoning in *Seila Law* dictate[d] the result").

109. *Easter Egg,* URBAN DICTIONARY, https://www.urbandictionary.com/define.php?term=the%20easter%20egg&page=1 (last visited May 29, 2025) [https://perma.cc/QJK6-4DLU] (defining an "easter egg" as "[a] hidden item placed in a movie, television show, or otherwise visual media for close watchers").

110. Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 216 n.2 (2020).

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

112. *See* Larry D. Kramer, *The Supreme Court 2000 Term—Forward: We the Court*, 115 HARV. L. REV. 4 (2001).

113. Katz & Rosenblum, *supra* note 104.

114. Matt Ford, *The Supreme Court Is in Charge Now*, THE NEW REPUBLIC (Nov. 13, 2020), https://newrepublic.com/article/160178/supreme-court-biden-judicial-gridlock [https://perma.cc/9U9V-KLHQ].

115. *See, e.g.*, Nina Totenberg, *Chief Justice Takes Back the Reins at the Supreme Court this Term*, NPR NEWS, (July 5, 2023), https://www.npr.org/2023/07/05/1185864571/chief-justice-takes-back-the-reins-at-the-supreme-court-this-term [https://perma.cc/36MV-SZNA]; Thomas G. Donnelly, *Supreme Court Legitimacy: A Turn to Constitutional Practice*, 47 BYU L. REV. 1487 (2022); Stuart Gerson, *Understanding John Roberts: A Conservative Institutionalist Concerned with Durability of the Law and Respect for the Court*, JURIST NEWS (July

majority see it as in their interest to break things more steadily, methodically, and over time.

To characterize this as the behavior of institutionalists, however, is to deprive the word of all meaning. "Institutionalist" is a title not to be emptily bestowed but earned. The term properly describes those who consistently demonstrate respect for *institutions*, including the fundamental rules, norms, conventions, practices, and principles—like adhering to established precedent—that undergird them.[116] And still, an impulse or strategy to feign respect for precedent while working insidiously to undercut it is understandable if only because the implications of "overruling" *stare decisis* are grave. To do so would make the ghastly admissions that: (1) the Court does not treat like cases alike (i.e., it undermines equal justice under the law); (2) the justices rule however they see fit despite others having settled the legal question (i.e., they create new law); and, perhaps most consequentially, (3) there are no real institutional constraints on the Court itself (i.e., it is above the law). If the Court screamed such lawlessness, it would not be accepted by the public because it would expose fraud on the Court—with the Court being the fraud—naturally leading to the conclusion that the institution needs to be reformed and restructured. And so, the justices just whisper. They pretend like their assaults on precedent are extraordinary when they are quite regular; they posture as though Thomas is the outlier on this issue when, in fact, he is more aptly considered the leader—and far more representative of the Court's conservatives than they would have you think. Thus, *stare decisis* is, paradoxically, being exploited by a Court that actively seeks its destruction. The justices bear false allegiance to the doctrine, while crouching behind the walls of a Potemkin village.

Stare decisis may not be an inexorable command. But it is a command—a long-standing one—and for good reason. This should be considered when the Supreme Court issues its next decision overruling legal precedent, whether it is *Humphrey's Executor* or another ruling, whether explicitly or by stealth, and irrespective of the merits of the underlying dispute. It may just be a valuable piece of evidence in the case for or against *stare decisis*.[117] Certainly, the jury is

31, 2020), https://www.jurist.org/commentary/2020/07/stuart-gerson-understanding-john-roberts/ [https://perma.cc/7KLH-XJUS]. *But see* Eric J. Segall, *Chief Justice John Roberts: Institutionalist or Hubris-in-Chief?*, 78 WASH. & LEE L. REV. ONLINE 107 (2021).

116. Michael Gentithes, *Chief Justice Roberts and What it Means to be an "Institutionalist" Supreme Court Justice*, APPELLATE ADVOCACY BLOG (Jan. 25, 2022), https://lawprofessors.typepad.com/appellate_advocacy/2022/01/chief-justice-roberts-and-what-it-means-to-be-an-institutionalist-supreme-court-justice.html [https://perma.cc/MEF4-VPMN] ("An institutionalist might seek to preserve long-standing norms within institutions (such as defending the filibuster in the Senate), or to preserve public faith in a particular government entity.").

117. Again, *stare decisis* contemplates that the Court will overrule precedent on extraordinary occasions, in ways that are normatively desirable and would further the doctrine's legitimacy. *See* Randy J. Kozel, *The Rule of Law and the Perils of Precedent*, 111 MICH. L. REV. FIRST IMPRESSIONS 37, 44 (2013) ("A system of precedent formulated with the rule of law in mind will contemplate a certain amount of overruling."). A prime example of prevailing law that might be displaced consistent with the doctrine of *stare decisis* and its normative force was established in the *Insular Cases*. In those cases, the Court drew on "explicitly racist narratives" to establish the doctrine of "unincorporated territories," which governs five U.S. islands—whose residents are largely racial minorities—"that are not on the path towards statehood and in which at least some parts of the Constitution (like the jury trial right or the Uniformity Clause) do not apply." Emmanuel Hiram Arnaud, *Colonizing by Contract*,

out as to whether we should continue to stand by the ideal or sit down to think more deeply about perpetuating the doctrine given its practical demerits. Rather than allowing the justices to continue a facade, perhaps we should just accept that this is a new reality. It just may be that by removing this metaphorical ace from the deck (or Joker, if you're Thomas), the house of cards at One First Street will come crumbling down. If that comes to pass, at least it may present the opportunity to draw up a new blueprint that instructs how to lay a more stable, "more perfect"[118] foundation.[119] And on those grounds, "we the People" can erect a true temple of Justice, one actually worthy of "ourselves and our posterity."[120]

124 COLUM. L. REV. 2239, 2241 n.6 (2024). Indeed, members of the Court have taken to criticizing the rulings as erroneous. *See, e.g.*, United States v. Vaello-Madero, 596 U.S. 159, 189 (2022) (Gorsuch, J., concurring) ("[T]he time has come to recognize that the *Insular Cases* rest on a rotten foundation. And I hope the day comes soon when the Court squarely overrules them."); *id*. at 194 n. 4 (Sotomayor, J., dissenting) ("I do agree [ ] with Justice Gorsuch's view that it 'is past time to acknowledge the gravity' of the error of the *Insular Cases*. Those cases were premised on beliefs both odious and wrong, and I share the concurrence's 'hope [that] the Court will soon recognize that the Constitution's application should never depend on the government's concession or the misguided framework of the *Insular Cases*.'"). Were the Court to reconsider and overrule this precedent, it could do so in ways that both accord with the *stare decisis* factors and advance the ideal of a multiracial democracy, all while finding ample support in relevant legal scholarship. *See, e.g.*, Adriel I. Cepeda Derieux & Rafael Cox Alomar, *Saying What Everyone Knows to be True: Why Stare Decisis is not an Obstacle to Overruling the* Insular Cases, 53 COLUM. HUMAN RIGHTS L. REV. 721, 746 (2023) ("Viewed through these [stare decisis] factors, the *Insular Cases* and the 'territorial incorporation doctrine' merit little loyalty as precedent."); Anthony M. Ciolli, *Judicial Antifederalism*, 91 FORDHAM L. REV. 1695, 1697 (2023) ("But the legal community did not suddenly discover in 2022 that the *Insular Cases* were wrongly decided and the product of naked racism rather than principled legal reasoning—on the contrary, '[t]he *Insular Cases*' departure from the Constitution's original meaning has never been much of a secret.' In fact, the Supreme Court's first admonishment that the *Insular Cases* 'should [not] be given any further expansion' occurred in 1957, only thirty-five years after the last of the *Insular Cases* had been decided."); Christina D. Ponsa-Kraus, *The Insular Cases Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L. J. 2449, 2485 (2022) (calling for the Court to overrule the *Insular Cases* because they "have engendered an ambiguous, confusing, and unnecessary approach to constitutional challenges involving unincorporated territories, all while leaving their subordinate status intact.").

118. U.S. CONST. pmbl.

119. Among my own public and scholarly writings is "a small volume" examining and urging constitutional amendment as an important means to establishing a firmer and less uneven foundation for U.S. law and politics. *See e.g.*, Wilfred U. Codrington III, *Move to Amend*, N.Y.U. J. LEG. & PUB. POL'Y QUORUM (Apr. 20, 2023) https://nyujlpp.org/quorum/codrington-move-to-amend/ [https://perma.cc/L4EB-Q8A9]; Wilfred Codrington III, *The Framers Would Have Wanted Us to Change the Constitution*, THE ATLANTIC (Sept. 30, 2021), https://www.theatlantic.com/ideas/archive/2021/09/framers-would-have-wanted-us-change-constitution/620249/ [https://perma.cc/NMR8-S2FM]; JOHN F. KOWAL & WILFRED U. CODRINGTON III, THE PEOPLE'S CONSTITUTION: 200 YEAR, 27 AMENDMENTS, AND THE PROMISE OF A MORE PERFECT UNION (2021); Wilfred Codrington III, *The United States Needs a Third Reconstruction*, THE ATLANTIC (July 20, 2020), https://www.theatlantic.com/ideas/archive/2020/07/united-states-needs-third-reconstruction/614293/ [https://perma.cc/U7RF-6RLT]; Wilfred Codrington III, *The Electoral College's Racist Origins*, THE ATLANTIC (Nov. 17, 2019), https://www.theatlantic.com/ideas/archive/2019/11/electoral-college-racist-origins/601918/ [https://perma.cc/QK5L-Q98S]; Wilfred U. Codrington III, *The Benefits of Equity in the Constitutional Quest for Equality*, 43 N.Y.U. REV. L. & SOC. CHANGE 105 (2019). For an argument based in history and theory contending that state constitutional amendment can help facilitate constitutional amendment at the federal level, see Wilfred U. Codrington III, *Springboard to Article V (or Electoral Democracy and the End of Constitutional Amendment in the Nation and States)*, 19 HARV. L. & POL'Y REV. 1 (2025).

120. U.S. CONST. pmbl.