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

Jason Semaya

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**PRESERVING JUDICIAL NEUTRALITY:
REGULATING STARE DECISIS FOR ELECTED
JUDGES IN AN ERA OF POLITICAL
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

1. *See* 600 U.S. 181, 230–31 (2023).

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 th[e] 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>].

3. *Compare* *Roe v. Wade*, 410 U.S. 113, 153–54 (1973) (establishing a woman’s constitutional right to an abortion), *and* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 845–46, 854–69 (1992) (upholding a woman’s right to an abortion and establishing a stare

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

decisis framework), *with Dobbs*, 142 S. Ct. at 2242, 2262 (overturning the right to an abortion and foregoing stare decisis). The decision in *Dobbs* also represents a shift in the substantive due process jurisprudence of the Supreme Court.

4. *See Dobbs*, 142 S. Ct. at 2262 (“[S]tare decisis is not an inexorable command,” (quoting *Pearson v. Callahan*, 555 U.S. 223, 233 (2009) (internal citations omitted))).

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 th[e] 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).

10. Jonathan Mann, *Stare Decisis: Its Definition, Role and Exceptions*, ALM (July 15, 2022, 10:11 AM), <https://www.law.com/dailybusinessreview/2022/07/15/stare-decisis-its-definition-role-and-exceptions/> [<https://perma.cc/LL8B-AB9P>].

11. *See* *Chisom v. Roemer*, 501 U.S. 380, 400 (1991) (“[There is a] fundamental tension between the ideal character of the judicial office and the real world of electoral politics[.]”).

12. *See generally* Zach Montellaro & Megan Messerly, *The Most Important Election Nobody’s Ever Heard Of*, POLITICO (Jan. 16, 2023, 07:01 AM) [hereinafter Montellaro & Messerly, *The Most Important Election*], <https://www.politico.com/news/2023/01/16/princeton-state-supreme-court-race-abortion-00077958> [<https://perma.cc/VNM6-NHCQ>].

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

13. See generally *Holmes v. Moore*, 881 S.E.2d 486 (N.C. 2022).

14. See Charles Moster & Rick Rosen, *It's Debatable: Is the Nation's Judicial System Fair and Equitable?*, LUBBOCK AVALANCHE-J. (Apr. 17, 2022, 8:41 AM), <https://www.lubbockonline.com/story/opinion/2022/04/17/its-debatable-nations-judicial-system-fair-and-equitable/7309256001/> [<https://perma.cc/Z8BJ-CJ4V>] (questioning the extent to which judges are fair and equitable).

15. See Patrick Marley, *Voters Could Tip Wisconsin Supreme Court Left on Abortion, Gerrymandering*, WASH. POST (Feb. 2, 2023, 6:00 AM), <https://www.washingtonpost.com/politics/2023/02/02/wisconsin-supreme-court-election/> [<https://perma.cc/TN2R-DF9V>] (explaining that candidates in Wisconsin's judicial elections are technically non-partisan, but that they work closely with political parties in election cycles); Reid J. Epstein, *2023's Biggest, Most Unusual Race Centers on Abortion and Democracy*, N.Y. TIMES (Jan. 25, 2023), <https://www.nytimes.com/2023/01/25/us/politics/550rinceton-supreme-court-election.html> [<https://perma.cc/BVY6-VUTB>] (predicting that the spending on Wisconsin's judicial election campaigns will wind up being the most in the history of judicial elections in U.S. history); Nick Evans, *Ohio Bar Condemns Ad Attacking Democratic State Supreme Court Nominees*, OHIO CAP. J. (Oct. 31, 2022, 5:00 AM) [hereinafter Evans, *Ohio Bar Condemns Ad*], <https://ohiocapitaljournal.com/2022/10/31/ohio-bar-condemns-ad-attacking-democratic-state-supreme-court-nominees/> [<https://perma.cc/7V7G-Y7WX>] (explaining how Ohio's Supreme Court elections have become increasingly politicized); Republican State Leadership Committee, *RSLC's Judicial Fairness Initiative Launches New Ad Targeting Soft-on-Crime Democrat Judges in Battle For Supreme Court Control*, RSLC (Oct. 11, 2023), <https://www.rslc.gop/press-releases/9iq6097ztgypjqlvvnh8qjq6w0g7aq?rq=judicial%20fairness%20initiative> [<https://perma.cc/QG6R-R4FG>] (describing attack ads against Democrats in the Ohio Supreme Court elections); Morgan Trau, *3 Ohio Judicial Candidates Accused of Breaking Ethics Code, Told PAC Abortion Isn't Constitutional Right*, NEWS 5 CLEV. (Oct. 7, 2022, 5:57 PM) [hereinafter Trau, *Candidates Accused of Breaking Ethics Code*], <https://www.news5cleveland.com/news/politics/ohio-politics/3-ohio-judicial-candidates-accused-of-breaking-ethics-code-told-political-group-abortion-isnt-constitutional-right> [<https://perma.cc/7645-VLT9>] (reporting that ethical concerns have been raised based on the politicization of the Ohio Supreme Court elections); Ohioans for Justice & Integrity, *Ohio Supreme Court Political Advertisement*, MYCMAG.KANTARMEDIA, https://mycmag.kantarmedia.com/KMIcmagvidbin2/STSUPCT_OH_OHJI_RIGHT_TO_CHOOS.html [<https://perma.cc/U2TA-FGUV>] (last visited Nov. 5, 2023).

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,¹⁷ questions about limiting judges from being political arise.

In the states, stability of precedent,¹⁸ reliance on precedent,¹⁹ judicial integrity,²⁰ and political polarization²¹ have either impacted or been impacted by adherence to stare decisis.²² In states with judicial elections, these impacts are amplified.²³ Candidates develop campaigns centered around increasingly politicized platforms.²⁴ 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.²⁵

As an initial matter, many variables affect the applicability of stare decisis. First, different types of cases mandate varying degrees of stare decisis.²⁶

17. See *supra* note 15 and accompanying text.

18. See, e.g., *People v. Colon*, 866 N.E.2d 207, 219 (Ill. 2007) (“[The purpose of stare decisis is] so that the law will not change erratically, but will develop in a principled, intelligible fashion.” (citing *People v. Mitchell*, 727 N.E.2d 254 (2000)); *Meyer v. State*, 445 Md. 648, 669 (2015) (“Stare decisis means ‘to stand by the thing decided,’ and is ‘the preferred course because it 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.’” (quoting *State v. Waine*, 444 Md. 692, 699–700 (2015))); *In re Angeles Roca First Judicial District Philadelphia County*, 173 A.3d 1176, 1187 (Pa. 2017) (highlighting that stare decisis enforces stability in the law).

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.

21. See generally Oren Tamir, *Political Stare Decisis*, 22 CHI. J. INT’L L. 493 (2022).

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).

24. See Marley, *supra* note 15; Epstein, *supra* note 15; Zac Schultz, *Meet the Candidates Running in the 2023 Wisconsin Supreme Court Primary*, PBS WISCONSIN (Jan. 4, 2023) [hereinafter Schultz, *Meet the Candidates*], <https://pbswisconsin.org/news-item/meet-the-candidates-running-in-the-2023-wisconsin-supreme-court-primary/> [<https://perma.cc/JD5L-XJGT>]; Troy Shelton, *Judicial Elections Have Consequences, Too*, N.C. LAWS. WKLY. (Jan. 23, 2023), <https://nclawyersweekly.com/2023/01/23/judicial-elections-have-consequences-too/> [<https://perma.cc/AE99-4N3T>].

25. See Alicia Bannon, *Stare Decisis in the Spotlight*, BRENNAN CTR. FOR JUST. (Mar. 2, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/stare-decisis-spotlight> [<https://perma.cc/5MMY-ZW43>] (describing how the political election of judges in North Carolina may lead to precedents being overturned despite principles of stare decisis being in place).

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) (“[C]ommon-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. Rels. 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 [A]ny departure from the doctrine of stare decisis demands special justification.”); *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).

28. *Compare* *Roe v. Wade*, 410 U.S. 113, 153–54 (1973) (establishing a woman's right to an abortion), *and* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 845–46, 854–69 (1991) (upholding a woman's right to an abortion and establishing a stare decisis framework), *with* *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2242, 2262 (2022) (overturning the right to an abortion and foregoing stare decisis).

29. *See* *Flood v. Kuhn*, 407 U.S. 258, 282 (1973); *see also* *Roe v. Wade Overturned: How the Supreme Court Let Politicians Outlaw Abortion*, PLANNED PARENTHOOD, <https://www.plannedparenthoodaction.org/issues/abortion/roe-v-wade> [<https://perma.cc/M7G9-MA3Z>] (last visited Mar. 5, 2023). Even when all signs point towards maintaining a precedent, despite what a judge may have said or done in the past, they may nevertheless decide to do the opposite. *Cf.* Nyu Wang, *Robot Judges and AI Systems in China's Courts and Public Security Agencies*, EUR. COMM'N (Feb. 25, 2022), <https://futurium.ec.europa.eu/en552rinceton-ai-alliance/best-practices/robot-judges-and-ai-systems-chinas-courts-and-public-security-agencies> [<https://perma.cc/KKT6-44JV>].

30. 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.

31. 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,³² judicial elections become more important in reevaluating politically controversial precedents.³³

This Note discusses important judicial elections in North Carolina, Wisconsin, and Ohio and efforts in these states to restrict judges from overturning precedent.³⁴ This Note also discusses the extent to which stare decisis should be enforced in state supreme courts.³⁵ Ultimately, after determining that the existing frameworks in these states are ineffective, this Note considers new policies states should consider.³⁶ In creating policy proposals, this Note proposes mechanisms to check elected judges foregoing stare decisis.³⁷ 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.³⁸

Part I introduces different judicial election systems and systems of stare decisis.³⁹ 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.⁴⁰ Finally, Part III presents the benefits and drawbacks of stare decisis in state courts and proposes policies designed to regulate elected judges.⁴¹

Governance Paradox of Judicial Elections, LAWFARE (Feb. 22, 2023, 8:16 AM), <https://www.lawfareblog.com/when-elections-threaten-rule-law-good-governance-paradox-judicial-elections> [https://perma.cc/W2B3-C9ZP]. For example, a judge may decide to disregard precedent that, based on the facts of the case, the judge *should* have no discretion to disregard. See David Litt, *A Court Without Precedent*, ATLANTIC (July 24, 2022), <https://www.theatlantic.com/ideas/archive/2022/07/supreme-court-stare-decisis-roe-v-wade/670576/> [https://perma.cc/MAG7-KGK3] (“*Stare decisis* is what makes the Court an institution. Without it, the judiciary is just a collection of opinionated people.”).

32. See Epstein, *supra* note 15 (quoting Senator Chuck Schumer as saying that the “Wisconsin [judicial election] is extremely important[.]”); Montellaro & Messerly, *The Most Important Election*, *supra* note 12; Shelton, *supra* note 24.

33. See *infra* Section II.D (discussing how state courts are grappling with politically controversial precedents, some of which have been moot for a long time).

34. See *infra* Parts I–II.

35. See *infra* Section III.A.

36. See *infra* Section III.B.

37. See *infra* Section III.B.

38. See generally Christopher Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L.J. 2031 (1996).

39. See *infra* Part I.

40. See *infra* Part II.

41. See *infra* Part III.

I. JUDICIAL ELECTIONS AND STARE DECISIS

Section I.A begins with a discussion of judicial elections.⁴² Specifically, subpart 1 introduces the history of judicial elections in the United States,⁴³ subpart 2 evaluates the types of judicial election systems,⁴⁴ and subpart 3 discusses consequences of judicial elections.⁴⁵ Section I.B then discusses stare decisis.⁴⁶ Subpart 1 introduces the history of stare decisis,⁴⁷ subpart 2 discusses the types of stare decisis,⁴⁸ subpart 3 addresses consequences of stare decisis,⁴⁹ and subpart 4 introduces stare decisis in North Carolina, Wisconsin, and Ohio.⁵⁰

A. Judicial Elections

1. History of State Judicial Elections

Before 1832, no state had a completely elected judiciary.⁵¹ Instead, state officials appointed judges.⁵² Over time, the demand for judicial elections rose⁵³ as populists began recognizing that judges often came from elite and “landed families” that did not reflect the will of the people.⁵⁴ The disconnect between people and courts motivated states to hold elections.⁵⁵

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,⁵⁶ not all states have similar appointment mechanisms.⁵⁷ Of the 50 states, nearly half hold elections for high court judges.⁵⁸ Including trial and intermediate appellate courts, 39 states hold some form of judicial election.⁵⁹

2. Different Types of Judicial Election Systems

While different election systems have developed over time, the processes boil down to a few distinct types.⁶⁰ First, there are direct appointment elections.⁶¹ Second, there are merit-based appointment systems.⁶² Finally, there are contested elections.⁶³ Within these systems, there is significant

56. See U.S. CONST. art. II, § 2. In federal court, magistrate judges are elected by their peers. See *FAQs: Federal Judges*, U.S. CTS., <https://www.uscourts.gov/faqs-federal-judges> [<https://perma.cc/98D6-J6FX>] (last visited Apr. 27, 2023).

57. See BALLOTPEdia, *supra* note 55.

58. See BALLOTPEdia, *supra* note 55. In the United States, the highest court in each state is called the “supreme court” with a few exceptions. In New York, the highest court in the state is called the “State of New York Court of Appeals,” in West Virginia, the highest court in the state is called the “Supreme Court of Appeals of West Virginia,” and in Massachusetts, the highest court is called the “Massachusetts Supreme Judicial Court.” See BALLOTPEdia, *supra* note 55. Additionally, two states separate their highest appellate courts into two separate entities, one for criminal appeals and another for civil appeals. Oklahoma has the “Oklahoma Court of Criminal Appeals” in addition to the “Oklahoma Supreme Court,” and Texas has the “Texas Court of Criminal Appeals” and the “Texas Supreme Court.” See BALLOTPEdia, *supra* note 55.

59. *Judicial Selection: Significant Figures*, BRENNAN CTR. FOR JUST. (Apr. 14, 2023) [hereinafter Brennan Center, *Judicial Selection*], <https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures> [<https://perma.cc/642K-REHQ>].

60. See Wilets et al., *supra* note 23, at 209.

61. These elections are generally either gubernatorial elections or legislative elections. See Wilets et al., *supra* note 23, at 209–11. These include gubernatorial elections, where governors appoint candidates without recommendations by nomination commissions, and legislative elections, where state legislatures do the same. See Wilets et al., *supra* note 23, at 209–12.

62. See Wilets et al., *supra* note 23, at 211–15. These systems require specific metrics or processes for electing or re-electing judges. See Wilets et al., *supra* note 23, at 211–15. The typical types of merit-based appointment systems are retention elections, where constituents, commissions, or state legislatures vote to retain or dismiss sitting judges. See Wilets et al., *supra* note 23, at 213–14.

63. See *id.* at 215–17. While there are some variations, the two primary types are partisan and non-partisan elections. Wilets et al., *supra* note 23, at 215–16. Michigan and Ohio utilize what is known as the “Michigan method,” whereby the primary elections are partisan and the general elections are nonpartisan. See American Judicature Society, *Methods of Judicial Selection: Selection of Judges*, AM. JUDICATURE SOC’Y, http://web.archive.org/web/20150222053432/http://judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state= [<https://perma.cc/2Z7P-XQL6>] (last visited Nov. 4, 2022); *Michigan Method (State Supreme Court Selection)*, BALLOTPEdia, [https://ballotpedia.org/Michigan_method_\(state_supreme_court_selection\)](https://ballotpedia.org/Michigan_method_(state_supreme_court_selection)) [<https://perma.cc/4P6Y-5GZ9>] (last visited Nov. 6, 2023). Further, the New Mexico system is a hybrid system. Brennan Center, *Judicial Selection*, *supra* note 59. The governor initially

overlap.⁶⁴ The details of a state's system impact the effects of its judicial elections.⁶⁵ This Note focuses on contested election systems⁶⁶ because winning candidates in these elections can shift a court's ideological balance, forego precedent, and alter the state's laws.⁶⁷

3. *Consequences of Judicial Elections*

Judicial elections are different than standard political elections,⁶⁸ and elected judges are different than appointed judges.⁶⁹ 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.⁷⁰ This metaphor illustrates Chief Justice Roberts's view on judicial impartiality.⁷¹ 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 reelected 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.”).

69. *See* Stephen Gaustitis, *Judges: Appointed v. Elected*, HG.ORG, <https://www.hg.org/legal-articles/judges-appointed-v-elected-44870>

[<https://perma.cc/6PGN-9YRQ>] (last visited Mar. 6, 2023). Mostly those judges that do not serve life terms. *See* F. Andrew Hanssen, *The Effect of Judicial Institutions on Uncertainty and the Rate of Litigation: The Election Versus Appointment of State Judges*, 28 J. LEGAL STUD. 205, 211 (1999) (“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.”).

70. *See* Zygmunt A. Pines, *Mirror, Mirror, On the Wall – Biased Impartiality Appearances, and the Need for Recusal Reform*, 125 DICK. L. REV. 69, 71–72 (2020) (discussing the judicial philosophy of Chief Justice Roberts).

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.⁷² This concept of judicial neutrality goes hand-in-hand with judicial restraint.⁷³ One justification for stare decisis is limiting judges in this capacity.⁷⁴

Because elected judges are chosen democratically, they are politically accountable to their constituents.⁷⁵ Yet, elected judges also swear oaths to perform duties and administer justice impartially.⁷⁶ If people agree with how judges decide cases, they re-elect those judges; if they do not, people vote in replacements.⁷⁷ While in this way judges are akin to other elected officials, neutrality is still fundamental to their job.⁷⁸ Thus, holding judges politically accountable may inhibit their ability to decide cases free from external influence.⁷⁹ This conundrum underscores the need for regulation of stare decisis.⁸⁰ 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.⁸¹ 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).

76. *See, e.g., Oaths of Office*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/about/oath/oathsofoffice.aspx> [<https://perma.cc/AU7T-8ZLH>] (last visited Mar. 6, 2023) (describing the oaths that Justices of the Supreme Court are required to take before they take their appointed office).

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,⁸² financial contributions may incentivize judges to act in the interests of their donors.⁸³ It is usually easy to tell if a judge's financial interest renders him or her impartial.⁸⁴ However, some campaign contributions affect judges more subtly.⁸⁵ For example, state judges deciding cases that affect their donors,⁸⁶ even when their donors are not directly involved, may adjudicate with preconceived biases.⁸⁷ The law has not addressed these problems with effective recusal reforms,⁸⁸ and state courts lack clear standards for assessing whether a given campaign donation has an impact on a judge's decision-making.⁸⁹ In this way, elected judges are vulnerable to judicial bias.⁹⁰ Due to campaign finance,⁹¹ 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).

82. *See Money in Judicial Elections*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/issues/strengthen-our-courts/promote-fair-courts/money-judicial-elections> [<https://perma.cc/G66A-2XMP>] (last visited Mar. 6, 2023).

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

84. *See, e.g.*, *Cary v. State*, No. 05-12-01421-CR, 2014 WL 4261233, at *1 (Tex. App. 2018) (discussing Texas law on judicial bribery).

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.

87. *See* Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 779–80 (2001) (discussing how judges are susceptible to cognitive biases).

88. *See* James Sample, *Democracy at the Corner of First and Fourteenth: Judicial Campaign Spending and Equality*, 66 N.Y.U. ANN. SURV. AM. L. 727, 767 (2011); Jessie Gall, *Living with Republican Party of Minnesota v. White: The Birth and Death of Judicial Campaign Speech Restrictions*, 13 COMM. L. & POL'Y 97, 104 (2008).

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-Yulee 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); BRENNAN 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-Yulee*, 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.”).

94. See generally Marisa McGarvey, *The Price of Justice: How the Caperton Standard for Judicial Recusal Fell Short, but Opened the Door for Reform of the Recusal Standards Anyway*, 9 RUTGERS J.L. & PUB. POL’Y 545, 561–62 (2012); see also Colleen Murphy, ‘Judges Must Remain above the Fray’: Judge Censured for Failing to Recuse from Child Custody Case, ALM (Jan. 31, 2023, 6:10 PM), <https://www.law.com/2023/01/31/judges-must-remain-above-the-fray-judge-censured-for-failing-to-recuse-from-child-custody-case/> [<https://perma.cc/43MP-T8YC>].

95. See Ashleigh Edwards, *Finders Keepers: Selecting and Retaining State Judicial Candidates*, 19 LEWIS & CLARK L. REV. 1183, 1205 (2015) (discussing the relationship between campaign finance in judicial elections and judicial ethics violations).

96. See BRENNAN CTR., *Money in Judicial Elections*, *supra* note 82.

97. See, e.g., *supra* notes 9–12 and accompanying text.

98. Representation, BRITANNICA DICTIONARY, <https://www.britannica.com/dictionary/representation> [<https://perma.cc/3ZM3-HMA8>] (last visited Mar. 6, 2023).

99. See HANNA F. PITKIN, *THE CONCEPT OF REPRESENTATION* 39 (2d ed. 1972).

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/06-04-02-0026-0003>) [<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 I*, 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/72L2-85MB>].

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).

104. See Jennifer Szalai, *Why Is 'Politicization' So Partisan?*, N.Y. TIMES MAG. (Oct. 17, 2017), <https://www.nytimes.com/2017/10/17/magazine/why-is-politicization-so-partisan.html> [<https://perma.cc/L6EF-NBCE>].

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>].

106. See, e.g., *Decisions, Decisions*, TRUMAN LIBR. INST., <https://www.trumanlibraryinstitute.org/truman/decisions-decisions/> [<https://perma.cc/M2EX-K9FV>] (last visited Apr. 26, 2023) (explaining some of the most unpopular opinions in U.S. history that were made by President Harry Truman including engaging in nuclear warfare, desegregating the U.S. armed forces, and deploying U.S. armed forces in Korea). The same concept holds true with elected judges. See Adam Liptak, *Judges Who Are Elected Like Politicians Tend to Act Like Them*, N.Y. TIMES: SIDEBAR (Oct. 3, 2016) [hereinafter Liptak, *Elected Judges Act Like Politicians*], <https://www.nytimes.com/2016/10/04/us/politics/judges-election-john-roberts.html> [<https://perma.cc/M2BC-A8JA>].

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

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

109. See Sheri Englund et al., *Polarization Research in Ecuador Underscores Risks to U.S. Democracy*, CORNELL CHRON. (Oct. 27, 2022), <https://news.cornell.edu/stories/2022/10/polarization-research-ecuador-underscores-risks-us->

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.easiaforum.org/2023/03/29/ideological-polarisation-is-the-price-of-democratic-representation-in-indonesia/> [<https://perma.cc/G66U-3LJC>].

110. *See supra* note 109 and accompanying text.

111. *See supra* Section I.A.1.

112. *Cf.* Cody Cutting, *Who Really Picks New York's Judges?*, BRENNAN CTR. FOR JUST. (Nov. 11, 2015), <https://www.brennancenter.org/our-work/analysis-opinion/who-really-picks-new-yorks-judges> [<https://perma.cc/E5TA-8UJ9>].

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.¹¹⁷ In turn, judicial elections may allow politics to influence the judiciary.¹¹⁸

On the bench, elected judges — like some elected politicians¹¹⁹ — may make politically controversial decisions that help boost their re-election odds.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.¹²¹ Over time, the overall constituency becomes more political.¹²² Elected judges have incentives to be politically reactive; appointed judges do not. While this is an inevitable consequence of government,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.¹²⁴

117. See Liptak, *supra* note 106.

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.”).

119. See David Molloy, *What Is Populism, and What Does the Term Actually Mean?*, BBC NEWS (Mar. 6, 2018), <https://www.bbc.com/news/world-43301423> [<https://perma.cc/W3PT-UP5X>].

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).

121. See *Political Polarization in the American Public*, PEW RSCH. CTR. (June 12, 2014), <https://www.pewresearch.org/politics/2014/06/12/political-polarization-in-the-american-public/> [<https://perma.cc/5BU9-QTMU>] (discussing how partisan polarization manifests itself in election dynamics). An echo chamber is an environment where a person only hears opinions and beliefs that coincide with their own. See GCFLearnFree, *What Is an Echo Chamber?*, YOUTUBE (June 18, 2019), <https://www.youtube.com/watch?v=Se20RoB331w> [<https://perma.cc/HU2G-TDGK>].

122. Morgan Kelly, *Political Polarization and Its Echo Chambers: Surprising New, Cross-Disciplinary Perspectives from Princeton*, PRINCETON UNIV. (Dec. 9, 2021, 10:00 AM), <https://www.princeton.edu/news/2021/12/09/political-polarization-and-its-echo-chambers-surprising-new-cross-disciplinary> [<https://perma.cc/4DA8-M77X>].

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).

124. See PEW RSCH. CTR., *supra* note 121.

Elected judges are representatives under the descriptive and agency definitions of representation.¹²⁵ Appointed judges, however, are more closely aligned with the trustee theory of representation.¹²⁶ Because the judiciary is designed to be neutral and impartial,¹²⁷ being a representative under the descriptive or agency theory of representation conflicts with the judicial role.¹²⁸ Taken together, because judicial elections are more likely to reduce representation and increase politicization, courts may choose to ignore precedent.¹²⁹ This dynamic underscores the need for stare decisis reforms.

Third, judicial elections may cause “ossification”¹³⁰ — as opposed to “stagnation”¹³¹ — in state law.¹³² When new officials are elected, new voices, opinions, and perspectives come into government.¹³³ 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 RSCH. OBSERVER 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

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).

135. Compare *Roe v. Wade*, 410 U.S. 113, 153–54 (1973) (establishing a woman’s right to an abortion), and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 845–46, 854–69 (upholding a woman’s right to an abortion and establishing a stare decisis framework), with *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242, 2265 (2022) (overturning the right to an abortion and foregoing stare decisis). Generally, appointed judges serve for longer periods of time than elected judges. See Hanssen, *supra* note 69, at 211.

136. See *District of Columbia v. Heller*, 554 U.S. 570, 636–80 (2008) (Stevens, J., dissenting) (using the same originalist approach as Justice Scalia’s majority opinion to reach an opposite result).

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).

139. Cf. Explified, *What Is Anarchy: Anarchy Meaning Explained*, YOUTUBE (June 4, 2021), <https://www.youtube.com/watch?v=h6TyPy8dDcQ> [<https://perma.cc/HEC8-DHAF>].

140. U.S. CONST. amend. XIV, § 1.

141. See Michael S. Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 155 (1981) (identifying notice about what the law commands as central to political ideals that judges must protect).

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.

144. See, e.g., *United States v. Bass*, 404 U.S. 336, 347–49 (1971) (discussing the rule of lenity in criminal cases).

145. See *infra* Part III.

— for life or a set term — they serve for a long time.¹⁴⁶ Some states, however, allow elected judges to be replaced within a year.¹⁴⁷ Additionally, the longer a precedent is in place, the more of a presumption there should be towards maintaining that precedent.¹⁴⁸ However, when a state’s entire high court can be replaced within a few years,¹⁴⁹ decisions of previous courts may be easier to disregard.

These issues exist in courts where judges are both elected and appointed.¹⁵⁰ 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.¹⁵¹ 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,¹⁵² second, looking at the different factors affecting stare decisis,¹⁵³ third, assessing the consequences of stare decisis in the states,¹⁵⁴ and fourth, analyzing the stare decisis norms in North Carolina, Wisconsin, and Ohio.¹⁵⁵

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.”).

148. See *Flood v. Kuhn*, 407 U.S. 258, 278–79 (1972).

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.

151. See *ArtIII.S1.7.2.1 Historical Background on the Stare Decisis Doctrine*, CORNELL L. SCH., <https://www.law.cornell.edu/constitution-conan/article-3/section-1/historical-background-on-the-stare-decisis-doctrine> [https://perma.cc/H2PX-UTZ7] (last visited Apr. 26, 2023).

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

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/ALDE_00001187/\[https://perma.cc/UR7N-QHH6\]](https://constitution.congress.gov/browse/essay/artIII-S1-5-1/ALDE_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.*

161. Lower courts must follow precedent set by higher courts. See *id.* (citing *Vertical Stare Decisis*, BLACK'S LAW DICTIONARY 1537 (10th ed. 2014) (“[D]efining ‘vertical stare decisis’ as ‘the doctrine that a court must strictly follow the decisions handed down by higher courts within the same jurisdiction.’”)); *cf.* PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 193–98 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting), *abrogated by* Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020).

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.

164. See Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 791–99 (2012).

be more difficult to overturn.¹⁶⁵ This relates to the idea of respecting reliance interests that have built up over time and ensuring that people know what activities are legal.¹⁶⁶ The antitrust exemption in baseball illustrates the importance of time in understanding stare decisis.¹⁶⁷ In *Federal Baseball Club of Baltimore v. National League of Professional Base Ball Clubs*,¹⁶⁸ the Supreme Court held that baseball was not commerce, and thus not subject to the Sherman Antitrust Act.¹⁶⁹ Over thirty years later, in *Toolson v. New York Yankees, Inc.*, the Court upheld *Federal Baseball*.¹⁷⁰ 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.¹⁷¹ Throughout the opinions in *Flood*, all nine members of the Court seemed to agree that *Toolson* and *Federal Baseball* were wrongly decided.¹⁷² Nevertheless, the Court invoked stare decisis because of the precedent's longevity.¹⁷³

A second presumption relates to different "types" of cases.¹⁷⁴ Specifically, three "types" of cases receive three different presumptions.¹⁷⁵ First, statutory cases invoke the highest level of stare decisis.¹⁷⁶ Second, common law cases trigger a moderate level of stare decisis.¹⁷⁷ Third, constitutional cases implicate the lowest level of stare decisis.¹⁷⁸ The reasoning behind these norms is structural.¹⁷⁹ In the federal government, statutes can be overturned by a majority of both houses and approval by the

165. See, e.g., *Flood v. Kuhn*, 407 U.S. 258, 279 (1972).

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.

170. 346 U.S. 356, 357 (1953).

171. *Flood*, 407 U.S. at 282–85.

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).

177. See Kalt, *supra* note 26, at 278; *Flood*, 407 U.S. at 279, 282–85 (upholding *Federal Baseball*, 259 U.S. at 200 and *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356, 356 (1953)). Note that the Sherman Antitrust Act is based on common law.

178. See Kalt, *supra* note 26, at 278; *Flood*, 407 U.S. at 268; see, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (substantially overturning *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

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.¹⁸⁰ However, common law doctrine is more difficult for Congress to overrule,¹⁸¹ and constitutional norms are the most difficult for Congress to change.¹⁸² As such, there is an inverse relationship between judicial stare decisis presumptions and the ease with which Congress can change a previous court decision.¹⁸³

The third presumption, that intervening changes in the law impact the strength of stare decisis, cuts both ways.¹⁸⁴ 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.¹⁸⁵ On the contrary, if a court decision is underwritten by a court¹⁸⁶ or legislature,¹⁸⁷ the stare decisis effect is presumed to strengthen in subsequent court cases addressing the same legal issue.¹⁸⁸

3. *Consequences of Stare Decisis in the States*

While these presumptions are helpful, they are difficult to apply in state courts.¹⁸⁹ The first consequence relevant to this Note relates to state courts elections.¹⁹⁰ 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=OgVKvqTlto> [<https://perma.cc/5SAK-NJDX>].

181. *See* Kalt, *supra* note 26, at 278.

182. *See id.*

183. *Compare Brown*, 347 U.S. at 493 (overturning *Plessy*, 163 U.S. at 537), *with Flood*, 407 U.S. at 279, 282–85 (upholding *Fed. Baseball Club of Balt. v. Nat'l League of Pro. Baseball Clubs*, 259 U.S. 200, 200 (1922) and *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356, 356 (1953)).

184. *See Mehaffey v. Burger King*, 749 S.E.2d 252, 256–57 (N.C. 2013) (holding that when a change occurs in the law upon which a prior judicial decision rests, that the supreme court should look at the question anew). *But cf.* *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005) (applying the intervening change of law concept to agency interpretations).

185. *See* *Matter of 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 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).

187. *See, e.g.,* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. § 1981(a) (2012)) (underwriting the Supreme Court decision in *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

188. *See* Ethan J. Leib & James J. Brudney, *Legislative Underwrites*, 103 VA. L. REV. 1487, 1534–44 (2017) (discussing the interplay between legislative underwrites and stare decisis).

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.¹⁹¹ Thus, when judges are elected rather than appointed, should *stare decisis* still apply?¹⁹²

The second important consequence of *stare decisis* relates to state court common law powers.¹⁹³ In common law courts, decisions are “points on a plane, which form patterns from which we can deduce the law.”¹⁹⁴ This complicates the role of state courts because judges can ignore precedent by differentiating one or two specific facts from the guiding precedent.¹⁹⁵

Third, whereas the U.S. government is a government of limited and enumerated powers,¹⁹⁶ state governments have broad, residual plenary powers.¹⁹⁷ These powers are reflected in the different systems states use to pass laws and amend constitutions.¹⁹⁸ The U.S. Constitution has not been amended since 1992;¹⁹⁹ however, state constitutions are amended frequently.²⁰⁰ This frequency reflects the relative ease with which state

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.”).

192. See *supra* notes 77–80.

193. Except for some state courts in Louisiana, where a civil law system is used. See generally David Gruning, *Bayou State Bijuralism: Common Law and Civil Law In Louisiana*, 81 U. DET. MERCY L. REV. 437 (2004); see also *Common Law: Defining What It Is and What You Need To Know*, THOMSON REUTERS (Nov. 15, 2022), <https://legal.thomsonreuters.com/en/insights/articles/what-is-common-law> [<https://perma.cc/N2EL-5M46>].

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.”).

196. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 521 (2012) (“[T]he Federal Government is a government of limited and enumerated powers.”).

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))).

198. See Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1652–66 (2014) (highlighting that state constitutions reflect policy choices of their voters).

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.²⁰¹ This ease weakens the reasoning for implementing lenient horizontal stare decisis in state courts,²⁰² as addressing constitutional concerns is easier for state legislatures than for Congress.²⁰³ 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.²⁰⁴

Finally, every state government has a different policy on stare decisis.²⁰⁵ Some require strict adherence to precedent;²⁰⁶ others mandate that courts reconsider precedent in light of changing circumstances.²⁰⁷ Because no two states are identical,²⁰⁸ judges elected to high courts must conform to *their state's* interpretation of stare decisis.²⁰⁹ These doctrines are complicated by the types of stare decisis²¹⁰ and consequences of judicial elections,²¹¹ both of which affect decision-making in the states.²¹² 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.²¹³

<https://www.nga.org/wp-content/uploads/2022/10/CSG-book-of-the-states-2021.pdf>
[<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).

206. *See* Richard M. Garner, *Flexible Predictability: Stare Decisis in Ohio*, 48 AKRON L. REV. 15, 21 (2015) (discussing Ohio’s “fairly strict standard” for stare decisis).

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”).

208. Legal Aid Society of Northeastern New York, *The Differences Between Federal, State, and Local Laws*, LAWHELP.ORG, <https://www.lawhelp.org/resource/the-differences-between-federal-state-and-loc> [<https://perma.cc/7X7Q-89AQ>] (last visited Nov. 4, 2023) (“There are 50 states and several commonwealths and territories within the United States. Each has its own system of laws and courts[.]”).

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.²¹⁴ 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 2022–23.²¹⁵ These case studies illustrate how, regardless of a state’s *stare decisis* policy, changing times give rise to new challenges that may undermine precedent.²¹⁶

In North Carolina, the standard for *stare decisis* and the strength of precedent are ambiguous.²¹⁷ On the contrary, Wisconsin articulates factors for evaluating precedential effect, and its adherence to *stare decisis* is stricter than that of North Carolina.²¹⁸ Of the three states, Ohio has the clearest standard for *stare decisis*.²¹⁹ Yet, Ohio courts have applied the state’s doctrine inconsistently, which has left the strength of precedent in Ohio uncertain as well.²²⁰

The supreme courts in all three states are common law courts.²²¹ The Wisconsin Supreme Court, however, has both superintending and administrative authority, as well as appellate jurisdiction over all courts,²²²

214. See, e.g., Diedrich, *supra* note 205, at 35. For example, North Carolina courts are significantly less clear about how they treat precedent than Ohio courts. See *infra* Section I.B.4.

215. See *supra* note 15.

216. See generally Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647 (1999).

217. Cf. *Rabon v. Rowan Mem’l Hosp. Inc.*, 152 S.E.2d 485, 498 (N.C. 1967) (“No court has been more faithful to *Stare decisis*.”). Yet, the North Carolina Supreme Court does seem to have substantial discretion to overturn precedent. See *Coastal Conservation Ass’n v. State*, 878 S.E.2d 288, 294–97 (N.C. Ct. App. 2022).

218. Compare *Hall v. City of Madison*, 107 N.W. 31, 32 (Wis. 1906) (holding that in order to overcome *stare decisis*, the argument must be so convincing as to compel belief not only that the decision was indefensible, but also that it would be palpably wrong to let it stand), with *Leib & Brudney, supra* note 188, at 1508. Compare *State v. Carchidi*, 204 N.W. 473, 474 (Wis. 1920) (holding that when a court discusses and decides a question that is legitimately important to a case, but not necessary to its conclusion, that conclusion is still treated as *stare decisis*), and *Sch. Dist. No. 4, Vill. of Shorewood v. First Wis. Co.*, 203 N.W. 939, 940 (Wis. 1925) (same), with cases cited *infra* note 229.

219. See *infra* notes 263–73 and accompanying text.

220. Some Ohio judges have decided to apply the *stare decisis* framework rigidly, and others have not. These decisions to abide by or forego *stare decisis* appear politically motivated. Because judges decide to ignore or follow the framework as they wish, it is difficult to determine the strength of a given decision. See *infra* notes 263–73 and accompanying text.

221. See Thomson Reuters, *supra* note 193 (“[E]very U.S. state — with the exception of Louisiana — has a common law legal system.”); see also N.C. GEN. STAT. ANN. § 4–1 (West 1715).

222. WIS. STAT. ANN. Art. 7, §§ 3(1)–(2) (West 2018).

as they can review judgments and orders of lower courts and remove or accept cases from their dockets.²²³ In each state, stare decisis has been a key tool for a long time.²²⁴ Further, even though stare decisis is a judicial doctrine, state constitutions are relevant.²²⁵

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.²²⁶ Second, all three courts have criteria for how to treat precedents that are novel, longstanding, or in conflict with each other.²²⁷ 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.²²⁸ Third, North Carolina, Wisconsin, and Ohio have rules about how to treat constitutional cases and statute-based cases.²²⁹ Fourth, court cases in North Carolina, Wisconsin, and Ohio have addressed the power of their state supreme courts

869, 883 (Wis. 2021) (invoking stare decisis based on a precedent that was just three years old). Similarly, the Ohio Supreme Court has articulated many rules about how the timing of a decision should impact stare decisis. For example, Ohio regards modern decisions as more worthy of stare decisis than older decisions. *See* *New Amsterdam Cas. Co. v. Johnson*, 24 Ohio C.D. 76, 82 (Ohio Ct. App. 8th 1913), *rev'd*, 110 N.E. 475 (1914). Yet, the court has provided that legislative acquiescence (specifically long acquiescence) should strengthen the precedent of the court's interpretation of a statute. *See e.g.*, *Tax Comm'n of Ohio v. Nat'l Malleable Castings Co.*, 144 N.E. 604, 606 (Ohio 1924); *State ex rel. Taylor v. French*, 117 N.E. 173, 179–80 (Ohio 1917). However, the supreme court has also said that when two decisions conflict, precedent should be given to the recent decision rather than the older one. *See* *Cent. Transfer & Storage Co. v. Frost*, 36 N.E.2d 494, 497 (Ohio Ct. App. 2d 1935).

228. For example, the Ohio Supreme Court has held that recent decisions should be given precedent over the old decisions when the two decisions conflict, however, the court also held that precedents gain stare decisis effect the longer they remain untouched. *See supra* note 227.

229. North Carolina also emphasizes the importance of statutory stare decisis over constitutional stare decisis, as constitutional questions are given a weak stare decisis effect (if at all). *See* *State v. Mobley*, 83 S.E.2d 100, 108 (1954); *Webb v. McKeel*, 551 S.E.2d 440, 442 (N.C. 2001); *Rodwell v. Rowland*, 50 S.E. 319, 327 (N.C. 1905). In fact, when the court decides a constitutional question and then the legislature amends the North Carolina Constitution relating to that question, the result is that, in new decisions, the original doctrine is dicta. Here, “dicta” refers to “obiter dictum,” which refers to “a judge’s statement that is based on some established facts, but does not affect the judgement.” *Obiter Dictum*, BLACK’S LAW DICTIONARY (2d ed. 2023), <https://thelawdictionary.org/obiter-dictum/> [<https://perma.cc/574N-7UAZ>] (last visited July 17, 2023). *See* *Moose v. Bd. of Comm’rs of Alexander Cnty.*, 90 S.E. 441, 448 & 453 (N.C. 1916); *see, e.g.*, *Pilkington v. West*, 99 S.E.2d 798, 801 (N.C. 1957). However, if the supreme court consistently interprets a statute, the interpretation gains stare decisis effect unless the legislature changes that statute. *See* *O’Mary v. Land Clearing Corp.*, 135 S.E.2d 193, 195 (N.C. 1964) (“The interpretation so consistently given to the statute is as much a part of the statute as if expressly written in it.”). While there are many exceptions to this principle in North Carolina, stare decisis is still not inflexible and courts have substantial discretion. *See* *Mobley*, 83 S.E.2d at 108 (“[W]here a statute covering the subject matter has been overlooked, the doctrine of stare decisis does not apply.”); *Connette for Gullatte v. Charlotte-Mecklenburg Hosp. Auth.*, 876 S.E.2d 420, 433 ¶ 37 (N.C. 2022); *Patterson*, 99 S.E. at 405; *Lowdermilk*, 109 S.E. at 573; *Hart v. State*, 774 S.E.2d 281, 287 (N.C. 2015). Still, the Supreme Court of North Carolina has ruled that courts should view decisions relating to a statute as if they have become part of the statute itself. *See* *Hill v. Atlantic & N.C.R. Co.*, 55 S.E. 854, 868 (N.C. 1906). This logic was part of why North Carolina began enforcing precedents about property rights firmly. *See* *Hill*, 55 S.E. at 866 (“[N]o power can disturb [property rights].”). This principle does not apply to cases where the underlying statute or law has been overlooked. *See* *Mobley*, 83 S.E.2d at 108; *Patterson*, 99 S.E. at 405; *Lowdermilk*, 109 S.E. at 573. Like North Carolina (and federal stare decisis), “[s]tare decisis [in Wisconsin] has greater significance when [] prior decisions involve the interpretation of statutes.” *Hennessy v. Wells Fargo Bank*, 908 N.W.2d 684, 695 n.9 (Wis. 2022); *see also* *State v. Braunschweig*, 921 N.W.2d 199, 203 (Wis. 2018); *Engelhardt v. City of New Berlin*, 921 N.W.2d 714, 719 (Wis. 2019). In Ohio, constitutional precedents are weak and are never entirely persuasive. *See* *State ex rel. Guilbert v. Lewis*, 69 N.E. 132, 133–34 (1903); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 419–20 (1983), *overruled by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 833 (1992).

and the finality of those decisions.²³⁰ Finally, these courts have all discussed which parts of decisions that are afforded precedential effect.²³¹

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,²³² Wisconsin,²³³ and Ohio²³⁴ have some unique features of their stare decisis doctrines.²³⁵ While some principles have persisted, others have not.²³⁶ All three states, however, have generated complicated, layered, and conflicting rules for evaluating stare decisis.²³⁷ 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.²³⁸

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.²³⁹ The North Carolina Supreme Court suggested that the factors established by the U.S. Supreme Court in *Janus v. American Federation of State, County, & Municipal Employees, Council 31*²⁴⁰ should guide them.²⁴¹ But, since federal stare decisis has become ambiguous,²⁴² the uncertainty impacts North Carolina.²⁴³ Wisconsin, however, has consolidated its rules and principles into clear-cut factors that courts *should* use to determine whether stare decisis applies.²⁴⁴ These factors try to discern “special” or “compelling” purposes for overruling precedent.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.²⁴⁶

Similarly, in 2003, the Ohio Supreme Court formulated three factors courts must consider in overruling stare decisis.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.’”²⁴⁸ This doctrine has been referred to as the “flexible predictability” standard.²⁴⁹

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

239. See *State v. Hilton*, 378 N.C. 692, 731, 862 S.E.2d 806 (N.C. 2021) (Earls, J., dissenting).

240. 138 S. Ct. 2448, 2478–79 (2018).

241. See *N.C. Farm Bureau Mut. Ins. Co., v. Dana*, 866 S.E.2d 710, 721 (N.C. 2021); *State v. Kelliher*, 873 S.E.2d 366, 385 (N.C. 2022).

242. See *supra* notes 3–4 and accompanying text.

243. See *N.C. Farm Bureau Mut. Ins. Co.*, 866 S.E.2d at 721.

244. See *Diedrich*, *supra* note 205, at 32.

245. See *Schultz v. Natwick*, 653 N.W.2d 266, 275 (2022) (special); *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 665 N.W.2d 257, 285 (Wis. 2003) (compelling).

246. *Diedrich*, *supra* note 205, at 32.

247. See *Garner*, *supra* note 206, at 15; *Westfield Ins. Co. v. Galatis*, 797 N.E.2d 1256, 1256 (Ohio 2003).

248. *Garner*, *supra* note 206, at 16 (quoting *Galatis*, 797 N.E.2d at 1268).

249. See *Garner*, *supra* note 206, at *passim*.

still similar to that of North Carolina.²⁵⁰ In Wisconsin, even though there are clear criteria, the factors for evaluating precedent have not been applied consistently.²⁵¹ In fact, the Wisconsin Supreme Court has increased the rate at which they overturn cases in the last few years.²⁵² Most of these cases mentioning *stare decisis* have upheld existing doctrine,²⁵³ but some provided new wrinkles to Wisconsin's *stare decisis* doctrine.²⁵⁴ Despite the bright-line rules, *stare decisis* in Wisconsin is not absolute,²⁵⁵ as some judges have suggested that strict adherence to *stare decisis* in Wisconsin is excessive.²⁵⁶ This rhetoric introduces some uncertainty,²⁵⁷ as courts do not always agree about how to apply the doctrine.²⁵⁸ Thus, although the factors and principles

250. In North Carolina, recently-elected state supreme court judges have invoked rare procedural rules allowing the court to re-hear already-decided cases. *See* Bannon, *supra* note 25. Some perceive these actions as the first step in altering precedent in North Carolina. *See id.*; *see generally* *Judicial Voter Guide: 2022 Primary Election*, NORTH CAROLINA STATE BOARD OF ELECTIONS, <https://www.ncsbe.gov/judicial-voter-guide-2022-primary-election> [https://perma.cc/9XE6-9LMV] (last visited Feb. 15, 2023).

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=i0ad7401500000186c99eb46056bef803&searchId=i0ad7401500000186c99e1bbafc25005c&transitionType=ListViewType&contextDAta=\(sc.Search\)](https://1.next.westlaw.com/Search/Results.html?query=adv%3A%20%22stare%20decisis%22&isPremiumAdvanceSearch=false&jurisdiction=WI-CS&contentType=CASE&querySubmissionGuid=i0ad7401500000186c99eb46056bef803&searchId=i0ad7401500000186c99e1bbafc25005c&transitionType=ListViewType&contextDAta=(sc.Search)) [https://perma.cc/P25B-ZNAU] (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 adornment 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 6, ¶81 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.

260. See Grace Panetta, *How Dobbs Made the Wisconsin Supreme Court Race One of the Biggest Elections of 2023*, THE 19TH (Feb. 2, 2023, 6:00 AM), <https://19thnews.org/2023/02/wisconsin-supreme-court-abortion/> [https://perma.cc/Z5NH-WXRN]; Marley, *supra* note 15; Epstein, *supra* note 15; Schultz, *Meet the Candidates*, *supra* note 24; Montellaro & Messerly, *The Most Important Election*, *supra* note 12; Geoffrey Skelley, *Yes, 2023 Is an Election Year. Here Are the Races to Watch*, FIVETHIRTYEIGHT (Jan. 25, 2023, 6:00 AM), <https://fivethirtyeight.com/features/yes-2023-is-an-election-year-here-are-the-races-to-watch/> [https://perma.cc/L557-TF5H]; Brownstein, *supra* note 65; Amanda Powers & Douglas Keith, *Key 2022 State Supreme Court Election Results and What They Mean*, BRENNAN CTR. FOR JUST. (Nov. 9, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/key-2022-state-supreme-court-election-results-and-what-they-mean> [https://perma.cc/5BXR-QYUE]; see also Chuck Quirnbach, *Judicial Conduct Complaints Begin in Wisconsin Supreme Court Race, but What Are the Chances for Success?*, WUWM 89.7 FM (Feb. 1, 2023, 9:55 AM), <https://www.wuwm.com/2023-02-01/judicial-conduct-complaints-begin-in-wisconsin-supreme-court-race-but-what-are-the-chances-for-success> [https://perma.cc/7UZG-9782]; Emilee Fannon, *Partisanship Creeping into State Supreme Court Race: Are Candidates Violating Judicial Code of Conduct?*, CBS58 (Jan. 26, 2023, 5:44 PM), <https://www.cbs58.com/news/partisanship-creeping-into-state-supreme-court-race-are-candidates-violating-judicial-code-of-conduct> [https://perma.cc/5YRW-3ZCF].

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).

263. *State v. Henderson*, 162 N.E.3d 776, 787 (Ohio 2020). Since a February 2015 article evaluated stare decisis in Ohio and recent applications of *Galatis*, the Ohio Supreme Court published 37 cases that mention “stare decisis.” See *id.* at *passim*; Westlaw Search, THOMSON REUTERS WESTLAW PRECISION, <https://1.next.westlaw.com/Search/Results.html?query=stare%20decisis&isPremiumAdvancedSearch=false&jurisdiction=OH-CS&contentType=CASE&querySubmissionGuid=i0ad7401400000186cd6d8822c4a21bc6>

language and facts substantially the same as those in the initial case,²⁶⁴ that *Galatis* applies only to cases overruling precedent on substantive law,²⁶⁵ and that while stare decisis is designed to ensure “justice [] flows from certainty and stability[,]”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].”²⁶⁷ Taken together, Ohio’s clear rules have not stopped courts from interpreting restrictions on their authority narrowly.²⁶⁸ In light of recent Ohio Supreme Court elections,²⁶⁹ Ohio’s history of overturning precedent after judicial elections is relevant.²⁷⁰ As new standards have proved ineffective,²⁷¹ the questions the court grappled with when they first developed the *Galatis* standard are arising once more.²⁷²

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

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264. See *New Riegel Loc. Sch. Dist. Bd. of Educ. v. Buehrer Grp. Architecture & Eng’g, Inc.*, 133 N.E.3d 482, 489 (Ohio 2019); *Rural Health Collaborative of S. Ohio, Inc. v. Testa*, 50 N.E.3d 486, 494 (Ohio 2016).

265. *Henderson*, 162 N.E.3d at 787 (emphasizing that *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).

266. *State v. Harper*, 159 N.E.3d 248, 259 (Ohio 2020).

267. *State v. Graham*, 172 N.E.3d 841, 892 (Ohio 2020).

268. See *supra* notes 247–49, 262–63 & 264–67 and accompanying text.

269. See *infra* Section II.C.

270. See *Garner*, *supra* note 206, at 17–18.

271. See *supra* notes 262–63 & 264–67 and accompanying text.

272. See *Garner*, *supra* note 206, at 20–21; see, e.g., *DuBose 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/J35X-F7LJ].

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).

274. See *Liptak, Elected Judges Act Like Politicians*, *supra* note 106.

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,²⁷⁶ 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,²⁷⁷ Section II.B will focus on Wisconsin,²⁷⁸ and Section II.C will focus on Ohio.²⁷⁹ 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.²⁸⁰

A. North Carolina Supreme Court

The North Carolina Supreme Court was established in 1818.²⁸¹ For the first 50 years of the court, there were no judicial elections.²⁸² Then, in 1868 North Carolina implemented judicial elections for the North Carolina Supreme Court.²⁸³ Beginning at this time, judges were elected through

CS&contentType=CASE&querySubmissionGuid=i0ad740370000018964bd2c75a08fadae&searchId=i0ad740370000018964bcda45a1528733&transitionType=ListViewType&contextData=(sc.Search) [https://perma.cc/SSS5-EXH3] (filter jurisdiction to North Carolina Supreme Court and search “stare decisis.” Then sort by date.). Of those 135 cases, 16 were in 2021, 2022, or 2023. *See id.* This coincided with the time where Associate Justice Robin E. Hudson decided that she would not seek an additional term due to the fact that she was nearing the mandatory retirement age. *See* Dallas Woodhouse, *Democrats’ N.C. Supreme Court Majority on the Line with Two Seats up in ‘22*, CAROLINA J. (July 8, 2021) [hereinafter Woodhouse, *Majority on the Line*], <https://www.carolinajournal.com/democrats-n-c-supreme-court-majority-on-the-line-with-two-seats-up-in-22/> [https://perma.cc/A6JY-MLLX].

276. For example, the Supreme Court of North Carolina overrules precedent relatively few times each year. *See, e.g.*, Stefanie A. Lindquist, *Stare Decisis as Reciprocity Norm*, in *WHAT’S LAW GOT TO DO WITH IT?* 173 (Charles G. Geyh ed., 2011).

277. *See infra* Section II.A.

278. *See infra* Section II.B.

279. *See infra* Section II.C.

280. *See infra* Section II.D.

281. *See* Michael Crowell, *History of North Carolina Judicial Elections*, UNC SCHOOL OF GOVERNMENT (Aug. 2020), https://www.sog.unc.edu/sites/default/files/additional_files/Judicial%20election%20history%20Aug%202020.pdf [https://perma.cc/6QLS-NSAR]; Martin H. Brinkley, *North Carolina Supreme Court — History*, NC HOME, https://www.carolana.com/NC/Courts/nc_supreme_court_history.html [https://perma.cc/NLN4-CRKT] (last visited Mar. 14, 2023).

282. Judges were appointed by the North Carolina General Assembly for life. *See* Brinkley, *supra* note 281.

283. *See* Brinkley, *supra* note 281; Crowell, *supra* note 281.

partisan political elections.²⁸⁴ From 1936–1937 until recently, the court more or less held partisan elections for its seven justices.²⁸⁵ Despite periodic changes, the court now consists of seven judges elected by partisan elections to eight-year terms.²⁸⁶

In 2022, the Supreme Court of North Carolina held important judicial elections.²⁸⁷ In particular, two seats on the North Carolina Supreme Court were on the ballot.²⁸⁸ The first seat was held by Associate Justice Sam J. Ervin IV, an incumbent Democrat who has been on the Court since 2015.²⁸⁹ Justice Robin Hudson held the other seat.²⁹⁰ Prior to the 2022 election, the

284. See Brinkley, *supra* note 281. Justices who retired or died on the bench were replaced by the governor until the following election. See Brinkley, *supra* note 281.

285. There were some moderate changes over time. See Brinkley, *supra* note 281. From 1868 until 1936–37, the North Carolina Supreme Court had five justices. See Brinkley, *supra* note 281; Crowell, *supra* note 281. See generally Republican Party of North Carolina v. Martin, 980 F.2d 943 (4th Cir. 1992). From 1992 until 2006, North Carolina experimented with its process for filling vacancies and fine-tuned its rules. See Crowell, *supra* note 281; see generally Brannon v. North Carolina State Board of Elections, 416 S.E.2d 398, 399 (N.C. 1992). In 2002, the state switched its Supreme Court elections to nonpartisan elections, which were implemented by 2004. See Crowell, *supra* note 281. Partisan and non-partisan elections differ in that candidates in partisan elections identify on the ballot with a political party and candidates in non-partisan elections do not. See National League of Cities, *Partisan vs. Nonpartisan Elections*, NAT'L LEAGUE OF CITIES, <https://www.nlc.org/partisan-vs-nonpartisan-elections/> [<https://perma.cc/9LZ9-T6H6>] (last visited Apr. 26, 2023). From 2004 until 2017, the elections remained nonpartisan, and the policies of the court continued evolving. See *id.* For example, the court experimented with a public funding program from 2004 until 2013. See *id.* The program was terminated by 2013. See *id.* The court also enforced one-person, one-vote for North Carolina Supreme Court elections. See *id.*; Blankenship v. Bartlett, 681 S.E.2d 759, 768 (N.C. 2009). Another experiment implemented a requirement that temporary appointments of judges be confirmed by the state legislature. See Crowell, *supra* note 281; Session Law 2014–100, § 18B.6. Further, North Carolina tested a law that would have implemented retention elections. See Crowell, *supra* note 281; Faires v. State Bd. of Elections, 784 S.E.2d 170, 171 (N.C. 2016). This effort did not succeed. See Crowell, *supra* note 281. Efforts to switch back to partisan judicial elections began in 2015, and succeeded in 2018. See Crowell, *supra* note 281; see also Melissa Boughton, *McCrory Signs Senate Bill 4 in Less than an Hour; Appoints Chief of Staff's Wife to Industrial Commission*, THE PULSE (Dec. 16, 2016), <https://pulse.ncpolicywatch.org/2016/12/16/mccrory-signs-senate-bill-4-less-hour-appoints-chief-staffs-wife-industrial-commission/#sthash.9YX2dph6.dpbs> [<https://perma.cc/H4HC-D9M3>].

286. *Judicial Voter Guide*, *supra* note 250.

287. See Woodhouse, *Majority on the Line*, *supra* note 275.

288. See Woodhouse, *Majority on the Line*, *supra* note 275.

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.

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.²⁹¹ However, the elections changed the court’s make-up.²⁹² In the first election, the incumbent was defeated by Republican Trey Allen.²⁹³ In the second election, Democrat Lucy Inman was defeated by Republican Richard Dietz.²⁹⁴ After the dust settled, what was once a 4–3 Democratic majority became a 5–2 majority for the Republican Party.²⁹⁵

The North Carolina Supreme Court’s conservative majority will be in place for years.²⁹⁶ In 2023, the new court made its presence felt immediately by issuing several decisions in politically controversial cases in the first

Benbow, *Two Republicans Win Seats on the NC Supreme Court, Flipping Majority*, THE DAILY TAR HEEL (Nov. 9, 2022, 2:32 AM), <https://www.dailytarheel.com/article/2022/11/city-nc-supreme-court-2022-election-results> [<https://perma.cc/47ML-B37J>]. Thus, she announced she was not running for re-election. *See id.*

291. *See* Powers & Keith, *supra* note 260; Woodhouse, *Majority on the Line*, *supra* note 275; Horton & Benbow, *supra* note 290.

292. *See* Powers & Keith, *supra* note 260; Woodhouse, *Majority on the Line*, *supra* note 275; Horton & Benbow, *supra* note 290; Hannah Schoenbaum, *Republicans Retake Control of North Carolina Supreme Court*, AP NEWS (Nov. 9, 2022), <https://apnews.com/article/north-carolina-state-courts-supreme-court-government-and-politics-176517442f012865f93d56e9c2827755> [<https://perma.cc/LZ9M-SGDL>].

293. Allen received 52.19% of the vote whereas Ervin received 47.81%. North Carolina State Board of Elections, *11/08/2022 Official General Election Results - Statewide* (Nov. 28, 2022, 8:46 PM), https://er.ncsbe.gov/contest_details.html?election_dt=11/08/2022&county_id=0&contest_id=1363 [<https://perma.cc/S7YL-GNCW>] (declaring the results for NC Supreme Court Associate Justice Seat 05); Powers & Keith, *supra* note 260; Horton & Benbow, *supra* note 290; Schoenbaum, *supra* note 292.

294. North Carolina State Board of Elections, *11/08/2022 Official General Election Results - Statewide* (Nov. 28, 2022, 8:46 PM), https://er.ncsbe.gov/contest_details.html?election_dt=11/08/2022&county_id=0&contest_id=1362 [<https://perma.cc/6E7D-HNM4>] (declaring the results for NC Supreme Court Associate Justice Seat 03); Powers & Keith, *supra* note 260; Horton & Benbow, *supra* note 290; Schoenbaum, *supra* note 292. In this contest, Dietz received 52.39% of the vote, whereas Inman received 47.61%. Prior to the elections, both Dietz and Inman were judges on the North Carolina Court of Appeals. Schoenbaum, *supra* note 292.

295. *See* Powers & Keith, *supra* note 260; Woodhouse, *Majority on the Line*, *supra* note 275; Horton & Benbow, *supra* note 290; Schoenbaum, *supra* note 292.

296. The Republican party is likely to have a majority on the supreme court until at least 2028. *See* Schoenbaum, *supra* note 292; *see also* Dallas Woodhouse, *New State Supreme Court Justices Take Oaths, Flip Control to Republicans*, THE CAROLINA J. (Jan. 1, 2023), <https://www.carolinajournal.com/opinion/new-state-supreme-court-justices-take-oaths-flip-control-to-republicans/> [<https://perma.cc/SFY6-E9R4>]. This is partially because the next two seats up for re-election are held by Democrats. *See id.* Justice Paul Newby was installed as Chief Justice in 2021. *See id.* “[Now, Chief Justice] Newby, [Justice] Allen, and [Justice] Dietz join Justices Phil Berger Jr. and Tamara Barringer to form a five-member conservative Republican majority on the seven-member court.” *Id.*

several days.²⁹⁷ Particularly, the court resolved motions in *Harper v. Hall*,²⁹⁸ *Bouvier v. Porter*,²⁹⁹ and *Holmes v. Moore*.³⁰⁰ Other controversial cases have been addressed as well.³⁰¹ These decisions, though mostly based on procedure, have far-reaching implications.³⁰² They represent the court's willingness to attack controversial political issues and decide — or even resurrect — cases already decided.³⁰³ Seeing as the powers of state supreme

297. See Westlaw Search, THOMSON REUTERS WESTLAW PRECISION, [298. 881 S.E.2d 630, 632 \(N.C. 2023\). In *Harper v. Hall*, the North Carolina Supreme Court is deciding issues related to political gerrymandering and legislative redistricting. See Sam Levine, *North Carolina Court Appears Poised to Overrule Itself in Gerrymandering Case*, THE GUARDIAN \(Mar. 14, 2023, 5:10 PM\), <https://www.theguardian.com/us-news/2023/mar/14/north-carolina-court-gerrymandering-case-voting-rights> \[https://perma.cc/V34S-9VBT\]. The North Carolina Supreme Court decided the case before the new Justices were sworn in. *Id.* After the new court was sworn in, “the new 5–2 GOP majority granted a request from the legislature to reconsider its redistricting ruling\[.\]” *Id.*](https://1.next.westlaw.com/Search/Results.html?query=advanced%3A%20DA(aft%2012-31-2022)&jurisdiction=NC-CS&contentType=CASE&querySubmissionGuid=i0ad604ad00000186e712a24c81248348&startIndex=201&categoryPageUrl=Home%2FCases%2FNorthCarolinaStateFederalCases%2FNorthCarolinaStateCases%2FNorthCarolinaSupremeCourtCases&searchId=i0ad604ad00000186e711e5eedeee1991&transitionType=ListViewType&contextData=(sc.Search)[https://perma.cc/8BHB-WGLC] (filter jurisdiction to North Carolina Supreme Court and search “advanced: DA(aft 12-31-2022)” and sort by date.).</p></div><div data-bbox=)

299. 881 S.E.2d 632, 633 (N.C. 2023). In *Bouvier v. Porter*, the North Carolina Supreme Court is deciding a defamation case filed by individuals who were accused of voter fraud in the 2016 election. See Southern Coalition for Social Justice, *Bouvier v. Porter*, S. COAL., <https://southerncoalition.org/cases/bouvier-v-porter/> [https://perma.cc/3QDA-8FKP] (last visited Mar. 15, 2023).

300. 881 S.E.2d 633, 633 (N.C. 2023). In *Holmes v. Moore*, the North Carolina Supreme Court is deciding “[w]hether the trial court’s order finding that a law imposing a photo identification requirement for voters violates the equal protection guarantee of Art. I section 19 of the North Carolina Constitution was supported by evidence in the record and properly applied governing legal standards.” See North Carolina Judicial Branch, *Holmes v. Moore*, NC CTS., <https://www.nccourts.gov/documents/appellate-court-opinions/holmes-v-moore-0> [https://perma.cc/GT4T-C9MD] (last visited Mar. 15, 2023).

301. See, e.g., *Estate of Graham v. Lambert*, 881 S.E.2d 714, 714 (N.C. 2023) (hearing a motion about a case related to governmental immunity).

302. All three opinions were short holdings that were responsive to procedural motions. See *supra* notes 298–300 and accompanying text.

303. See Zach Montellaro & Josh Gerstein, *North Carolina’s High Court Seems Inclined to Toss Past Redistricting Rulings*, POLITICO (Mar. 14, 2023, 05:38 PM), <https://www.politico.com/news/2023/03/14/north-carolina-supreme-court-gerrymandering-00087066> [https://perma.cc/X32K-NMQ2]; Will Doran, *NC Supreme Court Reopens Voter ID Case After Giving Gerrymandering Lawsuit A Do-Over. Are Politics At Play?*, WRAL NEWS [hereinafter Doran, *NC Supreme Court Reopens Voter ID Case*], <https://www.wral.com/nc-supreme-court-reopens-voter-id-case-after-giving-gerrymandering-lawsuit-a-do-over-are-politics-at-play/20762043/> [https://perma.cc/F223-2M96] (last visited Mar. 15, 2023); Will Doran, *NC Supreme Court Rehears Arguments In Controversial Redistricting Case*, WRAL NEWS [hereinafter Doran, *NC Supreme Court Rehears Arguments In Redistricting Case*], <https://www.wral.com/nc-supreme-court-rehears-arguments-in-controversial-redistricting-case/20761783/> [https://perma.cc/57GL-4C43] (last

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 1853.³⁰⁴ While the Wisconsin Supreme Court held its first judicial elections in that year,³⁰⁵ the initial elections were partisan.³⁰⁶ Over time, this changed.³⁰⁷ The court is now composed of seven judges elected by non-partisan elections to ten-year terms.³⁰⁸ For the past 14 years, the Wisconsin Supreme Court has had a conservative majority.³⁰⁹ However, the elections in 2023 swung the balance of the court.³¹⁰ The primary election had two conservative candidates and

visited Mar. 15, 2023); Kyle Morris, *North Carolina Supreme Court Uses New Republican Majority to Rehear Arguments in Redistricting Case*, FOX NEWS (Mar. 15, 2023, 11:28 AM), <https://www.foxnews.com/politics/north-carolina-supreme-court-uses-new-republican-majority-rehear-arguments-redistricting-case> [https://perma.cc/PX2P-TPDN]; Zach Schonfeld, *North Carolina Supreme Court Convenes For Rare Rehearing In Major Gerrymandering Case*, THE HILL (Mar. 14, 2023, 3:27 PM), <https://thehill.com/regulation/court-battles/3900078-north-carolina-supreme-court-convenes-for-rare-rehearing-in-major-gerrymandering-case/> [https://perma.cc/6TVX-X92X].

304. *History of the Courts: How Wisconsin's Judicial System Was Established*, WIS. CT. SYS. [hereinafter *History of Wisconsin Court System*], <https://www.wicourts.gov/courts/history/index.htm> [https://perma.cc/XAL5-664V] (last visited Feb. 15, 2023). Originally, the court had three justices elected in statewide elections. *See id.* One of these three judges was a chief justice. *See id.* The court expanded to four justices in 1877 and seven in 1903. *See id.*

305. *See id.*

306. See Michael Keane, *Judicial Elections Rooted in Wisconsin History*, WIS. STATE L. LIBR. (Dec. 3, 2019), <https://wilawlibrary.gov/learn/judicial-elections.pdf> [https://perma.cc/Q4CF-E6AR].

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. Czarnezki, *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; Czarnezki, *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. SENTINEL (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/V4F9-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.³¹¹

In a wider margin than anticipated, Judge Protasiewicz defeated Judge Kelly in the election by roughly 10%.³¹² The election process was politicized like no other Wisconsin judicial election in history.³¹³ Candidates, for what is supposed to be a position held by neutral arbiters,³¹⁴ vehemently pressed forward their views on sensitive political issues and proffered that, if elected, they will resolve cases related to those political issues.³¹⁵ These judicial campaigns have illustrated just how politicized judicial elections have become in Wisconsin.³¹⁶ Shifts in the election campaigns of judges foreshadow the magnitude this judicial election will have on the future of Wisconsin.³¹⁷ Protasiewicz and Kelly were both open about which issues are important to them.³¹⁸ 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/> [<https://perma.cc/3UPL-E5ZT>]; see also Schultz, *Meet the Candidates*, *supra* note 24; Panetta, *supra* note 260; Marley, *supra* note 15; Skelley, *supra* note 260.

311. See Panetta, *supra* note 260; Marley, *supra* note 15; Epstein, *supra* note 15; Schultz, *Meet the Candidates*, *supra* note 24; Syed, *supra* note 310; Montellaro & Messerly, *The Most Important Election*, *supra* note 12. The general election took place on April 4, 2023. See *Wisconsin State Supreme Court Primary Election*, N.Y. TIMES (Feb. 22, 2023), <https://www.nytimes.com/interactive/2023/02/21/us/elections/results-wisconsin-supreme-court.html> [<https://perma.cc/4J5Z-NFX7>].

312. See Politics, *What Went Down on The Biggest Election Day Of 2023*, FIVETHIRTYEIGHT (Apr. 4, 2023, 11:23 PM), <https://fivethirtyeight.com/live-blog/trump-arraignment-2023-election-results/> [<https://perma.cc/QRD7-4MKE>].

313. See Jonathan Bernstein, *Wisconsin Judicial Election is Bad for Democracy*, BLOOMBERG (Mar. 24, 2023, 7:30 AM), <https://www.bloomberg.com/opinion/articles/2023-03-24/wisconsin-judicial-election-is-bad-for-democracy#xj4y7vzkg> [<https://perma.cc/ND7Z-AUET>]; Matthew Rothschild, *How Wisconsin Supreme Court Races Became So Partisan*, WISCONSIN DEMOCRACY CAMPAIGN (Dec. 14, 2022), <https://www.wisdc.org/news/commentary/7254-how-wisconsin-supreme-court-races-became-so-partisan> [<https://perma.cc/X6VD-2U5J>].

314. See *supra* notes 68–70, 75–76 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; Quirnbach, *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.³¹⁹ Although many thought the election would become the most expensive judicial election in U.S. history, it far surpassed that expectation,³²⁰ becoming the most politicized and expensive judicial campaign in Wisconsin's history.³²¹

Now, the court has a 4–3 liberal majority.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,³²³ or until 2025.³²⁴ After newly-elected Justice Protasiewicz is sworn in, the swiftness with which the court will address her agenda will become apparent.³²⁵

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.

320. See *supra* notes 298–300; see also Sarah Ewall-Wice, *Why Wisconsin's Supreme Court Race Was the Most Expensive Election of Its Kind Ever*, CBS NEWS (Apr. 4, 2023, 10:31 PM), <https://www.cbsnews.com/news/why-wisconsins-supreme-court-election-is-the-most-expensive-election-of-its-kind-ever/> [<https://perma.cc/5X57-LYJG>]. Interest groups on all sides of all issues have poured money into the campaigns. These contributions included the Uihlein family, who are Republican megadonors that have funneled millions of dollars into Kelly's campaign through various PACs. See Molly Beck, *Wisconsin's Supreme Court Race Is Already the Most Expensive in U.S. History, and There Are Still 5 Weeks to Go*, MILWAUKEE J. SENTINEL (Mar. 1, 2023, 10:25 AM), <https://www.jsonline.com/story/news/politics/elections/2023/02/28/wisconsin-supreme-court-race-already-most-expensive-in-u-s-history/69955195007/> [<https://perma.cc/H6DG-Z86A>]; Matt Cohen, *Uihlein Money Runs Deep in Daniel Kelly's Wisconsin Supreme Court Campaign*, AM. INDEP. (Mar. 24, 2023, 10:30 AM), <https://americanindependent.com/uihleins-money-daniel-kelly-wisconsin-supreme-court/> [<https://perma.cc/QF38-6BQA>]; see also Panetta, *supra* note 260; Epstein, *supra* note 15; Montellaro & Messerly, *The Most Important Election*, *supra* note 12.

321. See *supra* notes 298–300 and accompanying text.

322. See *supra* notes 298–300 and accompanying text.

323. Anthony Dabruzzi, *Liberal-Backed Protasiewicz Wins Wisconsin Supreme Court Seat in Nation's Most Expensive Judicial Race*, SPECTRUM NEWS 1 (Apr. 5, 2023, 10:31 AM), <https://spectrumnews1.com/wi/green-bay/news/2023/04/05/protasiewicz-wins-10-year-term-on-state-supreme-court>. [<https://perma.cc/JWC6-UMEQ>].

324. In 2025, the next supreme court judicial elections will be held and Justice Ann Walsh Bradley's term is slotted 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.

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

326. OHIO CONST. art. IV, § 1; *see also* *Jurisdiction & Authority*, SUP. CT. OHIO & OHIO JUD. SYS. [hereinafter *Supreme Court Ohio, Jurisdiction & Authority*], <https://www.supremecourt.ohio.gov/courts/judicial-system/supreme-court-of-ohio/jurisdiction-authority/> [https://perma.cc/8QWT-YXP9] (last visited Mar. 10, 2023). Although founded in 1802, the court did not establish judicial review until 1807. *See History of the Supreme Court of Ohio*, SUP. CT. OHIO & OHIO JUD. SYS. [hereinafter *Supreme Court Ohio, History of the Supreme Court of Ohio*], <https://www.supremecourt.ohio.gov/courts/judicial-system/supreme-court-of-ohio/history-of-the-court/> [https://perma.cc/QT9A-CDFG] (last visited Mar. 25, 2023).

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-[p]artisan 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”³³² including three seats on the Supreme Court of Ohio.³³³ 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.”³³⁴

The first seat was contested between Republican Sharon Kennedy and Democrat Jennifer Brunner,³³⁵ the second seat was contested between Republican Pat Fischer and Democrat Terri Jamison,³³⁶ and the third seat was contested between Republican Pat DeWine and Democrat Marilyn Zayas.³³⁷ In addition, since one Justice was set to step up from Associate

332. *2022 Judicial Elections*, OHIO BAR ASS’N [hereinafter Ohio Bar Association, *2022 Judicial Elections*], <https://www.ohiobar.org/2022-judicial-elections/> [https://perma.cc/FR8V-6N3K] (last visited Mar. 10, 2023); *see also* Vu, *supra* note 330.

333. 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.

334. Andrew J. Tobias, *Eyeing Redistricting, National Republicans Plan \$2 million in Ads to Boost Ohio Supreme Court Candidates*, CLEVELAND.COM (Sept. 29, 2022, 5:27 PM) [hereinafter Tobias, *Eyeing Redistricting*], <https://www.cleveland.com/news/2022/09/eyeing-redistricting-national-republicans-plan-2-million-in-ads-to-boost-ohio-supreme-court-candidates.html> [https://perma.cc/WZ9M-QMAK].

335. *See 2022 Ohio Supreme Court Voters Guide: Jennifer Brunner (D) vs Sharon L. Kennedy (R)*, GUIDES.VOTE (Nov. 8, 2022), <https://guides.vote/guide/2022-ohio-supreme-court-brunner-kennedy-voters-guide> [https://perma.cc/P5KH-NNRJ]. Both candidates were already associate justices on the supreme court at the time. *See id.* The seat was previously held by Chief Justice O’Connor. *See Maureen O’Connor*, SUP. CT. OHIO & OHIO JUD. SYS., <https://www.supremecourt.ohio.gov/courts/judicial-system/supreme-court-of-ohio/justices-1803-to-present/maureen-oconnor/> [https://perma.cc/3NBR-GAV6] (last visited Apr. 26, 2023). Before the election, O’Connor was a relatively moderate Republican who sided with Democrats on many key issues. *See* Tobias, *Eyeing Redistricting*, *supra* note 334.

336. *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.*

337. *2022 Ohio Supreme Court Voters Guide: Pat DeWine (R) vs Marilyn Zayas (D)*, GUIDES.VOTE (Nov. 8, 2022), <https://guides.vote/guide/2022-ohio-supreme-court-dewine-zayas-voters-guide> [https://perma.cc/D9JT-ABE7]. Justice DeWine — the son of Ohio Governor Mike DeWine — had held a seat on the court since 2017. *See id.*; Morgan Trau, *Governor DeWine’s Son, Appeals Court Judge Run for Ohio Supreme Court, Talk About Integrity*, OHIO CAP. J. (Oct. 18, 2022, 4:50 AM), <https://ohiocapitaljournal.com/2022/10/18/governor-dewines-son-appeals-court-judge-run-for-ohio-supreme-court-talk-about-integrity/> [https://perma.cc/FZ9C-GBE5]. Like Justice Fischer, Justice DeWine was also a Republican incumbent. *See id.* Marilyn Zayas, the Democratic challenger, was elected to Ohio’s First District Court of Appeals in 2016. *See id.*; Press Release, Gov. Mike DeWine, *Governor DeWine to Appoint Joseph T. Deters to Ohio Supreme Court*, GOVERNOR.OHIO.GOV (Dec. 22, 2022), <https://governor.ohio.gov/media/appointments/governor-dewine-to-appoint-joseph-t-deters-to-ohio-supreme-court-12222022> [https://perma.cc/CB4J-EXQX].

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.

340. Chief Justice Kennedy defeated Justice Brunner with 56.31% of the vote, Justice Fischer defeated Judge Jamison with 57.15% of the vote, and Justice DeWine defeated Judge Zayas with 56.55% of the vote. Laura A. Bischoff, *Republicans Sweep 3 Ohio Supreme Court Races, Unofficial Results Show*, COLUMBUS DISPATCH (Nov. 9, 2022, 10:10 AM), <https://www.dispatch.com/story/news/politics/elections/2022/11/09/republicans-lead-in-three-ohio-supreme-court-races-2022-elections/69561966007/> [<https://perma.cc/WGL4-ZUCU>]; WLWT Digital Staff, *Election Results: Ohio Supreme Court*, WLWT5 (Nov. 8, 2022, 7:14 PM) [hereinafter *Election Results: Ohio Supreme Court*], <https://www.wlwt.com/article/election-results-ohio-supreme-court-races/41801839> [<https://perma.cc/Z9JG-QKK9>].

341. *See* Press Release, Gov. Mike DeWine, *supra* note 337.

342. *See* Press Release, Gov. Mike DeWine, *supra* note 337.

343. *See* Editorial Board, *Judicial Partisanship in 2022 Ohio Elections Has Tarnished the Appearance of Impartiality: Editorial*, CLEVELAND.COM (Nov. 13, 2022, 5:53 AM), <https://www.cleveland.com/opinion/2022/11/judicial-partisanship-in-2022-ohio-elections-has-tarnished-the-appearance-of-impartiality-editorial.html> [<https://perma.cc/Q8XQ-YD9W>].

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

(Nov. 2, 2022), <https://www.aclu.org/cases/preterm-cleveland-v-david-yost> [<https://perma.cc/H7EK-LYDD>]; see also Bischoff, *supra* note 340.

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

350. The three convincing victories and appointment of another Republican justice will remove obstacles blocking the Republican Party from pursuing their goals in court. See *Election Results: Ohio Supreme Court*, *supra* note 340; Press Release, Gov. Mike DeWine, *supra* note 337; Laura Benshoff, *How GOP State Supreme Court Wins Could Change State Policies and Who Runs Congress*, NPR (Nov. 22, 2022, 5:00 AM), <https://www.npr.org/2022/11/22/1138344117/republican-state-supreme-court-abortion-voting-redistricting-ohio-north-carolina> [<https://perma.cc/87KV-AVP2>].

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.”).

352. See generally Jeremy Waldron, *Five to Four: Why Do Bare Majorities Rule on Courts?*, 123 YALE L.J. 1692 (2014). This is true notwithstanding the fact that Ohio voters elected to adopt a constitutional amendment that protects access to abortion on November 4th, 2023. See Jessie Balmert et al., *Speaker Pans GOP Bill Blocking Judicial Review of Ohio Abortion Amendment*, CIN. ENQUIRER (Nov. 15, 2023, 1:10 PM), <https://www.cincinnati.com/story/news/politics/2023/11/14/speaker-pans-bill-blocking-judicial-review-of-ohio-abortion-amendment/71580075007/> [<https://perma.cc/MGV9-GY6T>].

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.³⁵⁴ These issues, which are among those prevalent in national political discourse, are discussed more below.³⁵⁵

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.³⁵⁶ To illustrate the impact of judicial elections and political polarization on precedent and stare decisis, three issues are addressed: abortion rights,³⁵⁷ political redistricting,³⁵⁸ and voter ID laws.³⁵⁹

1. Abortion Rights

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

354. Notably, the Ohio Supreme Court rejected several challenges related to legislative redistricting and partisan gerrymandering. Press Release, *Ohio Supreme Court Rejects Third Set of Legislative Maps over Partisan Gerrymandering*, BRENNAN CTR. FOR JUST. (Mar. 17, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/ohio-supreme-court-rejects-third-set-legislative-maps-over-partisan> [https://perma.cc/J944-N6LW]; Ally Mutnick, *States' High Courts Poised to Draw New Congressional Maps*, POLITICO (Dec. 13, 2021), <https://www.politico.com/news/2021/12/13/political-maps-redistricting-state-supreme-courts-524150> [https://perma.cc/7Q6Q-4ZCF]. The court also accepted appeals relating to abortion legislation, which could impact women's privacy rights in Ohio. See Samantha Wildow, *Ohio Supreme Court Accepts State Appeal over Case Involving State Abortion Law*, DAYTON DAILY NEWS (Mar. 14, 2023), <https://www.daytondailynews.com/local/ohio-supreme-court-accepts-state-appeal-over-case-involving-state-abortion-law/R3V7HJVJWDFBIED56L3ONQWII/> [https://perma.cc/GP3J-ZP2W]; Laura Hancock, *Ohio Supreme Court Accepts Yost's Appeal in 'Heartbeat' Abortion Ban Case, Won't Rule on Constitutional Question*, CLEVELAND.COM (Mar. 14, 2023, 10:08 AM), <https://www.cleveland.com/news/2023/03/ohio-supreme-court-accepts-yosts-appeal-in-heartbeat-abortion-ban-case-wont-rule-on-constitutional-question.html> [https://perma.cc/6VC8-EDE3].

355. See *infra* Section II.D.

356. See *infra* Section II.D.

357. See *infra* Section II.D.1.

358. See *infra* Section II.D.2.

359. See *infra* Section II.D.3.

360. 410 U.S. 113 (1973).

361. See *id.* at 164.

362. 505 U.S. 833 (1992).

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

364. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242–43 (2022).

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.³⁶⁵ *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.³⁶⁶

Since *Dobbs*, discerning what state laws say about abortion rights is complex.³⁶⁷ Old laws and precedents — some of which have not been touched in fifty years — are relevant once more.³⁶⁸ Accordingly, state courts must reinterpret dormant statutes, policies, and case law.³⁶⁹ 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.³⁷⁰ With these questions on the horizon,³⁷¹ understanding abortion precedents in North Carolina, Wisconsin, and Ohio is useful.

In North Carolina, abortion is legal for the first 12 weeks of pregnancy.³⁷² Following that period, abortion is only legal to save a pregnant person's life

365. *See id.* at 2284.

366. *See id.*

367. *See* Jessica Winter, *The Dobbs Decision Has Unleashed Legal Chaos for Doctors and Patients*, NEW YORKER (July 2, 2022), <https://www.newyorker.com/news/news-desk/the-dobbs-decision-has-unleashed-legal-chaos-for-doctors-and-patients> [https://perma.cc/JV5L-2HF5].

368. *See* Mabel Felix et al., *Legal Challenges to State Abortion Bans Since the Dobbs Decision*, KAISER FAM. FOUND. (Jan. 20, 2023), <https://www.kff.org/womens-health-policy/issue-brief/legal-challenges-to-state-abortion-bans-since-the-dobbs-decision/> [https://perma.cc/8HPZ-4LDU] (“With the aim of restricting access to abortion, many states moved swiftly to lift court orders previously blocking bans, revive dormant pre-*Roe* bans, certify ‘trigger’ bans, and enact new laws.”); *Tracking the States Where Abortion Is Now Banned*, N.Y. TIMES (Feb. 10, 2023), <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html> [https://perma.cc/NPY7-BGPP]; *Abortion Laws: 50-State Survey*, JUSTIA (Dec. 2022), <https://www.justia.com/constitutional-law/50-state-survey-on-abortion-laws/> [https://perma.cc/V84Q-AHRV].

369. *See supra* note 368 and accompanying text.

370. *See, e.g.*, Henry Isaiah Black, *3 Takeaways about Abortion Litigation since Dobbs*, BRENNAN CTR. FOR JUST. (Dec. 13, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/3-takeaways-about-abortion-litigation-dobbs> [https://perma.cc/RK2W-H6BJ] (“One big question will be how these courts approach principles like stare decisis, which is the binding effect of past decisions.”).

371. In some situations, these questions are already here. *See id.*

372. *See* Gary D. Robertson, *Federal Judge Allows Most of North Carolina's Revised 12-Week Abortion Ban to Take Effect*, PBS NEWS HOUR (June 1, 2023, 6:57 PM), <https://www.pbs.org/newshour/politics/federal-judge-allows-most-of-north-carolinas-revised-12-week-abortion-ban-to-take-effect> [https://perma.cc/BTN8-DWSY]. In May 2023, a federal judge upheld a revision to the North Carolina abortion statute that reduced the window for legal abortions from 12 weeks and six days to 12 weeks. *See id.*; Abortion Finder, *Abortion in North Carolina*, POWER TO DECIDE [hereinafter Abortion Finder, *Abortion in North Carolina*], <https://www.abortionfinder.org/abortion-guides-by-state/abortion-in-north-carolina> [https://perma.cc/LZ6F-X2VM] (last visited Mar. 26, 2023) (reporting that the legal period for abortion in North Carolina was 12 weeks and six days prior to the new law).

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.

374. Abortion Finder, *Abortion in Wisconsin*, POWER TO DECIDE, <https://www.abortionfinder.org/abortion-guides-by-state/abortion-in-wisconsin> [<https://perma.cc/K8FZ-QPJW>]; WIS. STAT. § 940.04 (1849). However, the Wisconsin abortion statute is ambiguous as to what physicians should do when a pregnant person's health is at risk. See Samantha McCabe, *Here's What to Know about Abortion Access in Post-Roe Wisconsin*, WIS. PUB. RADIO (Sept. 9, 2022, 5:00 AM), <https://www.wpr.org/heres-what-know-about-abortion-access-post-roe-wisconsin> [<https://perma.cc/WH23-H87S>]; Wis. Watch, *Wisconsin's 1849 Ban Allows Only Life-Saving 'Therapeutic Abortions' — No One Knows What That Means*, PBS WISCONSIN (Aug. 31, 2022), <https://pbswisconsin.org/news-item/wisconsins-1849-ban-allows-only-life-saving-therapeutic-abortions-no-one-knows-what-that-means/> [<https://perma.cc/3NJT-XA4X>].

375. Abortion Finder, *Abortion in Ohio*, POWER TO DECIDE [hereinafter Abortion Finder, *Abortion in Ohio*], <https://www.abortionfinder.org/abortion-guides-by-state/abortion-in-ohio> [<https://perma.cc/RM9C-KBS5>] (last visited Mar. 27, 2023).

376. See *Undue Burdens: A History of North Carolina Abortion Restrictions*, ACLU N.C. [hereinafter ACLU of North Carolina, *Undue Burdens*], https://www.acluofnorthcarolina.org/sites/default/files/field_documents/aclu-nc-undue-burdens-nc-abortion-restrictions-report-forprint.pdf [<https://perma.cc/5H8T-CKJN>] (last visited Mar. 26, 2023); ACLU of North Carolina, *Timeline of Abortion Restrictions in North Carolina*, ACLU N.C. [hereinafter ACLU of North Carolina, *Timeline of Abortion Restrictions*], <https://www.acluofnorthcarolina.org/en/timeline-abortion-restrictions-north-carolina> [<https://perma.cc/4NS4-L3NL>] (last visited Mar. 26, 2023); *Abortion in Wisconsin: What Happens if Roe v. Wade is Overturned?*, WIS. INST. FOR L. & LIB. [hereinafter WIS. INST. FOR L. & LIB.], <https://will-law.org/abortion-in-wisconsin-what-happens-if-roe-v-wade-is-overturned/> [<https://perma.cc/2N8M-S3YG>] (last visited Mar. 26, 2023); Madeline Kasper et al., *A Brief History of Abortion Laws in Wisconsin*, 6 WIS. LEGIS. REFERENCE BUREAU 1, 1–6 (Aug. 25, 2022), https://docs.legis.wisconsin.gov/misc/lrb/lrb_reports/history_of_abortion_laws_6_4.pdf [<https://perma.cc/P3H5-99FH>]; Nathan Denzin, *A History of Wisconsin's Abortion Laws*, PBS Wis. (July 1, 2022), <https://pbswisconsin.org/news-item/a-history-of-wisconsins-abortion-laws/> [<https://perma.cc/8VVC-CQ2J>]; see also *State v. Tippie*, 89 Ohio St. 35, 40 (1913); OHIO REV. CODE. § 2919.12 Unlawful Abortion (1996).

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 [] criminaliz[ed] 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.

380. North Carolina instituted programs to fund abortion access, which changed frequently from 1973 until 2011. See ACLU of North Carolina, *Timeline of Abortion Restrictions, supra* note 376; see also Gailya Paliga, *Women’s History Month: History of Abortion in NC, 1973 – 2020*, WOMEN ADVANCE (Mar. 22, 2021, 9:00 AM), <https://www.womenadvancenc.org/2021/03/22/womens-history-month-history-of-abortion-in-nc-1973-2020/> [<https://perma.cc/ZM24-PBTS>]. Over the past 12 years, North Carolina became increasingly strict about abortion access by rescinding programs, enforcing restrictions, and implementing new laws. See *id.*; see also *State Facts About Abortion: North Carolina*, GUTTMACHER INST. (June 2022) [hereinafter Guttmacher Inst., *State Facts About Abortion: North Carolina*], <https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-north-carolina> [<https://perma.cc/PYX5-S4PM>]. Some of these attempts to change the law in North Carolina were unsuccessful. See ACLU of North Carolina, *Timeline of Abortion Restrictions, supra* note 376 (“In 2019, the federal district court, later affirmed by the Fourth Circuit Court of Appeals, enjoined the 20-week ban in G.S. 14-45.1(a), requiring access to abortion up to viability. This injunction of the 20-week ban was reversed in 2022[.]”). In the late 1960s and early 1970s, Wisconsin shifted away from tight enforcement of abortion crimes. By 1973, most of the state’s legislation was not enforced. Since *Roe v. Wade*, however, Wisconsin implemented new policies such as obtaining consent for minors. See WIS. INST. FOR L. & LIB., *supra* note 376; Denzin, *supra* note 376; Kasper, *supra* note 376 at 7. Over the past 10–20 years, further restrictions have been placed on abortion access, by the Wisconsin Legislature, within the Supreme Court’s undue burden framework. See *Timeline of Abortion Laws in Wisconsin*, NAT’L INST. FOR REPRODUCTIVE HEALTH, https://www.supportwomenshealth.org/uploads/2/0/5/4/20541726/wi_abortion_laws_timeline_2017.pdf [<https://perma.cc/V5PK-T765>] (last visited Mar. 26, 2023). In Ohio, there were few developments after *Roe* until new abortion legislation was passed in the past decade. H.B. 258, 135th Gen. Assemb., Reg. Sess. (Ohio 2018) (available at: <https://www.legislature.ohio.gov/legislation/132/hb258> [<https://perma.cc/W34V-J45U>]). The Ohio law, known as the “heartbeat” legislation, is now being challenged in court, as it limits abortion access to the first six weeks of pregnancy. *Abortion Finder, Abortion in Ohio, supra* note 375; see also ACLU of Ohio, *Ohio Lower Court Blocks Six-Week Abortion Ban, Restoring Reproductive Rights Across State*, ACLU [hereinafter ACLU of Ohio, *Lower Court Blocks Six-Week Abortion Ban*], <https://www.aclu.org/press-releases/ohio-lower-court-blocks-six-week-abortion-ban-restoring-reproductive-rights-across> [<https://perma.cc/JDJ2-VWMG>] (last visited Mar. 27, 2023); *Legal Landscape of Abortion in Ohio*, ACLU OF OHIO (Jan. 12, 2023), <https://www.acluohio.org/en/legal-landscape-abortion-ohio>

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

[<https://perma.cc/N26Z-2R95>]; Elizabeth Cohen, *Ohio Abortion Law Meant Weeks of 'Anguish,' 'Agony' For Couple Whose Unborn Child Had Organs Outside Her Body*, CNN HEALTH (Feb. 8, 2023), <https://www.cnn.com/2023/02/08/health/ohio-abortion-long/index.html> [<https://perma.cc/GJ5F-S93K>]; Chris Ramirez, *What to Know About Abortion in Ohio, Post-Roe v. Wade*, COLUMBUS DISPATCH (July 2, 2022, 9:17 AM), <https://www.dispatch.com/story/news/2022/07/02/roe-v-wade-abortion-supreme-court-ohio-dewine-heartbeat-bill/7767433001/> [<https://perma.cc/V3X8-VQ3A>]; Jo Ingles, *In 2019, Ohio Passed Its Most Restrictive Abortion Law In Modern History*, WOSU PUBLIC MEDIA (Dec. 31, 2019, 5:00 AM), <https://news.wosu.org/news/2019-12-31/in-2019-ohio-passed-its-most-restrictive-abortion-law-in-modern-history> [<https://perma.cc/GPB7-DTF6>]. Even though the “heartbeat bill” is being challenged, other restrictions are in place. *See id.* For a detailed list of abortion rules as of June 28, 2022, *see State Facts About Abortion: Ohio*, GUTTMACHER INST. (June 2022) [hereinafter Guttmacher Institute, *State Facts About Abortion: Ohio*], <https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-ohio> [<https://perma.cc/K35D-W6VD>].

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.

382. *See* ACLU of North Carolina, *Timeline of Abortion Restrictions*, *supra* note 376; Veronica Stracqualursi & Tierney Sneed, *Federal Judge Allows North Carolina’s 20-Week Abortion Ban to Be Reinstated*, CNN POLITICS (Aug. 17, 2022, 9:03 PM), <https://www.cnn.com/2022/08/17/politics/north-carolina-20-week-abortion-ban/index.html> [<https://perma.cc/WS3T-FUF2>].

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

384. *See supra* note 380.

385. Kimberly Wehle, *Opinion: States’ Rights is about to Come Roaring Back*, POLITICO (Nov. 2, 2022, 11:03 AM), <https://www.politico.com/news/magazine/2022/11/02/the-supreme-courts-deference-to-states-rights-in-dobbs-might-have-been-just-the-start-00064607> [<https://perma.cc/M8PJ-HXML>].

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

386. See, e.g., *State v. Brooks*, 148 S.E.2d 263 (N.C. 1966); *State v. Hardling*, 170 N.W.2d 720 (Wis. 1969); *State Court Abortion Litigation Tracker*, BRENNAN CTR. FOR JUST. (Dec. 5, 2022) [hereinafter Brennan Center, *State Court Abortion Litigation Tracker*], <https://www.brennancenter.org/our-work/research-reports/state-court-abortion-litigation-tracker> [https://perma.cc/DG4P-M7JL]; Laura Hancock, *Lawsuit Asks Ohio Supreme Court to Split Proposed Abortion-Rights Amendment Into Multiple Issues, Requiring More Signatures*, CLEVELAND.COM (Mar. 20, 2023, 5:04 PM), <https://www.cleveland.com/news/2023/03/lawsuit-asks-ohio-supreme-court-to-split-proposed-abortion-rights-amendment-into-multiple-issues-requiring-more-signatures.html> [https://perma.cc/5B3J-5BTN]; Jo Ingles, *Will New Lawsuit Stop the Abortion Rights Amendment in Ohio? It Depends on Who You Ask*, THE STATEHOUSE NEWS BUREAU (Mar. 26, 2023, 9:35 PM), <https://www.stateneews.org/government-politics/2023-03-26/will-new-lawsuit-stop-the-abortion-rights-amendment-in-ohio-it-depends-on-who-you-ask> [https://perma.cc/83C4-E5LB]; David Dewitt, *The Political Strategy Against Ohio Abortion Rights: Manufacture Hysteria and Stack the Deck*, OHIO CAP. J. (Mar. 23, 2023, 4:30 AM), <https://ohiocapitaljournal.com/2023/03/23/the-political-strategy-against-ohio-abortion-rights-is-clear-manufacture-hysteria-and-rig-the-game/> [https://perma.cc/4SF5-EQCE].

387. See generally *Roe v. Wade*, 410 U.S. 113 (1973).

388. See generally *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2284 (2022). Rational basis review is generally understood to mean that a state law is valid so long as it is reasonably related to a legitimate state interest. See, e.g., *New Orleans v. Duke*, 427 U.S. 297, 303 (1976). This is widely understood to be the lowest standard of review in constitutional law. Cf. *Parents Involved v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (applying strict scrutiny).

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; Montellaro & Messlerly, *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,³⁹² although any decisions will certainly implicate principles of stare decisis.³⁹³

2. *Gerrymandering and Political Redistricting*

In 2019, the Supreme Court decided *Rucho v. Common Cause*.³⁹⁴ In *Rucho*, the Court held that questions relating to legislative redistricting were non-justiciable political questions.³⁹⁵ Accordingly, decisions about how states draw legislative districts are only judicially reviewable in state court.³⁹⁶ Since 2019, it has become more commonplace for state judiciaries to check maps drawn by state legislatures.³⁹⁷ These maps impact a political party's representation in the state and federal legislatures.³⁹⁸ In extreme cases, they even impact U.S. presidential elections.³⁹⁹ 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.⁴⁰⁰

Each state's policies for drawing legislative districts and standards for judicial review have come under the microscope.⁴⁰¹ As such, it is important

392. The Wisconsin Supreme Court has been the most vocal about favoring expanding abortion rights in the state, but doing so may require the court to disregard long-standing laws and decisions. *See supra* note 391.

393. In the pending Ohio litigation, parties have hinted that due to pre-existing reliance interests, stare decisis may be invoked. *See* Response to Relators' Motion for an Emergency Stay at 35, State ex rel. Preterm-Cleveland, et al. v. David Yost, et al., (Sup. Ct. Ohio June 30, 2022) (No. 2022-0803), https://www.supremecourt.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=926621.pdf&subdirectory=2022-0803%5CDocketItems&source=DL_Clerk [<https://perma.cc/97ZX-CBQQ>].

394. 139 S. Ct. 2484 (2019).

395. *See id.* at 2506–07.

396. *See id.* at 2507–08.

397. *See id.*; *see also* *Gerrymandering & Representation: Redistricting Litigation*, COMMON CAUSE, <https://www.commoncause.org/redistricting-litigation/> [<https://perma.cc/NP7F-L754>] (last visited Mar. 27, 2023).

398. *See* Liz Kennedy et al., *Redistricting and Representation*, AM. PROGRESS CAP (Dec. 5, 2016), <https://www.americanprogress.org/article/redistricting-and-representation/> [<https://perma.cc/S547-KQCG>].

399. *See, e.g.*, Moore v. Harper, 142 S. Ct. 2901 (2022); *see also* Brownstein, *supra* note 65; Marley, *supra* note 15.

400. *See* Brownstein, *supra* note 65; Zach Montellaro & Ally Mutnick, *House Republicans Could Expand Their Majority If They Win These Court Cases*, POLITICO (Mar. 14, 2023, 4:30 AM) [hereinafter Montellaro & Mutnick, *House Republicans Could Expand Their Majority*], <https://www.politico.com/news/2023/03/14/house-majority-decided-in-courts-2023-00086870> [<https://perma.cc/96EN-BFM7>].

401. *See* Nick Corasaniti et al., *How Maps Reshape American Politics*, N.Y. TIMES (Nov. 7, 2021), <https://www.nytimes.com/interactive/2021/11/07/us/politics/redistricting-maps-explained.html> [<https://perma.cc/S49B-97AR>]; *What Is Redistricting and Why Is It Important?*, BRENNAN CTR. FOR JUST. (July 3, 2017), <https://www.brennancenter.org/our-work/analysis-opinion/what-redistricting-and-why-it-important> [<https://perma.cc/6FJM-CCRXX>].

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.

403. See e.g., Montellaro & Gerstein, *supra* note 303 ("Republican justices look ready to use their new majority on the North Carolina's state Supreme Court to tear up the state's congressional maps, and the new ones would likely favor the GOP up and down the ballot."); Wisconsin Watch, *Wisconsin's Assembly Maps Are More Skewed Than Ever – What Happens in 2023?*, PBS WISCONSIN (Dec. 7, 2022) [hereinafter Wisconsin Watch, *Wisconsin's Assembly Maps*], <https://pbswisconsin.org/news-item/wisconsins-assembly-maps-are-more-skewed-than-ever-what-happens-in-2023/> [https://perma.cc/C776-J7VS]; Adams v. DeWine, 195 N.E.3d 74, 76 (Ohio 2022); League of Women Voters of Ohio v. Ohio Redistricting Comm'n, 192 N.E.3d 379, 385 (Ohio 2022); Mutnick, *supra* note 354; Julie Carr Smyth, *EXPLAINER: What's Ahead For Ohio's Unsettled Political Maps?*, AP NEWS (Jan. 1, 2023) [hereinafter Smyth, *EXPLAINER*], <https://apnews.com/article/politics-ohio-state-government-01117758be7ece7ce12ebc04baa0ce05> [https://perma.cc/DP3S-2XL9]; Camri Nelson, *Future of Map Redistricting Uncertain With New Members of Ohio Supreme Court*, SPECTRUM NEWS 1 (Nov. 10, 2022, 6:44 PM), <https://spectrumnews1.com/oh/columbus/news/2022/11/10/future-of-map-redistricting-uncertain-with-new-members-of-ohio-supreme-court> [https://perma.cc/HVU2-YF6L]. But see Susan Tebben, *Big Ohio Redistricting Changes Before 2024? Don't Count on It, Experts Say*, OHIO CAP. J. (Jan. 20, 2023, 5:00 AM), <https://ohiocapitaljournal.com/2023/01/20/redistricting-changes-before-2024-dont-count-on-it/> [https://perma.cc/U7HB-5MCC].

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].

405. The United States Census is conducted every ten years. See United States Census Bureau, *What We Do*, CENSUS.GOV, <https://www.census.gov/about/what.html> [https://perma.cc/4JCP-HJXH] (last visited Mar. 27, 2023).

406. See Brownstein, *supra* note 65; Julia Kirschenbaum & Michael Li, *Gerrymandering Explained*, BRENNAN CTR. FOR JUST. (Aug. 10, 2021), <https://www.brennancenter.org/our-work/research-reports/gerrymandering-explained> [https://perma.cc/4TPG-WYL7].

407. "Unlike most states, the resulting plans are *not* subject to the Governor's veto." Gerrymandering Project, *North Carolina: Scored Maps from The Redistricting Report Card*, PRINCETON UNIV. [hereinafter Gerrymandering Project, *North Carolina*], <https://gerrymander.princeton.edu/reforms/NC> [https://perma.cc/85Q3-4Z9R] (last visited Mar. 27, 2023) (emphasis added).

408. 967 N.W.2d 469 (Wis. 2021).

judiciary in redistricting under the Wisconsin Constitution.⁴⁰⁹ 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.⁴¹⁰

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.⁴¹¹ While North Carolina has no public input requirement, Ohio does.⁴¹² 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*,⁴¹³ 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. [hereinafter *Gerrymandering Project, Ohio*], <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. [hereinafter *Gerrymandering Project, Wisconsin*], <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.

413. *See* *Rucho v. Common Cause*, 139 S. Ct. 2484, 2491 (2019).

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

Among other issues, *Moore v. Harper* focused on the independent state legislature theory.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.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.⁴²¹ Of course, certain principles — such as “one-person, one-vote”⁴²² — will still be mandatory.⁴²³ Although *Moore*

414. See Ari Savitzky, *Explaining Moore v. Harper, the Supreme Court Case that Could Upend Democracy*, ACLU (Dec. 6, 2022), <https://www.aclu.org/news/voting-rights/explaining-moore-v-harper-the-supreme-court-case-that-could-upend-democracy> [<https://perma.cc/8U77-8828>]. See generally *Moore v. Harper*, 600 U.S. 1 (2023).

415. See *Rucho*, 139 S. Ct. at 2494, 2507–08.

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. *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. *Id.*

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).

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”).

419. See Savitzky, *supra* note 414.

420. See Savitzky, *supra* note 414.

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

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

423. See *id.* at 1005–06.

provided some limits,⁴²⁴ North Carolina courts will still have to evaluate new maps going forward.⁴²⁵ As such, old precedent may be relevant.

In Wisconsin, *Johnson* was the major Wisconsin Supreme Court case in the aftermath of *Rucho*.⁴²⁶ However, there have been updates since that Wisconsin Supreme Court decision.⁴²⁷ In practice, “[t]he state Assembly and Senate maps [are] drawn by the Legislature and selected by the Wisconsin Supreme Court[.]”⁴²⁸ Wisconsin’s current maps were drawn by Republican legislators in 2021 and were based on maps drawn by Republicans ten years prior.⁴²⁹ Lawyers and constituents are dissatisfied with the way this map represents Wisconsinites, and challenges will likely continue.⁴³⁰ Wisconsin’s districts are drawn by the legislature, subject to the legislative veto, and subject to judicial review on constitutional grounds.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.⁴³²

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

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.

425. See Savitzky, *supra* note 414.

426. *Redistricting Update*, WISCONSIN ELECTIONS COMM’N, <https://elections.wi.gov/node/1296> [<https://perma.cc/P8GY-69U9>] (last visited Mar. 27, 2023).

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

428. *Redistricting Update*, *supra* note 426.

429. See Bridgit Bowden, *What the Wisconsin Supreme Court Race Could Mean for the State’s Republican-Drawn Redistricting Maps*, WISCONSIN PUBLIC RADIO (Mar. 21, 2023, 5:45 AM), <https://www.wpr.org/wisconsin-supreme-court-april-race-state-legislature-redistricting-maps> [<https://perma.cc/48GU-8SGY>].

430. See *id.*; see also Wisconsin Watch, *Wisconsin’s Assembly Maps*, *supra* note 403.

431. See *supra* notes 408–09 and accompanying text; Gerrymandering Project, *Wisconsin*, *supra* note 411.

432. Gerrymandering Project, *Wisconsin*, *supra* note 411.

433. See *infra* notes 434–35.

maps,⁴³⁴ most of the districts are red despite a plurality of residents in Wisconsin voting blue in presidential elections.⁴³⁵ Despite these gaps, Wisconsin's laws on redistricting and gerrymandering are ambiguous and the judicial role is uncertain.⁴³⁶

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.⁴³⁷ Despite these processes, the Ohio congressional map has substantial efficiency gaps.⁴³⁸ This gap comes in political battleground states,⁴³⁹ and the discrepancy illustrates the backdrop against which the new Ohio Supreme Court will hear claims relating to

434. See *What Redistricting Looks Like in Every State*, FIVETHIRTYEIGHT (July 19, 2022, 3:50 PM) [hereinafter *FiveThirtyEight, Wisconsin Districts*], <https://projects.fivethirtyeight.com/redistricting-2022-maps/wisconsin/> [<https://perma.cc/H9WF-YBTY>].

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.*

redistricting.⁴⁴⁰ 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

440. See Karen Juanito Carrillo, *Ohio Votes Under 'Extreme' Gerrymandering that Favors Republicans*, CTR. FOR PUB. INTEGRITY (Oct. 6, 2022), <https://publicintegrity.org/politics/elections/who-counts/ohio-votes-under-extreme-gerrymandering-that-favors-republicans/> [<https://perma.cc/RZ5U-5CFC>]; see also Press Release, *Ohio Supreme Court*, *supra* note 354; Mutnick, *supra* note 354; Tobias, *Eyeing Redistricting*, *supra* note 334.

441. See *Ohio Redistricting Litigation: Ohio Organizing Collaborative v. Ohio Redistricting Commission* (Ohio Supreme Court); *Ohio Organizing Collaborative v. LaRose* (Southern District of Ohio), BRENNAN 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,⁴⁴⁹ partisan shifts⁴⁵⁰ could impact the ultimate outcomes in these cases.⁴⁵¹ 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.⁴⁵²

3. Voter ID Laws

Since the Voting Rights Act of 1965 (VRA),⁴⁵³ state legislatures have passed a wide variety of voter ID laws.⁴⁵⁴ While some states have lenient voter ID requirements,⁴⁵⁵ others have been scrutinized for blocking constituents from voting in elections.⁴⁵⁶ Because the 50 states have different requirements for voters,⁴⁵⁷ the challenges in each state are unique.⁴⁵⁸ 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*.⁴⁵⁹ This framework is still relevant in the

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.

451. Nelson, *supra* note 403; Montellaro & Mutnick, *House Republicans Could Expand Their Majority*, *supra* note 400.

452. For example, the 2022 court holding become precedent forcing the court to abide by stare decisis.

453. See Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973-1973bb-1).

454. See, e.g., Majoj S. Mate, *Challenging Voter ID Laws: The Need for Reform*, 58-OCT ORANGE CNTY. L. 30, 32 (2016) ("Following Shelby County, North Carolina's Republican-controlled legislature moved quickly to enact new voting restrictions."); Eugene D. Mazo, *Finding Common Ground on Voter ID Laws*, 49 U. MEM. L. REV. 1233, 1234 (2019).

455. See Nick Corasaniti & Allison McCann, *The 'Cost' of Voting in America: A Look at Where It's Easiest and Hardest*, N.Y. TIMES (Sept. 21, 2022), <https://www.nytimes.com/interactive/2022/09/20/us/politics/cost-of-voting.html> [<https://perma.cc/9XDU-34LT>].

456. See *id.*; Shirin Ali, *These Are the Most Difficult States to Vote In*, THE HILL (Sept. 28, 2022), <https://thehill.com/changing-america/respect/accessibility/3665190-these-are-the-hardest-states-to-vote-in/> [<https://perma.cc/YU57-YR44>] (identifying Texas, Florida, and Iowa as three of the most difficult states to vote in).

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.⁴⁶⁰ However, the criteria for state voter ID laws has become more ambiguous, and focused on state constitutional restrictions.⁴⁶¹

In 2013, the United States Supreme Court decided *Shelby County, Alabama v. Holder*.⁴⁶² In *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.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.⁴⁶⁴ The result, increases in voter ID laws, have correlated with increased litigation challenging those laws.⁴⁶⁵ While federal and state courts share jurisdiction to hear these cases,⁴⁶⁶ the role of state supreme courts in deciding challenges to voter ID laws has grown the past few years.⁴⁶⁷ Further, increased voter fraud accusations,⁴⁶⁸ and public opposition to immigrant voting rights⁴⁶⁹ have exacerbated voter ID challenges and propelled these issues into the spotlight.⁴⁷⁰

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

460. See Sally Tyler, *State Voter ID Laws and the Challenge to Democracy*, 37-MAR CHAMPION 52, 53 (2013); Mate, *supra* note 454, at 31; Mazo, *supra* note 454, at 1252–54.

461. See Mazo, *supra* note 454, at 1253–54.

462. See 570 U.S. 529 (2013).

463. See *id.* at 556–57. The majority in *Shelby County* reasoned that the coverage formula has not achieved its purpose *because* voter discrimination still exists. 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. 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. See *id.* As such, new measures were needed *in addition to* Section 5 rather than to replace Section 5. See *id.*

464. See Mazo, *supra* note 454, at 1239–40.

465. See Mazo, *supra* note 454, at 1270–71.

466. Both the U.S. Constitution and state constitutions have requirements for voter registration and election law. See, e.g., N.Y. CONST. art. II.

467. See Mazo, *supra* note 454, at 1270–71.

468. See generally Lynn Adelman, *A New Stage in the Struggle for Voting Rights*, 43 U. ARK. LITTLE ROCK L. REV. 477 (2021).

469. See generally *id.*

470. See Michael Waldman, *What's Behind the Voter Fraud Witch Hunt?*, BRENNAN CTR. FOR JUST. (Mar. 30, 2016), <https://www.brennancenter.org/our-work/analysis-opinion/whats-behind-voter-fraud-witch-hunt> [<https://perma.cc/3445-SNNS>].

471. *Voter ID*, N.C. STATE BD. OF ELECTIONS, <https://www.ncsbe.gov/voting/voter-id> [<https://perma.cc/QDY2-YRP2>] (last visited Feb. 15, 2023).

472. See generally 881 S.E.2d 486 (N.C. 2023).

473. See *id.*; *Voter ID*, *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.⁴⁷⁴ 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 Corporation*⁴⁷⁷ and held that the law had an intent to unfairly discriminate.⁴⁷⁸

474. See Robyn Sanders, *Voter ID Law Struck Down by North Carolina Supreme Court*, BRENNAN CTR. FOR JUST. (Feb. 7, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/voter-id-law-struck-down-north-carolina-supreme-court> [<https://perma.cc/3XKC-2DU7>]; Doran, *NC Supreme Court Reopens Voter ID Case*, *supra* note 303; Gary D. Robertson, *N. Carolina Voter ID Still Void After Supreme Court Ruling*, AP NEWS (Dec. 16, 2022), <https://apnews.com/article/north-carolina-5d529571b6fde1faad9856aa7b118c6f> [<https://perma.cc/ZG8B-3VA8>]; DeJuan Hoggard, *North Carolina Supreme Court Rehears Voter ID Case*, ABC 11 (Mar. 15, 2023), <https://abc11.com/politics-voter-id-law-nc-supreme-court-republicans/12956143/> [<https://perma.cc/JKM3-DKGU>]; CJ Staff, *New NC Supreme Court Could Restore 2018 Voter ID Law*, CAROLINA J. (Mar. 15, 2023), <https://www.carolinajournal.com/new-nc-supreme-court-could-restore-2018-voter-id-law/> [<https://perma.cc/6DHK-CLPR>]. Since the election of the new state supreme court, the justices have ordered a rehearing on the cases, including *Holmes*, that invalidated the previous voter ID requirement. Steve Doyle, *North Carolina Supreme Court Reconsiders Earlier Ruling on Voter ID Amendment*, FOX 8 (Mar. 28, 2023, 2:45 PM), <https://myfox8.com/news/north-carolina/north-carolina-supreme-court-reconsiders-earlier-ruling-on-voter-id-amendment/> [<https://perma.cc/AR9E-PX7U>]. The law in question is a 2018 law that required those voting in North Carolina to use “[v]oter photo identification cards.” S.B. 824, Gen. Assemb., 2017 Sess. (N.C. 2018) (also referred to as Sess. L. 2018–144). In December 2017, this law passed the General Assembly. *See id.* After it was vetoed by the Democratic governor, the state legislature voted in June 2018 to place the law on the ballot. *See* WTVS-AP, *North Carolina Voter ID Still Void after State Supreme Court Ruling*, ABC 11 (Dec. 16, 2022), <https://abc11.com/voter-id-law-state-supreme-court-ruling-elections-voting/12581748/> [<https://perma.cc/H3FC-TXWQ>]; *see also* Dr. Tracey B. Carter, *Post-Crawford: Were Recent Changes to State Voter ID Laws Really Necessary to Prevent Voter Fraud And Protect the Electoral Process?*, 12 CONN. PUB. INT. L.J. 283, 304 (2013); Lily Richardson, *Here's What You Need To Know About Voter ID In North Carolina*, THE DAILY TAR HEEL (Nov. 8, 2022, 1:40 AM), <https://www.dailytarheel.com/article/2022/11/city-voter-id-laws-explainer> [<https://perma.cc/93Q4-CSEA>]. In 2018, voters approved the law.

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.⁴⁷⁹ After the new justices were elected, the court invoked a rare procedural posture to revive the case.⁴⁸⁰ Now, they must decide what to do with the law.⁴⁸¹ 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.⁴⁸² This see-saw of partisanship raises questions that invoke principles of stare decisis and judicial neutrality.⁴⁸³

In Wisconsin, elections are administered at a municipal level, not by county or state.⁴⁸⁴ Nevertheless, election requirements are legislated at the state level.⁴⁸⁵ Since *Shelby County*, Wisconsin has had extensive litigation concerning the state's voter ID laws that has "spilled over from state to federal court."⁴⁸⁶ However, changes to Wisconsin voter ID laws began even prior to the Supreme Court's 2013 holding in *Shelby County*.⁴⁸⁷ Historically, Wisconsin is one of the most accessible states for voters.⁴⁸⁸ 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.⁴⁸⁹ Among

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.

484. See Isaac Yu, *Wisconsin Historically Ahead of the Curve in Voting Access*, MILWAUKEE J. SENTINEL (Oct. 13, 2022, 1:46 PM), <https://www.jsonline.com/in-depth/news/politics/elections/2022/08/23/wisconsin-historically-ahead-curve-voting-access/10183925002/> [<https://perma.cc/JE6N-GD6N>].

485. See Katherine Danaher, *The Price Tag on Voting Equality: How to Amend the Voting Rights Act Using the Spending Power*, 100 TEX. L. REV. 1197, 1216–17 n.156 (2022) (citing *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 28 (2020)) (emphasizing the differences between federal and state election law cases).

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).

487. See WIS. STAT. ANN. § 6.79(2)(a) (amended June 9, 2011) (West 2019).

488. See Yu, *supra* note 484. Some of these lenient points of entry are still intact. See *id.* Voters in Wisconsin do not register by party and there is same-day voter registration allowed at Election Day polling locations. See *id.*

489. See *id.*; Adam Liptak, *Wisconsin Decides Not to Enforce Voter ID Law*, N.Y. TIMES (Mar. 23, 2015) [hereinafter Liptak, *Wisconsin Voter ID Law*], https://www.nytimes.com/2015/03/24/us/supreme-court-rejects-challenge-to-wisconsin-voter-id-law.html?_r=0 [<https://perma.cc/AGH3-2Z7M>]; see also Larson Report Newsletter, *A Capital Update from Senator Chris Larson*, LEGIS.WISCONSIN.GOV (Oct. 14, 2019), <https://legis.wisconsin.gov/senate/07/Larson/media/eupdates/Larson-Report---10-14->

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 *Crawford*⁴⁹⁶ and applied the "lost-votes approach."⁴⁹⁷

2019.html [https://perma.cc/SBW3-DN4P] (arguing that despite there being no evidence of voter fraud, the stricter requirements were presented as countering voter fraud in the state); Wisconsin Watch, '*Election Integrity*' Proposals Do Not Address Most Common Voting Infraction in Wisconsin, PBS Wis. (Mar. 20, 2023) [hereinafter Wisconsin Watch, '*Election Integrity*' Proposals], <https://pbswisconsin.org/news-item/election-integrity-proposals-do-not-address-most-common-voting-infraction-in-wisconsin/> [https://perma.cc/J9W7-J96R].

490. See *id.* (describing how Wisconsin has implemented stricter ballot box requirements, especially for absentee voting); Larson Report Newsletter, *supra* note 489; Carter, *supra* note 474, at 304, 311–12 (describing the 2011 Wisconsin voter ID laws and the related constitutional challenges following its passage).

491. See Liptak, *Wisconsin Voter ID Law*, *supra* note 489.

492. See Larson Report Newsletter, *supra* note 489; Michael Redzich, *Poverty, Place and Voter Participation: Bridging the Gap*, 28 GEO. J. ON POVERTY L. & POL'Y 201, 213 (2021) (noting that the 2011 law survived constitutional challenges in state and federal courts). The amendment requires Wisconsin voters to show an original copy of an acceptable photo ID at their polling place to receive a ballot for all elections. *Photo ID*, WIS. ELECTIONS COMM'N, <https://elections.wi.gov/photoid> [https://perma.cc/86UX-KUJW] (last visited Mar. 29, 2023); University of Wisconsin-Milwaukee Student Voter Information, *What Is Wisconsin's Voter ID Requirement?*, UNIV. OF WIS.-MILWAUKEE, <https://uwm.edu/vote/faqs/what-is-wisconsins-voter-id-requirement/> [https://perma.cc/F2BC-9Z6R] (last visited Mar. 29, 2023); Larson Report Newsletter, *supra* note 489; Yu, *supra* note 484. It also requires voters to show a photo ID to receive an absentee ballot. Acceptable forms of ID include Wisconsin drivers licenses and state IDs, U.S. passports and Uniformed Services cards, Veteran Affairs ID and tribal ID cards, or Certificates of Naturalization. *Photo ID*, WIS. ELECTIONS COMM'N, *supra*; University of Wisconsin-Milwaukee Student Voter Information, *supra*. This requirement went into effect for all elections following the Wisconsin elections on April 7, 2015. See Liptak, *Wisconsin Voter ID Law*, *supra* note 489; *Photo ID*, WIS. ELECTIONS COMM'N, *supra*.

493. See *supra* notes 489, 492 and accompanying text.

494. See generally Frank v. Walker, 768 F.3d 744 (7th Cir. 2014); see also Liptak, *Wisconsin Voter ID Law*, *supra* note 489; Emily Rong Zhang, *Questioning Questions in the Law of Democracy: What the Debate over Voter ID Laws' Effects Teaches about Asking the Right Questions*, 69 UCLA L. REV. 1028, 1068 (2022).

495. See Liptak, *Wisconsin Voter ID Law*, *supra* note 489; see also Mann, *supra* note 477, at 255–57.

496. See *supra* note 495 and accompanying text.

497. Zhang, *supra* note 494, at 1068.

On one hand, those opposed to the law argued it suppressed voters.⁴⁹⁸ Although empirical evidence substantiates these claims *ex post*,⁴⁹⁹ the legal standard used by the court — perhaps the harshest application of the “lost-votes approach” — did not lead to this conclusion.⁵⁰⁰ 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.⁵⁰¹ This was a heightened standard of review for finding voter ID laws unconstitutional.⁵⁰² On the other hand, the main argument defending the voter ID law is that it protects against voter fraud.⁵⁰³ However, there is little evidence of voter fraud in Wisconsin.⁵⁰⁴ Following the Seventh Circuit’s decision, the U.S. Supreme Court denied certiorari.⁵⁰⁵ Simply put, the law did not reduce instances of voter fraud.⁵⁰⁶ 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.⁵⁰⁷ Since 2016, Wisconsin voting laws have come under intense scrutiny.⁵⁰⁸

The Wisconsin Supreme Court is in the middle of this scrutiny.⁵⁰⁹ The supreme court affects voting through its role in redistricting and in other profound ways.⁵¹⁰ Both *ex ante*⁵¹¹ and *ex post*,⁵¹² the court frequently gets involved in voting access cases before big elections.⁵¹³ The court will likely play a similar role in adjudicating disputes related to voting access again in 2024.⁵¹⁴ 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.⁵¹⁵ 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.

509. See generally Chantelle Lee, *What the Wisconsin Supreme Court Election Could Mean for the 2024 Election, Gerrymandered Maps and Abortion*, PBS: FRONTLINE (Apr. 7, 2023), <https://www.pbs.org/wgbh/frontline/article/wisconsin-supreme-court-2024-election-gerrymander-abortion/> [<https://perma.cc/E4TU-52S3>].

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/3J5Z-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.

517. See generally Ohio Secretary of State, *Identification Requirements*, OHIO SEC'Y OF STATE, <https://www.ohiosos.gov/elections/voters/id-requirements/> [<https://perma.cc/GCT7-Q4JN>] (last visited Mar. 10, 2023).

518. See Sydney Dawes, *What to Know About Ohio's Voter ID Law Ahead of Primaries*, GOVERNING (Mar. 6, 2023) [hereinafter Dawes, *What to Know About Ohio's Voter ID Law*], <https://www.governing.com/now/what-to-know-about-ohios-voter-id-law-ahead-of-primaries> [<https://perma.cc/R3JE-PGN4>]; see also Sydney Dawes, *With Ohio's New Voter ID Law, Here's What You Need to Know in Order to Vote in May Election*, DAYTON DAILY NEWS (Mar. 5, 2023) [hereinafter Dawes, *Ohio's New Voter ID Law*], <https://www.daytondailynews.com/local/with-ohios-new-voter-id-law-heres-what-you-need-to-know-in-order-vote-in-may-election/W22PXG2GQRF4RJUT4LPMEII4DI/> [<https://perma.cc/Z5BH-B45V>]; Nick Evans, *Ohio's Photo Voter ID Law Already Facing Legal Challenge*, OHIO CAP. J. (Jan. 10, 2023, 5:00 AM) [hereinafter Evans, *Ohio's Photo Voter ID Law*], <https://ohiocapitaljournal.com/2023/01/10/ohios-photo-voter-id-law-already-facing-legal-challenge/> [<https://perma.cc/T3W3-6CFC>]; Zurie Pope, *A Behind-the-Scenes Look at How Ohio Enacted the Most Restrictive Voter Photo ID Law in America*, OHIO CAP. J. (Mar. 1, 2023, 5:00 AM), <https://ohiocapitaljournal.com/2023/03/01/a-behind-the-scenes-look-at-how-ohio-enacted-the-most-restrictive-voter-photo-id-law-in-america/> [<https://perma.cc/CA93-L2EU>].

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).

525. See *HB 458: Ohio's New Strict Voter ID Law*, ACLU OF OHIO (Feb. 1, 2023), <https://www.acluohio.org/en/publications/hb-458-ohios-new-strict-voter-id-law> [<https://perma.cc/Q2NG-EM8W>].

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

531. See generally 570 U.S. 529 (2013).

532. See Samuel Issacharoff, *Ballot Bedlam*, 64 DUKE L.J. 1363, 1373, 1401 (2015).

533. See *id.* at 1401.

534. See, e.g., Pete Williams, *Supreme Court Gives Ohio Right to Purge Thousands of Voters from Its Rolls*, NBC NEWS (June 11, 2018, 10:11 AM), <https://www.nbcnews.com/politics/supreme-court/ohio-wins-supreme-court-fight-over-voter-registration-n873226> [<https://perma.cc/L8T5-C564>].

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.*

538. See Dawes, *What to Know About Ohio’s Voter ID Law*, *supra* note 518; Dawes, *Ohio’s New Voter ID Law*, *supra* note 518.

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), “violat[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.⁵⁴¹ Then, on January 6, 2023, House Bill 458 was signed.⁵⁴² The Republican lawmakers who sponsored the bill cite voting fraud concerns.⁵⁴³ Democrats criticized the bill and insinuated that it was an assault on democracy because it was more difficult to vote.⁵⁴⁴ Other critics argue the law will confuse inexperienced voters unaware of the law's timeline for implementation.⁵⁴⁵ HB 458 dramatically changed Ohio's voter ID landscape.⁵⁴⁶ Reacting to the bill, the Director of the Hamilton County Board of Elections explained that

541. See Pope, *supra* note 518.

542. See Pope, *supra* note 518; Kristin Mazur, *New Ohio Voter ID Law Raises Discrimination Concerns*, SPECTRUM NEWS 1 (Jan. 20, 2023, 5:12 PM), <https://spectrumnews1.com/oh/columbus/news/2023/01/20/new-ohio-voter-id-law-raises-discrimination-concerns> [<https://perma.cc/BDA8-VQPB>]. The new law went into effect in April during the first week of early voting. Dawes, *What to Know About Ohio's Voter ID Law*, *supra* note 518; Dawes, *Ohio's New Voter ID Law*, *supra* note 518.

543. See Dawes, *What to Know About Ohio's Voter ID Law*, *supra* note 518; Dawes, *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, *What to Know About Ohio's Voter ID Law*, *supra* note 518; Dawes, *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, *What to Know About Ohio's Voter ID Law*, *supra* note 518; Dawes, *Ohio's New Voter ID Law*, *supra* note 518.

544. See Dawes, *What to Know About Ohio's Voter ID Law*, *supra* note 518; Dawes, *Ohio's New Voter ID Law*, *supra* note 518; Pope, *supra* note 518.

545. See Dawes, *What to Know About Ohio's Voter ID Law*, *supra* note 518; Dawes, *Ohio's New Voter ID Law*, *supra* note 518.

546. *HB 458: Ohio's New Strict Voter ID Law*, *supra* note 525. The new legislation changed the allowable forms of ID. See Mazur, *supra* note 542; Pope, *supra* note 518. Valid forms of photo ID include Ohio driver's license, Ohio state ID cards, Interim ID forms issued by the Ohio BMV, a United States passport or passport card, a U.S. military ID card, an Ohio National Guard ID card, or a U.S. Department of Veterans Affairs ID card. See Ohio Secretary of State, *Identification Requirements*, *supra* note 517. However, if you do not have one of these forms of ID on election day, you can still cast a provisional ballot and then provide an ID to the board of elections within four days of the election to have your vote counted. See Ohio Secretary of State, *Identification Requirements*, *supra* note 517; Dawes, *What to Know About Ohio's Voter ID Law*, *supra* note 518; Dawes, *Ohio's New Voter ID Law*, *supra* note 518.

“voters now have to have an acceptable photo ID when casting their ballot in person[.]”⁵⁴⁷ The new law also added further restrictions.⁵⁴⁸

Although Ohioans are supportive of strict photo ID requirements for voting, the change may make it harder for some to vote.⁵⁴⁹ The new law will disproportionately impact out-of-state college students and Ohioans with military ties.⁵⁵⁰ Further, certain minority groups — such as trans individuals — fear the new laws will make it difficult for them to vote in person.⁵⁵¹

When the new ID law was passed, plaintiffs filed a court challenge alleging infringements on their right to vote.⁵⁵² With the new law being challenged in federal courts, the Ohio Supreme Court’s role will still be

547. See *What You Need to Know About Ohio’s Voter ID Law*, SPECTRUM NEWS 1 (Mar. 28, 2023, 6:32 PM), <https://spectrumnews1.com/oh/columbus/news/2023/03/28/what-you-need-to-know-about-ohio-s-voter-id-law> [<https://perma.cc/7FJ3-Q4EJ>]. She also noted that the most common form of ID is an Ohio driver’s license. See *id.* Now, utility or cell phone bills, bank statements, paychecks, government checks, and government documents from Social Security or Ohio Jobs and Family services are not allowed. See *HB 458: Ohio’s New Strict Voter ID Law*, *supra* note 525; see also Dawes, *What to Know About Ohio’s Voter ID Law*, *supra* note 518; Dawes, *Ohio’s New Voter ID Law*, *supra* note 518; Mazur, *supra* note 542. Prior to HB 458 they were permissible. See *HB 458: Ohio’s New Strict Voter ID Law*, *supra* note 525.

548. Among other things, the new law eliminated early voting the Monday before election day, provided discretion to the Secretary of State to reallocate hours of early in-person voting previously available by adding hours in the preceding week, eliminated August special elections unless they involve political subdivisions or school districts in a state of emergency, shortened the deadline to apply to cast absent voters’ ballots by mail, limited the drop-boxes to just one per county, and limited curbside voting to Ohio voters who cannot physically enter their polling location. See Mazur, *supra* note 542; see generally Dawes, *What to Know About Ohio’s Voter ID Law*, *supra* note 518; Dawes, *Ohio’s New Voter ID Law*, *supra* note 518.

549. See Mazur, *supra* note 542. Many Ohioans with expired licenses will not be able to vote, as a lot of these residents cannot renew their licenses due to debts from things like lack of insurance, unpaid fines, and court costs. See Mazur, *supra* note 542.

550. See Tyler Buchanan, *New Ohio Voter ID Law May Disadvantage College Students*, AXIOS COLUMBUS (Mar. 28, 2023), <https://www.axios.com/local/columbus/2023/03/28/new-ohio-voter-id-law-college-students-bind-id> [<https://perma.cc/C8EM-RRBU>]; Dawes, *What to Know About Ohio’s Voter ID Law*, *supra* note 518; Dawes, *Ohio’s New Voter ID Law*, *supra* note 518. While students can obtain an Ohio state ID and become eligible to vote, the concern is that this may have an impact on student financial aid due to changes in their residency statuses. See Dawes, *What to Know About Ohio’s Voter ID Law*, *supra* note 518; Dawes, *Ohio’s New Voter ID Law*, *supra* note 518.

551. See Mazur, *supra* note 542.

552. See Evans, *Ohio’s Photo Voter ID Law*, *supra* note 518. The firm filing the complaint in the U.S. District Court for the Northern District of Ohio, Elias Law, has become known as a premier law firm following its role in opposing attempts to overturn the 2020 election by the Trump campaign. See Evans, *Ohio’s Photo Voter ID Law*, *supra* note 518. The bill made it substantially harder for Ohioans to vote in person or by mail and harder to correct mistakes that prevent ballots from being counted. See Evans, *Ohio’s Photo Voter ID Law*, *supra* note 518. Lawmakers and proponents of the bill argue that the restrictions are in line with what Ohio voters want. See Evans, *Ohio’s Photo Voter ID Law*, *supra* note 518.

pivotal.⁵⁵³ Whether justices will uphold certain voting restrictions based on due process or equal protection remains to be seen.⁵⁵⁴ However, whether voters want these new laws or not, the state high courts will impact their validity.⁵⁵⁵ In turn, the voting rights of thousands of Ohioans are at stake.⁵⁵⁶ 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.⁵⁵⁷ When judges on state supreme courts — such as North Carolina, Wisconsin, and Ohio — are elected,⁵⁵⁸ the politically-charged platforms that they campaign on will create systematic conflicts with precedent on the books.⁵⁵⁹ In this context, it is important to assess whether elected judges *should be* given more (or less) authority to change existing precedent.⁵⁶⁰

Part III first assesses the benefits and drawbacks of holding elected judges to the same principles of stare decisis as their appointed counterparts.⁵⁶¹ 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.⁵⁶²

553. See Julie Carr Smyth, *New Voter ID Law in Ohio Draws Fire*, THE VINDICATOR (Mar. 27, 2023), <https://www.vindy.com/news/local-news/2023/03/new-voter-id-law-in-ohio-draws-fire/> [<https://perma.cc/AB6E-77DV>] (describing the role of state supreme courts in adjudicating disputes arising from voter ID laws and highlighting Ohio as a state with increasingly strict photo ID requirements).

554. See *id.*

555. See *id.*

556. See Mac Brower, *Ohio's New Voter Suppression Law Unpacked*, DEMOCRACY DOCKET (Jan. 18, 2023), <https://www.democracymocket.com/analysis/ohios-new-voter-suppression-law-unpacked/> [<https://perma.cc/GZP8-3FK3>].

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).

558. See Wilets et al., *supra* note 23, at 215–17.

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.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.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.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.⁵⁶⁶

Stare decisis also allows reliance interests to develop.⁵⁶⁷ State courts have substantial leeway to change the law over time regardless of any reliance on precedent by potential litigants.⁵⁶⁸ In court systems that are constantly evolving to meet the needs of society, stare decisis serves an opposite, but equally important role.⁵⁶⁹ People make decisions by relying on precedent whether they realize it or not.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

563. See *infra* Section III.A.2.

564. See generally Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.-KENT L. REV. 93 (1989).

565. See *supra* Section I.A.3 (discussing the relationship between judges and campaign finance).

566. See, e.g., *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 873–74 (2009); see also *Guthrie et al.*, *supra* note 87, at 779–80.

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).

568. See *id.*; see also *Kalt*, *supra* note 26, at 279.

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.”).

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.⁵⁷¹ Thus, stare decisis helps promote predictability in our judicial system and eliminating it opens the door for potential abuse.⁵⁷²

A third benefit of stare decisis is that it encourages judicial restraint.⁵⁷³ Throughout U.S. history, courts have criticized judges who “legislate from the bench.”⁵⁷⁴ While every state is different, the judicial role is distinct from that of the legislative and executive branches.⁵⁷⁵ Legislatures and executives create and implement laws.⁵⁷⁶ On the contrary, judges interpret laws and ensure those laws are consistent with federal and state constitutions.⁵⁷⁷ Thus, stare decisis discourages judges from exercising too much power.⁵⁷⁸

Finally, stare decisis promotes stability.⁵⁷⁹ In states that elect high court judges, the bench in one year can be completely different than the bench a few years later.⁵⁸⁰ While legislators and executives must work together to change laws, judges are generally subject to weaker checks and balances.⁵⁸¹ 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.⁵⁸² If courts can change the law to no end,

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.”).

573. *See* Thomas W. Merrill, *Originalism, Stare Decisis, and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 274–82 (2006).

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.”).

575. *See* Anna Kaufman, *What Are the Three Branches of Government? Executive, Judicial, Legislative Wings Explained.*, USA TODAY (Oct. 3, 2022, 7:00 AM), <https://www.usatoday.com/story/news/2022/10/03/three-branches-of-government-executive-judicial-legislative/10453187002/> [<https://perma.cc/FD3C-KFKW>].

576. *See id.*

577. *See The Role of Judges*, NAACP, <https://naacp.org/find-resources/know-your-rights/role-judges> [<https://perma.cc/Z76F-TA69>] (last visited Apr. 1, 2023).

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.”).

580. *See, e.g.,* Jim Gaines, *Ohio Supreme Court Election May Produce Seismic Shift*, DAYTON DAILY NEWS (Oct. 30, 2022), <https://www.daytondailynews.com/local/ohio-supreme-court-election-may-produce-seismic-shift/QOTI3UAMQVCYBL2ESKP4CUVIJM/> [<https://perma.cc/3DLC-T2BV>].

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.⁵⁸³ As such, they cannot build reliance interests or know whether their conduct is permissible.⁵⁸⁴ If judges can change the law this rapidly, there may be profound consequences.⁵⁸⁵ 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.⁵⁸⁶ 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.⁵⁸⁷ When interest groups and citizens finance judges that win their elections, the preferences of the state's citizens should be reflected in the judiciary.⁵⁸⁸ Therefore, if elected judges believe they should forego *stare decisis*, their inclinations could be viewed as an extension of the people's will.⁵⁸⁹ Accordingly, forcing judges to adhere to *stare decisis* against their beliefs — or the beliefs of the people — may be arbitrary and undemocratic.⁵⁹⁰

Another drawback is that *stare decisis* does not allow courts to change with the times.⁵⁹¹ Some precedents are simply outdated.⁵⁹² 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.”).

590. See Jack Boeglin & Julius Taranto, *Stare Decisis and Secret Law: On Precedent and Publication in the Foreign Intelligence Surveillance Court*, 124 YALE L.J. 2189, 2194 (2015) (“In an ideal world, *stare decisis* would insulate valid principles of law from arbitrary and unprincipled revision without entrenching ‘bad’ precedent against further review. In reality, *stare decisis* hinders defection from both appealing and unappealing precedent.”).

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.⁵⁹³ As such, requiring elected judges to adhere to stare decisis may only reinforce outdated laws and precedents.⁵⁹⁴

Finally, a more macro reason why elected state court judges should be allowed to forego stare decisis is because of separation of powers.⁵⁹⁵ States are laboratories for experimentation.⁵⁹⁶ They are free to codify judicial rulings if they wish.⁵⁹⁷ While one can view legislative inaction as reinforcing judicial precedent, it is equally plausible to interpret legislative inaction as leaving the judicial doctrine unsettled.⁵⁹⁸ 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.⁵⁹⁹ Yet, stare decisis may restrict courts in this capacity.⁶⁰⁰

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

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)).

594. Cf. *Weil v. Fed. Kemper Life Assurance Co.*, 866 P.2d 774, 802 (Cal. 1994) (Mosk, J., dissenting) (“In [some] circumstances we have not hesitated to depart from stare decisis and overrule outdated decisions of this court.”).

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 . . .”).

596. See Michael S. Greve, *Laboratories of Democracy*, AM. ENTER. INST. (Mar. 31, 2001), <https://www.aei.org/research-products/report/laboratories-of-democracy/> [<https://perma.cc/5G2P-H5QX>].

597. See, e.g., Linda C. McClain, *What Would It Mean to Codify Roe into Law?*, YES! MAG. (July 1, 2022), <https://www.yesmagazine.org/democracy/2022/07/01/codify-roe-v-wade-law> [<https://perma.cc/MLG7-HGK8>] (describing the logistics of either state legislatures or Congress codifying *Roe v. Wade*).

598. See Thomas Tai, *The (Not-So) Absolute Power of the Supreme Court*, LEAGUE OF WOMEN VOTERS (Sept. 27, 2022), <https://www.lwv.org/blog/not-so-absolute-power-supreme-court> [<https://perma.cc/7TV9-QZEX>].

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).

600. Cf. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242, 2262 (2022) (overturning the right to an abortion and foregoing stare decisis).

wrong.⁶⁰¹ As such, laws regulating judicial decision making are essential, especially when regulating elected judges with political incentives.⁶⁰²

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.⁶⁰³ While the former promotes stability and consistency, the latter is less predictable.⁶⁰⁴ However, as a matter of policy, there are both benefits and drawbacks to allowing judges to be malleable.⁶⁰⁵

One benefit of allowing judges to make decisions irrespective of existing jurisprudence is that elected judges can actively appeal to their constituents.⁶⁰⁶ Elected judges are publicly accountable.⁶⁰⁷ However, unlike legislators and executives, they are accountable not only to the people, but to the law as well.⁶⁰⁸ 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.⁶⁰⁹ 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.⁶¹⁰

A second benefit to allowing malleability is related to agencies. States, like the federal government, have administrative bodies.⁶¹¹ Similar to the federal system, many of these administrative bodies have judge-adjacent

601. See Devin Dwyer, *After Roe Ruling, is 'Stare Decisis' Dead? How the Supreme Court's View of Precedent Is Evolving*, ABC NEWS (June 24, 2022, 12:20 PM), <https://abcnews.go.com/Politics/roe-ruling-stare-decisis-dead-supreme-court-view/story?id=84997047> [https://perma.cc/PC3S-V3FR].

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.

611. See Gerald E. Ruth, *Unification of the Administrative Adjudicatory Process: An Emerging Framework to Increase “Judicialization” in Pennsylvania*, 5 WIDENER J. PUB. L. 297, 297 (1996).

officials.⁶¹² 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.⁶¹³ While these officials are often unelected,⁶¹⁴ they make important decisions.⁶¹⁵ 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.⁶¹⁶ This empowerment may result in more efficiency, consistency, and accountability.⁶¹⁷

ii. Drawbacks of Malleability

The drawbacks to malleability are plentiful.⁶¹⁸ Three general types of drawbacks are addressed below. First, malleability is complicated by judicial bias.⁶¹⁹ If judges are able to make decisions without being bound by old opinions, there is high potential for abuse.⁶²⁰ More specifically, judges may choose to decide cases based on their personal opinions rather than the relevant law.⁶²¹ Relatedly, problems may arise in the judiciary that are analogous to regulatory capture in agencies.⁶²² 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).

614. *See* Laurie L. Levenson, *Administrative Replacements: How Much Can They Do?*, 26 PEPP. L. REV. 879, 885 (1999) (questioning whether unelected administrative law judge decisions affect public confidence).

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.

619. *See* Thomas J. Miceli, *Legal Change: Selective Litigation, Judicial Bias, and Precedent*, 38 J. LEGAL STUD. 157, 158–59 (2009).

620. *See* John Wallace, *Stare Decisis and the Rehnquist Court: The Collision of Activism, Passivism, and Politics in Casey*, 42 BUFF. L. REV. 187, 201 (1994) (“[Stare decisis] prevent[s] future justices from abuse and derogation of law.”).

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.”).

622. *See generally* J. Jonas Anderson, *Court Capture*, 59 B.C. L. REV. 1543 (2018).

few.⁶²³ Similarly, malleability incentivizes political donors and interest groups to pour more money into judicial campaigns.⁶²⁴ If judges are free to make decisions on their own accord, then money can impact judicial decisionmaking.⁶²⁵ Taken together, judges who can adjudicate by injecting their own opinions or the opinions of their donors are dangerous.⁶²⁶

The second problem with malleability is related to separation of powers.⁶²⁷ Namely, if judges can make decisions with fewer checks and balances, the power of the judiciary will expand.⁶²⁸ In turn, the relative power of state executives and legislatures will be minimized.⁶²⁹ 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.⁶³⁰

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.⁶³¹ These effects could be positive.⁶³² However, by infusing judges with increased discretion, states run the risk of undermining the legal system at-large.⁶³³ This may lead to mistrust in the judiciary, and inequitable administration of justice.⁶³⁴ 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”).

627. See Thomas Jipping, *Judicial Independence Is an Obstacle to Power, Necessary for Liberty*, THE HERITAGE FOUND. (Oct. 7, 2022), <https://www.heritage.org/courts/commentary/judicial-independence-obstacle-power-necessary-liberty> [<https://perma.cc/V5VJ-N7PY>].

628. See Tai, *supra* note 598.

629. See Tai, *supra* note 598.

630. See Dylan Matthews, *The Supreme Court is Too Powerful and Anti-Democratic. Here’s How We Can Scale Back Its Influence*, VOX (Sept. 29, 2020, 9:10 AM), <https://www.vox.com/policy-and-politics/21451471/supreme-court-justice-constitution-ryan-doerfler> [<https://perma.cc/Y4WJ-J9X4>].

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.

634. See *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 446 (2015) (discussing erosion of public trust in the judiciary); see also *id.* at 445–48; *Meyer v. State*, 128 A.3d 147, 159 (Md. App. 2015).

including people of color, women, and the LGBTQ+ community — are most impacted.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.⁶³⁶

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;⁶³⁷ and 2) whether the facts of a given case should trigger courts to apply stare decisis analyses and frameworks⁶³⁸ in general.⁶³⁹

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.⁶⁴⁰ Within federal and state constitutional limits, creative solutions can help resolve these problems.⁶⁴¹ These solutions should approach the issue by balancing predictability and stability with ossification and malleability.⁶⁴² The goal is to establish objective triggers that confine judges. Policies can confine judges by enabling citizens to

635. See Melissa Heelan Stanzione, *ABA Group Urges Implicit Bias Training for Judges, Lawyers*, BLOOMBERG LAW (July 28, 2020, 4:51 AM), <https://news.bloomberglaw.com/us-law-week/proposal-seeks-implicit-bias-training-for-judges-lawyers> [https://perma.cc/A4N2-KDSC].

636. See generally Macey, *supra* note 564.

637. See *infra* Section III.B.1.

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 *already decided* that a precedent should be guiding.

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, *Stare Decisis — Rhetoric and Reality in the Supreme Court*, 2018 SUP. CT. REV. 121, 131 (2018) (“Sometimes this avoidance will be justified by efforts to distinguish the obstructive precedent[.]”).

640. See *supra* note 16 and accompanying text.

641. See generally Constitution Annotated, *supra* note 156.

642. See generally Macey, *supra* note 564.

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.

646. See *supra* note 644 and accompanying text; cf. Bernard S. Black, Professor of L. at Stan. Univ., Presentation at Third Asian Roundtable on Corporate Governance Singapore: The Principal Fiduciary Duties of Boards of Dirs. (Apr. 4, 2001), <https://www.oecd.org/daf/ca/corporategovernanceprinciples/1872746.pdf> [<https://perma.cc/XM5U-8FXD>].

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.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.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.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.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.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

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.

650. These factors include those discussed *infra* Section I.B.2. See Lewis H. Lazarus, *Standards of Review in Conflict Transactions on Motions to Dismiss: Lessons Learned in the Last Decade*, 36 DEL. 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.’”).

651. 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 *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.

652. See, e.g., Pa. Env’t Def. Found. v. Commonwealth, 161 A.3d 911, 917 (Pa. 2017).

653. 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. 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.⁶⁵⁴ 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.⁶⁵⁵

One potential drawback to the *stare decisis by supermajority* proposal is that different types of cases should require different degrees of *stare decisis*.⁶⁵⁶ 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.⁶⁵⁷ The result here is that, when a court is starkly divided over whether to forego *stare decisis*, the bar is raised.⁶⁵⁸ 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*.⁶⁵⁹

For purposes of this Note, we can call the third solution the *stay until referendum*.⁶⁶⁰ 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.

657. *Cf. Impeachment*, HIST., ART & ARCHIVES, U.S. HOUSE OF REPS., <https://history.house.gov/Institution/Origins-Development/Impeachment/> [<https://perma.cc/8NRZ-7UEF>] (last visited Apr. 26, 2023) (discussing the two-thirds supermajority needed to impeach a U.S. President and identifying it as difficult to reach).

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.⁶⁶¹ In an election, if X% of the state's population votes to uphold the previous precedent, the precedent should remain.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.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.⁶⁶⁴

To regulate this stay until referendum proposal, a potential law should identify variables that can be used to establish a threshold.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*.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.

661. Criteria could include all those factors discussed *supra* Section I.B.2.

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.

663. *See supra* note 661 and accompanying text.

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.

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.

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.⁶⁶⁷ 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.⁶⁶⁸ 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.⁶⁶⁹ 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,⁶⁷⁰ 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.

670. See *Life Cycle of a Supreme Court Case*, UNIV. MICH. L. LIBR. (Feb. 8, 2023), <https://libguides.law.umich.edu/scotus> [<https://perma.cc/2CFG-2YGF>].

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.⁶⁷¹ This is evident by the fact that they are re-elected by the people.⁶⁷² As such, their longevity on the court is at least somewhat related to the public's perception of their character.⁶⁷³

Creating a system that effectively implements these factors without violating fundamental rights — such as one person, one vote — is difficult.⁶⁷⁴ However, doing so may allow courts and litigants to better forecast whether a legal issue has already been decided.⁶⁷⁵ Doing so would also either allow a court to decide whether to forego stare decisis (if the facts are substantially the same),⁶⁷⁶ or it would allow the court to decide the case *de novo*, unbound by prior case law (if the facts are *not* substantially the

671. Cf. *Judges are Feeling Less Respected*, NAT'L JUD. COLL. (Feb. 16, 2017), <https://www.judges.org/news-and-info/judges-feeling-less-respected/> [https://perma.cc/3BTA-2EYZ]; see also Praneeta Tiwari, *Seniority as the Basis for Judicial Appointments — A Dubious and an Unjust Norm?*, CONST'L L. SOC'Y, <https://clsnuo.com/2020/11/24/seniority-as-the-basis-for-judicial-appointments-a-dubious-and-an-unjust-norm/> [https://perma.cc/YC56-QNLG] (last visited Apr. 26, 2023) (discussing the idea of judges being given authority based on their seniority).

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*, SEACOASTONLINE (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.

674. See generally *Ball v. James*, 451 U.S. 355 (1981).

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).⁶⁷⁷ 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 applies⁶⁷⁸ because the vote count is 4–3.⁶⁷⁹

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 *rather than* allowing judges to shirk the question.⁶⁸⁰ 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.⁶⁸¹ Cases outside this range would have normal rules that apply.⁶⁸² 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.⁶⁸³ 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

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.”).

678. *See id.*

679. This counts the two tenured judges' votes as two apiece.

680. *See* UNIV. HAW. L. LIBR., *supra* note 677.

681. *See, e.g.,* Schauer, *supra* note 639.

682. Every judge would have one vote.

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).

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

684. Compare Adam W. Kiracofe, *The Codified Canons of Statutory Construction: A Response and Proposal to Nicholas Rosenkranz's Federal Rules of Statutory Interpretation*, 84 B.U. L. REV. 571, *passim* (2004), with Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, *passim* (1992).

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.

687. See Andrew Rawnsley, *Democracy Is More Fragile Than Many of Us Realised, But Don't Believe That It Is Doomed*, THE GUARDIAN (Jan. 20, 2018, 7:05 PM), <https://www.theguardian.com/commentisfree/2018/jan/21/democracy-is-more-fragile-than-many-of-us-realised-but-do-not-believe-that-it-is-doomed> [<https://perma.cc/S52M-MYE5>].

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 laws⁶⁹² — will disproportionately impact urban communities.⁶⁹³ Moreover, these issues are only further complicated when state high court judges are elected rather than appointed.⁶⁹⁴ 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.⁶⁹⁵

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.⁶⁹⁶ State courts that are becoming increasingly politicized — such as North Carolina, Wisconsin, and Ohio — should consider these policies.⁶⁹⁷ 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.⁶⁹⁸

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.