

# Reason and Rhetoric in *Edwards v. Vannoy*

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## ABSTRACT

*Judicial reasoning and rhetoric should be mutually reinforcing, but often they end up at odds. Edwards v. Vannoy offers an unusually rich opportunity to explore this tension. First, the watershed exception, though declared “moribund,” may actually have survived. Second, Justice Gorsuch’s ostensibly strict judgment-based approach arguably called for providing relief in Edwards. Third, majority coalitions have a counterintuitive incentive, rooted in rhetoric, to overrule relatively insignificant precedents. Fourth, Edwards featured charges of personal inconsistency that both reflect and facilitate the erosion of conventional legal argument. Finally, the legal system may benefit from the superficial and even fallacious reasoning often present in judicial decisions, including excellent ones.*

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## INTRODUCTION

Judicial reason and rhetoric should be mutually reinforcing, but they often end up at odds. A decision’s reasoning can point toward conclusions that are inconsistent with its rhetoric. And efforts at rhetoric can undermine the quality, or even the appeal, of legal reasoning.<sup>1</sup> The Supreme Court’s recent decision in *Edwards v. Vannoy* offers an unusually rich opportunity to explore this set of tensions and tradeoffs. Both the Court and the dissent explicitly discussed “rhetoric,” for quite different purposes.<sup>2</sup> And the results will shape both habeas corpus and the law of precedent.

In brief, *Edwards* issued two holdings. First, it held that the jury-unanimity right previously recognized in *Ramos v. Louisiana* is not a “watershed” rule of criminal procedure and so cannot justify habeas corpus relief for criminal defendants whose convictions are already final.<sup>3</sup> Second, the Court held that the entire concept of watershed rules, though purportedly a staple of the Court’s habeas jurisprudence for decades, had become “moribund.”<sup>4</sup> As to both points, Justice Kagan

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1. See *Edwards v. Vannoy*, 141 S. Ct. 1547 (2021). By “reason,” I mean considerations that support correct legal conclusions; and by “rhetoric,” I mean efforts to persuade. For trenchant criticism of judicial opinions that aim at rhetoric, see Nina Varsava, *Professional Irresponsibility and Judicial Opinions*, 59 HOUS. L. REV. 103 (2021) (“People might be more persuaded by an artful opinion that masks legal reasons behind evocative narratives and pleasing rhetorical flourishes.”).

2. See *infra* text accompanying notes 126 and 144. It is rare for the justices to discuss their own rhetoric at all, much less argue about it.

3. See 141 S. Ct. 1547; *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020). “Watershed” rules of criminal procedure are an exception to the normal rule, established in *Teague v. Lane*, 489 U.S. 288, 311 (plurality opinion), that new rules aren’t retroactively applicable in habeas corpus proceedings.

4. See *Edwards*, 141 S. Ct. at 1560.

vehemently dissented for herself and Justices Breyer and Sotomayor.<sup>5</sup> Meanwhile, Justice Gorsuch, joined by Justice Thomas, endorsed what purported to be a radical curtailing of habeas relief, based on historical practices.<sup>6</sup>

This essay critically discusses *Edwards* to advance several claims relating to the Court's use of reason and rhetoric. First, the watershed concept, though declared "moribund," may actually have survived. Second, Justice Gorsuch's ostensibly strict judgment-based approach to habeas corpus arguably called for relief in *Edwards*. Third, majority coalitions at the Court have a counterintuitive incentive, rooted in rhetoric, to overrule relatively insignificant precedents as often as possible. Fourth, charges of personal inconsistency among the justices both reflect and facilitate the erosion of conventional precedential argument. Finally, the legal system may benefit from the superficial and even fallacious reasoning that characterizes judicial opinions, including excellent ones.

Along the way, the essay also discusses *Edwards*'s apparent use of remedial equilibration, its procedural irregularities, and its defensible if unfamiliar approach to stare decisis. The topic of reason and rhetoric lends itself to self-criticism, and the essay finds some time for that as well.

### I. DID *RAMOS* RECOGNIZE A "WATERSHED" RULE?

While new rules of criminal procedure generally don't apply retroactively in habeas corpus proceedings, the Supreme Court has long noted an exception for "watershed" rules.<sup>7</sup> In *Edwards*, the Court splintered on whether *Ramos*'s jury-unanimity rule qualified as a watershed rule, yet the justices had surprisingly little to say about what the watershed exception means. I accordingly begin by showing that neither the *Edwards* majority nor the dissent came close to offering a satisfying account of what a watershed is, much less whether the rule at issue in *Edwards* should qualify.

I then propose two contrasting first-principled approaches to this issue, one grounded in pragmatism and the other in the formal law of

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5. See *id.* at 1573 (Kagan, J., dissenting).

6. Justice Thomas also wrote a concurrence on a related set of issues, namely the relationship between *Teague* and AEDPA deference. See *Edwards*, 141 S. Ct. at 1562 (Thomas, J., concurring). I postpone thorough treatment of that opinion for another day, though it briefly comes up once or twice below. See *infra* note 61 and accompanying text.

7. See *Teague*, 489 U. S. at 311 (plurality opinion).

judgments. The pragmatic account indicates that *Edwards* was a close case on account of a yawning empirical uncertainty. And the more formalist account suggests not only that Justice Gorsuch’s concurrence actually preserved a kind of watershed exception, but also that the jury-unanimity right might have qualified.

#### A. *The Court and Dissent Have No Theory of Watersheds*

In a case about the watershed exception, you might expect considerable discussion of what the exception *is*. What is the point of the exception? What would satisfy it? How could we describe its content? Remarkably, however, these basic questions aren’t directly addressed by either of the decision’s dueling opinions. I will return to the reasons for this omission later. For now, let’s explore what the opinions *do* say about the watershed exception.

For its part, Justice Kavanaugh’s majority opinion focused on what we *don’t* know. The watershed exception, we learn, applies “only when, *among other things*, the new rule alters ‘our understanding of the bedrock procedural elements essential to the fairness of a proceeding.’”<sup>8</sup> That description is avowedly incomplete and quite vague. Confirming as much, the Court immediately noted that “those various adjectives—watershed, narrow, bedrock, essential—do not tell us much about whether a particular decision of this Court qualifies for the watershed exception.”<sup>9</sup>

But instead of giving more definite content to the watershed idea, the Court pivoted to describing things held *not* to be watersheds. While appearing to accept that *Gideon* established a watershed,<sup>10</sup> the Court pointed to three non-watershed rules that “fundamentally reshaped criminal procedure throughout the United States and significantly expanded the constitutional rights of criminal defendants.”<sup>11</sup> In the Court’s view, there is simply “no good rationale for treating *Ramos* differently.”<sup>12</sup> Some commentators shared that intuition,<sup>13</sup> but the

8. *Edwards*, 141 S. Ct. at 1557 (quoting *Whorton v. Bockting*, 549 U.S. 406, 417–18 (2007)) (emphasis added).

9. *Id.*

10. See *Edwards*, 141 S. Ct. at 1557 (“The Court has identified only one pre-*Teague* procedural rule as watershed: the right to counsel recognized in the Court’s landmark decision in *Gideon* . . .” (citations omitted)).

11. *Id.* at 1559.

12. *Id.*

13. See e.g., Steve Vladeck (@steve\_vladeck), TWITTER (Dec. 2, 2020) (“If *Ring*, *Crawford*, and *Padilla* aren’t ‘watershed’ rules, it’s hard to see how *Ramos* could be.”).

Court never explained why it is true. What traits would a *Gideon*-like watershed possess that the jury-unanimity rule doesn't? And, just what do the relevant precedents teach us about the content of the watershed exception? In declining to answer those questions, the Court effectively left the matter to a "you know it when you see it" test. The majority is thus vulnerable to critics who assert different intuitions, as well as to proponents of first-principles theories that can tell us what watersheds are.

Justice Kagan's dissent, too, said precious little about what watersheds are, despite having the burden of showing that the exception applied. The dissent's most specific statement is the following: "a new rule, to qualify as watershed, must be 'essential to [the trial's] fairness' [and] it must go to the defendant's guilt or innocence, 'prevent[ing] an impermissibly large risk of an inaccurate conviction.'"<sup>14</sup> But what is "essential" to "fairness" or qualifies as "an impermissibly large risk of an inaccurate conviction"? The dissent never directly answered that basic follow-up question.

Instead, the dissent presented a list of checked-off factors. Here is the relevant passage, presented as a literal checklist:

- ✓ Start with history. The ancient foundations of the unanimous jury rule? Check.
- ✓ The inclusion of that rule in the Sixth Amendment's original meaning? Check.
- ✓ Now go to function. The fundamental (or bedrock or central) role of the unanimous jury in the American system of criminal justice? Check.
- ✓ The way unanimity figures in ensuring fairness in criminal trials and protecting against wrongful guilty verdicts? Check.
- ✓ The link between those purposes and safeguarding the jury system from (past and present) racial prejudice? Check.

In sum: As to every feature of the unanimity rule conceivably relevant to watershed status, *Ramos* has already given the answer—check, check, check—and today's majority can say nothing to the contrary.<sup>15</sup>

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14. *Edwards*, 141 S. Ct. at 1575 (Kagan, J., dissenting) (quoting *Whorton v. Bockting*, 549 U.S. 406, 418 (2007)).

15. *Id.* at 1578 (edited for presentation in a checklist format).

Unfortunately, the dissent offered no reason to think that this is the right checklist. The list itself is entirely unprecedented.<sup>16</sup> And the dissent never explained why the checklist lines up with the purposes of the watershed exception.

Instead, the dissent claimed that the jury-unanimity rule possesses “every feature . . . conceivably relevant to watershed status.”<sup>17</sup> Yet that is plainly not the case. To give just one example,<sup>18</sup> the Court has suggested that watershed status could turn on whether the rule in question instigated a widespread change in practice.<sup>19</sup> That the Court chose to undertake such a sweeping change could evidence the rule’s importance—much as the dissent claimed that *Ramos*’s importance is evidenced by the fact that it overruled precedent.<sup>20</sup> And, if the Court required that feature, *Ramos* would flunk.<sup>21</sup>

The dissent’s checklist can also be criticized for being too long. An originalist might react to Kagan’s list by asserting that only the first two factors bearing on “history” are relevant.<sup>22</sup> By contrast, a pragmatist might care only about the factors pertaining to “function.” Yet either of those possibilities threatens the dissent’s conclusion, since the

16. The dissent asserted that “the jury unanimity requirement fits to a tee *Teague*’s description of a watershed procedural rule.” *Id.* at 1574; *see also id.* at 1581 (positing an “airtight match between *Ramos* and *Teague*”). But “*Teague*’s description” is actually quite vague and, in any event, does not resemble the dissent’s checklist. *See supra* text accompanying note 8.

17. *See id.* at 1578.

18. As we will see, the briefing in *Edwards* identified another important item omitted from the dissent’s checklist: ease or efficiency of implementation. *See infra* note 35 and accompanying text.

19. *See Edwards*, 141 S. Ct. at 1559 (emphasizing that even non-watershed rules “fundamentally reshaped criminal procedure throughout the United States”); *Whorton*, 549 U.S. at 421 (positing that watershed rules must be “sweeping” in terms of the cases affected (internal quotations omitted)); *see also* *United States v. Mandanici*, 205 F.3d 519, 521 (2d Cir. 2000) (concluding that a watershed “must be a groundbreaking occurrence, a sweeping change that applies to large swathe of cases” (internal quotation marks omitted)); Transcript of Oral Argument at 76, *Edwards v. Vannoy*, 141 S. Ct. 1547 (2021) (No. 19–5807) (similar).

20. *Edwards*, 141 S. Ct. at 1575 (Kagan, J., dissenting) (“The first clue that the unanimity rule falls within *Teague*’s small core is that the Court thought its adoption justified overturning precedent.”).

21. *Ramos v. Louisiana* affected convictions in only two states (~2.7 percent of U.S. population), one of which had already eliminated non-unanimous juries on a prospective basis. 140 S. Ct. 1390, 1407–08 (2020) (plurality opinion). By comparison, some non-watershed rules affected many or most states. And *Gideon* prospectively affected at least five states. *See* Justin Driver, *Constitutional Outliers*, 81 U. CHI. L. REV. 929, 939 (2014) (viewing *Gideon* as an “outliers” case). *Gideon* also helped foster ineffective assistance of counsel litigation, which remains prevalent today.

22. *See Edwards*, 141 S. Ct. at 1572 (Gorsuch, J., concurring) (“it’s hard to see how rights originally memorialized in the Constitution could fail to qualify” as “fundamental” enough to be watersheds).

majority points to cases where no watershed was found despite the presence of those factors. To wit, *Crawford v. Washington* had history on its side, and *Batson v. Kentucky* raised similar functionalist considerations.<sup>23</sup> Yet neither made the grade.<sup>24</sup> Again, the dissent lacks resources to address these challenges because it offers no affirmative account of what a watershed rule is.

Apart from whether it contains too few or too many factors, the dissent's checklist is also qualitatively flawed. The dissent assumes that each "checked" factor is a binary trait. Yet the listed factors are actually matters of degree, raising the possibility that the jury-unanimity right insufficiently presents them. To wit, Kagan recognized at oral argument that whether a right "protect[s] against wrongful guilty verdicts" can be true to varying extents—and that the evidence with respect to jury unanimity was "sparse."<sup>25</sup> *Ramos* itself had made substantially the same point.<sup>26</sup> So the dissent's fourth "checked" item probably needs an asterisk.

Or take the last factor, which asks whether there is a "link between [the right's] purposes and safeguarding the jury system from (past and present) racial prejudice."<sup>27</sup> Is it enough for there to be a "link," yes or no? One might think it relevant whether there is a *close* link. And once that possibility arises, the dissent's checklist again becomes inadequate. Here, too, *Batson* looms large: it directly struck at racially invidious peremptory strikes,<sup>28</sup> whereas *Ramos* banned a practice that can often be non-discriminatory.<sup>29</sup> But despite the Court's emphasis on *Batson*, the dissent mentions it only once—when summarizing the majority.<sup>30</sup>

The dissent thus offers no persuasive basis for its conclusion that if *Ramos*'s rule "isn't a watershed one, then nothing is."<sup>31</sup> We can easily

23. *Crawford v. Washington*, 541 U.S. 36 (2004) (adopting a historically oriented interpretation of the Confrontation Clause); *Batson v. Kentucky*, 476 U.S. 79 (1986) (establishing a procedure for challenging racially invidious peremptory strikes in jury selection).

24. *Allen v. Hardy*, 478 U.S. 255 (1986); *Whorton*, 549 U.S. 406.

25. See Tr. of Oral Argument, *supra* note 19 at 18–19.

26. See, e.g., *Ramos*, 140 S. Ct. at 1401 ("[W]ho can say whether any particular hung jury is a waste . . .?"); see also *infra* notes 38 & 140.

27. See *Edwards*, 141 S. Ct. at 1578 (Kagan, J., dissenting).

28. 476 U.S. 79 (1986).

29. See *Ramos*, 140 S. Ct. at 1427 (Alito, J., dissenting) (collecting jurisdictions and organizations that have supported non-unanimous juries for race-neutral reasons). Kagan joined most of the foregoing opinion.

30. See *Edwards*, 141 S. Ct. at 1579 (Kagan, J., dissenting). The dissent masterfully keeps attention away from its greatest vulnerabilities (e.g., *Batson*) while drawing out the Court's problematic personal attack. See *infra* Section IV.D.

31. See *Id.* at 1576.

imagine many plausible accounts of the watershed exception that would include some rules and exclude *Ramos*.

### *B. Teague as Cost-Benefit Analysis*

If the justices didn't offer a satisfactory account of the watershed exception, can we do better? This Section offers a pragmatic account and suggests that *Edwards* posed a far harder case than either the majority or the dissent let on.

The foundational assumption here is that the watershed exception is supposed to allow for collateral relief that is sufficiently beneficial on net, where the main competing interests are: (i) the state's interest in finality and (ii) defendants' interest in avoiding erroneous or otherwise unfair convictions.<sup>32</sup> In other words, retroactive application of a procedural right must pay its way by helping wrongfully convicted defendants *more* than it unsettles justified convictions.<sup>33</sup> Apart from having intuitive appeal, the foregoing cost-benefit analysis is arguably what *Teague* itself described as the basis for the watershed exception.<sup>34</sup>

Given that pragmatic approach, the unanimous jury rule can be viewed as unusual, even unique. In short, we can easily identify a large set of cases where the right's violation seems consequential—namely, the set of cases where there was a non-unanimous verdict of conviction. The jury's divided vote, say, 11-1 or 10-2 in favor of conviction, is a powerful and easily ascertainable signal that the jury's voting rule mattered.<sup>35</sup> Moreover, it seems reasonable to presume that the holdout jurors are often trying to protect innocent or otherwise unjustly

32. See *Teague v. Lane*, 489 U.S. 288, 310–13 (1989) (plurality opinion); see also Susan Bandes, *Taking Justice to its Logical Extreme: A Comment on Teague v. Lane*, 66 S. CAL. L. REV. 2453, 2456 (1993). For an alternative approach, see Jeffrey G. Ho, *Finality, Comity, and Retroactivity in Criminal Procedure: Reimagining the Teague Doctrine After Edwards v. Vannoy*, Note, 73 STAN. L. REV. 1551 (2021).

33. One issue here is whether *Teague* is concerned not only with protecting legal innocence, but also with all unwarranted or unfair convictions. Historically, holdout jurors were thought to be just as important for their ability to protect people who were legally guilty but unjustly prosecuted. See Nancy J. King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 U. CHI. L. REV. 433 (1998). And debates about jury nullification persist, including in connection with racial justice. See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995).

34. See *Teague*, 489 U.S. at 310–13 (plurality opinion). This approach must still weigh potential incommensurables. But it is plausible that retroactive relief is beneficial when nearly all affected convictions are wrongful.

35. See Amicus Brief of NAACP Legal Defense and Education Fund, Inc., in Support of Petitioner, at 10–13, *Edwards v. Vannoy*, 141 S. Ct. 1547 (2021) (No. 19–58070). This point resembles harmless error: the jury-unanimity right would be retroactive only as to violations that seemed harmful.

prosecuted defendants. The basic assumption of the unanimous jury right, after all, is that a holdout juror is no quirky worrywart, but rather a telltale indication that a conviction is unwarranted.<sup>36</sup>

The claim here is that the jury-unanimity rule is special, not because it is unusually important, but because it is unusually easy to implement through habeas. By comparison, retroactively implementing (for instance) the *Batson* right would require speculation about how struck jurors would have voted, had they been impaneled. The cost-benefit argument for *Ramos*'s retroactivity is thus entirely compatible with the Court's conclusion that *Ramos* is no more important than any number of other "momentous" decisions.<sup>37</sup> The point is that the unanimous jury right allows for targeted, high-yield relief. And if the relief is nearly perfectly targeted—essentially disrupting *only* erroneous or unfair convictions—then the results of the cost-benefit analysis would presumably be clear.

Still, the cost-benefit analysis has its own problems. As *Ramos* noted, a demand for jury unanimity could simply mean that many divided verdicts will turn into unanimous convictions.<sup>38</sup> And it is a staple of criminal practice that initially conflicted juries are urged to think again, ultimately arriving at a consensus finding of guilt. The signal afforded by split verdicts could therefore be viewed as noisy, raising the costs of retroactive application. Justice Kagan acknowledged this sort of problem at oral argument:

I'll just give you my sense that the empirics here are sparse, maybe surprisingly sparse, as to how this unanimity requirement works with respect to what I take to be the ordinary meaning of 'accuracy,' which is simply a reduction in the error rate in trials. . . . [I]t might be that the unanimity rule allows more guilty people to go free than it – than it stops innocent people from being convicted, or at least it's just not certain.<sup>39</sup>

Kagan's candid observation reveals a difficulty engendered by a cost-benefit approach to the watershed exception and, perhaps, many similar doctrines. When a habeas case comes to the Court, there will

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36. See *Williams v. Florida*, 399 U.S. 78, 100 (1970).

37. See *Edwards*, 141 S. Ct. at 1559.

38. See *Ramos v. Louisiana*, 140 S. Ct. 1390, 1401–02 & n.45 (2020) ("some studies suggest that the elimination of unanimity has only a small effect on the rate of hung juries"); see generally Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1272–73 (2000).

39. See Tr. of Oral Argument, *supra* note 19 at 18–19.

often be unclear or insufficient evidence of what the key consequences might be. And because serious empirical research can take years, or yield results that vary by context, delaying a decision might not produce much better evidence.

How should judges manage this uncertainty? Some jurists might want to place a burden of proof on the claimant, thereby ensuring defeat for Edwards and all similar defendants. Others might err on the side of claimants, who after all can hardly be faulted for not having conducted peer-reviewed studies. Either way, the cost-benefit approach would ultimately turn on something other than a genuine tabulation of costs and benefits.

### C. Gorsuch's Judgment-based Approach

Justice Gorsuch's concurring opinion staked out an alternative, formalist approach.<sup>40</sup> Judged by its rhetoric, the concurrence proposed a radical narrowing of habeas doctrine that goes far beyond the majority's apparent decision to retire the watershed exception. Remarkably, however, Gorsuch's reasoning suggests not only that a type of watershed exception should survive but also that the exception should have applied in *Edwards*.

Gorsuch's basic goal is to return habeas practice to something closer to what it was in the early twentieth century (or before).<sup>41</sup> In that era, habeas review generally ceased if a warden could show that he held the claimant pursuant to a valid judgment of conviction. Consequently, habeas practice focused on a salient way to attack preclusive judgments—namely, by showing that the convicting court lacked jurisdiction.<sup>42</sup> In a footnote, however, Gorsuch reserved whether “substantive rules, which place certain conduct ‘beyond the power of the criminal law-making authority to prescribe,’” might fit within “the jurisdictional exception to the finality rule.”<sup>43</sup>

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40. See *Edwards*, 141 S. Ct. at 1566, 1571 (Gorsuch, J., concurring) (citing Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 446–48 (1963)). For a dynamic account of habeas that challenges Bator's conclusions, see Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575 (1993).

41. See *Edwards*, 141 S. Ct. at 1570 (Gorsuch, J., concurring) (“returning the Great Writ to its historical office”).

42. See *id.* at 1567. Historically, “jurisdiction” here may have been a legal fiction allowing for some merits-based relief. See Jonathan R. Siegel, *Habeas, History, and Hermeneutics*, 64 ARIZ. L. REV. (forthcoming 2022).

43. See *id.* at 1571 n.6 (citations omitted). In addition, Gorsuch appears to view “a state court's extreme departure from ‘established modes’ of criminal trial practice, such as proceeding under the specter of mob violence,” as “akin to the loss of ‘jurisdiction.’” *Id.* at 1568. He thus

Surprisingly, Gorsuch's theory seems to require something like the watershed exception. Again, the exception purports to define a set of "procedural" rules that apply retroactively in habeas.<sup>44</sup> And Gorsuch joined the Court's apparent disavowal of such rules.<sup>45</sup> But Gorsuch also argues that jurisdictional defects are remediable in habeas—and such defects are generally regarded as procedural. We might therefore imagine a new rule as to when criminal courts have jurisdiction. In fact, Gorsuch himself recently authored just such a decision in *McGirt v. Oklahoma*, which constricted state criminal jurisdiction.<sup>46</sup> Under Gorsuch's view of habeas, shouldn't the *McGirt* rule, and other jurisdictional rules like it, be not only procedural but also retroactively applicable? If so, his opinion doesn't eliminate the watershed exception so much as specify its content.

Further, Gorsuch's reasoning suggests that he is wrong to place so much emphasis on jurisdictional defects. Again, the reason for caring about such a defect, both historically and on Gorsuch's account, is that a judgment without jurisdiction is no judgment at all—and thus no answer to a claim for habeas relief. But jurisdictional defects are just one way in which judgments can be inadequate.<sup>47</sup> Imagine that the judgment pertains to a different person, for instance. Surely a warden can't defeat a habeas claim by showing that *other people* are being held pursuant to a valid judgment. As that example illustrates, the real touchstone for Gorsuch must, or should, be whether a preclusive judgment supports the detention.

Gorsuch indicates openness to that revised view through his reservation for "substantive rules." If the defendant's judgment of conviction is for something that is not a crime at all, then the judgment itself seems defective. At an extreme, we might imagine a judgment of conviction saying that "John Smith is guilty of thinking and so is sentenced to a prison term." Because there is no crime of "thinking," and presumably could not be such a crime under the Constitution, that judgment would be facially defective, or simply a legal nullity. If that

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deems *Frank v. Mangum*, 237 U.S. 309 (1915), only a "modest" innovation. If this "extreme departure" exception abides for Gorsuch, then it too might create room for watershed rules—and for awarding Edwards relief.

44. See *Teague v. Lane*, 489 U.S. 288, 311 (1989) (plurality opinion).

45. See *Edwards*, 141 S. Ct. at 1572 (Gorsuch, J., concurring).

46. See *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).

47. Bator, too, invoked the law of judgments. See Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 461 (1963) (citing RESTATEMENT, JUDGMENTS (1942)); see also *infra* note 48.

much is right, it likely follows that a conviction for an unconstitutional offense is similarly ineffective. An unconstitutional law, after all, is generally treated as no law at all.<sup>48</sup>

But if Gorsuch's theory really ought to be focused on all judgment defects, not just jurisdiction, then why didn't he vote to award relief to Edwards? The rule recognized in *Ramos*, after all, is directly relevant to the defendant's judgment of guilt. What indeed is a criminal judgment in a jury case, other than a report of what a properly constituted jury decided? Again, an extreme example can help clarify the issue: imagine a judgment of guilt that reported a verdict issued by a council of dragons. That would not be a valid judgment under the Constitution of the United States. To be constitutional, the conviction would have to report on a jury, legally defined.<sup>49</sup> And, under *Ramos*, that means a *unanimous* jury (of humans).<sup>50</sup> Further, Gorsuch's opinion for the Court in *Ramos* specifically grounded that conclusion in historical practice: "A verdict, taken from eleven, was no verdict at all."<sup>51</sup> So Edwards's judgment of conviction is arguably defective, perhaps even on its face.<sup>52</sup>

And what about the other *Teague* exception? Apart from the watershed exception, *Teague* allows for retroactive application of substantive rules.<sup>53</sup> That additional exception has flourished in recent years.<sup>54</sup> Yet Gorsuch's reservation might not fully encompass it. Under the substantive-rule exception, the Court retroactively applies new rules that *narrow* criminal liability. Gorsuch, however, expressly

48. This was the logic of *Ex parte Siebold*, 100 U.S. 371 (1879), which Gorsuch cites. *See also* Bator, *supra* note 47, at 471–73 ("a judgment under [an unconstitutional] statute . . . has a nonexistent quality, as if there were no competence in the premises at all"). Still, at least some remedial doctrines *are* concerned with unconstitutional laws. *E.g.*, *Wilson v. Layne*, 526 U.S. 603, 617–18 (1999) (qualified immunity); *Illinois v. Krull*, 480 U.S. 340 (1987) (good-faith exception to the exclusionary rule).

49. There can, of course, be waivers of jury-trial rights.

50. This argument suggests that the jury-trial right itself should have been applied retroactively in habeas, contrary to *DeStefano v. Woods*, 392 U.S. 631 (1968) (per curiam). But *DeStefano* predates *Teague*. At any rate, Gorsuch is plainly prepared to reject wrongheaded Warren Court precedents.

51. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1395 (internal quotation marks omitted). The *Edwards* dissent powerfully both opened and concluded with this line from *Ramos* but didn't tie it to Gorsuch's judgment-based approach.

52. *See* Joint Appendix at 26–39, *Edwards v. Vannoy*, 141 S. Ct. 1547 (2021) (No. 19-580) (transcript showing the divided jury vote at entry of conviction).

53. *See* *Teague v. Lane*, 489 U.S. 288, 310–13 (1989) (plurality opinion).

54. *E.g.*, *Welch v. United States*, 578 U.S. 120 (2016); *see generally* Leah M. Litman, *Legal Innocence and Federal Habeas*, 104 VA. L. REV. 417 (2018).

reserved only convictions based on unconstitutional statutes.<sup>55</sup> Thus, Gorsuch's approach could preclude relief when a prohibition is partially struck down or narrowed in scope through interpretation.<sup>56</sup> So it seems that Gorsuch has set himself not just against the watershed exception, but also against important aspects of the other, livelier *Teague* exception.

Yet here, too, Gorsuch's reasoning suggests a more complicated answer. It turns out that there is another relevant way of challenging a judgment's preclusive effect—namely, changes based on intervening law.<sup>57</sup> Gorsuch himself recently joined a decision vigorously applying this exception to overcome issue preclusion in a civil case, even though the change in the law fell short of an express overruling.<sup>58</sup> The logic of that exception would seem to apply *a fortiori* to new rules that explicitly narrow criminal liability.<sup>59</sup> So Gorsuch's reservation may be stated too narrowly for the theory it accompanies.

Stepping back, it's striking that Gorsuch's opinion didn't explore the possibility that his historically grounded, judgment-based approach might have called for granting Edwards relief. In declaring that the “‘watershed’ exception for new rules of criminal procedure is no exception at all,”<sup>60</sup> Gorsuch was satisfied with debunking the existing doctrinal framework without fully developing his own. Nor did Gorsuch consider that his judgment-based theory might supply a way of overcoming, or circumventing, AEDPA's bar on review of claims “‘adjudicated on the merits in State court.’”<sup>61</sup> So while Gorsuch deserves praise for advancing a theory of what the case was about, he failed to dwell on that theory long enough to resolve the case at hand. We can

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55. See *Edwards*, 141 S. Ct. at 1571 n.6 (Gorsuch, J., concurring).

56. See, e.g., *Bousley v. United States*, 523 U.S. 614 (1998).

57. See *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019).

58. See *id.* at 1697 (“Even when the elements of issue preclusion are met, however, an exception may be warranted if there has been an intervening ‘change in [the] applicable legal context.’” (quoting *Bobby v. Bies*, 556 U.S. 825, 834 (2009) (in turn quoting RESTATEMENT (SECOND) OF JUDGMENTS § 28, cmt. c (1980))).

59. “The change-in-law exception recognizes that applying issue preclusion in changed circumstances may not ‘advance the equitable administration of the law.’” *Id.* (citation omitted).

60. See *Edwards*, 141 S. Ct. at 1573 (Gorsuch, J., concurring).

61. See Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d)(1). Justice Thomas's separate concurrence, which Gorsuch joined, argued that § 2254(d)(1) generally precludes relief in cases like *Edwards*, regardless of *Teague*. See *Edwards*, 140 S. Ct. at 1562 (Thomas, J., concurring). But a judgment that is extra-jurisdictional or otherwise defective seemingly cannot render a claim “‘adjudicated’” at all. Cf. Lee Kovarsky, *Preclusion and Criminal Judgment*, 92 NOTRE DAME L. REV. 637, 638 (2016) (arguing that “a state criminal judgment is now *more* preclusive than is its civil counterpart”).

only hope that, in declaring that he plans to be “guided as nearly as [possible] by the principles set forth herein,”<sup>62</sup> Gorsuch left room for later filling-in—even if that work proves too late for Edwards and defendants like him.

Gorsuch’s revisionism illustrates a broader problem in contemporary jurisprudence. As formalist approaches to law have risen in prominence, judges are increasingly troubled by the doctrinal frameworks established in prior eras. One option is simply to throw out all the old decisions and eagerly start afresh, from formalist first principles. Gorsuch’s *Edwards* concurrence exemplifies that approach. But, as Gorsuch has elsewhere remarked, we should not “clear away a fence just because we cannot see its point.”<sup>63</sup> Likewise, a doctrine that today seems like errant functionalism could originally have come about at least in part through formalist reasoning. Overzealous revisionism can thus recreate long-solved problems—and ultimately require judges to reconstruct the same doctrinal edifices they themselves had too hastily torn down.

Finally, one might either defend or criticize Gorsuch’s opinion on procedural grounds. After all, no party or even amicus had prompted Gorsuch to address the points above, including whether a judgment-based theory might have supported Edwards far more strongly than the governing doctrinal framework. But Gorsuch’s theory came utterly without warning, leaving the parties no particular reason to attend to it. So perhaps the lack of briefing on the topic is another ground for criticism. And, it turns out, Gorsuch isn’t alone in being subject to that sort of procedural objection.

## II. WAS THE COURT’S DECISION-MAKING PROCESS ILLEGITIMATE?

Substance is sometimes revealed procedurally. This Part argues that troubling aspects of *Edwards*’s decision-making process shed light on how the Court resolved the questions presented. In particular, the Court in both *Ramos* and *Edwards* was likely engaged in remedial equilibration.

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62. See *Edwards*, 141 S. Ct. at 1573 (Gorsuch, J., concurring). Gorsuch did not explain how to reconcile this promise with *stare decisis*.

63. See *Artis v. District of Columbia*, 138 S. Ct. 594, 608 (2018) (Gorsuch, J., dissenting) (referencing Chesterton). Revisionist formalism can be modest—and more in the vein of rediscovery than critique.

### A. *Edwards's Procedural Problems*

The argument so far underscores a set of procedural objections to *Edwards*. As we've seen, the case raised pragmatic issues in need of empirical clarification, and Gorsuch's formalist theory called for greater analytic development. A natural response to both of these shortfalls is to urge the Court to bide its time even more than usual, so as to allow greater research and ventilation of the relevant issues. Yet the Court did quite the opposite.

In fact, *Edwards* was doubly precipitous, as compared with normal process. First, the Court granted certiorari over a petition that did not pose a retroactivity issue at all.<sup>64</sup> Evidently, the Court followed that anomalous approach because it wanted to resolve *Ramos's* retroactivity right away, based on an already pending petition. Needless to say, that approach short-circuited the normal process of percolation in lower courts.<sup>65</sup>

Second, the Court dispatched the watershed exception despite the fact that no party *ever* requested that the Court do so.<sup>66</sup> Even more than the first, this second break from normal practice deprived the Court of thorough adversarial presentation on critical issues. The dissent leveled substantially this critique by pointing out that "no one here had a chance to make" arguments against overruling.<sup>67</sup>

I find these procedural objections persuasive, partly because I view the watershed issue in *Edwards* as difficult. But it is worth asking whether anything might justify, or render less objectionable, the Court's blatantly anomalous way of handling this case.

### B. *Did the Court Engage in Remedial Equilibration?*

The most charitable construal of events, I think, is that the Court's decisions in both *Ramos* and *Edwards* were guided, at every level, by a desire for remedial equilibration.

In brief, remedial equilibration is the idea that rights and remedies are to be considered in tandem, so as to achieve an optimal balance of

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64. Compare Grant of Certiorari, *Edwards v. Vannoy*, No. 19–5807 (granting certiorari limited to the retroactivity issue); with Petition for Certiorari, No. 19–5807, at ii (raising *only* the question of whether the Constitution requires jury unanimity in some cases).

65. For doubts on percolation's usefulness, see Michael Coenen & Seth Davis, *Percolation's Value*, 73 STAN. L. REV. 363 (2021).

66. Appearing as amicus, even the United States declined to make that request. See Tr. of Oral Argument at, *supra* note 19 at 75..

67. See *Edwards*, 141 S. Ct. at 1581 (Kagan, J., dissenting).

the two.<sup>68</sup> One implication of this approach is that rights expansions might be justified if, or because, they will be tempered by remedial retrenchment. The opposing view, sometimes called *rights essentialism*, is that questions of rights and remedies are strictly distinct, such that a change with respect to one has no direct effect on the other.<sup>69</sup> Both approaches find considerable support among jurists and scholars alike, with remedial equilibration often associated with functionalists and rights essentialism with formalists.

But even formalists should respect the case for remedial equilibration in connection with *Ramos* and *Edwards*. That is because the formal doctrines at play seemed to stitch the two decisions together. In *Ramos*, the Court had to consider whether to overturn precedent, making reliance and other pragmatic factors highly pertinent.<sup>70</sup> And the biggest, perhaps even the only cognizable, reliance interest at stake in *Ramos* had to do with the question posed in *Edwards*—namely, whether states that had relied on the Court’s earlier decisions would have to retry long-convicted defendants.<sup>71</sup> So whether the jury-unanimity right would apply retroactively (the *Edwards* question) was legally central to deciding whether to recognize that right at all (the *Ramos* question).

Moreover, *Edwards* came close to endorsing remedial equilibration in so many words. As part of a remarkable exchange with the dissent (more on that to come), the Court offered the following defense of its decision to find *Ramos* nonretroactive:

[T]he dissent asserts that the Court is not living up to the promise of *Ramos* for criminal defendants. . . . To properly assess the implications for criminal defendants, one should assess the implications of *Ramos* and today’s ruling together.<sup>72</sup>

This passage demonstrates that at least some justices saw a tight relationship between *Ramos*’s decision to recognize a right and *Edwards*’s decision not to allow for retroactive remediation of that right in habeas.

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68. See generally Daryl Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999).

69. See *id.* at 858.

70. See *Ramos*, 140 S. Ct. at 1405–08 (opinion of the Court and plurality opinion).

71. See *id.* at 1407 (plurality opinion) (explaining that the watershed inquiry is “expressly calibrated to address the reliance interests States have in the finality of their criminal judgments”).

72. See *Edwards*, 141 S. Ct. at 1562 (small caps omitted).

### *C. Might the Watershed Exception Have Survived?*

Viewing *Edwards* in terms of remedial equilibration recasts every important feature of that decision, from its timing to its outcome.

Start with the Court's evident rush to grant cert on the retroactivity issue, despite its not being properly presented. If the two issues were effectively merged, as remedial equilibration would suggest, then retroactivity must have been all but decided at the same time that *Ramos* chose to overrule precedent. And there is evidence that some justices in *Ramos* in fact held that view, with Kavanaugh in particular volunteering an early answer to the retroactivity issue.<sup>73</sup> That the Court didn't decide against *Ramos*'s retroactivity in *Ramos* itself might then be taken as a sop to normal practice or, perhaps, as a courtesy to members of the *Ramos* majority—such as Breyer and Sotomayor—who may not have been equilibrating.<sup>74</sup>

For another thing, the remedial equilibration framing supplies a new way of understanding the Court's uninvited decision to close off the watershed exception. If equilibration is the order of the day, then the question of retroactivity should be decided in tandem with the recognition of new procedural rules. Thus, there is no reason for lower courts to ask whether to apply new procedural rules retroactively. The Court itself would already have answered that question when it identified the rules in the first place. As *Edwards* put it: "*Ramos* itself explicitly forecast today's decision."<sup>75</sup> So *Edwards* can be viewed as an elaboration on what *Ramos* had already decided.

But if the decision to phase out the watershed exception actually has to do with the *who* and the *when* of deciding watershed issues, then the exception might one day come out of retirement. Imagine a new rule entitling criminal defendants to access a state-operated Perfect Lie Detector.<sup>76</sup> That rule would be at least as valuable as the one adopted in *Gideon*, which *Edwards* accepted as a watershed rule.<sup>77</sup> So, if it eventually recognizes a new right of sufficient import, the Court might just find a watershed, too. Or it might not. The point is that the

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73. See *Ramos*, 140 S. Ct. at 1420 (Kavanaugh, J., concurring) (expressly incorporating the watershed inquiry into the stare decisis analysis).

74. Justices Breyer and Sotomayor concurred in *Ramos* and then dissented in *Edwards*, yielding no evidence they engaged in remedial equilibration.

75. See *Edwards*, 141 S. Ct. at 1561.

76. We might imagine a rule entitling certain defendants access to DNA testing or to a brain-imaging system capable of corroborating testimony.

77. See *supra* note 10.

watershed exception would have survived as a legal category. *Stare decisis* would not preclude its future use.

Supporting that view, the Court’s rejection of the watershed exception could largely be viewed as an elaborate dictum. While holdings in the alternative are traditionally viewed as precedential,<sup>78</sup> the majority’s claim that the watershed exception is “moribund” wasn’t just unnecessary—it was explicitly parasitic on the Court’s prior conclusion that the unanimous-jury rule didn’t qualify as a watershed.<sup>79</sup> Thus, the Court’s broader conclusion wasn’t really “in the alternative” so much as “in addition to.”

Further, the Court’s conclusion is somewhat ambiguous. In stating that “[n]ew procedural rules *do not* apply retroactively on federal collateral review,” the Court may have been describing a present, contingent reality, not a permanent truth.<sup>80</sup> The former reading makes more sense of the Court’s apparent recognition that *Gideon* established a genuine watershed rule, and we will see below that it also aligns with *Edwards*’s approach to *stare decisis*.<sup>81</sup>

One might fairly respond that the decision’s rhetoric offers surer evidence of what *this* Court intends to do.<sup>82</sup> After all, the Court’s tone in *Edwards*, and some of its discrete statements, evince a desire to eliminate watersheds once and for all. But *stare decisis* might properly track judicial reasoning, rather than predictive rhetoric.<sup>83</sup> In the absence of a clear holding to the contrary, the option to find a watershed remains legally available to future justices.

So perhaps *Edwards* didn’t really alter all that much. Both before and after that decision, the justices were unlikely to find watershed rules.<sup>84</sup> *Edwards*’s main innovation had to do with what the justices

78. See *Hitchcock v. Sec’y, Fla. Dep’t of Corr.*, 745 F.3d 476, 485 n.3 (11th Cir. 2014) (collecting sources).

79. See *Edwards*, 141 S. Ct. at 1559 (asking: if many landmark rulings “and now *Ramos*” do not apply retroactively, how can any?).

80. *Id.* at 1560 (emphasis added).

81. See *supra* note 10 (on *Gideon*); *infra* Section III.B. (on precedent).

82. Cf. *United States v. Windsor*, 570 U.S. 744, 799 (2013) (Scalia, J., dissenting) (making a similar claim).

83. On whether precedent is (or should be) a predictive exercise, in which case rhetoric might dominate, or a more formal, reason-based practice, compare John M. Rogers, “*Issue Voting*” by *Multimember Appellate Courts: A Response to Some Radical Proposals*, 49 *VAND. L. REV.* 997, 1007–09 (1996), with *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996).

84. Still, *Edwards* has reduced any *in terrorem* effect that watersheds might have had for lower courts. See Dov Fox & Alex Stein, *Constitutional Retroactivity in Criminal Procedure*, 91 *WASH. L. REV.* 463 (2016).

could “responsibly continue to suggest . . . to litigants and courts.”<sup>85</sup> In essence, the Court’s new message is: Don’t call us; we’ll call you. The statement that the watershed exception is “moribund” thus operates more as a vertical instruction to the lower courts than as a horizontal constraint on the justices themselves.

The bottom line is that *Edwards* might not be quite so final about finality. Rather, the Court played fast and loose with the normal process of review for the sake of remedial equilibration. And by declaring the watershed exception defunct, the Court simply relieved the lower courts of having to spend time on an unlikely possibility that the Court had decided to handle all by itself.<sup>86</sup>

### III. DID *EDWARDS* VIOLATE STARE DECISIS?

The *Edwards* dissent took the majority to task for “overruling” the watershed exception.<sup>87</sup> But there is good reason to think that the majority’s reasoning, though elliptical, satisfied the demands of stare decisis.

#### A. *Was the Watershed Exception Even Precedential?*

Was the watershed exception ever really a holding at all, as opposed to a dictum or some other lesser form of precedent?

On the one hand, the Court has said many times that there might be watershed decisions of criminal procedure, and it has held that many new rules fall short of meeting that standard.<sup>88</sup> Those repeated statements seem legally significant. They reflected the considered views of at least some justices. And lower courts were right to heed them as a matter of vertical precedent, for reasons of decisional efficiency and uniformity, if nothing else.<sup>89</sup>

On the other hand, an unfulfilled statement of possibility, even if part of the Court’s reasoning, seems more in the vein of a reservation than a holding. Part of what makes precedent is a court’s willingness to follow through on what it says—to rest a judgment on otherwise

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85. *Edwards*, 141 S. Ct. at 1559.

86. Cf. Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1 (2009).

87. See *Edwards*, 141 S. Ct. at 1574 (Kagan, J., dissenting).

88. See, e.g., *Whorton v. Bockting*, 549 U.S. 406, 417 (2007); *Schiro v. Summerlin*, 542 U.S. 348, 352 (2004).

89. Cf. *Jones v. St. Paul Co.*, 495 F.3d 888, 893 (8th Cir. 2007) (bowing to Court “dicta”).

academic reasoning.<sup>90</sup> Because the watershed exception never passed that test, it may not have earned the full support of *stare decisis*.

Viewing the watershed exception as never fully precedential helps make sense of the Court’s curt treatment of it. As the dissent complained, the Court devoted just two paragraphs to the issue of whether the exception was defunct and never ticked through all the traditional *stare decisis* factors.<sup>91</sup> Still, perhaps the most important factor—reliance—was mentioned and quickly dispatched: “no one can reasonably rely on an exception that is non-existent in practice.”<sup>92</sup> This treatment reads like *stare decisis* lite.

### *B. Was the Exception Empirically Undermined?*

Even if the watershed exception wasn’t fully precedential, it still might make sense to give its fate a full hearing. The point of ticking through all the factors—here and elsewhere—might not be to constrain the Court or even persuade it to change course, but rather to clarify its thought process in ways that it (and we) might not even anticipate.<sup>93</sup> There is some reason to think such clarification would have been helpful. True, the “workability” and “doctrinal outlier” factors seem almost to have been implicitly addressed.<sup>94</sup> But another traditional factor calls for consideration of the quality of the prior decision’s reasoning. And, as we have seen, the Court fell short on that score, offering precious little about the reasons for recognizing the watershed exception in the first place. Attending to this factor would have clarified precisely where, in the Court’s view, *Teague* went awry in recognizing the exception.

But perhaps we can connect the dots ourselves. On reflection, the watershed doctrine has three component precepts: (i) a substantive principle relating to new rules of criminal procedure bearing on accuracy and fairness; (ii) an empirical view of the likelihood of such

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90. On one traditional view, only judicial results are really precedential; the rules that judges articulate are of lesser, or no, precedential value. *See, e.g.*, Roscoe Pound, *What of Stare Decisis?*, 10 *FORDHAM L. REV.* 1, 7 (1941) (suggesting that no overruling takes place when past reasoning is rejected without repudiating any result). And, on a pure results model, there would appear to be no precedent for the existence of a watershed exception.

91. *See Edwards*, 141 S. Ct. at 1581 (Kagan, J., dissenting).

92. *See id.* at 1551 (majority opinion).

93. *See, e.g.*, Deborah Hellman, *An Epistemic Defense of Precedent*, in *PRECEDENT IN THE UNITED STATES SUPREME COURT* 63–66 (Christopher J. Peters ed., 2013).

94. *See, e.g.*, *Franchise Tax Bd. of California v. Hyatt*, 139 S. Ct. 1485, 1499 (2019) (listing the four main *stare decisis* factors). In other words, the majority arguably showed the watershed test to be both unworkable and an outlier because it was practically unmeetable.

rules existing; and (iii) an implementation rule calling for courts to hear watershed claims.<sup>95</sup>

The Court seems to have focused on the second of these components. That is, the Court apparently concluded that watersheds are like “the Tasmanian tiger,” possibly real but practically unobservable.<sup>96</sup> And, given that revised empirical assessment, informed by over three decades of experience, the basis for the implementation rule fell away.<sup>97</sup> Even if the Tasmanian tiger really does exist out there—somewhere—the search for it might be too costly, and too improbable, to be worth carrying out.<sup>98</sup> This assessment dovetails with the remedial-equilibration account of *Edwards* described earlier.<sup>99</sup> So, again, perhaps the search for watershed rules hasn’t been declared impossible so much as discontinued.

The upshot is that the core principle underlying the watershed exception—the idea that procedural rules can be so integral to fairness and accuracy as to justify retroactive application in habeas—remains unrefuted. So, if the Court one day gets a bead on the Tasmanian tiger, the search might recommence.

### C. *Overruling as a Fait Accompli*

If you look closely, you can see that *Edwards* did apply a stare decisis framework—just not the one that normally attends an overruling. In its crescendo statement, the Court stated: “The watershed exception is moribund. It must ‘be regarded as retaining no vitality.’”<sup>100</sup> The Court was quoting *Herrera v. Wyoming*, which resolved a tension between two precedents as follows: “While [the first case] ‘was not expressly overruled’ in [the second one], ‘it must be regarded

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95. On implementation rules, see RICHARD H. FALLON, IMPLEMENTING THE CONSTITUTION (2001); Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 9 (2004).

96. See Tr. of Oral Argument, *supra* 19 at 13–14 (remarks of Justice Alito).

97. Ironically, the best defense of the Court’s argument comes from the dissent. In a moment of exasperation, the dissent declared that, if the jury-unanimity right “isn’t a watershed one, then nothing is.” *Edwards*, 141 S. Ct. at 1576 (Kagan, J., dissenting). Now, the dissent was probably engaged in a little hyperbole here; but if *Ramos* really did pose the strongest possible case for a watershed and still came up short, then the Court would indeed seem justified in simply abolishing the watershed exception.

98. See *Edwards*, 141 S. Ct. at 1561 (holding out a “false hope” only “wastes the resources of defense counsel, prosecutors, and courts”); see also *id.* at 1565 (Gorsuch, J., concurring) (“the majority wisely closes a door to retroactive relief that likely never existed in the first place”).

99. See also *supra* Section II.C.

100. See *Edwards*, 141 S. Ct. at 1560 (majority opinion) (citation omitted).

as retaining no vitality’ after that decision.”<sup>101</sup> The logic appears to be that if one precedent implicitly overrules another, a still later precedent can announce that fact as a *fait accompli*.

One might question *Edwards*’s invocation of *Herrera* on the grounds that no particular decision drained the watershed exception’s “vitality.”<sup>102</sup> Rather, *Edwards* focused on “the Court’s many retroactivity precedents taken together.”<sup>103</sup> Yet a pattern of erosion or evasion could be taken as better evidence of implicit overruling than any single, potentially one-off decision. One might respond that the past decisions actually showed that the watershed exception had been repeatedly reaffirmed. But the cases are better viewed as harbingers of the exception’s impending demise, with several explicitly speculating that no watersheds were ever likely to be found.<sup>104</sup>

At any rate, both *Herrera* and *Edwards* raise the same fundamental question: does the Court illegitimately evade stare decisis by declaring that an overruling *has already occurred*, even though no prior decision had so declared? As the dissent argued, the stare decisis analysis can be regarded as “disciplining.”<sup>105</sup> Yet that discipline is avoided through overruling as a *fait accompli*. Surely, one might think, a stare decisis analysis is called for at some point in a precedent’s demise. The “retaining no vitality” line could even be viewed as a bad-faith strategy for undermining precedent.

But here, too, the situation is more complicated. The problem with *fait accompli* overrulings is especially severe if we imagine that the earlier ruling was undertaken with the follow-through in mind. But it’s possible, even likely, that the earlier ruling wanted to create a period of precedential tension, rather than knowing precisely how things would be resolved. If experience turned out to favor the later ruling over the earlier one, then the case for overruling would have been made. And if not, then not. The case for good faith grows still stronger if many years—and judicial appointments—lie between the practical and

101. See *Herrera v. Wyoming*, 139 S. Ct. 1686, 1697 (2019) (quoting still earlier case law).

102. See Daniel B. Rice & Jack Boeglin, *Confining Cases to Their Facts*, 105 VA. L. REV. 865, 893–94 (2019) (discussing *Herrera* and related cases while arguing that a single, decisive repudiation of precedent is distinctive).

103. See *Edwards*, 141 S. Ct. at 1562.

104. See *id.* at 1555 (citing *Whorton v. Bockting*, 549 U.S. 406, 417 (2007)); see also Kermit Roosevelt III, *A Retroactivity Retrospective, with Thoughts for the Future: What the Supreme Court Learned from Paul Mishkin, and What It Might*, 95 CAL. L. REV. 1677, 1694 (2007) (“[N]o new procedural rule has yet satisfied the *Teague* exception, and the Court has strongly intimated that none shall.”).

105. See *Edwards*, 141 S. Ct. at 1581 (Kagan, J., dissenting).

formal overrulings.

We can better see both the appeal and the distinctiveness of *fait accompli* overrulings by placing them in historical perspective. To a great extent, these rulings harken back to an earlier era, when precedential principles were not made but found. Today, lawyers often assume that a case loses precedential value only if and when a court-as-legislature formally declares it to be repealed or “overruled.” But, at common law, a judicial decision could be set aside for already being odds with the custom or practice of the courts in general.<sup>106</sup> Experience, one might say, can gradually reveal a once venerable precedent’s error.<sup>107</sup> Similar logic may explain the Court’s recourse to “the court of history” in disavowing *Korematsu*, even though that precedent had never been formally overruled.<sup>108</sup>

All this to say that overruling by *fait accompli*, including in *Edwards*, is at least plausible and possibly even preferable to legislative overruling pursuant to the stare decisis factors. In general, showing that a case has gone by the wayside is harder, calling for greater judicial patience and humility, than simply running through a four-part, one-and-done rubric. So a pattern of erosion or evasion would seem to qualify as a basis for overcoming stare decisis. To harmonize this conclusion with extant doctrine, such a pattern might be treated as a “special factor” within the stare decisis analysis.

#### D. Stare Decisis as Crying Wolf

*Edwards* surfaces important tension in the practice of precedent-based dissents, one that befuddles dissenters and counterintuitively fosters efforts to overrule.

Imagine that you are a justice who generally hopes to protect existing case law from erosion or repudiation. You might think it is a good idea to complain about each and every instance of overruling, so as to keep stare decisis salient and make the majority coalition pay an ever-increasing “price” in professional and public esteem. But you

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106. See Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187, 1225–27 (2007).

107. See Charles Barzun, *Impeaching Precedent*, 80 U. CHI. L. REV. 1625, 1636–37 (discussing overruling based on experience).

108. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018); see also Daniel B. Rice, *Repugnant Precedents and the Court of History*, 121 MICH. L. REV. (forthcoming 2022). As we have seen, *Edwards*’s disavowal of the watershed exception may itself have been dicta or otherwise “empty,” as some critics have alleged with respect to *Trump v. Hawaii*’s repudiation of *Korematsu*. Cf. Jamal Greene, *Is Korematsu Good Law?*, 128 YALE L.J. F. 629 (2019).

would also worry about coming across as Chicken Little, or the Boy Who Cried Wolf. It isn't always a big deal to overrule, even when doing so is wrong. And, sometimes, overruling is positively the right thing to do. Much as the Court would lose face by overruling too freely, as though precedent were legally irrelevant, dissenters can sacrifice their credibility by acting as though every new overruling is a fresh End of Days. So, what's a dissenter to do?

The most straightforward response would be to moderate through selectivity. That is, the dissenter could make a big deal out of especially outrageous overrulings, while toning it down when overrulings are less consequential or unjustified. Dissenters surely avail themselves of this option to some extent. Yet the costs of moderation are high, as it turns overruling into an occasion for refined judgment, not automatic skepticism. Fostering pervasive anger, or anxiety, about the threat to stare decisis might seem critical to deterring the majority and preventing at least some overrulings from happening at all. Frequent dissenters therefore have good reason to see if they can have their rhetorical cake and eat it, too.

One way of finessing that issue is to try and have it both ways in the moment. This solution relates to an even broader dynamic that might be termed *the dissenter's dilemma*, that is, the dissenter's desire simultaneously to both fuel outrage over a decision's potential reach and to minimize the same decision's actual consequences.<sup>109</sup> In *Jones v. Mississippi*, for instance, Justice Sotomayor's dissent argued that the Court was in effect "overturning *Miller* or *Montgomery*," contrary to stare decisis.<sup>110</sup> But, later, the dissent also insisted that "sentencers should hold this Court to its word: *Miller* and *Montgomery* are still good law."<sup>111</sup> The problem with this approach is that the dissent might come across as self-contradictory, or as overly strategic in how it spins the Court's treatment of case law.

Another way of squaring the rhetorical circle is to try and have it

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109. I borrow this term from related discussion in ALEXANDER M. BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS: THE SUPREME COURT AT WORK* 21, 28–30 (1957); see also *United States v. Travers*, 514 F.2d 1171, 1174 (2d Cir. 1974) (Friendly, J.) ("Cassandra-like predictions in dissent are not a sure guide to the breadth of the majority's ruling . . ."). Cf. Oren Tamir, *Political Stare Decisis*, 22 *CHI. J. INT'L L.* (forthcoming 2022) (discussing the risk of being a "sore loser" in the context of political precedent).

110. 141 S. Ct. 1307, 1336 (2021) (Sotomayor, J., dissenting) (referring to *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 577 U.S. 190 (2016)); see also *id.* at 1337 ("Now, it seems, the Court is willing to overrule precedent without even acknowledging it is doing so, much less providing any special justification.").

111. *Id.* at 1337.

both ways at different points in time. This solution requires selective forgetting: the importance of stare decisis is trumpeted in dissent after dissent, but the doom-and-gloom rhetoric attending each dissent is instantly swept under the rug. The point of this strategy is to make each transgression of stare decisis seem unprecedented, as though stare decisis had been eroded for the first time. A less helpful understanding of events, namely, that stare decisis has proven to be quite flexible, is thus kept out of view.<sup>112</sup> This approach counts on the reader's short memory—and, ironically, on the forgettability of the dissenter's earlier rhetorical flourishes.

Here, Justice Kagan provides a nice example. Two years before *Edwards*, Kagan inveighed against the majority's decision to overrule in *Knick v. Township of Scott*, writing for instance: "If that is the way the majority means to proceed—relying on one subversion of *stare decisis* to support another—we may as well not have principles about precedents at all."<sup>113</sup> Did Kagan mean that *Knick* had so abused precedent as to effectively overrule stare decisis itself? Apparently not, for in *Edwards* Kagan selected *Knick* as an exemplar of the Court's "customary, and disciplining, practice" of "consider[ing]—and usually at length—a familiar set of factors capable of providing the needed special justification."<sup>114</sup> Each vehement dissent becomes water under the bridge.

All this raises the question of how the majority coalition might respond to our imagined dissenter's rhetorical strategizing. The majority might do just what the dissenter hopes: wince at each rhetorical lashing, try to avoid the next one, and generally think hard before overruling.<sup>115</sup> But there is another salient possibility: much as the public could come to wonder whether the dissenter is overdoing it, the majority might decide that there is no satisfying the opposition. Someone who cannot see that overrulings are sometimes justified—or just not a big deal—might not be worth appeasing. The majority could then become numb to the lashing, and unafraid to overrule. The strong

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112. There are starker takeaways available. See, e.g., Lisa Heinzerling, *The Rule of Five Guys*, 119 MICH. L. REV. 1137, 1141 (2021) ("The very notion that the Court is bound to follow precedent until it formally overrules it is either naïve or disingenuous.").

113. 139 S. Ct. 2162, 2190 (2019) (Kagan, J., dissenting).

114. *Edwards*, 141 S. Ct. at 1581 (Kagan, J., dissenting).

115. The result might be rhetorical conflict. See generally Frederick Schauer, *Stare Decisis—Rhetoric and Reality in the Supreme Court*, 2018 SUP. CT. REV. 121 (2019) (discussing "weaponized" stare decisis used for "rhetorical emphasis" by majorities and dissenters alike).

rhetoric against overruling would have defeated itself.<sup>116</sup>

That reasoning can be taken still further. A cynical majority might put itself on the lookout for precedents to overrule. Not just any precedent will do, of course. Overruling cases that are either too important or too sound would tend to feed the dissenter's critical flame. But when precedents are contrary to the would-be dissenter's view of the merits, or else not terribly important, a decision to overrule can put the dissenter in a bind: she would have to moderate her rhetoric or else risk coming across as crying wolf. Notably, *Ramos* and *Edwards* respectively fit each half of that strategy, with *Ramos* appealing to (and splintering) the Court's left wing and *Edwards* "overruling" only a never-used exception. So there is some evidence that rhetorical strategies influence not just opinion style but also substantive outcomes in discrete cases.

#### IV. WHAT ABOUT THE SHARPLY PERSONAL EXCHANGE?

Perhaps the most talked-about aspect of the *Edwards* opinions was a sharp, personal exchange between the majority and the dissent. This exchange offers a particularly stark illustration of the tension between reason and rhetoric.

##### A. *The Exchange*

Let me start by reproducing the most relevant passages. Here is a main-text passage that appears near the end of Kagan's dissent:

Taking with one hand what it gave with the other, the Court curtails *Ramos*'s effects by expunging *Teague*'s provision for watershed rules. . . . For the first time in many decades . . . those convicted under rules found not to produce fair and reliable verdicts will be left without recourse in federal courts.<sup>117</sup>

The majority responded at length. Here is an edited portion of that riposte:

[T]he dissent asserts that the Court is not living up to the promise of *Ramos* for criminal defendants. . . . [W]ith respect, Justice Kagan dissented in *Ramos*. . . . [I]t is of course fair for a dissent to vigorously critique the Court's analysis. But it is

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116. Cf. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 944 (1973) ("One possible judicial response to this style of criticism would be to conclude that one might as well be hanged for a sheep as a goat: So long as you're going to be told, no matter what you say, that all you do is *Lochner*, you might as well *Lochner*.").

117. *Edwards*, 141 S. Ct. at 1581 (Kagan, J., dissenting).

another thing altogether to dissent in *Ramos* and then to turn around and impugn today's majority for supposedly shortchanging criminal defendants. To properly assess the implications for criminal defendants, one should assess the implications of *Ramos* and today's ruling *together*. And criminal defendants as a group are better off under *Ramos* and today's decision, taken together, than they would have been if Justice Kagan's dissenting view had prevailed in *Ramos*. . . . The rhetoric in today's dissent is misdirected.<sup>118</sup>

Kagan then dropped a footnote rejoinder that I reproduce in full:

The majority's final claim is that it is properly immune from this criticism—that I cannot “turn around and impugn” its ruling—because “criminal defendants as a group are better off under *Ramos* and today's decision, taken together, than they would have been if my dissenting view had prevailed in *Ramos*.” The suggestion is surprising. It treats judging as scorekeeping—and more, as scorekeeping about how much our decisions, or the aggregate of them, benefit a particular kind of party. I see the matter differently. Judges should take cases one at a time, and do their best in each to apply the relevant legal rules. And when judges err, others should point out where they went astray. No one gets to bank capital for future cases; no one's past decisions insulate them from criticism. The focus always is, or should be, getting the case before us right.<sup>119</sup>

This highly personal exchange is unusual, intense, and provocative. And it seems to capture a deep, broad dispute about how the Court's cases are, and should be, decided. Perhaps for those same reasons, both sides of the exchange are highly ambiguous.

### *B. Possible Readings*

Many readers have been energized, outraged, or persuaded by different parts of the above exchange, but it is surprisingly hard to tell what it is even about.

One possibility is that the exchange is about whether to bend the law today in light of beneficent decision-making yesterday. The dissent encourages that takeaway, including by positing: “Judges should take cases one at a time, and do their best in each to apply the relevant legal

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118. *Id.* at 1561–62 (majority opinion).

119. *Id.* at 1581 n.8 (Kagan, J., dissenting) (citations and brackets omitted).

rules.”<sup>120</sup> But it would be shocking for even a single justice, much less a six-justice majority, to announce open defiance of what the law required, for any reason. And the Court says no such thing. In fact, the Court anticipates and disclaims that very reading: “If we thought otherwise and believed that *Ramos* qualified under the Court’s precedents as a rule that applies retroactively, we would certainly say so.”<sup>121</sup>

Another possibility is that the exchange is about remedial equilibration. On this reading, the majority believes that *Ramos*’s “promise” is best fulfilled by curbing the jury-unanimity right’s practical consequences. Moreover, the majority faults Kagan’s contrary approach for unjustifiably leading to an across-the-board denial of the right. The key sentence here is one that we have already encountered: “To properly assess the implications for criminal defendants, one should assess the implications of *Ramos* and today’s ruling *together*.”<sup>122</sup> This reading makes sense of why the Court tethers *Edwards* specifically to *Ramos*. When doing remedial equilibration, it is natural to focus on just that pair: the right and its remediation. By contrast, the dissent’s objection to “scorekeeping,” and related focus on taking cases “one at a time,” might be taken as an endorsement of rights-essentialism.<sup>123</sup> Rather than evaluating rights in light of anticipated remedial rulings, Kagan would keep those two issues apart. Both sides would thus be endorsing reasonable but opposing jurisprudential views. Yet it’s hard to shake the sense that each side is actually casting aspersions on the other.

A third possibility is that the two sides are debating about personal consistency. This framing best captures the personal nature of the exchange. The dissent cites Kavanaugh’s *Ramos* concurrence no fewer than seven times—even though that solo concurrence did not qualify as Court precedent.<sup>124</sup> Kagan was instead leveling a charge of inconsistency against the author of the *Edwards* majority opinion, quoting Kavanaugh by name and adding: “But that statement precludes today’s result.”<sup>125</sup> Kagan generalized this claim, arguing that the Court itself was “[t]aking with one hand what it gave with the

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120. *Id.*

121. *Id.* at 1561 (majority opinion).

122. *Id.* at 1562. *See also supra* Section II.B.

123. *See id.* at 1581 n.8 (Kagan, J., dissenting).

124. *See id.* at 1574–81.

125. *See id.* at 1577–78.

other.”<sup>126</sup> The basic allegation here is one of hypocrisy.

The majority can then be read as both rebutting Kagan’s inconsistency charge—which the majority labels as “rhetoric”<sup>127</sup>—and then responding in kind. The rebuttal was that “*Ramos* itself explicitly forecast today’s decision on retroactivity.”<sup>128</sup> That characterization may be a tad strong,<sup>129</sup> but it’s undeniable that *Ramos* reserved the watershed issue.<sup>130</sup> So, no inconsistency there. And the response-in-kind was the observation that Kagan, too, could be accused of inconsistency. Given her expressed concern for “those convicted under rules found not to produce fair and reliable verdicts,”<sup>131</sup> why did Kagan previously oppose affording those same people any relief whatsoever? That retort is about as plausible as Kagan’s parallel insinuation that the Court somehow acted inconsistently by answering a question it had previously reserved.

On balance, the final reading is probably the most persuasive. But while that interpretation makes the most sense of the back-and-forth, it raises new concerns.

### C. Are Kagan’s Votes Reconcilable?

Rhetoric aside, we might wonder whether Justice Kagan’s votes in *Ramos* and *Edwards* can be reconciled. In exploring this issue, I now focus on substance rather than the more personal back-and-forth in *Edwards*.

Here’s the basic problem: a right that isn’t worth having at all seems incapable of being worth applying retroactively in habeas cases. As we’ve seen, the stare decisis analysis in *Ramos* and the watershed analysis in *Edwards* are both largely about weighing the state’s reliance interests against the defendant’s interests in accuracy and fairness. The main practical difference here is that *Ramos*’s overruling in itself

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126. *Id.* at 1581.

127. *See id.* at 1562 (majority opinion) (“The rhetoric in today’s dissent is misdirected.”).

128. *Id.* at 1561. What’s more, Kavanaugh’s *Ramos* concurrence expressly rejected the watershed claim, thereby insulating Kavanaugh from the charge of having broken a “promise.” *See Ramos*, 140 S. Ct. at 1419–20 (Kavanaugh, J., concurring). Interestingly, *Edwards* doesn’t point out Kavanaugh’s early answer to the watershed issue, perhaps because doing so would too openly shed the conceit of writing for the Court as a whole.

129. *See Ramos*, 140 S. Ct. at 1407 (plurality opinion) (emphasizing that the watershed test “is a demanding one, so much so that this Court has yet to announce a new rule of criminal procedure capable of meeting it.”).

130. *Id.* (plurality opinion) (“Nor is the *Teague* question even before us. Whether the right to jury unanimity applies to cases on collateral review is a question for a future case”).

131. *Edwards* 141 S. Ct. at 1581 (Kagan, J., dissenting).

operated only prospectively, whereas the watershed inquiry determined retrospective effect. So, for criminal-procedure cases, we might think that the relevant inquiries go something like this:

- Stare decisis may be overcome when *prospectively* recognizing a right is net beneficial.
- A watershed rule may be found when *retroactively* recognizing a right in habeas is net beneficial.<sup>132</sup>

Kagan voted to find a watershed where she wouldn't have overruled in the first place. In casting that pair of votes, Kagan achieved a first: no justice applying *Teague* has ever before urged retroactive application of a new procedural rule that they had opposed.<sup>133</sup> And that previously unbroken pattern is unsurprising: both intuitively and as a matter of case law, the standard for overruling is much lower than the standard for finding a watershed. After all, lots of procedural rules that come about through overrulings aren't watersheds. And the government's reliance interests are at their apex when it comes to disrupting long-settled convictions that comported with then-extant Court precedent.<sup>134</sup> So, how could reliance interests be so strong as to defeat the right prospectively (under stare decisis), but not strong enough to defeat the right as retroactively applied (under the watershed exception)?<sup>135</sup>

One way out is to posit that something other than reliance interests explained Kagan's vote in *Ramos*. Perhaps Kagan didn't think that constitutional text and history supported a jury unanimity right; but, once such a right was found, it was of sufficient practical importance to qualify as a watershed rule. That explanation runs into a snag, however: the *Ramos* dissent, which Kagan joined, assumed the "correctness" of the majority's merits analysis and rested on reliance interests alone.<sup>136</sup>

132. The *Ramos* plurality made a similar point, noting: "It would hardly make sense to . . . count the State's reliance interests in final judgments both here and again there." *Ramos*, 140 S. Ct. at 1407 (plurality opinion). Note that the bullet points state necessary conditions.

133. The statement in the main text is based on a review of the Court's *Teague* cases cited in *Edwards*, including at 141 S. Ct. at 1580 n.7 (Kagan, J., dissenting).

134. Dean Vikram Amar makes a similar point by distinguishing mere reliance from *detrimental* reliance. Vikram David Amar, *Justice Kagan's Unusual and Dubious Approach to "Reliance" Interests Relating to Stare Decisis*, VERDICT (June 1, 2021) <https://verdict.justia.com/2021/06/01/justice-kagans-unusual-and-dubious-approach-to-reliance-interests-relating-to-stare-decisis>. In arguing that Kagan "got it wrong both times," Amar reconciles Kagan's votes by deeming them erroneous. *Id.*

135. Of course, Kagan might just have changed her mind. But then one might have expected her to say so.

136. See *Ramos*, 140 S. Ct. at 1425–26 (Alito, J., dissenting) ("I would not overrule *Apodaca*."

Moreover, that sentiment comports with Kagan's writings elsewhere.<sup>137</sup> So, this defense requires that Kagan substantially disagreed with an opinion that, quite in character, she chose to join. That's possible, but it's also speculative.

A second possibility is that *Ramos* established that jury unanimity is valuable in a way that Kagan didn't accept when *Ramos* was decided. Kagan's dissent in *Edwards* seems carefully written to suggest this way out. Take her opening volley in the sharp exchange above, with emphasis added: "For the first time in many decades . . . those convicted under rules found not to produce fair and reliable verdicts will be left without recourse in federal courts."<sup>138</sup> Kagan seems not to be taking a position on whether the convictions actually *were* "fair and reliable." It sufficed that they were *found* not to be. And, after *Ramos*, Kagan was prepared to accept that finding.

This explanation, while plausible, also encounters difficulties. What exactly could *Ramos* have changed? Again, the *Ramos* dissent assumed that the jury unanimity right was "correct" on the merits.<sup>139</sup> And the *Ramos* majority was noncommittal on whether or how much jury unanimity actually improved accuracy. For the Court, it was enough to identify the existence of an historical "rule," without endorsing any particular functional basis for it.<sup>140</sup> The rest of *Ramos*'s reasoning largely consists of historical claims, such as that the lack of jury unanimity in some states sprang from an invidious desire to engage in or foster race discrimination. The *Ramos* dissent disregarded that history as not "what matters."<sup>141</sup> Once the Court held that that history *did* matter for stare decisis, did Kagan feel obligated to view it as relevant to the watershed inquiry as well?

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Whatever one may think about the correctness of the decision, it has elicited enormous and entirely reasonable reliance."); *id.* at 1436 ("What convinces me that *Apodaca* should be retained are the enormous reliance interests of Louisiana and Oregon.").

137. Kagan often emphasizes the importance of safeguarding reliance pursuant to stare decisis. See e.g., *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 458 (2015) (Kagan, J.) ("We would prefer not to unsettle stable law.").

138. See *Edwards*, 141 S. Ct. at 1581 (Kagan, J., dissenting).

139. See *Ramos*, 140 S. Ct. at 1425–26 (Alito, J., dissenting).

140. In claiming that *Ramos* "found" jury unanimity to foster "fair and reliable" verdicts, Kagan reproduced the Court's quotation of Blackstone. *Edwards*, 141 S. Ct. at 1576 (Kagan, J., dissenting) (citing *Ramos*, 140 S. Ct. at 1395). But *Ramos* declined to endorse that—or any other—functionalist basis for jury unanimity. See, e.g., *id.* at 1402 ("it is not our role to reassess whether the right to a unanimous jury is 'important enough' to retain"); see also *supra* note 26. Could Kagan have remembered *Ramos* as functionalist because that, in her mind, is the most charitable way to understand it?

141. See *Ramos*, 140 S. Ct. at 1427 (Alito, J., dissenting).

That leads to a third and best explanation: perhaps Kagan is exhibiting *precedential maximalism*. On this view, Kagan doesn't just hope to *preserve* precedents in the sense of not overruling them. She also wants to *extend* the reasoning of those precedents to their logical conclusion, even if doing so goes beyond the precedents' holdings or intrudes on their reservations. That could be what Kagan meant when she explained why she dissented in both *Ramos* and *Edwards*: "Now that *Ramos* is the law, *stare decisis* is on its side. I take the decision on its own terms, and give it all the consequence it deserves."<sup>142</sup> One might have thought that whether *Ramos* had *stare decisis* "on its side" wasn't relevant, since nobody proposed overruling it. *Edwards* was instead about a related but distinct issue: watersheds.

To get a better handle on precedential maximalism, consider three ways of reading *Ramos*. First, the case could be read *literally* as holding jury unanimity to be important enough to overrule precedent but not necessarily to make a watershed rule. The watershed question would simply be open, and a new inquiry would be required to answer it. Second, a *skeptical* reading would, in effect, continue the dissent from *Ramos* by reading that precedent to have only narrow effect, thereby precluding watershed status. Finally, a *maximalist* reading would embrace *Ramos*'s rhetoric rather than its reservation and then extend the case's reach. In choosing that last option, Kagan read the *Ramos* opinions, including the concurrences, for all they could be.<sup>143</sup> As she put it, her dissent honored "what those opinions (often with soaring rhetoric) proclaim."<sup>144</sup> So "rhetoric" prevails.

And Kagan has reason to favor rhetoric here. On reflection, precedential maximalism makes sense for someone enthusiastic about *stare decisis*. Let's assume that Kagan's primary goal is to prevent overrulings. While that goal wouldn't in itself require that cases be read broadly in light of their rhetoric, doing so might tend to make precedent seem more important. Precedential maximalism might operate

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142. *Edwards*, 141 S. Ct. at 1573 n.1 (Kagan, J., dissenting) (emphasis added).

143. Several weeks after *Edwards*, Kagan elaborated: "[F]idelity to precedent . . . places demands on the winners. They must apply the Court's precedents—limits and all—wherever they can, rather than widen them unnecessarily at the first opportunity." *Collins v. Yellen*, 141 S. Ct. 1761, 1801 (2021) (Kagan, J., concurring in part). This passage could be read as an endorsement of reading case law literally, honoring precedents "limits and all." *Id.* But perhaps this passage, too, reflects a form of precedential maximalism, albeit in a subtler form. In finding a constitutional violation, a precedent could establish only a sufficient condition for unconstitutionality. Kagan, however, seems to treat the precedent as binding not only as to what is *prohibited* but also as to what is *allowed*. So, again, Kagan may be reading precedent for all it can be.

144. *Edwards*, 141 S. Ct. at 1578.

somewhat like a protective buffer, shoring up the core features of stare decisis. From this vantage point, *Ramos* and *Edwards* might as well not have been about jury unanimity at all. The decisive consideration would instead be that both cases afforded opportunities to glorify precedent. And Kagan seized those opportunities—without ever expressing her own view of the right in question.<sup>145</sup>

Is precedential maximalism defensible? One might think that precedents should always be read literally, so that rhetoric and reservations are treated equally. Alternatively, whether a judge treats precedent broadly or narrowly might depend in part on the judge's view of the precedent's merits.<sup>146</sup> Or, perhaps, precedential maximalism might generally be preferred, perhaps on the ground that it most vigorously promotes the principle and policy of stare decisis. For present purposes, it suffices to say that Kagan's apparent choice to engage in precedential maximalism represents another debatable and underexplained aspect of her dissent.

#### *D. Is this Entire Exchange a Waste of Time, or Worse?*

The jousting between Kavanaugh and Kagan created a fascinating spectacle, but was it good? Did it help advance valuable arguments and principles, or undermine them?

One attractive answer is that both sides were engaged in a form of the *tu quoque* or “you too” fallacy. When your opponent is inconsistent but pretends not to be, that might prove that they exhibit a vice such as hypocrisy, but it doesn't actually show who's right and who's wrong. So there's generally no truth-value in leveling charges of personal inconsistency.<sup>147</sup> This objection would not apply to the dissent's use of the majority opinion in *Ramos*, since consistency with past precedential rulings is an integral part of stare decisis and legal argument. But it does apply to the dissent's focus on Kavanaugh's non-precedential solo concurrence as well as to the majority's decision to respond by singling out Kagan for “turn[ing] around.”<sup>148</sup>

On balance, however, the majority's charges of personal

145. As we have seen, the *Ramos* dissent assumed the Court was correct on the merits, and the *Edwards* dissent relied on *Ramos*.

146. See Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861 (2014); KARL N. LLEWELLYN, *THE BRAMBLE BUSH* 69 (1930) (Quid Pro Books 2012).

147. But only generally. See Scott F. Aiken, *Tu Quoque Arguments and the Significance of Hypocrisy*, 2 INFORMAL LOGIC 155 (2008).

148. *Edwards*, 141 S. Ct. at 1561–62.

inconsistency are worse. The majority, after all, is writing for the Court as an institution. And why should the institution have a stake in trying to personally criticize or embarrass a particular justice?<sup>149</sup> Even if Kagan had tied herself in knots, that conclusion wouldn't demonstrate why Justices Breyer and Sotomayor were wrong to dissent in *Edwards*. Dissenters have the pain of defeat and the freedom of personal voice to excuse their behavior. By comparison, personal attacks are beneath the Court.

The concern here isn't just about decorum. Perhaps *Edwards* involved so many charges of personal inconsistency because participants on both sides recognized that conventional legal arguments wouldn't persuade. So, in the hope of better swaying audiences both on and off the Court, the justices may have felt justified in turning to personal precedent—and even to ad hominem rhetoric.<sup>150</sup> In this way, the erosion of conventional authority can become self-reinforcing. As unconventional arguments gain attention, they crowd out normal practice. *Edwards* illustrates this dynamic, as the majority's willingness to engage in personalized rhetoric tacitly conceded the force and legitimacy of that mode of argument, making it even more likely to appear in the next case.

So, while I tend to side with the majority on the substance of this dispute, I lament the Court's decision to participate in it.

#### V. CONCLUSION: SHOULD WE WANT REASON, OR RHETORIC?

Having now criticized the majority, the dissent, and Justice Gorsuch's concurrence, let me spend a little time on self-criticism. Have I been holding the *Edwards* opinions to an unrealistic standard, and an overly academic one at that?

Perhaps so. The *Edwards* opinions are so interesting—and worth sustained examination—precisely because their reasoning and rhetoric are unusually elaborate. (Conclusory opinions are read for the content

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149. Even Justice Scalia, who may have been the Court's most outrageously ad hominem dissenter, always kept a more professional and aloof tone in his majority opinions. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2630 (2015) (Scalia, J., dissenting) (“It is one thing for separate concurring or dissenting opinions to contain extravagances . . . [but] it is something else for the official opinion of the Court to do so.”).

150. On “personal precedent,” or fidelity to one's own past opinions, see Richard M. Re, *Personal Precedent in Bay Mills*, Re's Judicata (June 4, 2014) <https://richardresjudicata.wordpress.com/2014/06/04/personal-precedent-in-bay-mills/>. Personal precedent may properly, or necessarily, have a role. See Richard M. Re, *Precedent as Permission*, 99 TEX. L. REV. 907, 947–48 (2021).

of their diktats, but they aren't worth poring over.) What's more, Kavanaugh, Kagan, and Gorsuch are all acclaimed legal writers,<sup>151</sup> and they pulled out all the stops on this one. So, complaining about this decision may seem a bit like finding fault with the performances of bemedaled Olympians.

Moreover, my criticisms focus on first-principles reasoning in a way that may resonate more with the Ivory Tower than either the bench or the bar. Over and over, I've pressed a simple theme: the *Edwards* opinions are packed with provocative but incomplete or surface-level reasoning. The opinions, in short, are largely rhetorical. To give just a few examples: the majority never addresses its deviations from normal appellate process, the dissent leaves the proper content of the watershed exception undefended, and Gorsuch neglects plausible reasons to think that his approach would afford Edwards relief. Yet the opinions find time for accusations of personal inconsistency and zippy one-liners.

But asking judges to generate deep, comprehensive arguments may be both unrealistic and misguided. Despite their discretionary docket, the justices have to resolve a lot of complex cases on a schedule. They lack the luxury of writing a tentative, exploratory essay like the one you're presently reading. And they also face the daunting challenge of reaching consensus while saying something important, persuasive, or at least interesting.<sup>152</sup> In *Edwards*, both the majority and the dissent may have eschewed deeper arguments out of sheer necessity: there may not have been sufficiently confident agreement to write opinions that delved deeply into the first-principles positions. Rhetoric is what remains.

Justice Kagan's rhetorically magnificent dissent offers perhaps the best example. As we have seen, Kagan faced daunting precedential obstacles—a fact acknowledged by sympathetic but candid commentators.<sup>153</sup> And Kagan dealt with those obstacles in a singularly unconvincing way, namely, by incorrectly asserting that the jury-unanimity right qualified as a watershed rule under any plausible view. Kagan's argument is best understood as an instance of the rhetorical device of hyperbole. Advancing her case more carefully and accurately

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151. For instance, they all have won the *Green Bag's* judicial writing award, with Kagan seemingly winning almost every year.

152. See Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982); Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

153. See Vladeck, *supra* note 13.

would have generated several problems. It could have made for tepid prose, divided her joiners, and obligated her to do a lot of research as well as shadowboxing with potential objectors.

The implications reach well beyond any one judge's desire to promote her own reputation or objectives. The legal system itself often benefits from keeping things at a surface or rhetorical level. Cases move faster, precedent is more flexible, and judicial opinions become less tedious to read. Meanwhile, serious observers will be merely entertained, not fooled, by the quick moves and catchy put-downs. Those clear-eyed spectators care more about the bland language of referees than the pep squad's cheers and jeers. And the Court's desire to appeal to that relatively impartial audience can discourage judicial rhetoric from being overdone or taken too seriously.<sup>154</sup> So long as those responsible readers hold sway, the fact that the justices don't reason as scholars do, or always reason so well at all, is just fine.

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154. "Judges supply opinions to meet demand,"so "if we were more careful with our compliments, perhaps judges would be more responsible, too." Richard M. Re, *A Rule Against Fun*, JOTWELL (July 22, 2021) (alteration omitted). In that sense, keeping judicial rhetoric in check is a job not just for the justices but also for the readers of judicial opinions—that is, for us. For if too many readers are eager to be taken in by judicial rhetoric—perhaps because it is written by their favorite justices in pursuit of their favorite causes—then nothing will discipline the Court's abuse of reason.