Preserving Judicial Neutrality: Regulating Stare Decisis for Elected Judges in an Era of Political Polarization

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PRESERVING JUDICIAL NEUTRALITY:
REGULATING STARE DECISIS FOR ELECTED
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POLARIZATION

Jason Semaya*

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INTRODUCTION

On June 29, 2023, in Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, the Supreme Court held that race-based college admission programs violate the Equal Protection Clause of the Fourteenth Amendment.¹ This monumental affirmative action decision is a recent example of a troubling trend.² Namely, the Supreme Court is overturning long-established legal doctrines and weakening federal stare decisis.³ The

² See id. at 342 (Sotomayor, J., dissenting) (“It is a disturbing feature of today’s decision that the Court does not even attempt to make the extraordinary showing required by stare decisis. The Court simply moves the goalposts, upsetting settled expectations and throwing admissions programs nationwide into turmoil.”); see also Dobbs v. Jackson Women’s Health Organization, 142 S. Ct. 2228, 2305 (2022) (Kavanaugh, J., concurring) (“After today’s decision, all of the States may evaluate the competing interests and decide how to address the consequential issue [of abortion].”). “Affirmative action refers to any set of policies in place to ensure equal opportunity and prevent discrimination based on a broad range of identities, including race, sex, gender, religion, national origin and disability.” Emily Mae Czachor, What Is Affirmative Action? History Behind Race-Based College Admissions Practices the Supreme Court Overruled, CBS News (June 29, 2023, 5:07 PM), https://www.cbsnews.com/news/what-is-affirmative-action-history-college-admissions-supreme-court/ [https://perma.cc/V2EA-PE4D].
resulting ambiguity of federal stare decisis has eked into state stare decisis doctrines as well.4 As the U.S. Supreme Court’s 6–3 conservative majority5 continues to limit the role of federal courts,6 candidates for state court elections are sharing how they would address political issues if elected.7 Consequently, these candidates are infusing politics into state court elections.8 In this context, the tight interplay between the politicization of state supreme court elections and stare decisis is clear.9

Stare decisis — Latin for “to stand by things decided”10 — is incongruous with judicial candidates campaigning on political issues.11 How can a judge campaigning on expanding abortion access abide by stare decisis if they are judging cases in a state that has long codified restrictions to abortion access?12 Similarly, how can a judge campaigning on restricting voting rights abide by stare decisis if their state has always had non-restrictive voter

5. See Nina Totenberg, The Supreme Court Is the Most Conservative in 90 Years, NPR (July 5, 2022, 7:04 AM), https://www.npr.org/2022/07/05/1109444617/the-supreme-court-conservative [https://perma.cc/3CHM-EE2D].
6. See Whole Woman’s Health v. Jackson, 142 S. Ct. 522, 535 (2021) (“The equitable powers of federal courts are limited by historical practice[.]”).
7. Many questions once decided by federal courts are now reserved to the states. See Dobbs, 142 S. Ct. at 2305 (Kavanaugh, J., concurring) (“After today’s decision, all of the States may evaluate the competing interests and decide how to address [the] consequential issue [of abortion].”).
8. See infra note 15 and accompanying text.
9. See Penny J. White, The Other Costs of Judicial Elections, 67 DEPAUL L. REV. 369, 372 (2018) (“As a result of judicial elections, members of the judiciary are less experienced and less likely to be guided by precedent and by the fundamental principle of stare decisis. Thus, judicial elections may produce a judiciary that is unable to fulfill the purpose envisioned for America’s courts.”); Stefanie A. Lindquist, Judicial Activism in State Supreme Courts: Institutional Design and Judicial Behavior, 28 STAN. L. & POL’Y REV. 61, 77 (2017) (proffering that electing judges does not necessarily provide litigants with better cues as to how cases will be decided because judges may decide to forego stare decisis to follow their own policy preferences).
ID laws.13 These questions underscore the problem of partisan judicial elections. Even though judges are trusted to be unbiased, fair, and equitable,14 states such as Wisconsin and Ohio have allowed — and even encouraged — candidates for state high courts to voice their political opinions.15 When judges are political, there is a perception of impartiality, which may be unnerving.16 These skepticisms give way to questions about how political preferences should factor into adjudication. Elected judges can express their political views, but should they incorporate their preferences into decision-making if doing so undercuts precedent? As the United States


16. Even though politicization of the judiciary is concerning, the U.S. Supreme Court has held that a judicial candidate’s First Amendment rights empower them to voice their political opinions. See Republican Party of Minnesota v. White, 536 U.S. 765, 774–75 (2002).
trends towards allowing states to rework precedent, questions about limiting judges from being political arise.

In the states, stability of precedent, reliance on precedent, judicial integrity, and political polarization have either impacted or been impacted by adherence to stare decisis. In states with judicial elections, these impacts are amplified. Candidates develop campaigns centered around increasingly politicized platforms. On the campaign trail, politicization is visible in a judge’s rhetoric; on the bench, politicization manifests in a judge’s choice to conform to or ignore stare decisis.

As an initial matter, many variables affect the applicability of stare decisis. First, different types of cases mandate varying degrees of stare decisis.


19. See supra note 3 and accompanying text; see also Cook v. State, 870 S.E.2d 758, 772–73 (Ga. 2022) (holding that the entrenchment of precedent in the legal system is a type of reliance interest in stare decisis analysis).

20. See Meyer, 445 Md. at 669.


22. See id. at 513.

23. Some states allow candidates in judicial elections to identify with a political party and others do not. See James Wilets et. al., A Critique of the Judicial Appointment Process and Rule of Law in the United States: A Comparative Perspective, 46 Nova L. Rev. 201, 215–17 (2022). In either case, candidates that are elected feel the need to make good on promises to their donors and constituents and may be more likely to disregard principles of stare decisis than judges who are appointed and who have no political accountability. See Defining Democracy: Accountability, RENEW DEMOCRACY INITIATIVE, https://rdi.org/defining-democracy-accountability/ [https://perma.cc/JP5G-ZN3Q] (last visited Mar. 6, 2023).


26. See generally Brian C. Kalt, Three Levels of Stare Decisis: Distinguishing Common-Law, Constitutional, and Statutory Cases, 8 Tex. Rev. L. & Pol. 277 (2004); see also Zachary
Second, states encourage — or discourage — stare decisis to different extents.27 Third, stare decisis as a whole is not fixed,28 as political pressure may impact judgments.29 These factors coalesce to create a spectrum for judicial adherence to stare decisis, where a judge’s discretion ranges from minimal to absolute.30 However, without systems restraining elected judges, courts make unpredictable decisions regardless of whether they have discretion to do so.31

B. Pohlman, Stare Decisis and the Supreme Court(s): What States Can Learn from Gamble, 95 NOTRE DAME L. REV. 1731, 1760 (2020) (“Common-law stare decisis is different in kind, not merely in degree, from statutory and constitutional stare decisis.”); id. at 1750 (describing how different states have different mandates regarding methodological stare decisis in statutory interpretation); City of Rocky River v. State Emp. Rel. Bd., 539 N.E.2d 103, 107–11 (Ohio 1989). These distinctions are often flexible and arbitrary, which allows judges to hand-pick which precedents they want to uphold. For example, judges driven by partisan agendas can justify foregoing stare decisis by tying a political issue to a constitutional precedent rather than a statutory one. See generally infra Section I.B.ii.

27. This makes the equation different for Wisconsin judges seeking to overturn precedent than for North Carolina or Ohio judges seeking to do the same. See infra Sections I.B.iv. The same distinctions are evident throughout the states. See, e.g., Petersen v. Magna Corp., 773 N.W.2d 564, 572 n.48 (Mich. 2009) (“if our stare decisis analysis leads to the Court overruling precedent every time it is applied, stare decisis becomes not an “inexorable command,” but rather a meaningless exercise.”); Naftalin v. King, 102 N.W.2d 301, 302 (Minn. 1960) (“Whether or not the rule of stare decisis should be followed is a question entirely within the discretion of the court which is again called upon to consider a question once decided.”); Schultz v. Natwick, 653 N.W.2d 266, 275 (Wis. 2002) (“Ordinarily . . . we adhere to the principle of stare decisis . . . .”); Shelton, supra note 24 (noting that the North Carolina Constitution invites judges to reconsider precedent); N.C. CONST. art. I § 35 (“A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty.”). See generally State ex rel. Guilbert v. Lewis, 69 N.E. 132 (Ohio 1903); State ex rel. Guilbert v. Yates, 64 N.E. 570 (Ohio 1902); Hixon v. Burson, 43 N.E. 1000 (Ohio 1896) (holding that the oath of a judge is to support the Ohio Constitution, not to follow former decisions).


29. On one end of the spectrum, judges have near complete discretion to overturn previous case law. On the other end of the spectrum, judges are almost entirely bound to uphold the previous case law.

30. Decisions impacting millions of people should not hinge entirely on one judge’s political incentives. See Kevin Frazier, When Elections Threaten the Rule of Law: The Good
As state courts become more politicized, judicial elections become more important in reevaluating politically controversial precedents.

This Note discusses important judicial elections in North Carolina, Wisconsin, and Ohio and efforts in these states to restrict judges from overturning precedent. This Note also discusses the extent to which stare decisis should be enforced in state supreme courts. Ultimately, after determining that the existing frameworks in these states are ineffective, this Note considers new policies states should consider. These ideas seek to strike a balance by allowing judges to enforce the will of the people while also ensuring that judges are loyal to precedent.

Part I introduces different judicial election systems and systems of stare decisis. Part II highlights North Carolina, Wisconsin, and Ohio as states with influential supreme court elections in 2022–23 and analyzes prevalent issues these judicial elections will impact. Finally, Part III presents the benefits and drawbacks of stare decisis in state courts and proposes policies designed to regulate elected judges.
I. JUDICIAL ELECTIONS AND STARE DECISIS

Section I.A begins with a discussion of judicial elections. Specifically, subpart 1 introduces the history of judicial elections in the United States, subpart 2 evaluates the types of judicial election systems, and subpart 3 discusses consequences of judicial elections. Section I.B then discusses stare decisis. Subpart 1 introduces the history of stare decisis, subpart 2 discusses the types of stare decisis, subpart 3 addresses consequences of stare decisis, and subpart 4 introduces stare decisis in North Carolina, Wisconsin, and Ohio.

A. Judicial Elections

1. History of State Judicial Elections

Before 1832, no state had a completely elected judiciary. Instead, state officials appointed judges. Over time, the demand for judicial elections rose as populists began recognizing that judges often came from elite and “landed families” that did not reflect the will of the people. The disconnect between people and courts motivated states to hold elections.

42. See infra Section I.A.
43. See infra Section I.A.1.
44. See infra Section I.A.2.
45. See infra Section I.A.3.
46. See infra Section I.B.
47. See infra Section I.B.1.
48. See infra Section I.B.2.
49. See infra Section I.B.3.
50. See infra Section I.B.4.
51. See Patrick W. Dunn, Judicial Selection in the States: A Critical Study with Proposals for Reform, 4 Hofstra L. Rev. 267, 277–78 (1976), (“Mississippi became the first state to adopt a completely elected judiciary in 1832, but it was not until after the New York Constitutional Convention of 1846 that a major shift to elected judges began.” (footnote omitted)).
52. This practice was inherited from the English monarchy. See id. at 276–77.
53. This rise corresponded with a period in America in the mid-18th Century defined by populism. See id. at 277.
54. See id. at 277–78.
55. See id. at 278–79. Other democratic checks on state judicial branches include term limits and mandatory retirement ages, among other things. See also State Supreme Courts, Ballotpedia, https://ballotpedia.org/State_supreme_courts#Courts [https://perma.cc/BT8P-77KB] (last visited Mar. 6, 2023).
While most federal judges are appointed by the President, not all states have similar appointment mechanisms. Of the 50 states, nearly half hold elections for high court judges. Including trial and intermediate appellate courts, 39 states hold some form of judicial election.

2. Different Types of Judicial Election Systems

While different election systems have developed over time, the processes boil down to a few distinct types. First, there are direct appointment elections. These elections are generally either gubernatorial elections or legislative elections. These include gubernatorial elections, where governors appoint candidates without recommendations by nomination commissions, and legislative elections, where state legislatures do the same. Second, there are merit-based appointment systems. These systems require specific metrics or processes for electing or re-electing judges. Typically, these systems are retention elections, where constituents, commissions, or state legislatures vote to retain or dismiss sitting judges. Finally, there are contested elections. Within these systems, there is significant variation.
overlap. The details of a state’s system impact the effects of its judicial elections. This Note focuses on contested election systems because winning candidates in these elections can shift a court’s ideological balance, forego precedent, and alter the state’s laws.

3. Consequences of Judicial Elections

Judicial elections are different than standard political elections and elected judges are different than appointed judges. Chief Justice John Roberts of the U.S. Supreme Court proffered that judges are like baseball umpires, responsible for interpreting the law as it is written, just as umpires call balls and strikes. This metaphor illustrates Chief Justice Roberts’s view on judicial impartiality. Just as an umpire cannot in good conscience appoints judges, then the judges compete in partisan elections during the following general election, and lastly, the judges are reselected in unopposed retention elections. Brennan Center, Judicial Selection, supra note 59.

64. See, e.g., Brennan Center, Judicial Selection, supra note 59. For example, a state can have both direct retention elections and partisan elections for judges on the same court. See id.

65. See, e.g., Marley, supra note 15 (noting that the partisan nature of the state court in Wisconsin will have profound impacts on issues of abortion and gerrymandering, among other things); Montellaro & Messerly, The Most Important Election, supra note 12 (same); Shelton, supra note 24 (noting that the North Carolina Supreme Court elections will have an impact on how judges view their roles); Ronald Brownstein, The Hidden Dynamic That Could Tip Control of the House, CNN POL. (Jan. 24, 2023, 8:56 AM), https://www.cnn.com/2023/01/24/politics/redistricting-house-majority-2024-brownstein/index.html [https://perma.cc/RAJ2-E9AZ] (noting that the composition of state supreme courts in upcoming elections could wind up affecting control of 15–19 seats in the House of Representatives in 2024).

66. It does not focus on the direct appointment elections or the merit-based appointment systems.

67. See supra notes 9–12, 14–15 and accompanying text.

68. See Williams-Yulee v. Fla. Bar, 575 U.S. 433, 446 (2015) (“[A] state’s interest in preserving public confidence in the integrity of its judiciary extends beyond its interest in preventing the appearance of corruption in legislative and executive elections . . . . States may regulate judicial elections differently than they regulate political elections, because the role of judges differs from the role of politicians.”).


71. See id.
call a fastball over the plate a ball, a judge cannot in good conscience interpret the law improperly for the sole purpose of reaching a preconceived outcome. This concept of judicial neutrality goes hand-in-hand with judicial restraint. One justification for stare decisis is limiting judges in this capacity.

Because elected judges are chosen democratically, they are politically accountable to their constituents. Yet, elected judges also swear oaths to perform duties and administer justice impartially. If people agree with how judges decide cases, they re-elect those judges; if they do not, people vote in replacements. While in this way judges are akin to other elected officials, neutrality is still fundamental to their job. Thus, holding judges politically accountable may inhibit their ability to decide cases free from external influence. This conundrum underscores the need for regulation of stare decisis. It also serves as a backdrop for assessing various consequences associated with judicial elections.

Three consequences of judicial elections illustrate how judicial bias and political polarization give rise to problems with precedent and stare decisis. First, judicial elections cause problems with campaign finance. Because

72. See id.

73. See generally Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (establishing the concept of judicial review and also exercising judicial restraint).

74. See People v. Peque, 3 N.E.3d 617, 635 (N.Y. 2013) (reasoning that stare decisis promotes predictability, fosters reliance on the court’s decisions, encourages judicial restraint, and reassures the public that the court’s decisions are grounded in legal principle rather than the personal preference).

75. See Gaustitis, supra note 69. The majority of states have supreme court justices serve terms that last between six and eight years. See Length of Terms of State Supreme Court Justices, https://ballotpedia.org/Length_of_terms_of_state_supreme_court_justices [https://perma.cc/CB2D-8CS8] (last visited Nov. 6, 2023).


77. See RENEW DEMOCRACY INITIATIVE, supra note 23.

78. See supra notes 68–70 & 75–76 and accompanying text.

79. For example, because elected judges receive campaign donations, there are growing concerns that these donations impact judicial decision-making. See Michael S. Kang & Joanna M. Shepherd, Partisanship in State Supreme Courts: The Empirical Relationship between Party Campaign Contributions and Judicial Decision Making, 44 J. LEGAL STUD. S161, S162 (2015).

80. Stare decisis is one of the mechanisms that can be used by judges to protect those who reasonably rely on existing legal precedent. See Bannon, supra note 25.

81. There has been a plethora of new legal standards surrounding campaign finance in the last several decades. See, e.g., Citizens United v. Fed. Election Comm’n, 558 U.S. 310, 372 (2010) (holding that corporations have First Amendment rights and that limits on corporate campaign contributions are unconstitutional). As a result of this novel doctrine, the criteria for what campaign finance is permissible in juridical elections is ambiguous and unclear. See,
judicial candidates for state judgeships must fundraise. It is usually easy to tell if a judge’s financial interest renders him or her impartial. However, some campaign contributions affect judges more subtly. For example, state judges deciding cases that affect their donors, even when their donors are not directly involved, may adjudicate with preconceived biases. The law has not addressed these problems with effective recusal reforms, and state courts lack clear standards for assessing whether a given campaign donation has an impact on a judge’s decision-making. In this way, elected judges are vulnerable to judicial bias. Due to campaign finance, judicial elections raise concerns relating to judicial

e.g., Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 893–98 (2009) (Roberts, C.J., dissenting) (asking 40 questions that underscore how connections between campaign contributions and judicial conduct are often unclear).


83. This may undermine judicial impartiality. See, e.g., N.Y. Judiciary Law § 14 (McKinney 2023); see generally Kang & Shepherd, supra note 79.


85. See, e.g., Caperton, 556 U.S. at 893–98 (Roberts, C.J., dissenting) (asking 40 questions that underscore how connections between campaign contributions and judicial conduct are often unclear).

86. See, e.g., id. at 873–74.


89. See Caperton, 556 U.S. at 890–98 (Roberts, C.J., dissenting). Even judicial bias could be regulated efficiently and legally, because of their fundraising, elected judges still may feel more obliged to adjudicate disputes with their donors in mind, than appointed judges. See Williams-Yu le v. Fla. Bar, 575 U.S. 433, 445–48 (2015) (holding that a Florida law prohibiting judicial candidates from personally soliciting contributions does not violate the First Amendment); BRENNA N CTR., Money in Judicial Elections, supra note 82.

90. See Kang & Shepherd, supra note 79, at S161–62. Yet, the standards and criteria for dealing with these problems are inadequate. See Caperton, 556 U.S. at 893–98 (Roberts, C.J., dissenting) (listing 40 questions that are ambiguous in assessing whether a judge should be compelled to recuse themselves from a case due to campaign contributions). Moreover, many potential solutions violate the First Amendment. See Williams-Yu le v. U.S., 575 U.S. at 445–48; Citizens United v. Fed. Election Comm’n, 558 U.S. 310, 372 (2010); State ex rel. Loughry v. Tennant, 732 S.E.2d 507, 510–11 & 516–17 (W. Va. 2012) (holding that a “matching funds provision” in a state pilot program, whereby the state would match any campaign contributions, was unconstitutional).

91. See State ex rel. Loughry, 732 S.E.2d at 516–17 (holding that even though there were compelling state interests in eliminating the need for campaign finance, doing so is unconstitutional). As such, where there are elections, there will be campaign finance.
capture,92 cognitive bias,93 recusal reform,94 and judicial ethics,95 among other issues. These conflicts and the lack of regulations to stem these problems have spurred politicization in the judicial branch.96 While in theory, stare decisis is meant to constrain judges from acting rogue, in practice, judges do what they want.97 As such, issues with campaign finance in judicial elections reveal the need for new laws narrowing the scope of judicial discretion for elected judges.

Second, relative to judicial appointments, judicial elections increase politicization without necessarily increasing representation. Representation occurs when “a person or group [...] speaks or acts for or in support of another person or group.”98 Hanna F. Pitkin identified three theories of representation that help illustrate the effects of judicial elections.99 First, the descriptive theory is where the representative body “mirror[s]” the people.100 Second, the agency theory suggests that a representative’s actions should be both authorized and verified by their constituents.101 Finally, the trustee

92. See Hanssen, supra note 69 at 211 (“Criticism that partisan elections enabled party machines to capture state judiciaries spurred the establishment of nonpartisan judicial elections, where candidates were forbidden to reveal party affiliation.”).
93. See Guthrie et al., supra note 87, at 779 (“Legal scholars representing various schools of thought have long argued that judges do not merely find facts or apply legal principles in a completely accurate and unbiased fashion.”).
96. See BRENNAN CTR., Money in Judicial Elections, supra note 82.
97. See, e.g., supra notes 9–12 and accompanying text.
100. See id. at 61. This model views representatives as a portrait of the people and argues that they should reason and act by making decisions on behalf of the people. See id. at 60. (quoting Letter from John Adams to John Penn (Mar. 27, 1776) (copy available at the National Archives website, https://founders.archives.gov/documents/Adams/06-04-02-0006-0003 [https://perma.cc/J3RT-33F8]).
101. See id. at 113. Put differently, this theory requires the representatives to think about how their constituents would want them to decide before actually making that choice. See id. at 119. This model is similar to the pluralist school of thought. See Jonathan S. Gould, The Law of Legislative Representation, 107 VA. L. REV. 765, 770–71 (2021).
theory proposes that representatives may act freely because voters indicate who they believe will make decisions in their best interest by voting.102 Representation conflicts with politicization.103 Politicization has a negative connotation because partisan actions lead to polarization.104 Even though elected officials should ideally represent the views and perspectives of all their constituents, it is impossible for one representative to accurately voice the opinions of all their constituents.105 As such, elected officials will make decisions that do not represent some constituents.106

Depending on the nature of an elected judge’s decision and which views of representation107 and politicization are adopted,108 a politically charged decision may decrease representation.109 Paradoxically, a decision designed

102. The trustee model was developed by Edmund Burke, an Irish philosopher, in the 18th Century. See Edmund Burke, Speech to the Electors of Bristol (Nov. 3, 1774), reprinted in THE FOUNDERS’ CONSTITUTION 1, ch. 13 doc. 7 (Philip B. Kurland & Ralph Lerner eds., 1987) (“You choose a member, indeed: but when you have chosen him, he is not a member of Bristol, but he is a member of parliament.”); see also Miles Unterreiner, Two Visions of Democracy, STAN. DAILY (Nov. 25, 2012, 10:59 PM), https://stanforddaily.com/2012/11/25/two-visions-of-democracy/ [https://perma.cc/7L2Z-85MB].

103. Politicization is defined as the act of “relat[ing] (an idea, issue, etc.) to politics in a way that makes people less likely to agree.” Politicize, BRITANNICA DICTIONARY, https://www.britannica.com/dictionary/politicize [https://perma.cc/C4EG-HCTX] (last visited Mar. 6, 2023).


105. See, e.g., Unicam Focus, NEB. LEGISLATURE, https://nebraskalegislature.gov/education/lesson1.php [https://perma.cc/TF3F-TVU6] (last visited Mar. 7, 2023) (“Representatives are chosen by citizens to serve in legislative bodies and to voice their concerns to the government.”). In reality, “[y]ou can please some of the people all of the time, you can please all of the people some of the time, but you can’t please all of the people all of the time.” Liguorian Editor, Sword Thrusts or Healing?, LIGUORIAN (June 29, 2021), https://www.liguorian.org/sword-thrusts-or-healing/[https://perma.cc/MYN5-RE6M].


107. See supra notes 99–102 and accompanying text.

108. See supra notes 103–04 and accompanying text.

to be non-partisan and representative may increase politicization if some constituents are dissatisfied with the choice.110 While judicial elections are supposed to hold the judicial branch accountable and represent the public, increased political polarization may grow out of the dissatisfaction of the dissenting citizens.111 Thus, even though states with contested judicial elections are at least facially more democratic than systems where the people do not get a vote, these states may become more politicized, and judicial decisions may be less representative.112

More specifically, even though elected judges represent their constituents, under either the descriptive or agency theory of representation, being a good representative complicates one’s ability to be a good judge.113 For example, an appointed judge who makes decisions free of outside influence and an elected judge who responds to external influence will impact representation and politicization differently. The appointed judge will act based on their judicial philosophy because they are not making decisions to appease their constituents.114 The elected judge, however, is more likely to make decisions that consider their re-election chances because they need votes and donations.115 Although some elected judges will not react to external influence,116 there is a higher likelihood that elected judges will consider democracy [https://perma.cc/UK3C-UGEN]; Diego Fossati, Ideological Polarization Is the Price of Democratic Representation in Indonesia, E. ASIA F. (Mar. 29, 2023), https://www.eastasiaforum.org/2023/03/29/ideological-polarisation-is-the-price-of-democratic-representation-in-indonesia/ [https://perma.cc/GF6U-3LJC].

110. See supra note 109 and accompanying text.
111. See supra Section I.A.1.
113. See supra notes 99–102 and accompanying text.
114. By not reacting to public perception, this judge is making decisions based on their own judicial philosophy rather than based on what they perceive others to want them to do. As such, their overall body of work will reflect their views on the law rather than the will of the people. Although the people may consider other factors when this judge is up for re-election, those who are voting based on the judge’s performance are considering a body of work that reflects the judge’s perspectives rather than a body of work that is a product of the judge’s political incentives.
115. See supra notes 99–102 and accompanying text.
116. See, e.g., Bostock v. Clayton Cnty., 590 U.S. __, 140 S. Ct. 1731, 1731 (2020). In Bostock, conservative Justice Gorsuch wrote the majority opinion, which held that discrimination based on one’s sexual orientation or gender identity is discrimination “because of” sex as defined in Title VII of the Civil Rights Act of 1964. See id. at 1746. In writing the majority opinion, Justice Gorsuch unexpectedly deviated from his socially conservative background. See also Jane Coaston, Social Conservatives Feel Betrayed by the Supreme Court — And the GOP That Appointed It, Vox (July 1, 2020, 11:00 AM), https://www.vox.com/2020/7/1/21293370/supreme-court-conservatism-bostock-lgbtq-republicans [https://perma.cc/6AXB-JBFH].
public perception in order to position themselves better for re-election.\footnote{117} In turn, judicial elections may allow politics to influence the judiciary.\footnote{118}

On the bench, elected judges — like some elected politicians\footnote{119} — may make politically controversial decisions that help boost their re-election odds.\footnote{120} In doing so, they represent some at the expense of others. Voters who feel like they are not being heard become more partisan and enter echo chambers.\footnote{121} Over time, the overall constituency becomes more political.\footnote{122} Elected judges have incentives to be politically reactive; appointed judges do not. While this is an inevitable consequence of government,\footnote{123} the differences between a judge up for election and a judge appointed for life highlight how elections exacerbate political polarization without necessarily being more representative.\footnote{124}

\footnotetext[117]{117}{See Liptak, supra note 106.}
\footnotetext[118]{118}{See Hanssen, supra note 69, at 232. Even in nonpartisan elections, candidates develop platforms they believe will help them get elected. The American Presidency Project: Party Platforms, U.C. SANTA BARBARA, https://www.presidency.ucsb.edu/documents/app-attributes/party-platforms [https://perma.cc/HHF5-AAKT] (last visited Mar. 7, 2023) ("A . . . platform is a formal statement of [] principles and goals . . . . The expectation is that they bind . . . candidates to some extent. The platform is an appeal to the general public, for the ultimate purpose of winning public support and votes based on specific topics or issues.").}
\footnotetext[120]{120}{See Eric Lesh, The Problem with Judicial Elections, LAMBDA LEGAL, https://www.lambdalegal.org/justice-out-of-balance/judicial-elections [https://perma.cc/5GK4-PHD5] (last visited Mar. 7, 2023) ("Each day, thousands of elected judges in state courts across the country make decisions that could cost them their jobs if the law requires a ruling that is unpopular enough to anger a majority of voters or inspire special interest attacks."); see also Anya Bernstein & Glen Staszewski, Judicial Populism, 106 MINN. L. REV. 283, 285–86 (2021) (arguing that judicial populist rhetoric contradicts and undermines republican democracy).}
\footnotetext[123]{123}{Since 1937, when George Gallup began conducting presidential job approval ratings, no U.S. President has ever had a 100% approval rating. Roper Center for Public Opinion Research, Presidential Approval Highs & Lows, CORNELL UNIV., https://ropercenter.cornell.edu/presidential-approval/highslows [https://perma.cc/N977-3M87] (last visited Mar. 7, 2023).}
\footnotetext[124]{124}{See PEW RSCH. CTR., supra note 121.}
Elected judges are representatives under the descriptive and agency definitions of representation. Appointed judges, however, are more closely aligned with the trustee theory of representation. Because the judiciary is designed to be neutral and impartial, being a representative under the descriptive or agency theory of representation conflicts with the judicial role. Taken together, because judicial elections are more likely to reduce representation and increase politicization, courts may choose to ignore precedent. This dynamic underscores the need for stare decisis reforms.

Third, judicial elections may cause “ossification” — as opposed to “stagnation” — in state law. When new officials are elected, new voices, opinions, and perspectives come into government. Without proper measures to keep laws consistent, changes in the court’s make-up can cause

125. See supra notes 99–102 and accompanying text.
126. See supra notes 99–102 and accompanying text.
127. See supra notes 68–72, 75–76 and accompanying text.
128. See supra notes 68–70, 75–76, 99–102 and accompanying text.
129. Because politicization and representation have become key issues in judicial elections, some commentators have outright proposed that judges be imposed with fiduciary duties. See generally Ethan J. Leib et al., A Fiduciary Theory of Judging, 101 CALIF. L. REV. 699 (2013) (proposing that judges be bound by fiduciary duties to make decisions in the best interest of the public). The goal of such a policy — like the goal of monitoring stare decisis discussed in this Note — is to promote judicial neutrality and stability. See id.
130. Ossification refers to the concept of laws changing frequently in a short period of time. For example, ossification is evident in administrative law when some agencies change their policies every time a new president is elected. See, e.g., United States v. Mead Corp., 533 U.S. 218, 247 (2001) (Scalia, J., dissenting) (comparing the standard for agency deference under Skidmore to the agency standard under Chevron, and proffering that allowing agencies to provide Skidmore deference over Chevron deference would lead to the ossification of agency interpretation).
131. Stagnation refers to the concept of laws being kept the same over time, even when circumstances suggest that they be adapted or changed. See Juan Carlos Botero et al., Judicial Reform, 18 WORLD BANK RSK. OBSERV. 61, 61 (2003) (“Chronic judicial stagnation calls for simplifying procedures and increasing [judicial] flexibility.”).
132. On the spectrum of ossification to stagnation, state judiciaries are hard to judge. See Hanssen, supra note 69, at 209 n.12; Herbert M. Kritzer, Appointed or Elected: How Justices on Elected State Supreme Courts Are Actually Selected, 48 L. & SOC. INQUIRY 371, 373 (“[S]tate supreme court justices who are retained through partisan or nonpartisan elections are more willing to overturn legislation (and to reverse precedents) than are judges who face reappointment rather than reelection[].”) (citing Lindquist, supra note 9, at 61–108); see also Brennan Center, Judicial Selection, supra note 59.
133. See, e.g., Alice Ollstein et al., The 17 Things Joe Biden Did on Day One, POLITICO (Jan. 21, 2021, 12:56 PM), https://www.politico.com/interactives/2021/interactive_biden-first-day-executive-orders/ [https://perma.cc/4PYX-VCFV] (providing an example of how new leadership often means changes in the law, as exemplified by day one presidential executive orders).
ossification in the law.134 When elected judges are removed and added to the bench with ease, these consequences are more noticeable.135

Reasonable minds differ as to whether the law should ossify.136 By way of example, some believe the United States Constitution should not adapt to changing circumstances;137 others believe the Constitution should change as society evolves.138 However, even those most passionate about allowing the law to adapt recognize that there are limits.139 To ensure equal protection,140 people require notice about what they can and cannot do under the law.141 People also must be able to rely on existing laws without worrying about how changes will impact them.142 This is why ex post facto laws are prohibited in criminal law,143 and why canons of statutory interpretation construe ambiguities in favor of the party allegedly having violated a law.144

Reliance interests and notice underscore the significance of establishing stare decisis standards in elected judiciaries.145 When judges are appointed

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134. See, e.g., Mead Corp., 533 U.S. at 247 (Scalia, J., dissenting) (comparing the standard for agency deference under Skidmore to the agency standard under Chevron, and proffering that allowing agencies to provide Skidmore deference over Chevron deference would lead to the ossification of agency interpretation).


137. See id. at 634–35 (“Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.”).

138. See id. at 689–90 (Breyer, J., dissenting) (approaching a constitutional question by using a balancing inquiry that accounts for current factors and trends). Both schools of thought are reputable depending on one’s perspective. See id. at 636–80 (Stevens, J., dissenting) (using the same originalist approach as Justice Scalia’s majority opinion to reach an opposite result).


140. U.S. CONST. amend. XIV, § 1.


142. See id. (noting that protection of reliance interests is important for judges to safeguard).

143. See U.S. CONST. art. I, §§ 9–10. No ex post facto in criminal law means that citizens cannot be convicted of a crime if their conduct was not illegal at the time of their actions.


145. See infra Part III.
— for life or a set term — they serve for a long time. Some states, however, allow elected judges to be replaced within a year. Additionally, the longer a precedent is in place, the more of a presumption there should be towards maintaining that precedent. However, when a state’s entire high court can be replaced within a few years, decisions of previous courts may be easier to disregard.

These issues exist in courts where judges are both elected and appointed. However, judicial elections impact judicial bias (due to campaign finance and elections), representation and politicization, and ossification in the law in profound ways.

B. Stare Decisis

Stare decisis is rooted in the idea that unelected officials should not expand or change existing laws. However, when judges are elected officials, should they apply stare decisis in the same way? Part I.B introduces this complex question by first, looking at the history of stare decisis, second, looking at the different factors affecting stare decisis, third, assessing the consequences of stare decisis in the states, and fourth, analyzing the stare decisis norms in North Carolina, Wisconsin, and Ohio.

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146. See Hanssen, supra note 69, at 211 & n.17 (“[A]ppointed judges serve longer terms on average — 10.3 years compared to 7.9 years for elected judges.”).

147. See, e.g., Iowa Judicial Branch, Justices, IOWA COURTS, https://www.iowacourts.gov/iowa-courts/supreme-court/justices [https://perma.cc/C6T3-AWJB] (last visited Mar. 8, 2023) (“A justice serves an initial term of office that is one year after appointment and until January 1 following the next judicial retention election after expiration of such year. The regular term of office of justices retained at election is eight years.”).


149. See Hanssen, supra note 69, at 211 (“[A]ppointed judges serve longer terms on average — 10.3 years compared to 7.9 years for elected judges.”); see also Hanssen, supra note 69, at 211 n.17.

150. See, e.g., supra note 23 and accompanying text.


152. See infra Section I.B.1.

153. See infra Section I.B.2.

154. See infra Section I.B.3.

155. See infra Section I.B.4.
1. History of Stare Decisis

Stare decisis originated in English common law.\(^{156}\) It developed out of the idea that judges should promote stability in the law by upholding former precedents.\(^{157}\) In *Federalist No. 78*, Alexander Hamilton presented his version of stare decisis,\(^{158}\) which Chief Justice John Marshall subsequently incorporated into his judicial philosophy in an effort to limit the unfettered discretion of judges.\(^{159}\) Over time, two main types of stare decisis developed: vertical stare decisis and horizontal stare decisis.\(^{160}\) While vertical stare decisis is mandatory,\(^{161}\) horizontal stare decisis is not.\(^{162}\) For this Note, the primary focus is on horizontal stare decisis because the analysis focuses on regulating courts choosing to uphold or abandon established precedents.\(^{163}\)

2. Different Factors and Types of Stare Decisis

Many factors impact the strength of horizontal stare decisis.\(^{164}\) First, there is a presumption that precedents in place for longer periods of time should

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156. See Libr. of Cong., *ArtIII.S1.7.2.1 Historical Background on Stare Decisis Doctrine*, Const., Annotated, https://constitution.congress.gov/browse/essay/artIII-S1-5-1/ADE_00001187/ [https://perma.cc/UR7N-QHH6] (last visited Mar. 8, 2023) (citing Stare Decisis, BLACK’S LAW DICTIONARY 1626 (10th ed. 2014) ("[D]efining ‘stare decisis’ as ‘the doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation.’").

157. See id.

158. See id. (citing *The Federalist No. 78*, at 439 (Alexander Hamilton) (Clinton Rossiter ed., 1999)).

159. See id. (citing Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 681–87, 734 (1999)).

160. See id.


162. See Libr. of Cong., *supra* note 156. (citing *Horizontal Stare Decisis*, BLACK’S LAW DICTIONARY 1537 (10th ed. 2014) ("[D]efining horizontal stare decisis as the doctrine that a court . . . must adhere to its own prior decisions, unless it finds compelling reasons to overrule itself.").

163. Choosing to overturn precedent is only theoretically an option when a court is evaluating a precedent that may be subject to horizontal stare decisis. See Michael T. Morley, *Vertical Stare Decisis and Three-Judge District Courts*, 108 GEO L.J. 699, 702–03 (2020) (discussing the obligations courts have to follow precedent set by higher appellate courts); see also supra note 161 and accompanying text.

be more difficult to overturn. The antitrust exemption in baseball illustrates the importance of time in understanding stare decisis. In Federal Baseball Club of Baltimore v. National League of Professional Base Ball Clubs, the Supreme Court held that baseball was not commerce, and thus not subject to the Sherman Antitrust Act. Over thirty years later, in Toolson v. New York Yankees, Inc., the Court upheld Federal Baseball. Thus, when Kurt v. Flood came before the Court in 1972, challenging the reserve clause in professional baseball contracts, the Court invoked horizontal stare decisis and upheld the baseball antitrust exemption. Throughout the opinions in Flood, all nine members of the Court seemed to agree that Toolson and Federal Baseball were wrongly decided. Nevertheless, the Court invoked stare decisis because of the precedent’s longevity.

A second presumption relates to different “types” of cases. Specifically, three “types” of cases receive three different presumptions. First, statutory cases invoke the highest level of stare decisis. Second, common law cases trigger a moderate level of stare decisis. Third, constitutional cases implicate the lowest level of stare decisis. The reasoning behind these norms is structural. In the federal government, statutes can be overturned by a majority of both houses and approval by the

166. See CORNELL L. SCH., supra note 151.
167. See, e.g., Flood, 407 U.S. at 279; see also CORNELL LAW SCHOOL, supra note 151.
168. 259 U.S. 200 (1922).
169. See id. at 208–09.
172. See id. passim.
173. See id.
174. See supra note 26 and accompanying text.
175. See id.
176. See Kalt, supra note 26, at 279; Flood, 407 U.S. at 282; see, e.g., Patterson v. Mclean Credit Union, 491 U.S. 164 (1989).
179. See Lawrence C. Marshall, Contempt of Congress: A Reply to the Critics of an Absolute Rule of Statutory Stare Decisis, 88 Mich. L. Rev. 2467, 2475 (1990) (“[T]he constitutional structure of separation of powers should be enough to justify the Court’s invocation of the rule without congressional directive.”).
President. However, common law doctrine is more difficult for Congress to overrule, and constitutional norms are the most difficult for Congress to change. As such, there is an inverse relationship between judicial stare decisis presumptions and the ease with which Congress can change a previous court decision.

The third presumption, that intervening changes in the law impact the strength of stare decisis, cuts both ways. If a court’s decision is overridden by the legislative or executive branch — or if new laws impact an old decision — the stare decisis effect weakens. On the contrary, if a court decision is underwritten by a court or legislature, the stare decisis effect is presumed to strengthen in subsequent court cases addressing the same legal issue.

3. Consequences of Stare Decisis in the States

While these presumptions are helpful, they are difficult to apply in state courts. The first consequence relevant to this Note relates to state courts elections. One justification of stare decisis is that decisions should be

180. U.S. CONST. art. I, § 7, cl. 2; see also PlayNowPlayL8tr, Schoolhouse Rock — I’m Just a Bill, YOUTUBE (Nov. 8, 2016), https://www.youtube.com/watch?v=OgVKvqTItto [https://perma.cc/5SAK-NJDX].
181. See Kalt, supra note 26, at 278.
182. See id.
185. See Matter of Blaisdell, 261 A.3d 306, 311 (N.H. 2021) (“[O]ne factor [in evaluating stare decisis] concerns whether the law has developed in such a manner as to undercut the prior rule. Such development could arise upon the promulgation of new laws or rules that render past decisions obsolete or upon the formulation of laws across multiple jurisdictions in a manner that is discordant with the prior rule.” (citation omitted)). There is also a presumption against repeals by implication. See Morton v. Mancari, 417 U.S. 535, 549 (1974).
186. See, e.g., Toolson, 346 U.S. at 357 (underwriting the antitrust exemption to professional baseball).
189. See Mead, supra note 164 at 825.
190. See, e.g., supra notes 28–30 and accompanying text.
made by elected, rather than appointed officials. Thus, when judges are elected rather than appointed, should stare decisis still apply? The second important consequence of stare decisis relates to state court common law powers. In common law courts, decisions are “points on a plane, which form patterns from which we can deduce the law.” This complicates the role of state courts because judges can ignore precedent by differentiating one or two specific facts from the guiding precedent.

Third, whereas the U.S. government is a government of limited and enumerated powers, state governments have broad, residual plenary powers. These powers are reflected in the different systems states use to pass laws and amend constitutions. The U.S. Constitution has not been amended since 1992; however, state constitutions are amended frequently. This frequency reflects the relative ease with which state

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191. Lewis F. Powell, Jr., Stare Decisis and Judicial Restraint, 47 WASH. & LEE L. REV. 281, 286–87 (1990) (“[T]he Court is not composed of unelected judges free to write their policy views into law.”).
194. See Kalt, supra note 26, at 279.
195. See United States v. Cardales-Luna, 632 F.3d 731, 735 (1st Cir. 2011) (“Yet even accepting that there are legitimate grounds for distinguishing cases on the basis of materially different facts, . . . it remains true that a panel may not disregard binding precedent simply out of disagreement.”).
197. See Daniel B. Rodriguez, The Political Question Doctrine in State Constitutional Law, 43 RUTGERS L.J. 573, 586 (2013) (“[T]he keystone of state constitutionalism [is] that state constitutions are documents of limit, rather than grant.”); W. Feliciana Par. Gov’t v. State, 286 So. 3d 987, 993 (La. 2019) (holding that the state’s legislature can enact anything that is not prohibited by the constitution); see also Woonsocket Sch. Comm. v. Chafee, 89 A.3d 778, 791 (R.I. 2014) (“Plenary power means that ‘all . . . determinations [are left] to the [state legislature’s] broad discretion to adopt the means it deems “necessary and proper” in complying with the constitutional directive.’” (quoting In re Request for Advisory Op. from the House of Representatives (Coastal Res. Mgmt. Council), 961 A.2d 930, 935–36 (R.I. 2008))).
199. The U.S. Constitution has 27 total amendments. See generally U.S. CONST. amends. I–XXVII.
200. As of 2021, the 50 states have had roughly 150 constitutions, amended over 7,800 times (including Alabama’s constitution, which has been amended 977 times). See Council of State Governments, Chapter One: State Constitutions, 53 THE BOOK OF STATES 1, 5–7 (2021),
governments amend their constitutions. This ease weakens the reasoning for implementing lenient horizontal stare decisis in state courts, as addressing constitutional concerns is easier for state legislatures than for Congress. Why should it be easier for a court to forego stare decisis in a case based on a constitutional amendment developed and voted for by the people, than a case based on a new statute passed narrowly by the state’s legislature? While practically, decisions relating to the constitutional amendment ought to be harder for courts to overturn, rules of stare decisis suggest decisions otherwise.

Finally, every state government has a different policy on stare decisis. Some require strict adherence to precedent; others mandate that courts reconsider precedent in light of changing circumstances. Because no two states are identical, judges elected to high courts must conform to their state’s interpretation of stare decisis. These doctrines are complicated by the types of stare decisis and consequences of judicial elections, both of which affect decision-making in the states. To illustrate these trends, this Note highlights three states that held important judicial elections in 2022 and 2023, and that face crucial questions about stare decisis.

[https://perma.cc/2XFG-9W63].

201. See id. In fact, 18 states allow voters to vote directly to amend the constitution. Id. at 32.

202. See supra Section I.B.ii.

203. See U.S. CONST. art. V.

204. See supra Section I.B.2.

205. For example, “the Wisconsin Supreme Court is the only state court that can overrule Wisconsin Court of Appeals precedent.” See Joseph S. Diedrich, The State of Stare Decisis in Wisconsin, 91-NOV WIS. L. 30, 34 (2018).


207. See Shelton, supra note 24 (noting that the North Carolina constitution invites judges to reconsider precedent); N.C. CONST. art. I, § 35 (“A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty”).


209. The highest courts in every state have different precedents that do not necessarily align with one another. See id. Every state also has different norms pertaining to stare decisis. See, e.g., Diedrich, supra note 205, at 34.

210. See supra Section I.B.2.

211. See supra Section I.A.3.

212. See supra notes 26–33 and accompanying text.

213. See infra Section I.B.4.
4. Stare Decisis in the States: Historical Development

While the same general principles usually hold true, stare decisis is different in every state, as some courts articulate clearer standards than others. This Subpart focuses on stare decisis in North Carolina, Wisconsin, and Ohio because all three are historically political battlegrounds, and all three held state supreme court elections in 2022–23. These case studies illustrate how, regardless of a state’s stare decisis policy, changing times give rise to new challenges that may undermine precedent.

In North Carolina, the standard for stare decisis and the strength of precedent are ambiguous. On the contrary, Wisconsin articulates factors for evaluating precedential effect, and its adherence to stare decisis is stricter than that of North Carolina. Of the three states, Ohio has the clearest standard for stare decisis. Yet, Ohio courts have applied the state’s doctrine inconsistently, which has left the strength of precedent in Ohio uncertain as well.

The supreme courts in all three states are common law courts. The Wisconsin Supreme Court, however, has both superintending and administrative authority, as well as appellate jurisdiction over all courts.
as they can review judgments and orders of lower courts and remove or accept cases from their dockets. In each state, stare decisis has been a key tool for a long time. Further, even though stare decisis is a judicial doctrine, state constitutions are relevant.

Over time, North Carolina, Wisconsin, and Ohio courts have developed similar types of rules and norms for evaluating precedent. First, these states all have rules about reserving precedential effect for cases that deserved precedential effect in the first place, that are equitable, or that are still workable. Second, all three courts have criteria for how to treat precedents that are novel, longstanding, or in conflict with each other. However, in

223. Id. § 3(3).
224. The Supreme Court of North Carolina, Wisconsin Supreme Court, and Ohio Supreme Court have used stare decisis in decisions as early as 1819, 1853, and 1838 respectively. See e.g., McCree v. Houston, 7 N.C. 429, 443 (1819); Rogan v. Walker, 1 Wis. 631, 650 (1853); Allen v. McCoy, 8 Ohio 418, 437 (1838).
225. For example, North Carolina’s constitution encourages judges to consider changes and trends in deciding cases, while Wisconsin’s constitution imposes no standards or conditions for stare decisis. See Shelton, supra note 24 (noting that the North Carolina constitution invites judges to reconsider precedent); N.C. CONST. art. I, § 35 (“A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty”); Wis. Const. art. VII, § 3(3).
226. In North Carolina, a single decision seldom serves as the basis for stare decisis, and stare decisis cannot “perpetuate error.” Patterson v. McCormick, 99 S.E. 401, 405 (N.C. 1919); see also Williamson v. Rabon, 98 S.E. 830, 832 (N.C. 1919); Lowdermilk v. Butler, 109 S.E. 571, 573 (N.C. 1921) (“[I]t has been said that, where grave and palpable error, widely affecting the administration of justice, must either be solemnly sanctioned or repudiated . . . the rule of stare decisis [should not apply].”). In Wisconsin, stare decisis is a principle of policy, not an “inexorable command.” See Diedrich, supra note 205, at 32.
Finally, in Ohio, courts are instructed to regard certain types of cases as having a stronger precedential effect than others. For example, reported decisions have a stronger stare decisis effect than unreported decisions. See Bumiller v. Walker, 116 N.E. 797, 800 (Ohio 1917).
Unanimous decisions are also stronger than divided decisions. See Patten v. Aluminum Castings Co., 136 N.E. 426, 436 (Ohio 1921), overruled in part by Ohio Automatic Sprinkler Co. v. Fender, 141 N.E. 269 (Ohio 1923). Further, procedural precedents are stronger than substantive precedents. Piascik v. Indus. Comm’n of Ohio, 143 N.E. 533, 534 (Ohio 1924) (“[C]ase[s] [that are] not unanimously concurred in by this court, but [that] involve[ ] only a question of procedure [] should be accepted as the rule in future cases in the interest of settled practice and uniformity.”). In addition, property, tort, and contractual interests should not be undermined by foregoing stare decisis. See Shumaker v. Pearson, 65 N.E. 1005, 1006–07 (Ohio 1902); 23 OHIO JUR. 3d Courts and Judges § 401 (2023) (“Stare decisis remains a controlling doctrine in cases presenting questions on the law of contracts, property and torts[,]”).
227. In North Carolina, recent or conflicting decisions weaken stare decisis, and stare decisis may not apply at all to cases with conflicting decisions. See e.g., Williamson, 98 S.E. at 832; Patterson, 99 S.E. at 405; Lowdermilk, 109 S.E. at 573–74. North Carolina courts have also usurped the power to make novel decisions on legal issues when there are new developments in the law. See Mehaffey v. Burger King, 749 S.E.2d 252, 257 (“When, however, a change occurs in the law upon which a prior decision rests, this Court must look afresh at the questioned provision.”). In Wisconsin, stare decisis is weaker when less time has elapsed between the initial decision and current decision. But see State v. Prado, 960 N.W.2d
some instances, these rules lack clarity and consistency. Third, North Carolina, Wisconsin, and Ohio have rules about how to treat constitutional cases and statute-based cases. Fourth, court cases in North Carolina, Wisconsin, and Ohio have addressed the power of their state supreme courts.
and the finality of those decisions. Finally, these courts have all discussed which parts of decisions that are afforded precedential effect.

230. The Supreme Court of North Carolina is the highest authority on issues of state-law and the final voice on law and jurisprudence in the state. See Coastal Conservation Ass’n v. State, 878 S.E.2d 288, 294 (N.C. Ct. App. 2022). Yet, the court has also understood stare decisis as non-mandatory. State v. Barnes, 481 S.E.2d 44, 71 (N.C. 1997) (quoting Rabon v. Rowan Mem’l Hosp. Inc., 152 S.E.2d 485, 498 (N.C. 1967) (“[N]othing is settled [under the doctrine of stare decisis] until it is settled right.’’’)); cf. id. at 83 (Frye, J., dissenting) (arguing that stare decisis requires the court to abide by previous decisions (in this case) rather than to overturn them). In Wisconsin, when a justice subsequently withdraws their acquiescence in a decision, those choices do not impact the stability of stare decisis. See Wisc. Power & Light Co. v. City of Beloit, 254 N.W. 119, 122–23 (Wis. 1934). In addition, stare decisis is applicable to judicial decisions, but not to jury errors. See Gross Coal Co. v. City of Milwaukee, 175 N.W. 793, 794 (Wis. 1920). Ohio courts, however, have restricted stare decisis to circumstances where facts are substantially the same as the original case. See State v. Bodyke, 933 N.E.2d 753, 762 (Ohio 2010). This rule seeks to ensure that judges do not defer blindly to stare decisis and perpetuate a rule of law that is unjust. See City of Cleveland v. Ryan, 148 N.E.2d 691, 692–93 (Ohio Ct. App. 8th 1958). This is why the Ohio Supreme Court has held that appeals courts have a right to discard former errors to promote justice over unfairness and certainty over doubt. Cleveland v. Maistros, 762 N.E.2d 1065, 1071 (Ohio Ct. App. 8th 2001).

231. For example, North Carolina courts do not give stare decisis effect to pieces of a decision that are not necessary to reach the holding. See Muncie v. Travelers Ins. Co., 116 S.E.2d 474, 476–77 (N.C. 1960) (overruled on other grounds by Great American Ins. Co. v. C. G. Tate Const. Co., 279 S.E.2d 768 (N.C. 1981)). This doctrine has been applied liberally and precedent has been overruled by characterizing earlier statements that may seem on point as unnecessary to reach a holding. See City of Asheville v. State, 665 S.E.2d 103, 114–15 (N.C. 2008); see also State ex rel. Utilities Comm’n v. Va. Electric and Power Co., 873 S.E.2d 608, 624 n.4 (N.C. 2022) (noting that foregoing stare decisis requires finding “material differences” between the current facts and the facts in the original case). In Wisconsin, courts are more prone to apply stare decisis to a string of cases as opposed to just one case. See State v. Surma, 57 N.W.2d 370, 395 (Wis. 1953). The Ohio Supreme Court has also held that only parts of an opinion necessary to reach a decision should be given stare decisis effect. See 1 OHIO JUR. PL. & PR. FORMS § 2:19 (2022) (“An opinion expressed by a court upon some question of law which is not necessary to the decision of the case before it is obiter dictum, and such an expression does not become a precedent.’’’).
Additionally, North Carolina, Wisconsin, and Ohio have some unique features of their stare decisis doctrines. While some principles have persisted, others have not. All three states, however, have generated complicated, layered, and conflicting rules for evaluating stare decisis. To some extent, confusing stare decisis rules caused problems of this nature throughout the states. For these reasons, some states added new stare decisis rules in the early 2000s.

232. For example, North Carolina enforces stare decisis strictly when property rights are at stake. See Bulova Watch Co v. Brand Distrib. of North Wilkesboro, 206 S.E.2d 141, 145 (N.C. 1974).

233. In Wisconsin, the recent case of Friends of Frame Park, U.A. v. City of Waukesha acknowledged horizontal and vertical stare decisis, but also a third type of stare decisis “unique to Wisconsin.” 976 N.W.2d 263, 280–81 (Wis. 2022). This “somewhat paradoxical” form of stare decisis requires the Wisconsin Supreme Court to follow precedents established by the state’s courts of appeals. See id. This seems to conflict with the Wisconsin Constitution, however, which declares that the supreme court is unequivocally the highest court in the state. See id. Theoretically, these conflicting policies reveal a strong policy of stare decisis. See id. Not only is it difficult for the supreme court to overturn their own precedent, but there is also a presumption against overturning cases decided by lower courts. See id.

234. Lastly, Ohio courts are disincentivized to overrule their own precedents and are instructed to revisit precedent only when necessary. See McClintock v. Cain, 142 N.E.2d 296, 306 (Ct. of Com. Pl., Franklin County, Ohio 1956); Dayton v. State, 87 N.E.3d 176, 176 (Ohio 2017). The reason for this norm is so courts foster predictability, prevent arbitrary decision-making, and provide clarity to existing rules, even if individual justices disagree with the outcome. See Groch v. Gen. Motors Corp., 883 N.E.2d 377, 401 (Ohio 2008); Westfield Ins. Co. v. Galatis, 797 N.E.2d 1256, 1267 (Ohio 2003). Ohio’s stare decisis doctrine also considers whether a public purpose exists in upholding incorrect opinions, whether a previous opinion is so embedded that overruling it would have overbearing consequences, and whether prospective or retrospective applications would have substantial effects. See Bouher v. Aramark Servs., Inc., 910 N.E.2d 40, 45 (Ohio Ct. App. 2009); In re LMD Integrated Logistic Servs., Inc., 119 N.E.3d 1250, 1256 (Ohio 2018) (“[C]onsidering . . . ‘whether retroactive application of the decision causes an inequitable result.’” (quoting DiCenzo v. A-Best Prods. Co., 897 N.E.2d 132, 132 (2008)); Peerless Elec. Co. v. Bowers, 129 N.E.2d 467, 468 (Ohio 1955) (per curiam).

235. See supra notes 232–34.

236. See, e.g., State v. Ballance, 51 S.E.2d 731, 733 (1949) (reaffirming that stare decisis cannot be applied to “perpetuate error,” or uphold a single decision by a divided court).

237. For example, in the 1990s, there was little consistency in the ways Ohio courts interpreted precedent. See, e.g., supra notes 227–28. Because the rules were convoluted, the doctrine was incoherent. See Garner, supra note 206, at 17–18. Thus, when the composition of the supreme court changed, the court began overruling precedent with ease. See id. The changes sparked retroactive effects, which exposed the ambiguity of the state’s stare decisis rules. See id. at 19–20 (highlighting changes in the realm of auto insurance).

238. For example, in the early 2000s, the Ohio Supreme Court’s ideological divide shifted again. See id. at 20–21. With the dynamics of the court shifting, the Ohio Supreme Court took the opportunity to clarify its standard for stare decisis. See id. at 21–22. From the latter part of the 20th Century to the early 2000s, other state courts followed suit and consolidated previous rules, standard, norms, and presumptions into more concise and comprehensive factors for courts to consider in assessing precedent.
While North Carolina “has not articulated factors to consider when examining the continued vitality of [its] precedents[,]” Wisconsin and Ohio have.\textsuperscript{239} The North Carolina Supreme Court suggested that the factors established by the U.S. Supreme Court in \textit{Janus v. American Federation of State, County, & Municipal Employees, Council 31}\textsuperscript{240} should guide them.\textsuperscript{241} But, since federal stare decisis has become ambiguous,\textsuperscript{242} the uncertainty impacts North Carolina.\textsuperscript{243} Wisconsin, however, has consolidated its rules and principles into clear-cut factors that courts \textit{should} use to determine whether stare decisis applies.\textsuperscript{244} These factors try to discern “special” or “compelling” purposes for overruling precedent.\textsuperscript{245} “[F]ive nonexclusive factors” are articulated as follows:

1. Changes or developments in the law have undermined the rationale behind a decision.
2. There is a need to make a decision correspond to newly ascertained facts.
3. There is a showing that the precedent has become detrimental to coherence and consistency in the law.
4. The prior decision is unsound in principle.
5. The prior decision is unworkable in practice.\textsuperscript{246}

Similarly, in 2003, the Ohio Supreme Court formulated three factors courts must consider in overruling stare decisis.\textsuperscript{247} Namely, “(1) the Court must conclude that ‘the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision must defy practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it.’”\textsuperscript{248} This doctrine has been referred to as the “flexible predictability” standard.\textsuperscript{249}

While state-specific standards are designed to set clear and objective criteria for future courts, adherence to precedent in Wisconsin and Ohio is

\textsuperscript{240} 138 S. Ct. 2448, 2478–79 (2018).
\textsuperscript{242} See supra notes 3–4 and accompanying text.
\textsuperscript{243} See \textit{N.C. Farm Bureau Mut. Ins. Co.,}, 866 S.E.2d at 721.
\textsuperscript{244} See \textit{Diedrich}, supra note 205, at 32.
\textsuperscript{246} Diedrich, supra note 205, at 32.
\textsuperscript{248} Garner, supra note 206, at 16 (quoting \textit{Galatis}, 797 N.E.2d at 1268).
\textsuperscript{249} See Garner, supra note 206, at passim.
still similar to that of North Carolina. In Wisconsin, even though there are clear criteria, the factors for evaluating precedent have not been applied consistently. In fact, the Wisconsin Supreme Court has increased the rate at which they overturn cases in the last few years. Most of these cases mentioning stare decisis have upheld existing doctrine, but some provided new wrinkles to Wisconsin’s stare decisis doctrine. Despite the bright-line rules, stare decisis in Wisconsin is not absolute, as some judges have suggested that strict adherence to stare decisis in Wisconsin is excessive. This rhetoric introduces some uncertainty, as courts do not always agree about how to apply the doctrine. Thus, although the factors and principles


251. See Diedrich, supra note 205, at 32–34.

252. See Diedrich, supra note 205, at 32–34. Since November 2018, when the report on stare decisis in Wisconsin was published, 22 cases in the Wisconsin Supreme Court have used the term “stare decisis” in the opinion. Diedrich, supra note 205, at 32–34; Westlaw Search, THOMSON REUTERS WESTLAW PRECISION, https://1.next.westlaw.com/Search/Results.html?query=adv%3A%20%22stare%20decisis%22&isPremiumAdvanceSearch=false&jurisdiction=WI-CS&ContentType=CASE&querySubmissionGuid=i0ad7401500000186c99e9b46056bef803&searchId=i0ad7401500000186c99e1bbaf2c5005c&transitionType=ListViewType&contextData=(sc.Search) (filter jurisdiction to Wisconsin Supreme Court and search “stare decisis.” Then sort by date after 11/01/2018.).

253. See State v. Roberson, 935 N.W.2d 813, 823 (Wis. 2019); see also Hinrichs v. DOW Chem. Company, 937 N.W.2d 37, 52–53 (Wis. 2020); In re Commitment of Stephenson, 951 N.W.2d 819, 829–30 (Wis. 2020); State v. Braunschweig, 921 N.W.2d 199, 209 n.15 (Wis. 2018).

254. See State v. Friedlander, 923 N.W.2d 849, 854 (Wis. 2019) (indicating that when a legislature has not commented on a court’s interpretation, the court has more discretion to change their previous interpretation irrespective of how much time has elapsed).

255. See Cobb v. King, 976 N.W.2d 410, 423 (Wis. 2022) (Bradley, J., dissenting) (“Stare Decisis Is Not Absolute.”)

256. See St. Augustine School v. Taylor, 961 N.W.2d 635, 663–64 (Wis. 2021) (Bradley, J., dissenting) (“‘Reflexively cloaking every judicial opinion with the armorment of stare decisis threatens the rule of law, particularly when applied to interpretations wholly unsupported by the statute’s text.’ Manitowoc Co., Inc. v. Lanning, 2018 WI 66, ¶5 n.5, 379 Wis. 2d 189, 906 N.W.2d 130 (Rebecca Grassl Bradley, J., concurring).”); see also Town of Wilson v. City of Sheboygan, 938 N.W.2d 493, 512–13 (Wis. 2020) (Bradley, J., concurring).

257. See supra notes 251–56.

258. Compare Koschkee v. Taylor, 929 N.W.2d 600, 604 n.4 (Wis. 2019) (holding that stare decisis does not apply to constitutional precedents that were wrong when decided), with id. at 617–19 (Bradley, J., dissenting) (“[N]othing in our Constitution has changed since [the relevant precedent] was decided, what has changed is the membership of the court. This time around, a new majority of the court does an about-face and now concludes that the substance of [the relevant act] is constitutional. To reach this conclusion, it throws the doctrine of stare
the court articulated are technically good law, they are not followed rigidly.259 Despite trying to simplify stare decisis, Wisconsin courts maintain substantial leeway to change precedent and are likely to exercise that discretion in the coming years.260

Similarly, in Ohio, the Galatis standard has been implemented narrowly.261 Since 2003, cases indicate that the Ohio Supreme Court has applied the Galatis test,262 but has been “anything but consistent” in doing so.263 These cases also emphasize that stare decisis should apply only to

decisis out the window . . . .”); see also Hennessy, 908 N.W.2d at 693–95 (“There has been no ‘[c]hange[] or development in the law’ that has ‘undermined the rationale behind’ Wisconsin’s current standard of review for questions of foreign country’s law . . . . There is no indication that the prior decisions were wrongly decided, ‘unsound in principle,’ or subject to change due to ‘newly ascertained facts.’ . . . [T]he standard has ‘produced a settled body of law’ that has, over the course of many decades, been workable in practice.” [all internal citations omitted]).”).

259. See supra note 257 and accompanying text.


261. See Johnson v. Auto-Owners Ins. Co., Nos. 2002-L-123, 2002-L-131, 2005 WL 124078, at *4 (Ohio Ct. App. Jan. 21, 2005). For example, in one case the supreme court held that the doctrine may not be fully applicable in constitutional cases. See Garner, supra note 206, at 32. In another case, the court iterated that, even for statutory matters, the court should focus more on the facts of a case than the specific factors. See id.

262. See, e.g., T. Ryan Legg Irrevocable Trust v. Testa, 75 N.E.3d 184, 200–02 (Ohio 2016) (applying the Galatis standard to hold that a tax-related precedent should not be upheld).
language and facts substantially the same as those in the initial case,\textsuperscript{264} that \textit{Galatis} applies only to cases overruling precedent on substantive law,\textsuperscript{265} and that while stare decisis is designed to ensure “justice [] flows from certainty and stability[,]”\textsuperscript{266} “the doctrine 'should not be . . . the sole reason for the perpetuation of a stated rule of law which has been proved to be unsound and unjust.’ [citation omitted].”\textsuperscript{267} Taken together, Ohio’s clear rules have not stopped courts from interpreting restrictions on their authority narrowly.\textsuperscript{268} In light of recent Ohio Supreme Court elections,\textsuperscript{269} Ohio’s history of overturning precedent after judicial elections is relevant.\textsuperscript{270} As new standards have proved ineffective,\textsuperscript{271} the questions the court grappled with when they first developed the \textit{Galatis} standard are arising once more.\textsuperscript{272}

North Carolina, Wisconsin, and Ohio courts all understand the purpose of stare decisis and its theoretical value.\textsuperscript{273} However, in these states, judges are politically responsive.\textsuperscript{274} As such, the risks of volatility and changes to precedent are difficult to contain.\textsuperscript{275} Even where precedent is not overturned

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\textsuperscript{265} Henderson, 162 N.E.3d at 787 (emphasizing that \textit{Galatis} is most applicable in cases related to contract, property, or tort principles). Some judges have even gone so far as to suggest that the test is inapplicable altogether in criminal cases. See id. at 798–800 (Kennedy, J., concurring in judgment only).

\textsuperscript{266} State v. Harper, 159 N.E.3d 248, 259 (Ohio 2020).

\textsuperscript{267} State v. Graham, 172 N.E.3d 841, 892 (Ohio 2020).

\textsuperscript{268} See supra notes 247–49, 262–63 & 264–67 and accompanying text.

\textsuperscript{269} See infra Section II.C.

\textsuperscript{270} See Garner, supra note 206, at 17–18.

\textsuperscript{271} See supra notes 262–63 & 264–67 and accompanying text.

\textsuperscript{272} See Garner, supra note 206, at 20–21; see, e.g., DaBose v. McGuffey, 168 Ohio St.3d 1, 24 ¶ 61 (Ohio 2022), https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2022/2022-Ohio-8.pdf [https://perma.cc/335X-F7LJ].

\textsuperscript{273} Matter of S.C.C., 864 S.E.2d 521, 527 (N.C. 2021) (“[stare decisis] promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.”); State v. Roberson, 935 N.W.2d 813, 831–32 (Wis. 2019) (Hagedorn, J., concurring) (“The doctrine of stare decisis ensures cases are grounded in the law, not in the will of individual members of the court.”); Engelhardt v. City of New Berlin, 921 N.W.2d 714, 719 (Wis. 2019).

\textsuperscript{274} See Liptak, Elected Judges Act Like Politicians, supra note 106.

\textsuperscript{275} The issue of stare decisis has clearly become important to the North Carolina Supreme Court in recent years. As of July 17, 2023, a search on Westlaw yields 136 cases in the history of the Supreme Court of North Carolina that use the words “stare decisis.” Westlaw Search, THOMSON REUTERS WESTLAW PRECISION, https://1.next.westlaw.com/Search/Results.html?query=adv%3A%20%22stare%20decisis%22&isPremiumAdvanceSearch=false&jurisdiction=NC/
often, giving judges excessive discretion is concerning in a setting with judicial elections and political polarization.

II. JUDICIAL ELECTIONS IN NORTH CAROLINA, WISCONSIN, AND OHIO: PREVALENT ISSUES AND SIGNIFICANT CHANGES

This Part will discuss the development of state supreme courts, recent judicial elections, and the importance of judicial elections in North Carolina, Wisconsin, and Ohio. Section II.A will focus on North Carolina, Section II.B will focus on Wisconsin, and Section II.C will focus on Ohio. Lastly, Section II.D will present prevalent issues these state courts will be dealing with and assess them in the context of the recent judicial elections.

A. North Carolina Supreme Court

The North Carolina Supreme Court was established in 1818. For the first 50 years of the court, there were no judicial elections. Then, in 1868 North Carolina implemented judicial elections for the North Carolina Supreme Court. Beginning at this time, judges were elected through
partisan political elections.\textsuperscript{284} From 1936–1937 until recently, the court more or less held partisan elections for its seven justices.\textsuperscript{285} Despite periodic changes, the court now consists of seven judges elected by partisan elections to eight-year terms.\textsuperscript{286}

In 2022, the Supreme Court of North Carolina held important judicial elections.\textsuperscript{287} In particular, two seats on the North Carolina Supreme Court were on the ballot.\textsuperscript{288} The first seat was held by Associate Justice Sam J. Ervin IV, an incumbent Democrat who has been on the Court since 2015.\textsuperscript{289} Justice Robin Hudson held the other seat.\textsuperscript{290} Prior to the 2022 election, the

\textsuperscript{284} See Brinkley, supra note 281.


\textsuperscript{286} Judicial Voter Guide, supra note 250.

\textsuperscript{287} See Woodhouse, Majority on the Line, supra note 275.

\textsuperscript{288} See Woodhouse, Majority on the Line, supra note 275.

\textsuperscript{289} See Woodhouse, Majority on the Line, supra note 275. This was a regularly scheduled election. See Woodhouse, Majority on the Line, supra note 275.

\textsuperscript{290} This seat was not supposed to be contentious in 2022. See Conrad Hoyt, State Supreme Court Justice Says She Won’t Run for Re-Election, WITN (Dec. 1, 2021, 4:17 PM), https://www.witn.com/2021/12/01/state-supreme-court-justice-says-she-wont-run-re-election/ [https://perma.cc/LGH9-4MD8]. Associate Justice Robin Hudson, a Democrat who held the seat until the 2022 election, was only eligible to serve 13 months of an eight-year term before reaching the mandatory retirement age of 72. See id.; Judicial Voter Guide, supra note 250; Woodhouse, Majority on the Line, supra note 275; Ethan E. Horton & Eliza
North Carolina Supreme Court had a 4–3 Democratic Party majority. However, the elections changed the court’s make-up. In the first election, the incumbent was defeated by Republican Trey Allen. In the second election, Democrat Lucy Inman was defeated by Republican Richard Dietz. After the dust settled, what was once a 4–3 Democratic majority became a 5–2 majority for the Republican Party.

The North Carolina Supreme Court’s conservative majority will be in place for years. In 2023, the new court made its presence felt immediately by issuing several decisions in politically controversial cases in the first...
several days. Particularly, the court resolved motions in *Harper v. Hall*, *Bouvier v. Porter*, and *Holmes v. Moore*. Other controversial cases have been addressed as well. These decisions, though mostly based on procedure, have far-reaching implications. They represent the court’s willingness to attack controversial political issues and decide — or even resurrect — cases already decided. Seeing as the powers of state supreme
courts are far-reaching, this willingness will affect North Carolina citizens for many years to come.

B. Wisconsin Supreme Court

The Wisconsin Supreme Court was established in 1853. While the Wisconsin Supreme Court held its first judicial elections in that year, the initial elections were partisan. Over time, this changed. The court is now composed of seven judges elected by non-partisan elections to ten-year terms. For the past 14 years, the Wisconsin Supreme Court has had a conservative majority. However, the elections in 2023 swung the balance of the court. The primary election had two conservative candidates and

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305. See id.


307. In 1891, the Wisconsin legislature passed a law prohibiting partisan politics and advancing the idea of a non-partisan judiciary. See id. Eventually, the judicial selection methods changed as well. See id.; see also Jason J. Czarnecki, A Call for Change: Improving Judicial Selection Methods, 89 Marq. L. Rev. 169, 170 (2005), https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1092&context=mulr [https://perma.cc/78EX-F4W6].

308. Keane, supra note 306; History of Wisconsin Court System, supra note 304; Czarnecki, supra note 307 at 169–70; Marley, supra note 15; Schultz, Meet the Candidates, supra note 24.

309. See Marley, supra note 15.

310. See Marley, supra note 15; Panetta, supra note 260; Schultz, Meet the Candidates, supra note 24; Montellaro & Messerly, The Most Important Election, supra note 12; Skelley, supra note 260; Powers & Keith, supra note 260. On February 21, 2023, Wisconsin held a primary election. See Marley, supra note 15; Ridah Syed, Wisconsin 2023 Spring Primary Election: How to Register, Where to Vote and Who Is on the Ballot, Milwaukee J. Sentin (Feb. 1, 2023, 12:10 PM), https://www.jsonline.com/story/news/politics/elections/2023/02/01/wisconsin-2023-spring-primary-how-to-vote-whos-on-the-ballot-registration-absentee-polling-locations/69836841007/ [https://perma.cc/V4P9-BHQW]. This was the first step in replacing
two liberal candidates, but only Janet Protasiewicz (liberal) and Daniel Kelly (conservative) advanced to the general election. In a wider margin than anticipated, Judge Protasiewicz defeated Judge Kelly in the election by roughly 10%. The election process was politicized like no other Wisconsin judicial election in history. Candidates, for what is supposed to be a position held by neutral arbiters, vehemently pressed forward their views on sensitive political issues and proffered that, if elected, they will resolve cases related to those political issues. These judicial campaigns have illustrated just how politicized judicial elections have become in Wisconsin. Shifts in the election campaigns of judges foreshadow the magnitude this judicial election will have on the future of Wisconsin. Protasiewicz and Kelly were both open about which issues are important to them. Their respective political

Chief Justice Roggensack, who announced her retirement from the court after her term ended in 2021. See Associated Press, Milwaukee County Judge Janet Protasiewicz Announces Candidacy for State Supreme Court, WIS. PUB. RADIO (May 25, 2022, 2:30 PM), https://www.nbc15.com/2022/05/25/milwaukee-county-judge-announces-candidacy-supreme-court/; see also Schultz, Meet the Candidates, supra note 24; Panetta, supra note 260; Marley, supra note 15; Skelley, supra note 260.


314. See supra note 313 and accompanying text.

315. See supra note 313 and accompanying text; Marley, supra note 15 (examining the public opinions of the judicial candidates on key political issues).

316. See Fannon, supra note 260; Quirmbach, supra note 260; Marley, supra note 15 (explaining that candidates are technically non-partisan, but that they work closely with political parties in election cycles); Epstein, supra note 15 (predicting that the spending on these judicial election campaigns will wind up being the most in the history of judicial elections in U.S. history).

317. See Epstein, supra note 15 (describing the liberal candidates as focusing on abortion issues and the conservative candidates as focusing on issues relating to crime); see also Panetta, supra note 260 (describing that Republicans have criticized Protasiewicz over comments she made about political mapping in Wisconsin).

318. See supra notes 298–300 and accompanying text.
campaigns took the same approach in developing their platforms and election strategies.\textsuperscript{319} Although many thought the election would become the most expensive judicial election in U.S. history, it far surpassed that expectation,\textsuperscript{320} becoming the most politicized and expensive judicial campaign in Wisconsin’s history.\textsuperscript{321}

Now, the court has a 4–3 liberal majority.\textsuperscript{322} Because Protasiewicz was elected, she will become a justice and her agenda may come into focus throughout the ten years she will be on the court,\textsuperscript{323} or until 2025.\textsuperscript{324} After newly-elected Justice Protasiewicz is sworn in, the swiftness with which the court will address her agenda will become apparent.\textsuperscript{325}

\textsuperscript{319} Protasiewicz was criticized for being soft on crime and being outspoken about gerrymandering and political mapping. See Panetta, supra note 260. Meanwhile, Kelly was criticized for participating in an “election integrity” tour and for indirectness on issues such as abortion. See Panetta, supra note 260.


\textsuperscript{321} See supra notes 298–300 and accompanying text.

\textsuperscript{322} See supra notes 298–300 and accompanying text.


\textsuperscript{324} In 2025, the next supreme court judicial elections will be held and Justice Ann Walsh Bradley’s term is slated to end. Justice Ann Walsh Bradley, Wis. CTS. (Feb. 13, 2022), https://www.wicourts.gov/courts/supreme/justices/bradley.htm [https://perma.cc/4HML-K4DN]. Protasiewicz’s goals include hearing challenges to old abortion laws, adjudicating disputes relating to partisan redistricting, and expanding voting access. Badger Herald Editorial Board, Issues to Watch After Wisconsin’s Supreme Court Election, THE BADGER HERALD (Apr. 5, 2023), https://badgerherald.com/opinion/2023/04/05/the-badger-herald-editorial-board-issues-to-watch-following-wisconsins-supreme-court-election/ [https://perma.cc/GJE5-QBR4]. These issues are discussed further below. See infra Section II.D.

\textsuperscript{325} See Badger Herald Editorial Board, supra note 324; Montellaro & Messerly, The Most Important Election, supra note 12.
C. Ohio Supreme Court

The Ohio Supreme Court was established by Article IV, Section 1 of the Ohio Constitution.326 Today, there are seven judges on the Ohio Supreme Court.327 Since 1912, two judges have been selected in every “even-numbered [year].”328 While Ohio’s elections historically consisted of a partisan primary and nonpartisan general election,329 in 2022 Ohio switched to partisan judicial elections.330 These elections are still conducted on a rotating basis in even-numbered years for the seven justices on the supreme court.331


327. See Supreme Court Ohio, Jurisdiction & Authority, supra note 326.

328. Justices by Term Since 1913, SUP. CT. OHIO & OHIO JUD. SYS. [hereinafter Supreme Court Ohio, Justices by Term Since 1913], http://www.supremecourt.ohio.gov/courts/judicial-system/supreme-court-of-ohio/justices-by-term/ [https://perma.cc/SX6H-AJP9] (last visited Mar. 10, 2023); see also Supreme Court Ohio, History of the Supreme Court of Ohio, supra note 326. When the chief justice runs, “voters pick three members of the Court.” Supreme Court Ohio, Justices by Term Since 1913, supra note 328. Originally, Ohio did not hold judicial elections, but in 1851 the Revised Constitution added judicial elections. See Supreme Court Ohio, History of the Supreme Court of Ohio, supra note 326.

329. See Supreme Court Ohio, Justices by Term Since 1913, supra note 328; see also Thomas Suddes, A Century Later, Ohio Judicial Elections Remain Half-Reformed: Thomas Suddes, CLEVELAND.COM (Jan. 15, 2011, 9:04 PM), https://www.cleveland.com/opinion/2011/01/a_century_later_ohio_judicial.html [https://perma.cc/6YL4-26FD]. This method — known as a “hybrid” method or a “[s]emi-[partisan election]” — was the result of a 1911 bill requiring nonpartisan general elections passing, and a companion bill requiring nonpartisan primary elections dying in the Ohio Senate. See Supreme Court Ohio, Justices by Term Since 1913, supra note 328; Herbert M. Kritzer, Polarization and Partisanship in State Supreme Court Elections, 105 DUKE UNIV. SCH. L. JUDICATURE 65, 65 (2021).

330. Tyler Vu, Editorial: Ohio’s Supreme Court Elections Are Critical, Even If They Are Partisan, CASE W. RSRV. OBSERVER (Nov. 4, 2022), https://observer.case.edu/editorial-ohios-supreme-court-elections-are-critical-even-if-they-are-partisan/ [https://perma.cc/XKG4-PRGZ] (“In July 2021, Ohio Gov. Mike DeWine signed legislation making it so that party affiliations for higher court judicial candidates would be shown on the ballot in general elections. Prior to this bill, Ohio had partisan primaries, but nonpartisan general elections.”).

331. See Supreme Court Ohio, Justices by Term Since 1913, supra note 328. Accordingly, the typical term length is six years. See Vu, supra note 330.
In 2022, Ohio voters “elect[ed] nearly 170 judges”\(^3\) including three seats on the Supreme Court of Ohio.\(^3\) In these elections, the Ohio Supreme Court was “up for grabs, with Republicans ... holding a narrow 4–3 majority, although [Justice Maureen] O’Connor [was] a swing vote who has voted with Democrats on redistricting and some other high-profile cases.”\(^\)\(^3\)

The first seat was contested between Republican Sharon Kennedy and Democrat Jennifer Brunner,\(^3\) the second seat was contested between Republican Pat Fischer and Democrat Terri Jamison,\(^3\) and the third seat was contested between Republican Pat DeWine and Democrat Marilyn Zayas.\(^3\) In addition, since one Justice was set to step up from Associate


\(^3\) The primary election was on May 3, 2022, and the general election was on November 8, 2022. See Ohio Bar Association, 2022 Judicial Elections, supra note 332.


\(^3\) See 2022 Ohio Supreme Court Voters Guide: Pat Fischer (R) vs Terri Jamison (D), GUIDES.VOTE (Nov. 8, 2022), https://guides.vote/guide/2022-ohio-supreme-court-fischer-jamison-voters-guide [https://perma.cc/83JR-2YY9]. Fischer ran for re-election as an incumbent against Democrat Terri Jamison, who prior to the election was a judge on the Ohio Tenth District Court of Appeals since 2021. See id.

Justice to Chief Justice, Ohio Governor Mike DeWine needed to appoint an interim Ohio Supreme Court justice until the next election cycle.338 Leading up to the 2022 election, campaigns were heavily politicized, as attack ads were televised and judicial ethics concerns were raised.339 On November 8, 2022, Justices Kennedy, Fischer, and DeWine — all Republicans — won their elections.340 In addition, Governor DeWine appointed Republican Joseph T. Deters to the fourth vacancy on December 22, 2022.341 As a result, the composition of the court shifted from a slight 4–3 Republican majority to a strong 5–2 conservative majority.342

The new 5–2 Republican-Democrat Ohio Supreme Court has not hidden its agenda.343 Throughout their judicial campaigns, the three Republican candidates openly acknowledged several key issues.344 For example, the candidates took an effective stance on redistricting by airing over $2 million in issue-specific ads from the Republican Party.345 This excessive politicization, however, was evident on both sides of the aisle.346 Democrats were condemned by the Ohio Bar Association for their attacks on Republican candidates throughout the election.347 Democratic candidates also focused on abortion rights and redistricting.348 The Republicans addressed

338. See id.
339. See Evans, Ohio Bar Condemns Ad, supra note 15; Republican State Leadership Committee, supra note 15; Trau, Candidates Accused of Breaking Ethics Code, supra note 15; Ohioans for Justice & Integrity, Ohio Supreme Court Political Advertisement, supra note 15.
341. See Press Release, Gov. Mike DeWine, supra note 337.
342. See Press Release, Gov. Mike DeWine, supra note 337.
344. See Trau, Candidates Accused of Breaking Ethics Code, supra note 15.
345. See Tobias, Eyeing Redistricting, supra note 334.
346. See, e.g., Evans, Ohio Bar Condemns Ad, supra note 15.
347. See Evans, Ohio Bar Condemns Ad, supra note 15; Trau, Candidates Accused of Breaking Ethics Code, supra note 15; Tobias, Eyeing Redistricting, supra note 334.
348. See Ohioans for Justice & Integrity, Ohio Supreme Court Political Advertisement, supra note 15; ACLU: Reproductive Freedom, Preterm-Cleveland v. David Yost, ACLU
redistricting, but also attracted voters by presenting Democrats as weak on crime.349

Following the election and appointment of new judges, the future is red in Ohio’s state judiciary.350 Legislative redistricting, abortion, and criminal law reform — all of which were discussed during campaigns351 — will now be easier and more straightforward for the court to monitor.352 Furthermore, the current court has several years to implement its agenda, as three of the next four justices up for re-election are Democrats.353 Since the new term began in January 2023, the Ohio Supreme Court has considered several

349. See Republican State Leadership Committee, supra note 15; see also Bischoff, supra note 340.


351. See Evans, Ohio Bar Condemns Ad, supra note 15; see also Republican State Leadership Committee, supra note 15 (highlighting the “Democrats’ ‘Sue Until It’s Blue’ gerrymandering scheme.”).


353. See Supreme Court Ohio, Justices by Term Since 1913, supra note 328. While Chief Justice Kennedy, and Justices Fischer and DeWine will maintain their seats until at least 2028, Justice Brunner, the Democratic who lost to Chief Justice Kennedy in this election, must run for re-election in 2026. See id. This timeline all but ensures that the court will maintain — and perhaps even expand — its conservative majority in the coming years.
controversial issues.\textsuperscript{354} These issues, which are among those prevalent in national political discourse, are discussed more below.\textsuperscript{355}

\section*{D. Prevalent Issues}

This Section builds off the discussion about elections in North Carolina, Wisconsin, and Ohio, and focuses on some specific issues that the new courts will be considering.\textsuperscript{356} To illustrate the impact of judicial elections and political polarization on precedent and stare decisis, three issues are addressed: abortion rights,\textsuperscript{357} political redistricting,\textsuperscript{358} and voter ID laws.\textsuperscript{359}

\subsection*{1. Abortion Rights}

In 1973, the U.S. Supreme Court decided \textit{Roe v. Wade},\textsuperscript{360} holding that the Fourteenth Amendment Due Process Clause provides women with the right to an abortion.\textsuperscript{361} Nearly 20 years later, in \textit{Planned Parenthood of Southeastern Pennsylvania v. Casey},\textsuperscript{362} the Court upheld but also weakened the rights established in \textit{Roe}.\textsuperscript{363} This notwithstanding, the recent conservative shift in the U.S. Supreme Court undermined \textit{Roe} and \textit{Casey}.\textsuperscript{364}


\textsuperscript{355} See infra Section II.D.

\textsuperscript{356} See infra Section II.D.

\textsuperscript{357} See infra Section II.D.1.

\textsuperscript{358} See infra Section II.D.2.

\textsuperscript{359} See infra Section II.D.3.

\textsuperscript{360} 410 U.S. 113 (1973).

\textsuperscript{361} See id. at 164.

\textsuperscript{362} 505 U.S. 833 (1992).

\textsuperscript{363} See id. at 845–46. The Court also established a framework for stare decisis, which reinforced the validity and strength of \textit{Roe}. See id. at 854–69.

Despite 50 years of precedent, the Supreme Court overturned Roe and held that there is no right to an abortion under the U.S. Constitution. Dobbs, however, did not make abortion illegal; rather, it shifted authority to the states, which are now responsible for codifying abortion laws as states see fit.

Since Dobbs, discerning what state laws say about abortion rights is complex. Old laws and precedents — some of which have not been touched in fifty years — are relevant once more. Accordingly, state courts must reinterpret dormant statutes, policies, and case law. Deciding what degree of stare decisis to afford previously moot cases and statutes goes hand-in-hand with the resurgence of state-run abortion regulation. With these questions on the horizon, understanding abortion precedents in North Carolina, Wisconsin, and Ohio is useful.

In North Carolina, abortion is legal for the first 12 weeks of pregnancy. Following that period, abortion is only legal to save a pregnant person’s life.
or preserve their general health. 373 In Wisconsin, abortion services are not offered except to save a pregnant person’s life. 374 In Ohio, abortion is legal for the first 21 weeks and six days of pregnancy. 375 However, all three states have frequently changed their abortion regulations over time. 376 The first laws criminalizing abortion care were passed in 1881 in North Carolina, 1849 in Wisconsin, and 1913 in Ohio. 377 In North Carolina and Ohio, few

373. See id.; N.C. GEN. STAT. § 90-21.86 (2011). Individuals under 18 years old also need consent from a parent or guardian to obtain an abortion. See Abortion Finder, Abortion in North Carolina, supra note 372.


377. See Claire Donnelly, Laws Regulating Abortion in North Carolina Date Back to 1881, WFAE 90.7 (June 1, 2022, 5:10 PM), https://www.wfae.org/health/2022-06-01/laws-regulating-abortion-in-north-carolina-date-back-to-1881 [https://perma.cc/M6NW-4CCU]; ACLU of North Carolina, Timeline of Abortion Restrictions, supra note 376; N.C. GEN. STAT. § 14-44, 14-45. These restrictions made it a crime to provide abortion care after quickening. See id. “In January 1849, just a few months after statehood, the Wisconsin Legislature [ ] criminalized the ‘willful killing of an unborn quick child’ and the use of ‘any instrument or other means, with the intent to thereby destroy such child.’” Wis. Inst. for L. & Lib., supra note 376; see also Wis. STAT. § 940.04 (1849). In 1913, the Ohio Supreme Court enforced criminal abortion laws and reasoned that “[t]he reason and policy of the statute is to protect
changes were made until Roe.378 In Wisconsin, the major change occurred when the word “quick” was removed from the abortion statute in 1858.379 After Roe v. Wade, all three states changed their policies.380 By the Dobbs

woman and unborn babies from dangerous criminal practice, and to discourage secret immorality between the sexes, and a vicious and craven custom amongst married pairs who wish to evade the responsibilities and burdens of rearing offspring.” See Tippie, 89 Ohio St. at 40.

378. In North Carolina, there were few statutory developments in abortion regulation until 1967. See supra note 377. In that year, the state legislature added an exception for when a pregnant person’s life is at risk. See Abortion Finder, Abortion in North Carolina, supra note 372; Donnelly, supra note 377; ACLU of North Carolina, Timeline of Abortion Restrictions, supra note 376. From 1967 until 1973, when Roe v. Wade was decided, the only further development was a requirement that all abortions be reported to the State Board of Health. See id. In Ohio, after Roe, there were fewer restrictions. See generally Roe v. Wade, 410 U.S. 113 (1973). Still, waiting periods and informed consent were in place. See Ohio Rev. Code. § 2919.12 Unlawful Abortion (1996).

379. See Kasper, supra note 376, at 2, 6.

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decision, restrictions and dormant laws were in place in North Carolina, Wisconsin, and Ohio. 381 Since Dobbs, abortion restrictions have changed in all three states in some capacity. In North Carolina, the 20-week ban was put back into place in August 2022. 382 In Wisconsin, abortion restrictions tightened, as the 1849 statute was reimplemented following Roe. 383 In Ohio, the challenge to the heartbeat legislation is relevant, but Ohio courts are trending towards enforcing stricter abortion regulations. 384 Since Dobbs, all three of these states have newfound authority. 385 Prior to Roe v. Wade, the North Carolina Supreme Court, Wisconsin Supreme Court, and Ohio Supreme Court were the courts of last resort responsible for

381. See ACLU of North Carolina, Undue Burdens, supra note 376. These laws were tied to the Supreme Court’s undue burden tests. See id. For a detailed list of abortion rules as of June 28, 2022, see Guttmacher Inst., State Facts About Abortion: North Carolina, supra note 380. In Wisconsin, when Dobbs was decided, many restrictions were already in place. See supra note 374 and accompanying text. For a more detailed list of abortion rules as of June 28, 2022, see State Facts About Abortion: Wisconsin, Guttmacher Inst. (June 2022) [hereinafter Guttmacher Institute, State Facts About Abortion: Wisconsin], https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-wisconsin [https://perma.cc/W3CX-YGHR]. In Ohio, the heartbeat legislation is the major legislation being challenged. Abortion Finder, Abortion in Ohio, supra note 375; ACLU of Ohio, Lower Court Blocks Six-Week Abortion Ban, supra note 380.


383. See Guttmacher Institute, State Facts About Abortion: Wisconsin, supra note 381; supra note 378 and accompanying text.

384. See supra note 380.

interpreting statutes, laws, cases, and controversies about abortion.386 From 1973 and 2022, all court actions assessing the legality of abortion policies relied on the federal doctrine.387 Now, although the United States Supreme Court held that abortion statutes are subject to only rational basis review,388 state courts have more authority to uphold or reject the constitutionality of abortion legislation than they have had in 50 years.389 As such, the recent judicial elections were pivotal.390 After the 2022 judicial elections, the North Carolina Supreme Court and Ohio Supreme Court have become more conservative, while the Wisconsin Supreme Court has become more liberal.391 How these ideological changes will practically impact abortion


389. See Brennan Center, State Court Abortion Litigation Tracker, supra note 386.

390. See Panetta, supra note 260; Marley, supra note 15; Epstein, supra note 15; Montelaro & Messerly, The Most Important Election, supra note 12; Skelley, supra note 260.

391. See supra Section II.A. With states gaining authority to uphold or reject abortion legislation, Ohio has been one of the first states to exercise these powers. Now, the 5–2 Republican majority will be integral in framing the new legislation. See Poppy Noor, Ohio’s Partisan Supreme Court Election Could Decide Abortion’s Future in State, THE GUARDIAN (Nov. 5, 2022, 4:00 AM), https://www.theguardian.com/us-news/2022/nov/05/ohio-abortion-partisan-supreme-court-election-midterms [https://perma.cc/ER3Z-TLTK]; supra Section II.A. The 4–3 liberal majority on the Wisconsin Supreme Court is likely to hear court cases about the 1849 abortion statute. See Politics, What Went Down on the Biggest Election Day of 2023, supra note 312; Badger Herald Editorial Board, supra note 324.
rights remains an open question, although any decisions will certainly implicate principles of stare decisis.

2. Gerrymandering and Political Redistricting

In 2019, the Supreme Court decided *Rucho v. Common Cause*. In *Rucho*, the Court held that questions relating to legislative redistricting were non-justiciable political questions. Accordingly, decisions about how states draw legislative districts are only judicially reviewable in state court. Since 2019, it has become more commonplace for state judiciaries to check maps drawn by state legislatures. These maps impact a political party’s representation in the state and federal legislatures. In extreme cases, they even impact U.S. presidential elections. As such, the power of state supreme courts to check maps has been a focal point in the past few years, especially in states where judges are elected.

Each state’s policies for drawing legislative districts and standards for judicial review have come under the microscope. As such, it is important...
to consider the authority of North Carolina, Wisconsin, and Ohio supreme courts in gerrymandering and political redistricting cases, as well as the cases they will decide. 402

In North Carolina, Wisconsin, and Ohio, political redistricting and gerrymandering have become focal points. 403 All three states are typically swing states in federal elections. 404 Because districts are drawn using census data, 405 one legislature’s map can affect multiple elections. 406

In North Carolina, “legislative and congressional districts are drawn by the state legislature by ordinary statute.” 407 In Johnson v. Wisconsin Elections Commission, 408 the Wisconsin Supreme Court accepted the United States Supreme Court’s holding in Rucho and described the role of the

402. See infra Section II.D.2.


404. See USA Facts, What Are the Current Swing States, And How Have They Changed Over Time?, USA FACTS (Nov. 1, 2022, 9:36 AM), https://usafacts.org/articles/what-are-the-current-swing-states-and-how-have-they-changed-over-time/ [https://perma.cc/N3EB-AW78].


408. 967 N.W.2d 469 (Wis. 2021).
judiciary in redistricting under the Wisconsin Constitution. Ohio’s system for redistricting is different than North Carolina and Wisconsin, as the Ohio court draws congressional districts and state legislative districts through two different processes.

North Carolina, Wisconsin, and Ohio all require their legislative and congressional districts to be contiguous, avoid county splits, keep counties whole, and abide by one-person, one-vote. While North Carolina has no public input requirement, Ohio does. All three states provide for varying levels of legislative autonomy in redistricting, and as such, the lawsuits that have arisen in each are unique. The common themes are that the maps in all three states are not reflective of their political constituencies, and those inequitable maps are being challenged in court.

Apart from North Carolina being one of two states from which the U.S. Supreme Court granted certiorari in the 2019 case Rucho, in June 2023 the Court decided Moore v. Harper, a case that considered North Carolina

409. See id. at 473, 482–83, 488. First, “the legislature’s enactment of a redistricting plan is subject to presentment and a gubernatorial veto.” Id. at 488. Next, “[i]f the legislature and the governor reach an impasse, the judiciary has a duty to remedy the constitutional defects in the existing plan.” Id. However, “the judiciary does not [usually] order government officials to enforce a modified, constitutional version of the statute.” Id.

410. See Gerrymandering Project, Ohio: Scored Maps from the Redistricting Report Card, PRINCETON UNIV. https://gerrymander.princeton.edu/reforms/OH [https://perma.cc/7RCP-EGS9] (last visited Mar. 27, 2023). For congressional districts, the Legislature must first try passing redistricting plans with bipartisan support. See id. If unsuccessful, a seven-member commission appointed by Ohio’s legislative leaders must create the map. See id. If the commission cannot reach a conclusion, the task returns to the legislature where bipartisan support is required. See id. Without bipartisan consent, the map is only in effect for four years. See id. The state’s legislative districts, however, are drawn differently. See id. First, the seven-member commission is responsible for drawing the maps. See id. To remain in effect for the full ten years, at least two commissioners from each party must vote for the map. See id. However, if the maps are approved along party lines, then they are only in place for the four years as well. See id.

411. See Gerrymandering Project, North Carolina, supra note 407; Gerrymandering Project, Wisconsin: Scored Maps from the Redistricting Report Card, PRINCETON UNIV. https://gerrymander.princeton.edu/reforms/WI [https://perma.cc/VEP6-JVPA] (last visited Mar. 27, 2023); Gerrymandering Project, Ohio, supra note 410. The state also mandates that districts not “unduly favor or disfavor a political party or its incumbents[.]” Gerrymandering Project, Ohio, supra note 410.

412. North Carolina does not require public hearings, but they often hold them regardless. These hearings, however, do not prevent litigation; in fact, challenges to maps have become more common over the past several decades. See Gerrymandering Project, North Carolina, supra note 407 (“North Carolina is one of the most extremely gerrymandered states in the nation and has been home to a decade’s worth of redistricting litigation.”); see also Gerrymandering Project, Ohio, supra note 410.

state court’s jurisdiction in reviewing legislative redistricting maps.\textsuperscript{414} These cases exemplify how legislative redistricting is a prevalent issue and how \textit{Rucho} gave states more autonomy.\textsuperscript{415} Despite the litigation, the new map does not differ substantially from previous maps in North Carolina.\textsuperscript{416} Nevertheless, because the state has about as many Democrat voters as Republicans voters,\textsuperscript{417} both the old and new maps appear somewhat inequitable.\textsuperscript{418}

Among other issues, \textit{Moore v. Harper} focused on the independent state legislature theory.\textsuperscript{419} In essence, the North Carolina legislature asked the Supreme Court to hold that they can draw districts without being constrained by the governor or the judiciary within the state.\textsuperscript{420} Even though the Supreme Court rejected North Carolina’s independent state legislature theory as unconstitutional, the Court acknowledged that other redistricting cases are on the horizon.\textsuperscript{421} Of course, certain principles — such as “one-person, one-vote”\textsuperscript{422} — will still be mandatory.\textsuperscript{423} Although \textit{Moore

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\textsuperscript{415} See Rucho, 139 S. Ct. at 2494, 2507–08.

\textsuperscript{416} See Gerrymandering Project, North Carolina, supra note 407; see also Savitzky, supra note 414; What Redistricting Looks Like in Every State, FiveThirtyEight (July 19, 2022, 3:50 PM) [hereinafter FiveThirtyEight, North Carolina Districts], https://projects.fivethirtyeight.com/redistricting-2022-maps/north-carolina/ [https://perma.cc/B6NS-6NHN]. The old map divided the state into 13 districts with: four being “[s]olid” Democrat, one being “[c]ompetitive” Democrat, none being “[h]ighly [c]ompetitive[,]” two being “[c]ompetitive” Republican, and six being “[s]olid” Republican. \textit{Id}. The new map, however, has 14 districts with: three being “[s]olid” Democrat, three being “[c]ompetitive” Democrat, one being “[h]ighly [c]ompetitive[,]” two being “[c]ompetitive” Republican, and five being “[s]olid” Republican. \textit{Id}.

\textsuperscript{417} In the most recent presidential election, 48.6% of the North Carolina popular vote was Democrat and 49.9% of the popular vote was Republican. See North Carolina, 270toWin, https://www.270towin.com/states/North_Carolina [https://perma.cc/R65M-WDGE] (last visited Mar. 27, 2023).

\textsuperscript{418} See FiveThirtyEight, North Carolina Districts, supra note 416 (identifying that, in these districts, the maps have been trending towards favoring republicans based on metrics such as “[m]edian seat” and “efficiency gap”).

\textsuperscript{419} See Savitzky, supra note 414.

\textsuperscript{420} See Savitzky, supra note 414.

\textsuperscript{421} See Savitzky, supra note 414; see also Moore v. Harper, 600 U.S. 1, 63–64 (2023) (Thomas, J., dissenting).

\textsuperscript{422} See generally Adam Raviv, Unsafe Harbors: One Person, One Vote and Partisan Redistricting, 7 U. PA. J. CONST. L. 1001, 1004 (2005).

\textsuperscript{423} See id. at 1005–06.
provided some limits.\textsuperscript{424} North Carolina courts will still have to evaluate new maps going forward.\textsuperscript{425} As such, old precedent may be relevant.

In Wisconsin, Johnson was the major Wisconsin Supreme Court case in the aftermath of Rucho.\textsuperscript{426} However, there have been updates since that Wisconsin Supreme Court decision.\textsuperscript{427} In practice, “[t]he state Assembly and Senate maps [are] drawn by the Legislature and selected by the Wisconsin Supreme Court[.]”\textsuperscript{428} Wisconsin’s current maps were drawn by Republican legislators in 2021 and were based on maps drawn by Republicans ten years prior.\textsuperscript{429} Lawyers and constituents are dissatisfied with the way this map represents Wisconsinites, and challenges will likely continue.\textsuperscript{430} Wisconsin’s districts are drawn by the legislature, subject to the legislative veto, and subject to judicial review on constitutional grounds.\textsuperscript{431} Despite these requirements,

Wisconsin is home to some of the most extreme partisan gerrymanders in the United States. It was the subject of the 2018 case of Gill v. Whitford, in which a lower court found the state Assembly plan to be an unconstitutional partisan gerrymander. The Supreme Court ultimately dismissed the case in light of its ruling in Rucho v. Common Cause that federal courts have no jurisdiction to hear partisan gerrymandering claims.\textsuperscript{432}

This is why recent maps have been skewed in favor of the Republican Party.\textsuperscript{433} While there have been minor changes between old and new

\textsuperscript{424} See Moore, 600 U.S. at 37; Savitzky, supra note 414 (“[I]t is our democracy that stands to lose if the power to set election rules is unconstrained by the rule of law and constitutional checks and balances.”); Montellaro & Mutnick, House Republicans Could Expand Their Majority, supra note 400; Doran, NC Supreme Court Rehears Arguments in Redistricting Case, supra note 303.

\textsuperscript{425} See Savitzky, supra note 414.


\textsuperscript{427} See id. See generally Johnson v. Wisconsin Elections Commission, 972 N.W.2d 559 (Wis. 2022).

\textsuperscript{428} Redistricting Update, supra note 426.


\textsuperscript{430} See id.; see also Wisconsin Watch, Wisconsin’s Assembly Maps, supra note 403.

\textsuperscript{431} See supra notes 408–09 and accompanying text; Gerrymandering Project, Wisconsin, supra note 411.

\textsuperscript{432} Gerrymandering Project, Wisconsin, supra note 411.

\textsuperscript{433} See infra notes 434–35.
most of the districts are red despite a plurality of residents in Wisconsin voting blue in presidential elections. Despite these gaps, Wisconsin’s laws on redistricting and gerrymandering are ambiguous and the judicial role is uncertain.

In Ohio, if any redistricting requirement is not met, the Ohio Supreme Court serves as the last line of defense, with the authority to decide redistricting disputes. Despite these processes, the Ohio congressional map has substantial efficiency gaps. This gap comes in political battleground states, and the discrepancy illustrates the backdrop against which the new Ohio Supreme Court will hear claims relating to


435. See id.; Wisconsin, 270towin, https://www.270towin.com/states/Wisconsin [https://perma.cc/34SB-QY4X] (last visited Mar. 27, 2023). Wisconsin’s eight districts inaccurately depict the overall political leanings of the state. See FiveThirtyEight, Wisconsin Districts, supra note 434. In both maps, there were two “[s]olid” Democrat districts, zero “[c]ompetitive” Democrat districts, zero “[h]ighly [c]ompetitive” districts, two “[c]ompetitive” Republican districts, and four “[s]olid” Republican districts. Id. Even though Wisconsin is a swing state, voters preferred the Democratic candidate in five of the last six elections. In that time, Democratic candidates maxed out at 56.2% of the popular vote and bottomed out at 46.5%, while the GOP candidate maxed out at 49.3% and bottomed out at 42.3%. See 270towin, Wisconsin, supra note 435. While this is not an entirely accurate metric, it underscores the fact that Wisconsin’s districts are disproportionate to the state’s ideological leanings.

436. See Zac Schultz, Janet Protasiewicz, Daniel Kelly on Wisconsin Redistricting, PBS Wis. (Mar. 9, 2023) [hereinafter Schultz, Protasiewicz & Kelly on Redistricting], https://pbswisconsin.org/news-item/janet-protasiewicz-daniel-kelly-on-wisconsin-redistricting/ [https://perma.cc/2DRR-VC9G]; supra note 445 and accompanying text; Bowden, supra note 429; Montellaro & Messerly, The Most Important Election, supra note 12; Brownstein, supra note 65; Marley, supra note 15.

437. See Gerrymandering Project, Ohio, supra note 410.

438. See What Redistricting Looks Like in Every State, FIVETHIRTYEIGHT (July 19, 2022, 3:50 PM), https://projects.fivethirtyeight.com/redistricting-2022-maps/ohio/ [https://perma.cc/TB56-H7HS] (defining an efficiency gap as the “[d]ifference between each party’s share of ‘wasted votes’ – those that don’t contribute to a candidate winning.”). On one hand, the newer map has a lower efficiency gap than the old map. See id. However, the new map, which has one less district than the old map, has one less “[s]olid Democrat” district and one less “[s]olid Republican” district. Id. The new proposed map is only 15 districts, and there are two “[s]olid Democrat[,]” zero “[c]ompetitive Democrat[,]” two “[h]ighly [c]ompetitive[,]” four “[c]ompetitive Republican[,]” and seven “[c]ompetitive Republican[,]” Id.

439. See Ohio, 270towin, https://www.270towin.com/states/Ohio [https://perma.cc/SQ9B-FB8L] (last visited Mar. 27, 2023). In the six presidential most recent elections, the Democrat candidate received a minimum of 43.6% of the popular vote and a maximum of 51.5% of the popular vote, whereas the GOP candidate received a minimum of 46.9% of the popular vote and a maximum of 53.3%. Id.
In the first few months of 2022, the Ohio Supreme Court rejected legislative maps in *Ohio Organizing Collaborative v. Ohio Redistricting Commission* \(^{441} \) and ordered the state’s commission to produce new maps using an independent map drawer. \(^{442} \) Now, in an extremely gerrymandered environment, \(^{443} \) the Ohio Supreme Court has substantial say in the future development of the state’s legislative maps. \(^{444} \)

In all three states, the 2022–2023 judicial elections will have a substantial impact on precedent and stare decisis will impact future court decisions. \(^{445} \) Whether it be the recent impact of *Moore* in North Carolina, \(^{446} \) or the three active lawsuits against legislative maps and two against congressional maps in Ohio, \(^{447} \) the judicial elections will have far-reaching consequences effecting the future of state and federal governments. \(^{448} \) Although the cases

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\(^{441} \) See *Ohio Redistricting Litigation: Ohio Organizing Collaborative v. Ohio Redistricting Commission (Ohio Supreme Court); Ohio Organizing Collaborative v. LaRose (Southern District of Ohio)*, BRENNA N CTR. FOR JUST. (Sept. 24, 2021), https://www.brennancenter.org/our-work/court-cases/ohio-redistricting-litigation-ohio-organizing-collaborative-v-ohio [https://perma.cc/FQ7C-Z55P].

\(^{442} \) See Press Release, *Ohio Supreme Court*, supra note 354. It is worth noting that the Ohio Supreme Court’s orders were ignored by the GOP. As such, an independent map was not put into effect. See Andrew J. Tobias, *Republicans Ignore Redistricting Order from Ohio Supreme Court, Signaling They Intend to Run Out the Clock*, CLEVELAND.COM (June 3, 2022, 2:44 PM), https://www.cleveland.com/news/2022/06/republicans-ignore-redistricting-order-from-ohio-supreme-court-signaling-they-intend-to-run-out-the-clock.html [https://perma.cc/GCW7-RRNK].

\(^{443} \) See Carrillo, supra note 440.

\(^{444} \) See Mutnick, supra note 354; Press Release, *Ohio Supreme Court*, supra note 354; Smyth, *EXPLAINER*, supra note 403; Nelson, supra note 403.

\(^{445} \) In Wisconsin, for example, candidates for Wisconsin Supreme Court recognized this influence and commented on political redistricting. See Bowden, supra note 429; Schultz, *Protasiewicz & Kelly on Redistricting*, supra note 436, https://pbswisconsin.org/news-item/janet-protasiewicz-daniel-kelly-on-wisconsin-redistricting/ [https://perma.cc/2DRR-VC9G]; Montellaro & Messerly, *The Most Important Election*, supra note 12; Brownstein, supra note 65; Marley, supra note 15. In Ohio, donors recognized redistricting issues and poured significant funds into the judicial campaigns with the goal of impacting redistricting. See Tobias, *Eyeing Redistricting*, supra note 334.

\(^{446} \) See generally Moore v. Harper, 600 U.S. 1 (2023); Savitzky, supra note 414.

\(^{447} \) See Smyth, *EXPLAINER*, supra note 403.

\(^{448} \) See Smyth, *EXPLAINER*, supra note 403 (highlighting the implications of legislative redistricting on the 2024 presidential election in Wisconsin).
may not all be decided by state supreme courts, partisan shifts could impact the ultimate outcomes in these cases. In these potential decisions, a judge’s political leanings will surely conflict with a previous court precedent. In this capacity, creating policies to compel judges to maintain or disregard precedent may be beneficial for purposes of keeping the law predictable and equitable.

3. Voter ID Laws

Since the Voting Rights Act of 1965 (VRA), state legislatures have passed a wide variety of voter ID laws. While some states have lenient voter ID requirements, others have been scrutinized for blocking constituents from voting in elections. Because the 50 states have different requirements for voters, the challenges in each state are unique. In 2008, the United States Supreme Court established a framework for assessing state voter ID laws under the U.S. Constitution in *Crawford v. Marion County Election Board*. This framework is still relevant in the

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449. See Tebben, supra note 403.
450. Such as the Wisconsin Supreme Court turning liberal for the first time in over a decade. See Marley, supra note 15; Politics, What Went Down on the Biggest Election Day Of 2023, supra note 312.
452. For example, the 2022 court holding become precedent forcing the court to abide by stare decisis.
457. See Mazo, supra note 454, at 1255–56.
458. See Mazo, supra note 454, at 1234–36.
459. See 553 U.S. 181 (2008) (evaluating a voter ID law in Indiana and applying a balancing inquiry); see also Mate, supra note 454, at 31.
federal context.\textsuperscript{460} However, the criteria for state voter ID laws has become more ambiguous, and focused on state constitutional restrictions.\textsuperscript{461}

In 2013, the United States Supreme Court decided \textit{Shelby County, Alabama v. Holder}.\textsuperscript{462} In \textit{Shelby County}, the Court held that Congress’s reauthorization of Section 5 of the VRA’s “coverage formula” was unconstitutional because it does not account for the changing landscape in American democracy.\textsuperscript{463} Regardless of whether the majority or dissent was correct, the impact of the decision is that states have broader latitude in enacting voter ID laws.\textsuperscript{464} The result, increases in voter ID laws, have correlated with increased litigation challenging those laws.\textsuperscript{465} While federal and state courts share jurisdiction to hear these cases,\textsuperscript{466} the role of state supreme courts in deciding challenges to voter ID laws has grown the past few years.\textsuperscript{467} Further, increased voter fraud accusations,\textsuperscript{468} and public opposition to immigrant voting rights\textsuperscript{469} have exacerbated voter ID challenges and propelled these issues into the spotlight.\textsuperscript{470}

The voter ID laws in North Carolina do not require voters to use a photo ID to vote.\textsuperscript{471} In \textit{Holmes v. Moore},\textsuperscript{472} the North Carolina Supreme Court held that such a law violates the state’s equal protection clause.\textsuperscript{473} However,

\begin{itemize}
\item \textsuperscript{460} See Sally Tyler, \textit{State Voter ID Laws and the Challenge to Democracy}, 37-MAR CHAMPION 52, 53 (2013); Mate, \textit{supra} note 454, at 31; Mazo, \textit{supra} note 454, at 1252–54.
\item \textsuperscript{461} See Mazo, \textit{supra} note 454, at 1253–54.
\item \textsuperscript{462} See 570 U.S. 529 (2013).
\item \textsuperscript{463} See \textit{id.} at 556–57. The majority in \textit{Shelby County} reasoned that the coverage formula has not achieved its purpose because voter discrimination still exists. \textit{See id.} at 536. This reasoning, the dissent argued, was misguided, as it presumes Section 5 has been unsuccessful in combatting discrimination because voter discrimination still exists. \textit{See id.} at 562–65. In making this assumption, the dissent suggests that the majority ignored the possibility that, even though voter discrimination still exists, Section 5 helped reduce discrimination over time. \textit{See id.} As such, new measures were needed in addition to Section 5 rather than to replace Section 5. \textit{See id.}
\item \textsuperscript{464} See Mazo, \textit{supra} note 454, at 1239–40.
\item \textsuperscript{465} See Mazo, \textit{supra} note 454, at 1270–71.
\item \textsuperscript{466} Both the U.S. Constitution and state constitutions have requirements for voter registration and election law. \textit{See, e.g., N.Y. CONST.} art. II.
\item \textsuperscript{467} See Mazo, \textit{supra} note 454, at 1270–71.
\item \textsuperscript{468} See generally Lynn Adelman, \textit{A New Stage in the Struggle for Voting Rights}, 43 U. ARK. LITTLE ROCK L. REV. 477 (2021).
\item \textsuperscript{469} See generally id.
\item \textsuperscript{472} See generally 881 S.E.2d 486 (N.C. 2023).
\item \textsuperscript{473} See \textit{id.}; \textit{Voter ID}, \textit{supra} note 471. See generally N.C. State Conf. of NAACP v. McCrory, 831 F.3d 204 (4th Cir. 2016) (invalidating an earlier North Carolina voter ID law).
this holding may not be in effect for long. Following the enactment of the voter ID requirement in 2018, several lawsuits were brought challenging the policy based on unfair discrimination.475 From 2021 until the waning weeks of 2022, a series of North Carolina Supreme Court decisions invalidated the law.476 The court adopted the United States Supreme Court’s standard in Village of Arlington Heights v. Metropolitan Housing Development Corporation477 and held that the law had an intent to unfairly discriminate.478


475. See Holmes, 881 S.E.2d at 486.

476. Sanders, supra note 474; Robertson, supra note 474; Richardson, supra note 474; Sneed, supra note 382; Doyle, supra note 474; Hoggard, supra note 474; CJ Staff, supra note 474. First, a Republican supermajority in the legislature passed the bill. Then a Democratic governor vetoed the bill. Finally, after a ballot initiated revived the bill, a liberal supreme court held that it was unconstitutional.

477. 429 U.S. 252 (1977); see also Sanders, supra note 474; Ryan Mann, Re-Examining Indiana’s Voter ID Law in Light of Recent Federal Court Cases: Where Does It Go from Here and What’s Next for Indiana Election Law, 51 IND. L. REV. 243, 252–54 (2018).

478. See infra note 630 and accompanying text. The court considered factors such as historical background, legislative history, and other events related to the law’s enactment. Sanders, supra note 474.
Since this decision, the court has become more conservative. After the new justices were elected, the court invoked a rare procedural posture to revive the case. Now, they must decide what to do with the law. If ideological divides are any indication of how the case will come out, the law will soon be validated over the objections of the past supreme court. This see-saw of partisanship raises questions that invoke principles of stare decisis and judicial neutrality.

In Wisconsin, elections are administered at a municipal level, not by county or state. Nevertheless, election requirements are legislated at the state level. Since Shelby County, Wisconsin has had extensive litigation concerning the state’s voter ID laws that has “spilled over from state to federal court.” However, changes to Wisconsin voter ID laws began even prior to the Supreme Court’s 2013 holding in Shelby County. Historically, Wisconsin is one of the most accessible states for voters. However, due to several factors — such as the 2000 election, the Supreme Court’s decision in Crawford, and allegations of numerous unfounded accusations of voter fraud — the state legislature has tried to tighten up elections. Among

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479. See supra Section II.A.
480. See Doran, supra note 303; Doyle, supra note 474; Hoggard, supra note 474; CJ Staff, supra note 474; Bannon, supra note 25.
481. See supra note 480.
482. See CJ Staff, supra note 474.
483. See Bannon, supra note 25; see also Woodhouse, New State Supreme Court, supra note 296.
486. See Mazo, supra note 454, at 1253–54 (citing Frank v. Walker, 17 F. Supp. 3d 837 (E.D. Wis. 2014), rev’d, 786 F.3d 744 (7th Cir. 2014) and Milwaukee Branch of the NAACP v. Walker, 851 N.W.2d 262 (Wis. 2014)); see also One Wis. Inst., Inc. v. Thomsen, 198 F. Supp. 3d 896 (W.D. Wis. 2016) (providing sharp criticism of ulterior motives behind voter ID laws in Wisconsin).
488. See Yu, supra note 484. Some of these lenient points of entry are still intact. See id.
other policies, these efforts led the Republican legislature and statehouse to enact new voting laws in 2011.490

The 2011 voter ID law, one of the strictest in the nation,491 faced substantial criticism in both state and federal courts.492 Despite challenges to the new law, it remained in effect.493 One suit challenging the law reached the Seventh Circuit in 2014.494 Even though the trial judge noted that it would deter or prevent a substantial number of registered voters from voting, the Seventh Circuit upheld the law.495 In doing so, the panel relied on the law’s resemblance to the Indiana law approved in Crawford496 and applied the “lost-votes approach.”497
On one hand, those opposed to the law argued it suppressed voters. Although empirical evidence substantiates these claims ex post, the legal standard used by the court — perhaps the harshest application of the “lost-votes approach” — did not lead to this conclusion. The legal standard applied by the court required state-specific and causal social evidence of voter suppression, as well as evidence that proves that the right to vote was burdened. This was a heightened standard of review for finding voter ID laws unconstitutional. On the other hand, the main argument defending the voter ID law is that it protects against voter fraud. However, there is little evidence of voter fraud in Wisconsin. Following the Seventh Circuit’s decision, the U.S. Supreme Court denied certiorari. Simply put, the law did not reduce instances of voter fraud. Instead, it suppressed voter turnout in low-income and minority areas, and reinforced a system that

498. Zhang, supra note 494, at 1068; see also Larson Report Newsletter, supra note 489. Studies reveal that laws of this nature can reduce turnout by as much as 3%. See Redzich, supra note 492, at 213–14. In Wisconsin, a study revealed that as many as 23,252 voters in two counties were prevented from casting their ballots in 2016 due to these restrictions. See Redzich, supra note 492, at 213–14.

499. See supra note 498 and accompanying text.

500. See Zhang, supra note 494, at 1068.

501. See Zhang, supra note 494, at 1068.

502. See Zhang, supra note 494, at 1068.

503. See Liptak, supra note 489; see also Larson Report Newsletter, supra note 489. Election fraud is rare and has been prosecuted fewer than 200 times in Wisconsin (once for every 163,000 ballots cast). See Wisconsin Watch, ‘Election Integrity’ Proposals, supra note 489. Prosecution also disproportionately accuses minorities of voter fraud, as black Wisconsinites are more overrepresented in election fraud prosecutions than they are in the court system overall. From 2012 to spring of 2022, Milwaukee County, the county with the most instances of voter fraud, have charged 57 people with election-related crimes out of the roughly 4.46 million votes cast (0.0013%). See Wisconsin Watch, ‘Election Integrity’ Proposals, supra note 489.

504. See supra note 503 and accompanying text. Some note that even if there was voter fraud, the law would not effectively prevent those incidents. See Larson Report Newsletter, supra note 489; Wisconsin Watch, ‘Election Integrity’ Proposals, supra note 489.

505. See Liptak, Wisconsin Voter ID Law, supra note 489.

506. See supra note 503 and accompanying text.
empowers the wealthy and disempowers the poor. Since 2016, Wisconsin voting laws have come under intense scrutiny.

The Wisconsin Supreme Court is in the middle of this scrutiny. The supreme court affects voting through its role in redistricting and in other profound ways. Both ex ante and ex post, the court frequently gets involved in voting access cases before big elections. The court will likely play a similar role in adjudicating disputes related to voting access again in 2024. As such, it is clear that the shift in the Wisconsin Supreme Court could have major implications for election-related legal fights throughout the 2024 presidential election. The new court will be interpreting the plethora

507. See supra note 474; Redzich, supra note 492, at 203, 205, 214 (reporting that in Wisconsin, a minority of voters select a majority of the legislature because the wealthiest five counties have outvoted the five poorest counties by an average of 8.01%). In particular, voters of color and elderly voters were among those most affected by new voter ID laws in 2016. See Yu, supra note 484. The Wisconsin voter ID laws could have deterred minorities enough to influence the 2016 election. See Danaher, supra note 485, at 1205. Members of the GOP were aware of the effects of the restrictions, as influential figures such as the former Attorney General of Wisconsin acknowledged the role that the voter ID laws played in Trump’s victory in Wisconsin in the 2016 election. See Larson Report Newsletter, supra note 489.

508. See Yu, supra note 484. Wisconsin implemented stricter ballot box requirements, especially for absentee voting. See id. Most notably, Trump tried overturning Biden’s victory in the state in 2020. See Aaron Navarro, Wisconsin Supreme Court Race Could Have Big Implications for Abortion, Election Laws, CBS NEWS (Feb. 21, 2023, 11:07 PM), https://www.cbsnews.com/news/wisconsin-supreme-court-race-abortion-election-laws/ [https://perma.cc/Q4BT-NB7A]. Despite the accusations, only 16 people were charged with voting illegally, a number on par with previous elections. See Yu, supra note 484.


510. See Yu, supra note 484 (highlighting the state supreme court’s 4–3 decision to pick a Congressional map drawn by Governor Evers and a state legislative map drawn by Republicans).

511. For example, the Wisconsin Supreme Court has shaped the state’s election laws by prohibiting ballot drop boxes and selecting maps that favor Republicans in the legislature. See Erich Bradner & Jeff Zeleny, Record-Breaking Wisconsin Supreme Court Race Could Decide Abortion Rights and 2024 Rules in Key Battleground, CNN POLS. (Mar. 22, 2023, 5:44 PM), https://www.cnn.com/2023/03/22/politics/wisconsin-supreme-court-election/index.html [https://perma.cc/3JSZ-KRPQ].

512. For example, the Wisconsin Supreme Court has also rejected Trump’s efforts to throw out ballots in Democrat-leaning counties. See id.

513. See Navarro, supra note 508. The court will not hesitate to get involved in how people fill out their ballots, submit their ballots, and how election administration should be carried out. See id.

514. See id.; see also Bradner & Zeleny, supra note 511. It is also possible that the court will hear challenges to the results in 2024 again. See Navarro, supra note 508.

515. See supra note 514 and accompanying text.
of recent cases involving election law and voter ID, and stare decisis will become central to those interpretations.516

In Ohio, voters are required to have an ID to vote in elections.517 This law and other related restrictions are new, and they have been criticized for being among the strictest in the nation.518 However, Ohio has not always had strict laws.519 In fact, the U.S. Supreme Court previously used the state’s laws as a model for evaluating equal protection in voting laws.520 Yet, over time, the narrative began to shift.521 Following the 2000 election, many states adopted stricter election processes.522 This notwithstanding, Ohio courts are less focused on restricting access, and more focused on consistency across

516. See supra note 514 and accompanying text.
519. See, e.g., Daniel P. Tokaji, Leave It to the Lower Courts: On Judicial Intervention in Election Administration, 68 OHIO ST. L. J. 1065, 1071 (2007) (noting that Ohio was once criticized for failing to implement specific standards for counting provisional ballots).
520. See Mann, supra note 477, at 249 (citing the Supreme Court case of Anderson v. Celebrezze, 460 U.S. 780, 789 (1983), which held that an Ohio voting law about qualifications for independent candidates to make the ballot violated a plaintiff’s Fourteenth Amendment right to equal protection). Mann describes that the Supreme Court established an equal protection framework that required a balancing inquiry. See Mann, supra note 477, at 249. The Court held that in evaluating election cases, courts should pinpoint the true justification of a law by looking at the evidence presented. See Mann, supra note 477, at 250–51. Then, courts should consider the magnitude of the injury claimed. See id. Finally, courts should balance these two inquiries to determine whether the election law should be upheld. See Mann, supra note 477, at 250–51.
521. See generally Tokaji, supra note 519.
522. See Tokaji, supra note 519, at 1072. In Ohio, voting laws were critiqued due to a lack of clear standards. Tokaji, supra note 519, at 1071 (highlighting Bush v. Gore as an event that led federal courts to scrutinize Ohio’s voting laws because they failed “to implement ‘specific standards’ for determining how provisional ballots should be counted.”).
poll sites.523 By way of example, a 2006 Ohio voter ID law that provided free state issued IDs to registered voters who did not possess a driver’s license or a state-issued ID card was criticized as being “exceptionally convoluted” and challenged in federal court.524 Although in place for a short period of time, the law has been modified.525

What seemed like an extension of free access to the polls was mere deception, as Ohio — and its related federal and state courts — began enacting and enforcing stricter voting requirements.526 In 2011, Ohio was one of many states to consider enhanced voter ID proposals.527 After 2011, the Sixth Circuit and related federal courts heard cases on new Ohio voter ID laws.528 Whereas decisions in federal courts in North Carolina and Wisconsin emerged as examples of courts opposing strict voter ID laws, the decisions pertaining to similar laws in Ohio serve an opposite purpose.529 Although courts upheld many restrictions, there were some small victories for the expansion of voting rights.530

523. See Tokaji, supra note 519, at 1071 (citing cases such as Schering v. Blackwell (dismissed), and League of Women Voters of Ohio v. Blackwell, 340 F. Supp. 2d 823 (N.D. Ohio 2004) and criticizing the lack of specific standards in Ohio’s election administration). As a result, voting access was not the primary issue being addressed in courts. See Tokaji, supra note 519, at 1072 (explaining that challenges to election laws in Ohio were related to voting technologies, voter registration, provisional voting, voter identification, voter eligibility, and rules about voting lines).

524. See Tracey McCants Lewis, Legal Storytelling: The Murder of Voter ID, 30 BYU J. PUB. L. 41, 43 n.4 (2015). Free IDs are not yet available for the upcoming elections in 2023 under the new state law. See Dawes, What to Know About Ohio’s Voter ID Law, supra note 518; Dawes, Ohio’s New Voter ID Law, supra note 518; Tokaji, supra note 519, at 1079, 1083–86; see also OHIO REV. CODE ANN. § 3505.18 (West 2023).


526. Although Ohio looked to be trending towards expanding voting rights at this time, in the subsequent handful of years, the state has passed increasingly strict laws. See, e.g., id.; see also Carter, supra note 474, at 305 n.187.

527. See Carter, supra note 474, at 305 n.187.

528. The Sixth Circuit upheld Ohio’s voter ID law against multiple challenges. See Mann, supra note 477, at 244. These cases include Ne. Ohio Coal. for the Homeless v. Husted, 837 F.3d 612, 637–38 (6th Cir. 2016) and Ohio Democratic Party v. Husted, 834 F.3d 620, 640 (6th Cir. 2016). See Mann, supra note 477, at 244 n.12.

529. See Mann, supra note 477, at 251. The key provisions of Ohio voter ID laws challenged in federal court were absentee ballot laws and the amount of time voters need to be provided with to cure lack of ID. See Mann, supra note 477, at 259–60. In advocating for strict election laws, the Sixth Circuit relied on the Supreme Court’s holdings in Crawford as precedent. See Mann, supra note 477, at 259–60.

530. By way of example, the Sixth Circuit also rejected Ohio’s absentee and provisional ballot reforms that required “technical precision” because there was a great impact on a small set of voters that outweighed the state’s interests. See Mann, supra note 477, at 260, 263.
At or around this time period, the Supreme Court decided *Shelby County v. Holder.*\(^{531}\) This decision did not have as much of an effect on voting rights in Ohio as in other states like North Carolina because the coverage formula that was abolished did not cover Ohio.\(^{532}\) As such, even without *Shelby County*, efforts to diminish voting opportunities in Ohio (and in Wisconsin) would not have been protected by Section 5 of the VRA.\(^{533}\) Despite *Shelby County* being a relative non-factor, federal and state courts have increasingly issued rulings that intensify Ohio voting restrictions.\(^{534}\)

In 2018, “[i]n a 5–4 ruling, the U.S. Supreme Court gave Ohio a victory . . . in a fight over the state’s method for removing people from the voter rolls, a practice that civil rights groups said discourages minority turnout.”\(^{535}\) The issue before the Supreme Court was whether a voter’s decision to sit out a certain number of elections could trigger their removal from voter registration rolls.\(^{536}\) The holding made it easier for states to drop people from voter registration rolls.\(^{537}\)

Since 2020, Ohio has enacted stricter voter ID laws.\(^{538}\) “[A]mong the new voting restrictions [in the U.S.], voter ID is the most studied and litigated topic[.]”\(^{539}\) Although there have been some equal protection violations,\(^{540}\)

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533. See id. at 1401.


535. Id.

536. See id.

537. See id. Opponents of the Ohio system argued that it violated the National Voter Registration Act. See id. Dissenters and critics argued that the holding would pave the way for voter suppression across the country. See id.


539. Issacharoff, * supra* note 532, at 1384.

540. See, e.g., *State ex rel. Maras v. LaRose*, 170 Ohio St.3d 374 (2022), https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2022/2022-ohio-3852.pdf [https://perma.cc/P7W6-624C]. In this case, a lawsuit alleged that R.C. 3505.21 (a law governing the appointment of election observers), “violate[ed] the Equal Protection Clauses of the United States and Ohio Constitutions because it prevent[ed] certified independent candidates from appointing election observers to the same extent as political parties.” *Id.* at 2. The Plaintiffs sought writs of mandamus “compelling respondent, Ohio Secretary of State Frank LaRose, to allow her to appoint election observers to inspect the counting of votes . . . [and] compelling the secretary of state to provide election observers with copies of all software, source codes, and hardware that is installed on any automatic vote-tabulating machine.” *Id.* In denying the requests, the court reasoned that R.C. 3505.21 is constitutional under the Equal Protection Clauses of the U.S. and Ohio constitutions because it is rationally related to legitimate state interests. See *id.* at 10. The court also reasoned that the plaintiff did not provide a statutory basis for her to be granted the relief that she sought. See *id.* at 11.
Ohio’s voter ID laws were not rejected on these grounds.\textsuperscript{541} Then, on January 6, 2023, House Bill 458 was signed.\textsuperscript{542} The Republican lawmakers who sponsored the bill cite voting fraud concerns.\textsuperscript{543} Democrats criticized the bill and insinuated that it was an assault on democracy because it was more difficult to vote.\textsuperscript{544} Other critics argue the law will confuse inexperienced voters unaware of the law’s timeline for implementation.\textsuperscript{545} HB 458 dramatically changed Ohio’s voter ID landscape.\textsuperscript{546} Reacting to the bill, the Director of the Hamilton County Board of Elections explained that

\begin{footnotesize}
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\item See Pope, supra note 518.
\item See Dawes, \textit{What to Know About Ohio’s Voter ID Law}, supra note 518; Dawes, \textit{Ohio’s New Voter ID Law}, supra note 518; Pope, supra note 518. Despite this reasoning, “[t]otal possible nationwide voter fraud in the 2020 election was roughly 0.0005 percent.” See Dawes, \textit{What to Know About Ohio’s Voter ID Law}, supra note 518; Dawes, \textit{Ohio’s New Voter ID Law}, supra note 518. Further, officials from the ACLU assert that even though the new requirements were implemented to combat voter fraud, there are no instances of voter impersonation. See Mazur, supra note 542. In the 2020 general election, there were “more than 70 reports of people voting twice” out of the “[n]early 6 million Ohioans [who] voted during that election.” Dawes, \textit{What to Know About Ohio’s Voter ID Law}, supra note 518; Dawes, \textit{Ohio’s New Voter ID Law}, supra note 518.\textsuperscript{544}
\item See Dawes, \textit{What to Know About Ohio’s Voter ID Law}, supra note 518; Dawes, \textit{Ohio’s New Voter ID Law}, supra note 518; Pope, supra note 518.\textsuperscript{545}
\item See Dawes, \textit{What to Know About Ohio’s Voter ID Law}, supra note 518; Dawes, \textit{Ohio’s New Voter ID Law}, supra note 518.\textsuperscript{546}
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“voters now have to have an acceptable photo ID when casting their ballot in person.”

Although Ohioans are supportive of strict photo ID requirements for voting, the change may make it harder for some to vote. The new law will disproportionately impact out-of-state college students and Ohioans with military ties. Further, certain minority groups — such as trans individuals — fear the new laws will make it difficult for them to vote in person.

When the new ID law was passed, plaintiffs filed a court challenge alleging infringements on their right to vote. With the new law being challenged in federal courts, the Ohio Supreme Court’s role will still be
Whether justices will uphold certain voting restrictions based on due process or equal protection remains to be seen. However, whether voters want these new laws or not, the state high courts will impact their validity. In turn, the voting rights of thousands of Ohioans are at stake. After these decisions, stare decisis will be relevant as the Ohio Supreme Court hears challenges to voter ID laws in the future.

III. HOW TO UNDERSTAND STARE DECISIS IN AN ENVIRONMENT OF POLITICAL POLARIZATION AND INCREASED SALIENCE IN JUDICIAL ELECTIONS

State supreme courts will continue to be asked by litigants to abide by stare decisis and uphold precedents so judges do not legislate from the bench. When judges on state supreme courts — such as North Carolina, Wisconsin, and Ohio — are elected, the politically-charged platforms that they campaign on will create systematic conflicts with precedent on the books. In this context, it is important to assess whether elected judges should be given more (or less) authority to change existing precedent.

Part III first assesses the benefits and drawbacks of holding elected judges to the same principles of stare decisis as their appointed counterparts. Part III then proposes solutions to provide elected judges with leeway to change precedent, while also systematically restraining their ability to make decisions that are backed not by law, but by their own political incentives.

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554. See id.

555. See id.


557. See Bruce G. Peabody, Legislating from the Bench: A Definition and a Defense, 11 LEWIS & CLARK L. REV. 185, 204 n.91 (2007) (describing the nexus between stare decisis and legislating from the bench).


559. See Tamir, supra note 21, at 513 (“[J]udges who refuse to embrace stare decisis and the constraining force of precedents signal to others on the bench their uncooperativeness, which, in turn, may undermine their ability to make sure some judgments that they themselves care about will stick.”).

560. See infra Sections III.A.1–2.

561. See infra Section III.A.1.

562. See BRENNAN CTR., Money in Judicial Elections, supra note 82; see also infra Sections III.A.1–2.
These solutions seek to ground elected judges in precedent and also allow them to alter decisions no longer serving the public’s interest.\textsuperscript{563}

A. The Benefits and Drawbacks of Stare Decisis in the States

1. Policy of Encouraging Stare Decisis

   i. Benefits of Stare Decisis

   In state supreme courts, there are many benefits to requiring elected judges to abide by stare decisis.\textsuperscript{564} The first benefit is related to campaign finance, as elected judges financing their campaigns are incentivized to make decisions that maximize their campaign fundraising.\textsuperscript{565} Thus, there should be checks on elected judges so they decide cases based on the law rather than on how a given decision impacts their interest groups and donors.\textsuperscript{566}

   Stare decisis also allows reliance interests to develop.\textsuperscript{567} State courts have substantial leeway to change the law over time regardless of any reliance on precedent by potential litigants.\textsuperscript{568} In court systems that are constantly evolving to meet the needs of society, stare decisis serves an opposite, but equally important role.\textsuperscript{569} People make decisions by relying on precedent whether they realize it or not.\textsuperscript{570} If judges can ignore precedent and change the law, people will make decisions without considering the consequences because they cannot be sure how their conduct will be interpreted in a

\textsuperscript{563} See infra Section III.A.2.
\textsuperscript{565} See supra Section I.A.3 (discussing the relationship between judges and campaign finance).
\textsuperscript{567} See, e.g., Cook v. State, 870 S.E.2d 758, 772–73 (Ga. 2022) (holding that the entrenchment of precedent in the legal system is a type of reliance interest in stare decisis analysis).
\textsuperscript{568} See id.; see also Kalt, supra note 26, at 279.
\textsuperscript{569} Macey, supra note 564, at 96 (“The problem is that courts face severe constraints in terms of resources, time and expertise. In a world of increasing technological complexity, where the stock of information is increasing exponentially, the need for specialization is acute. All of these factors are sources of judicial error that stare decisis can mitigate.”).
\textsuperscript{570} See Benjamin P. Friedman, Fishkin and Precedent: Liberal Political Theory and the Normative Uses of History, 42 EMORY L. J. 647, 669 (1993) (“[P]recedent has theoretical implications that extend into everyday life.”).
courtroom. Thus, stare decisis helps promote predictability in our judicial system and eliminating it opens the door for potential abuse.

A third benefit of stare decisis is that it encourages judicial restraint. Throughout U.S. history, courts have criticized judges who “legislate from the bench.” While every state is different, the judicial role is distinct from that of the legislative and executive branches. Legislatures and executives create and implement laws. On the contrary, judges interpret laws and ensure those laws are consistent with federal and state constitutions. Thus, stare decisis discourages judges from exercising too much power.

Finally, stare decisis promotes stability. In states that elect high court judges, the bench in one year can be completely different than the bench a few years later. While legislators and executives must work together to change laws, judges are generally subject to weaker checks and balances. Under these circumstances, stare decisis is increasingly important. State courts, like state legislatures and executive branches, should not have the freedom to change laws after every election cycle without being checked by other branches of government. If courts can change the law to no end,

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571. Cf. In re S.C.C., 864 S.E.2d 521, 527 (N.C. 2021) (“[It is] an established rule to abide by former precedents, stare decisis, where the same points come up again in litigation, as well to keep the scale of justice even and steady, and not liable to waver with every new judge’s opinion” (quoting McGill v. Town of Lumberton, 11 S.E. 2d 873, 876 (N.C. 1940))).

572. See William A. Waddell, Jr., Stare Decisis, 56 ARK. L. 16, 17 (2021) (“Nuanced concepts of stare decisis, such as factors for overruling previous precedents and the distinction between vertical and horizontal stare decisis, make their way into the lawyer’s predictability consciousness.”).


574. See, e.g., Com. v. Kriner, 915 A.2d 653, 659 (Pa. Super. 2007) (“[W]e are unable to rewrite a statute or legislate from the bench; we are only to adjudicate what the plain language of a statute means.”).


576. See id.


578. See generally Waddell, Jr., supra note 572.

579. See Conway v. Town of Wilton, 680 A.2d 242, 246 (Conn. 1996) (“This court has repeatedly acknowledged the significance of stare decisis to our system of jurisprudence because it gives stability and continuity to our case law.”).


581. See Kaufman, supra note 575.

582. See Conway, 680 A.2d at 246.
then by the time people adjust their conduct to conform with the law, the law may change once more. As such, they cannot build reliance interests or know whether their conduct is permissible. If judges can change the law this rapidly, there may be profound consequences. For this reason, stare decisis plays a key role in the stability of America’s legal system.

ii. Drawbacks of Stare Decisis

These benefits notwithstanding, there also are drawbacks to stare decisis for state-elected judiciaries. First, one can argue that elected judges should have more leeway to change the law because they were elected by the people, and therefore should represent their interests. When interest groups and citizens finance judges that win their elections, the preferences of the state’s citizens should be reflected in the judiciary. Therefore, if elected judges believe they should forego stare decisis, their inclinations could be viewed as an extension of the people’s will. Accordingly, forcing judges to adhere to stare decisis against their beliefs — or the beliefs of the people — may be arbitrary and undemocratic.

Another drawback is that stare decisis does not allow courts to change with the times. Some precedents are simply outdated. If elected judges

583. See Macey, supra note 564, at 96 (“[Ignoring] stare decisis . . . substitutes one source of legal certainty (precedent) for another form of legal certainty (coin tossing.”).
584. This system more closely resembles a civil law system, whereby precedents serve only a persuasive role. See Vincy Fon & Francesco Parisi, Judicial Precedents in Civil Law Systems: A Dynamic Analysis, 26 INT’L REV. L. & ECON. 519, 521–23 (2006).
585. See id. at 528 (“The absence of a dominant jurisprudential tradition further implies that courts have greater freedom to follow positive or negative jurisprudential trends.”).
586. See generally Macey, supra note 564.
587. See David E. Pozen, Judicial Elections as Popular Constitutionalism, 110 COLUM. L. REV. 2047, 2085–86 (2010) (describing the discretion that elected judges have relative to other judges in the context of sentencing determinations).
588. See Liptak, Elected Judges Act Like Politicians, supra note 106.
589. See Richard F. Hayse, Safeguarding Judicial Independence, 74-AUG. J. KAN. BAR ASS’N 4, 4 (2005) (“[Many] believe that judges should be elected to carry out the will of the people, just like the Legislature.”).
591. See Kendra Clark, Specters of California’s Homophobic Past: A Look at California’s Sex Offender Registration Requirements for Perpetrators of Statutory Rape, 52 U.C. DAVIS L. REV. 1747, 1759 (2019) (“[A]t times, stare decisis must be abandoned to accommodate growth and change in the political climate of the nation.” (emphasis omitted)).
592. See, e.g., Dick Proctor Imps., Inc. v. Sumitomo Corp. of Am., 486 F. Supp 815, 817 (E.D. Mo. 1980) (“This Court, sitting via diversity, need not blindly follow existing but outdated precedent in the forum state[,]”).
want to update the state’s jurisprudence to meet the needs of a constantly changing society, then the mandate of stare decisis may serve as an obstacle to that instinct. As such, requiring elected judges to adhere to stare decisis may only reinforce outdated laws and precedents.

Finally, a more macro reason why elected state court judges should be allowed to forego stare decisis is because of separation of powers. States are laboratories for experimentation. They are free to codify judicial rulings if they wish. While one can view legislative inaction as reinforcing judicial precedent, it is equally plausible to interpret legislative inaction as leaving the judicial doctrine unsettled. Therefore, judges should have the ability to overturn precedent unless state legislatures codified the prior decision because inaction by other government branches should not restrict the judiciary. Yet, stare decisis may restrict courts in this capacity.

Regardless of the extent of stare decisis, recent decisions overturning longstanding precedent at the U.S. Supreme Court level have opened the door for state courts to do so as well, if they believe the original decision was

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593. See Conway v. Town of Wilton, 680 A.2d 242, 246 (Conn. 1996) (“Stare decisis is ‘a formidable obstacle to any court seeking to change its own law.’” (citations omitted).


595. See In re Blaisdell, 261 A.3d 306, 311 (N.H. 2021) (“[One] factor [in evaluating stare decisis] concerns whether the law has developed in such a manner as to . . . render past decisions obsolete . . . .”)


599. See, e.g., State v. Friedlander, 923 N.W.2d 849, 854 (Wis. 2019) (indicating that when a legislature has not commented on a court’s interpretation, the court has more discretion to change their previous interpretation irrespective of how much time has elapsed).

wrong. As such, laws regulating judicial decision making are essential, especially when regulating elected judges with political incentives.

2. Policy of Encouraging Judges to be Malleable

   i. Benefits of Malleability

   The opposite of binding judges to stare decisis would be allowing judges to be malleable. While the former promotes stability and consistency, the latter is less predictable. However, as a matter of policy, there are both benefits and drawbacks to allowing judges to be malleable.

   One benefit of allowing judges to make decisions irrespective of existing jurisprudence is that elected judges can actively appeal to their constituents. Elected judges are publicly accountable. However, unlike legislators and executives, they are accountable not only to the people, but to the law as well. This presents a problem whereby precedent may direct judges to decide a dispute one way even though their constituency wants them to reach an opposite result. Allowing judges to forego stare decisis and be malleable would allow them to favor the public rather than an older court no longer in place.

   A second benefit to allowing malleability is related to agencies. States, like the federal government, have administrative bodies. Similar to the federal system, many of these administrative bodies have judge-adjacent

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602. See Anthony T. Kronman, The Problem of Judicial Discretion, 36 J. LEGAL EDUC. 481, 483 (1986) (“A judge who has given up on the law as hopelessly indeterminate can still find relief in a theory of politics that promises the objectivity and rigor which the law itself has proven unable to supply.”).

603. See, e.g., Diedrich, supra note 205, at 35.

604. See Diedrich, supra note 205, at 35 (“Adhering to precedent over time has both benefits and drawbacks. On the one hand, it fosters predictability in rules of conduct and reduces the need to relitigate the same issues.”).

605. See generally Macey, supra note 564.

606. See Joanna M. Shepherd, Money, Politics, and Impartial Justice, 58 DUKE L.J. 623, 626 (2009) (“[J]udges are accountable to their constituents because they may not be reelected if they make rulings with which voters disagree.”).

607. See id.

608. See id. at 632–33.

609. See Bernstein & Staszewski, supra note 120, at 345 n.34.

610. See generally Bernstein & Staszewski, supra note 120.

officials. Just as many administrative law judges (ALJs) in federal agencies are free to make decisions on a case-by-case basis without precedential effect, some state officials can do so as well. While these officials are often unelected, they make important decisions. Why should unelected bureaucrats be free to change their minds day-to-day, while elected state supreme court judges are not? It may be more equitable to empower elected state court judges with discretion instead of, or in addition to, these unelected ALJs. This empowerment may result in more efficiency, consistency, and accountability.

ii. Drawbacks of Malleability

The drawbacks to malleability are plentiful. Three general types of drawbacks are addressed below. First, malleability is complicated by judicial bias. If judges are able to make decisions without being bound by old opinions, there is high potential for abuse. More specifically, judges may choose to decide cases based on their personal opinions rather than the relevant law. Relatedly, problems may arise in the judiciary that are analogous to regulatory capture in agencies. Our system should not allow decisions that affect the many to be left to the unchecked opinions of the

612. See id.
613. See id. at 312 (explaining that some administrative adjudications are non-binding).
615. See Ruth, supra note 611, at 302 n.20 (identifying the lack of reliance available in administrative hearings as problematic).
616. See Thaya Brook Knight et al., Ending the Reign of the Administrative Law Judge, CATO INST. (Mar. 10, 2017, 1:13 PM), https://www.cato.org/blog/ending-reign-administrative-law-judge [https://perma.cc/L9L8-9VDN] (“Defendants should have the right to have their cases heard by federal judges, with all the due process protections that implies.”).
617. See C. Stuart Greer, Expanding the Judicial Power of the Administrative Law Judge to Establish Efficiency and Fairness in Administrative Adjudication, 27 UNIV. RICH. L. REV. 103, 123 n.100 (1992) (“[C]ritics reason that without expertise, ALJs [are] inefficient in resolving technical issues and will be subject to manipulation by participants who must educate the ALJs as to the facts and substantive law.”).
618. See generally Macey, supra note 564.
621. See id. (“[S]tare decisis restrains an individualistic, idiosyncratic, or activist judge from injecting his or her own personal mores and beliefs into the law.”).
Similarly, malleability incentivizes political donors and interest groups to pour more money into judicial campaigns. If judges are free to make decisions on their own accord, then money can impact judicial decisionmaking. Taken together, judges who can adjudicate by injecting their own opinions or the opinions of their donors are dangerous.

The second problem with malleability is related to separation of powers. Namely, if judges can make decisions with fewer checks and balances, the power of the judiciary will expand. In turn, the relative power of state executives and legislatures will be minimized. Even for those that believe in a strong judiciary, maximizing the power of the judiciary at the expense of the other branches of government could have cataclysmic effects.

Finally, promoting malleability may implicate problems with citizens. More specifically, if judges can change precedent with few constraints, then there is a lack of reliance, notice, and stability. These effects could be positive. However, by infusing judges with increased discretion, states run the risk of undermining the legal system at-large. This may lead to mistrust in the judiciary, and inequitable administration of justice. Typically, when equitable concerns are raised, marginalized groups —

623. See Dwyer, supra note 601.
624. See Brennan Ctr., Money in Judicial Elections, supra note 82.
625. See Brennan Ctr., Money in Judicial Elections, supra note 82.
626. See Brennan Ctr., Money in Judicial Elections, supra note 82.; see also Miceli, supra note 619, at 166 (acknowledging that “judges can affect legal change in ways that may be detrimental to efficiency”).
628. See Tai, supra note 598.
629. See Tai, supra note 598.
631. See supra notes 13–19 and accompanying text.
632. By way of example, it is good to change laws that unfairly discriminate. See, e.g., Brown v. Board of Ed., 347 U.S. 483, 493 (1954) (overturning Plessy v. Ferguson, 163 U.S. 537 (1896)).
633. See Matthews, supra note 630.
including people of color, women, and the LGBTQ+ community — are most impacted.\textsuperscript{635}

After assessing the benefits and drawbacks of stare decisis, this Note concludes that states should create stare decisis reforms that force judges to abide by precedent most of the time, while allowing them the flexibility to update decisions that are no longer workable and legal doctrines that have not changed with the times.\textsuperscript{636}

\section*{B. Resolving Problems of Stare Decisis for Elected Judges}

There are two main inquiries that need to be addressed when developing a system for stare decisis in elected state judiciaries: 1) how to strike a balance between binding judges to precedent and allowing them the flexibility to move the law forward,\textsuperscript{637} and 2) whether the facts of a given case should trigger courts to apply stare decisis analyses and frameworks\textsuperscript{638} in general.\textsuperscript{639}

\subsection*{1. Striking a Balance: How to Constrain Elected Judges and Allow Judicial Discretion}

After taking stock of the development of stare decisis in North Carolina, Wisconsin, and Ohio, and assessing the recent supreme court elections in those states and the implications of those elections, one clear problem pertains to limiting the discretion of elected judges by more concretely regulating stare decisis.\textsuperscript{640} Within federal and state constitutional limits, creative solutions can help resolve these problems.\textsuperscript{641} These solutions should approach the issue by balancing predictability and stability with ossification and malleability.\textsuperscript{642} The goal is to establish objective triggers that confine judges. Policies can confine judges by enabling citizens to

\begin{itemize}
  \item \textsuperscript{636} See generally Macey, supra note 564.
  \item \textsuperscript{637} See infra Section III.B.1.
  \item \textsuperscript{638} The term “stare decisis framework” is used to refer to a judge (or court) analysis of whether to forego stare decisis once they have \textit{already decided} that a precedent should be guiding.
  \item \textsuperscript{639} See infra Section III.B.2. This includes the various proposals relating to the first inquiry, discussed infra Section III.B.1. See Frederick Schauer, \textit{Stare Decisis — Rhetoric and Reality in the Supreme Court}, 2018 \textit{SUP. CT. REV.} 121, 131 (2018) ("Sometimes this avoidance will be justified by efforts to distinguish the obstructive precedent[,]”).
  \item \textsuperscript{640} See supra note 16 and accompanying text.
  \item \textsuperscript{641} See generally Constitution Annotated, supra note 156.
  \item \textsuperscript{642} See generally Macey, supra note 564.
\end{itemize}
challenge a judicial decision, by raising the vote count needed for judges to overturn precedent, or by otherwise acting creatively to make it more difficult for judges to overturn precedent for politically charged reasons.643

The first solution this Note proposes is a “fiduciary theory of stare decisis.” This theory takes a page from the book of corporate law.644 This solution argues that the law should statutorily prescribe elected judges on state high courts with fiduciary duties of loyalty, care, and good faith to the people when those judges are voting to overturn precedent.645 This idea analogizes shareholders of a corporation and the board of directors of that corporation to the people as trustees voting to elect judges, and elected judges, as boards of directors owing fiduciary duties to the citizens.646 This would mean decisions to overturn precedent would leave judges potentially liable to citizens if their decisions are not made in the best interest of the people.647 Under this model, citizens can challenge a judge’s decision to overturn precedent if they believe the judge is not doing so in good faith, is doing so because of a conflict of interest, or if they are doing so without paying attention to the relevant facts and precedent. These challenges could apply to either individual judges or to an entire court. If a judge was found guilty of breaching their fiduciary duty, potential consequences would include: the precedent being maintained, the judge violating their duty and thus being forced to recuse themselves from the case, or in extreme cases, sanctioning, fining, or even impeaching the offending judge. However, if such a model were adopted, the procedures that would enable citizens to bring challenges would need to be regulated as well.648

One way this system can be regulated would be by establishing threshold requirements to trigger a cause of action. By way of example, a predefined number of people would need to sign on for the people (the shareholders) to be able to challenge a court’s decision. This threshold could be defined as at least X% of the population or at least X% of the population that voted in

643. See infra Section III.B.(i).

644. See generally Edwin W. Hecker, Jr., Fiduciary Duties in Business Entities Revisited, 61 Univ. Kan. L. Rev. 923 (2013); see also Leib et al., supra note 129.

645. See supra note 644 and accompanying text.


647. See supra note 644 and accompanying text.

648. If citizens could challenge judges under this theory with no restraints, then there would be far too many challenges, many of which are baseless. Therefore, any potential policy needs to make sure that only legitimate challenges are brought forth.
the previous judicial election.\textsuperscript{649} The goal of this system of implementation is to ensure small portions of the population who do not represent the community cannot challenge decisions every time a court overrides a precedent.

A second way this system could be regulated would be to implement varying levels of review (i.e., rational basis, business judgment rule, etc.) that change according to several factors.\textsuperscript{650} Such factors include: 1) how long the precedent has been in effect, 2) the type of stare decisis that is being invoked (i.e., constitutional, common law, statutory, etc.), and 3) the amount of people who are challenging the overturning of the case. The details of this process would need to be established by a state’s legislature to ensure that the thresholds are appropriate and democratic.\textsuperscript{651}

Taken together, these systems can help develop a fiduciary model for challenging judges that forego stare decisis. In fact, some states have implemented similar fiduciary-type relationships to bind their governments to pursue certain legitimate state interests.\textsuperscript{652} However, there are still other complications. One key complication is deciding who would adjudicate these challenges, as the court being challenged is not a neutral arbiter.\textsuperscript{653} One solution is to create a nonpartisan (or bipartisan) state agency that processes these requests, and another potential solution is to delegate this power to a panel of neutral arbitrators.

Overall, this fiduciary theory of stare decisis has the potential to check the discretion of judges who seek to change precedent. In doing so, a state legislature would pass legislation that gives the people a check on their elected judges. At the same time, the procedures proposed to enforce this fiduciary theory of stare decisis — depending on how they are ultimately

\textsuperscript{649} Here, “X” represents a percentage that would differ based on the jurisdiction and the specific acts of the court. Calculating an appropriate percentage for a law of this nature is beyond the scope of this Note.

\textsuperscript{650} These factors include those discussed infra Section I.B.2. See Lewis H. Lazarus, \textit{Standards of Review in Conflict Transactions on Motions to Dismiss: Lessons Learned in the Last Decade}, 36 DELO. J. CORP. L. 967, 972–73 (2011) (“The business judgment rule ‘is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.’”).

\textsuperscript{651} Every state has different methods for judicial selection and court compositions. See BALLOTEDIA, \textit{State Supreme Courts}, supra note 55. Further, every state has a different sized population and a different demographic. See generally QuickFacts, U.S. CENSUS BUR., https://www.census.gov/quickfacts/US [https://perma.cc/3NCQ-B4GY] (last visited Apr. 26, 2023). As such, it is intuitive that the weight of these variables varies state-to-state.


\textsuperscript{653} \textit{See supra} notes 68–70, 75–76 and accompanying text. Here, judges would be deciding cases about their own decisions. This would therefore create a conflict of interest warranting recusal. \textit{See generally} Pines, supra note 70.
implemented — serve the added purpose of making it difficult for citizens to restrict judicial discretion to change laws if there are not enough people in favor of maintaining the status quo.

The second solution this Note proposes can be referred to as *stare decisis by supermajority*. This proposal would require shifting the number of judges that are needed to overturn a decision if a decision has been in place for a pre-set number of years. By way of example, instead of majority-rule, as is the case on most every appellate court, a state supreme court would require a 6–3, 5–2, or 4–1 majority (depending on the composition of the court) to overturn a precedent in place for X+ years. Such a solution would ensure precedents that get overridden are at least perceived to be wrongfully decided by an overwhelming majority of the court. If this were the law, then precedents that are overturned are more likely to be both accepted by the public and in the best interest of the people.

One potential drawback to the stare decisis by supermajority proposal is that different types of cases should require different degrees of stare decisis. This could be combatted by either adjusting the number of years that a precedent must be in place to trigger the supermajority requirement based on the type of the case, or by only applying this rule to only certain types of cases. If implemented, this supermajority proposal effectively raises the bar to overturn precedent. The result here is that, when a court is starkly divided over whether to forego stare decisis, the bar is raised. Yet, when cases are so wrong so as to warrant being overturned, it is more likely that the court will decide overwhelmingly to forego stare decisis.

For purposes of this Note, we can call the third solution the *stay until referendum*. This proposal shifts the judicial discretion to forego stare decisis to the people by democratizing the process. More practically, a state

654. Here, “X” represents the number of years that would trigger a “stare decisis by supermajority” requirement. Calculating an appropriate number of years for a law of this nature is beyond the scope of this Note.

655. By way of example, cases that decide to forego stare decisis by way of a supermajority vote are more widely accepted as proper in the public eye. See, e.g., Brown v. Board of Ed., 347 U.S. 483, 493 (1954) (overturning Plessy v. Ferguson, 163 U.S. 537 (1896)).

656. See supra Section I.B.2.


658. See, e.g., id.

659. See supra note 655 and accompanying text.

660. Here “stay” is “the act of arresting a judicial proceeding, by order of the court.” *Stay*, BLACK’S LAW DICTIONARY (2d ed. 2023). This entails *not* implementing a court’s decision until after some subsequent event has occurred. See *Stay Order*, BLACK’S LAW DICTIONARY (2d ed. 2023). In this case, the subsequent event would be a referendum.
legislature could pass a law requiring court decisions overturning precedent to be stayed until the following state-wide election if the precedent in question meets certain criteria.\textsuperscript{661} In an election, if X\% of the state’s population votes to uphold the previous precedent, the precedent should remain.\textsuperscript{662} However, to avoid sending voters to the polls every time a state supreme court changes its mind, these elections should only be triggered in certain instances.\textsuperscript{663} The goal of such a policy would be to allow people to have a say in decisions where judges invoke stare decisis if those cases affect a significant portion of the public or if overturning the precedent appears politically-charged.\textsuperscript{664}

To regulate this stay until referendum proposal, a potential law should identify variables that can be used to establish a threshold.\textsuperscript{665} This threshold would then need to be met in the next election for the people to overrule a court decision to forego stare decisis.\textsuperscript{666} By way of example, suppose a state’s supreme court votes 4–3 to overturn a statutory precedent that has been in place for 75 years. Because such a precedent should be particularly strong and difficult to overturn, a presumption that the precedent be maintained makes logical sense. Therefore, if a ballot initiative were to be triggered, the threshold for voters to override the court’s decision to forego stare decisis should be lower. For example, perhaps 55\% of the popular vote would be sufficient to maintain the precedent.

On the other hand, suppose a state’s supreme court votes 5–2 to overturn a constitutional precedent that has been in place for three years. In these circumstances, the court appears more unified and the precedent appears less established. As a result, it may be appropriate that 66\% of the popular vote be needed to override the court’s decision. The exact weight of the variables and numbers is beyond the scope of this Note. However, in practice the idea remains a workable solution to the problem of judicial abuse of precedent.

\textsuperscript{661} Criteria could include all those factors discussed supra Section I.B.2.
\textsuperscript{662} Here, “X” represents a percentage that would differ based on the jurisdiction and the specific factors referenced supra Section I.B.2. Calculating an appropriate percentage for the stay until referendum proposal is beyond the scope of this Note.
\textsuperscript{663} See supra note 661 and accompanying text.
\textsuperscript{664} This can be measured either if the decision causes certain monetary changes, if a petition gets enough signatures, or if other evidence is presented establishing that elected judges made their decision for political reasons rather than legal reasons.
\textsuperscript{665} Variables can include: the amount of votes in the majority/dissent, the amount of time a precedent has been in place, and the type of case (statutory, common law, constitutional, etc.) that is being invoked.
\textsuperscript{666} See supra note 665 and accompanying text.
2. Regulating the Fact-Specific Inquiry Loophole

The three proposals above — the fiduciary theory of stare decisis, stare decisis by supermajority, and stay until referendum — shift burdens so elected state court judges cannot overturn precedent haphazardly. However, there is another fundamental problem that remains. Namely, judges often decide that stare decisis does not apply by reasoning that the facts of the present case differ from those in the original, precedential case. Even if the measures proposed above are implemented in various capacities, this still remains a fundamental loophole. This problem is difficult to address; however, this Note proposes four creative outlets to do so.

First, these so-called fact-specific inquiry concerns could be addressed by judges and lawmakers creating a new rule of appellate procedure. Such a rule would require judges to vote on and consider whether the facts of one case are substantially similar to those of another if there is a reasonable chance that stare decisis will be an issue on appeal. Thus, before even deciding a case on the merits, the highest appellate court in each state would — as part of a separate procedural posture — be required to consider if there is already guiding precedent.

Like some of the earlier proposals, this procedure should have certain trigger points. For example, one of the following three triggers could require an appellate court to consider whether a stare decisis analysis should be adopted. First, the procedure could be triggered if a lower court holds that the case was already decided, or if a lower court publishes a concurrence or dissent of the same vein. Second, if a party to the lawsuit, in good faith, argues that the case is bound by stare decisis in an appellate brief, the separate procedure can be triggered. Lastly, similar to the requirement of four U.S. Supreme Court Justices needed to grant certiorari of a case, the procedure here could be triggered if a certain percentage or number of judges on a high court vote to trigger this provision. Either individually or together, these trigger points could better regulate judges who seek to ignore stare decisis by differentiating the facts of a given case.

A second proposal considers weighing the opinions of certain judges more than others when determining if a case should be placed into a stare decisis

667. See supra Section III.B.1.
668. See, e.g., Schauer, supra note 639, at 131.
669. These factors include those discussed supra Section I.B.2. Every state has different methods for judicial selection and court compositions. See Ballotpedia, State Supreme Courts, supra note 55. Further, every state has a different-sized population and a different demographic. See generally U.S. Census Bur., supra note 651. As such, it is intuitive that the weight of these variables varies from state-to-state.
framework. Specifically, rules could require courts to weigh opinions of judges who were on the court for the initial opinion more heavily. If a member of a state supreme court is on the bench when a decision is handed down, that judge inherently has a better understanding of the facts of that case than a judge who was subsequently elected to the court. Therefore, if a second case comes about some years later, a newly elected judge may claim that the facts of the case are substantially different. However, if the judge who was on the bench to the original decision does not believe so, they are at least facially more credible. As such, their decision about whether specific facts in a case are substantially similar to the original decision should be given more weight. In addition, judges who are on elected courts for a long time are often well-respected. This is evident by the fact that they are re-elected by the people. As such, their longevity on the court is at least somewhat related to the public’s perception of their character.

Creating a system that effectively implements these factors without violating fundamental rights — such as one person, one vote — is difficult. However, doing so may allow courts and litigants to better forecast whether a legal issue has already been decided. Doing so would also either allow a court to decide whether to forego stare decisis (if the facts are substantially the same), or it would allow the court to decide the case de novo, unbound by prior case law (if the facts are not substantially the


672. See Yuka Kaneko, A Procedural Approach to Judicial Reform in Asia: Implications from Japanese Involvement in Vietnam, 23 COLUM. J. ASIAN L. 313, 347 (2010) (“The author learned from judges that the high rate of successful conciliations is not only respected by society in general but is also the basis of affirmative grading in the personnel evaluation of judges, which is often directly relevant to the promotion of judges and their re-election following expiration of their five-year tenure.”). This law review article focused on international judicial system, but the premise that well-respected judges are more likely to be re-elected still holds true. See Mark Croteau, Set Politics Aside, Vote on Experience, SEA COAST ONLINE (Nov. 2, 2016, 2:20 PM), https://www.seacoastonline.com/story/news/local/york-star/2016/11/02/set-politics-aside-vote-on/24633875007/ [https://perma.cc/Z673-M733].

673. See supra notes 671–72 and accompanying text.


675. See Waddell, supra note 572, at 17 (discussing the effect of stare decisis on predictability).

676. Including the potential constraints discussed supra Section III.B.1.
same).\footnote{677}{See Standards of Review, UNIV. HAW. L. LIBR., https://law-hawaii.libguides.com/standardsofreview [https://perma.cc/J5S4-GHHV] (last visited Apr. 26, 2023) ("In a de novo review the appellant is asking the court to look at issues of law anew and affords the lower court no level of deference.").}

This rule would likely be best utilized if the first suggestion of a rule of appellate procedure was also adopted.

To illustrate how this framework would work, suppose a state’s supreme court has five members. Three were elected to the court three years ago and the other two were elected ten years ago. Today, the court hears a case that one party claims is bound by a precedent decided seven years ago and the other claims has substantially different facts. Suppose also that this court has implemented a rule that requires judges to undergo a separate procedural posture to determine if the facts require a stare decisis analysis. This rule also mandates that the opinions of the two judges on the bench for the initial case be treated as two votes apiece on the specific issue of whether the facts of the case are the same. As such, in this specific context, the two tenured judges decide that the case was exactly the same, and the three novel judges believe that it is substantially different. Despite there being a simple majority that believes the case need not undergo a stare decisis analysis, the court must proceed to address whether stare decisis applies\footnote{678}{See id.} because the vote count is 4–3.\footnote{679}{This counts the two tenured judges’ votes as two apiece.}

The effects of such a rule are twofold. First, it forces courts to tread on the side of explicitly addressing whether they are foregoing stare decisis \textit{rather than} allowing judges to shirk the question.\footnote{680}{See \textsc{Univ. Haw. L. Libr.}, supra note 677.} Thus, elected judges are forced to come up with compelling justifications for their decision to change the law rather than abuse their unfettered discretion. Second, the rule is really only relevant for precedents established within the service time of the most tenured judge on a court.\footnote{681}{See, e.g., Schauer, supra note 639.} Cases outside this range would have normal rules that apply.\footnote{682}{Every judge would have one vote.} These older precedents, however, unlike the more recent precedents, already have presumptions that attach to them because of the amount of time that they have been in place.\footnote{683}{See supra Section I.B.2. Generally, the longer a precedent is in place, the harder it ought to be to overturn. See Flood v. Kuhn, 407 U.S. 258, 279 (1972).} Thus, they are inherently more difficult to overturn. Implementing this policy would merely heighten the standard across the board for cases that may otherwise be more susceptible to being overturned for politically charged reasons. Altogether, this suggestion forces more cases to be decided under stare decisis frameworks. In turn, all state court judges — even those elected for partisan
or political purposes — will be compelled to be clearer, more concise, and more grounded in their decision-making processes.

The third idea is a presumption of similarity canon of construction. Such a tool would presume that facts of a case are substantially similar to facts of another case if: (1) two cases cite to or rest on the same statute/act/section of the code, or (2) two cases cite to or rest on the same constitutional amendment or principle or doctrine. This canon could theoretically be codified, but it can also be adopted by courts informally.684

The fourth and final idea is a stare decisis framework mandate. This rule would more broadly require courts to undergo stare decisis analyses if any judge or court invokes principles of stare decisis at all.685 This mandate would be triggered if a state’s supreme court is taking a case from either an intermediate appellate court, another lower court, or a federal court, and one of those courts mentions foregoing precedent or the principle of stare decisis. Further, it can be triggered if a judge in a previous court writes a concurrence or dissent that invokes stare decisis.686 The rule could also vary state-by-state depending on the composition of the lower court and the state’s judicial norms.

CONCLUSION

In times of uncertainty, democracy becomes increasingly fragile.687 In already uncertain times, recent shifts in power from the federal government to the states exacerbate such uncertainty.688 Although our democratic institutions have remained strong,689 this expansion of power in the states will pose challenges for our judicial systems unlike anything else in recent memory.690 The lion’s share of these difficulties will involve state judicial systems.691 Furthermore, the ways courts decide issues discussed in this


685. In effect, such a rule would merely be a burden shifting tool.

686. This concurrence and dissent piece of the proposal could apply so long as the initial concurrence or dissent received multiple votes. It could require not just the author of an opinion to mention stare decisis, but also at least one or two additional judges to sign on.


688. See supra notes 5–8 and accompanying text.

689. See Rawnsley, supra note 687.

690. See supra notes 5–8 and accompanying text.

691. See id.
Note — such as abortion, redistricting, and election laws — will disproportionately impact urban communities. Moreover, these issues are only further complicated when state high court judges are elected rather than appointed. For these reasons and more, it is increasingly pivotal for states to create standards and mechanisms that monitor and constrain judicial decision-making. Most directly, these changes must involve stare decisis in state courts.

While there is no one hard and fast mechanism for constraining the use of stare decisis in elected state high courts, this Note lays down the groundwork for many potential solutions that could help. State courts that are becoming increasingly politicized — such as North Carolina, Wisconsin, and Ohio — should consider these policies. By doing so, elected state courts can remain reliable and respected institutions that accurately reflect the desires of their constituents, while simultaneously upholding longstanding norms and practices that should not be disturbed.

Nobody can predict the future. But, by regulating their judicial systems, states can try and constrain judges so that the range of potential changes narrows. Doing so will ensure that, regardless of what the future holds, courts remain fair, and the public good remains protected.

692. See supra Section II.D.
693. See supra Sections I.B.2, I.A.3; notes 3–18 and accompanying text.
694. See supra Sections I.B.2, I.A.3; notes 3–18 and accompanying text.
695. See supra Section III.
696. See id.
697. See supra Sections II.A–C.
698. See generally Peters, supra note 38.