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A DELIBERATIVE DEMOCRATIC THEORY OF PRECEDENT

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Stare decisis is widely regarded as a vital mechanism for promoting the rule of law. Yet high courts can always overrule prior decisions with a special justification, and different justices will inevitably have different perspectives on when such a justification exists. Moreover, when courts rely on stare decisis to follow a mistaken or unjustified decision, they arguably undermine the rule of law. Stare decisis therefore does not, and probably cannot, reliably promote a formal conception of the rule of law.

While this reality might lead us to conclude that we should give up on horizontal stare decisis, presumptive deference to precedent may serve other worthwhile functions. This Article argues that rather than providing a binding legal constraint, presumptive deference to precedent is best understood as a mechanism for promoting the democratic legitimacy of a constitutional regime by facilitating reasoned deliberation within the judiciary regarding the most justifiable understanding of the Constitution and generating sustained constitutional dialogue of a deliberative and agonistic nature outside the federal courts. This Article thus contends that deliberation is the governing value that should be used to

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evaluate and implement stare decisis in practice. This Article explores what a deliberative democratic vision of precedent would entail and concludes that by shifting our focus from law to democracy we can develop a coherent and normatively attractive grand unifying theory of precedent that comports with the best understanding of American legal practice. This theory also provides a normative framework to critique the approach of the current Court and a descriptive lens that may offer potential hope for the future.

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INTRODUCTION

The presumption that courts will follow applicable precedent is one of the defining features of the American legal system.[1] The Supreme Court has repeatedly emphasized that respect for precedent is indispensable to the rule of law under the Constitution.[2] Yet the Court has also established a legal doctrine that requires the Justices to balance the benefits of adhering to precedent against the harm that would result from following a mistaken decision.[3] Moreover, the Court has never produced a coherent theory of horizontal stare decisis or identified the precise circumstances in which courts should follow or overrule prior decisions.[4] Not surprisingly, the Court's treatment of precedent has been inconsistent, and its decision-making has been widely criticized as unprincipled or politically motivated.[5] Prominent jurists and scholars have responded by proposing major doctrinal reforms that would allegedly remedy those deficiencies and thereby promote formal conceptions of the rule of law.[6] While fundamentally conservative in nature, this is

1. *See* BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 16 (2016).

2. *See, e.g.*, Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 854 (1992).

3. *See* RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT 9 (2017).

4. *See* Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422 (1988) (recognizing the absence of a prevailing theory); *see also* Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 261 (2005) ("How and when precedent should be rejected remains one of the great unresolved controversies of jurisprudence."); Colin Starger, *The Dialectic of Stare Decisis Doctrine*, *in* PRECEDENT IN THE UNITED STATES SUPREME COURT 19 (Christopher J. Peters ed., 2013) (recognizing that both the Court and individual Justices deploy stare decisis in an inconsistent fashion). Horizontal stare decisis involves a court's consideration of the effects of its own prior decisions, whereas vertical stare decisis involves precedents that run from higher to lower courts. *See* Kozel, *supra* note 3, at 7. While the effects of these doctrines cannot be completely disentangled, *see infra* note 163, this Article focuses primarily on horizontal stare decisis. It addresses some implications for vertical stare decisis in the final Part.

5. *See, e.g.*, Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 743 (1988).

6. *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1414–16 (2020) (Kavanaugh, J., concurring in part) (claiming the existing "muddle poses a problem for the rule of law," and advocating a three-pronged analysis that could "provide a structured methodology and roadmap for determining whether to overrule an erroneous

also a project that is increasingly of interest to progressives who would like to preserve legal victories from earlier eras in the face of a hostile environment in today's Court.

But the quest to develop a uniform and consistent rule of stare decisis is a pipe dream. Everyone agrees that "[s]tare decisis is not an inexorable command,"[7] and the Court can legitimately overrule otherwise controlling precedent when there is a "special justification."[8] Moreover, the competing normative and methodological commitments of the Justices, and the need to balance incommensurate and potentially conflicting values, effectively ensures that the Justices will have different perspectives on the proper treatment of precedent.[9]

This creates something of a puzzle. We've been told for many years that stare decisis is meant to promote the rule of law. But horizontal stare decisis does not reliably perform this function, and given the way our legal system works, it cannot consistently achieve this goal. This suggests that we should either get rid of stare decisis because it does not perform a useful role—and potentially serves instead as an ideological construct that people wield for their own strategic purposes—or that we should consider whether stare decisis serves other values that might make it worth keeping.

It turns out, if one looks carefully, that regardless of what horizontal stare decisis was meant to do, what it does do is encourage deliberation. That may seem counterintuitive, but presumptive deference to precedent facilitates reasoned deliberation within the judiciary by obligating courts to consider and respond in a reasoned fashion to prior decisions by judges with different methodological commitments and normative perspectives. Presumptive deference to precedent also generates constitutional deliberation in the political sphere by providing a stable baseline or target for concerned citizens and public officials to build upon and entrench or to rally against and contest. This constitutional dialogue can, of course, subsequently influence the Court.

This Article's descriptive claims are vividly illustrated by the Court's recent decision in *Dobbs v. Jackson Women's Health*

constitutional precedent"); KOZEL, *supra* note 3, at 128–30 (summarizing his "second-best" approach); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1 (2001).

7. Payne v. Tennessee, 501 U.S. 808, 828 (1991) (emphasis omitted).

8. *See, e.g.*, Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 266 (2014) (quoting Dickerson v. United States, 530 U.S. 428, 443 (2000)).

9. *See* KOZEL, *supra* note 3, at 60–69.

Organization,[10] which overruled *Roe v. Wade* and eliminated the fundamental constitutional right to an abortion. Much of the Court's decision focused on an evaluation of the reasoning and impact of *Roe* and *Casey*, and the reaction to *Dobbs* in the political sphere has been, and will continue to be, seismic. For example, President Joseph Biden issued an Executive Order designed to protect access to reproductive health services in the wake of the Court's decision.[11] Moreover, advocates of abortion rights are seeking to enact ballot initiatives that would codify *Roe* in several states, and Congress is considering legislation that would codify *Roe* (or *Casey*) and effectively overrule *Dobbs*. If the latter effort lacks sufficient votes to succeed at this time (particularly as a result of the continued existence of the filibuster in the Senate), such a law could be enacted in the future—and *Dobbs* will almost certainly have a major impact on what happens in subsequent elections.

So, it turns out that horizontal stare decisis has a significant function, it's just not the function people thought it had. And the function stare decisis has is, in fact, far more promising and normatively attractive than the function people thought it had because reasoned deliberation is central to the democratic legitimacy of governmental authority in a republican democracy.[12] We should therefore not only keep stare decisis, but also seek to mold it with an eye toward better serving its deliberative functions. That is, stare decisis already encourages reasoned deliberation, and because that is its most valuable role, deliberation is the governing value that we should use to evaluate and implement stare decisis in practice.

This Article does not claim that existing legal doctrine and practice are perfect, but instead contends that stare decisis can and should be molded to better serve its deliberative functions. This Article draws on deliberative democratic theory to develop a normative perspective that helps to show, for example, precisely what is wrong with *Dobbs*.[13] Rather than adopting a "neutral" understanding of the Constitution that merely transferred power from the Court to state legislatures, the Court relied upon its own preferred originalist methodology to

10. No. 19-1392, slip op. at 5–6 (U.S. June 24, 2022).

11. *See* Exec. Order No. 14,076, 87 Fed. Reg. 42,053 (July 8, 2022).

12. *See* Joshua Cohen, *Deliberation and Democratic Legitimacy*, *in* THE GOOD POLITY: NORMATIVE ANALYSIS OF THE STATE 17 (Alan Hamlin & Philip Pettit eds., 1989).

13. *See* discussion *infra* Section III.B.2.

authorize state legislatures to prohibit individuals who can get pregnant from deciding whether to have a child. The Court's stare decisis analysis was driven, in turn, by its orthodox originalist perspective, which led the majority to conclude that *Roe* was egregiously wrong and that considering the overwhelmingly negative consequences of their decision for individuals who can become pregnant, as well as for the perceived legitimacy of the Court, would be an abuse of judicial power. In the process, the Court replaced a legal framework that reflected a deliberative compromise, which could reasonably have been accepted by people on both sides of the debate, with an authoritarian rule that allows antiabortion activists within the states to impose their own moral and religious views on everyone. *Dobbs* may not formally violate the rule of law, but it is fundamentally undemocratic.

This Article thus contends that, rather than promoting a formal conception of the rule of law, presumptive deference to precedent is best understood as a mechanism for promoting the democratic legitimacy of a constitutional regime. Stare decisis performs this democratizing function by facilitating reasoned deliberation within the judiciary regarding the most justifiable understanding of the Constitution. It also performs this role by generating sustained constitutional dialogue of a deliberative and agonistic nature outside the federal courts.[14] Stare decisis provides a structural safeguard that promotes republican principles of government and improves the democratic legitimacy of decision-making by countermajoritarian courts.

Part I describes the prevailing rule of law paradigm of stare decisis. It goes on to explain that the Court's ever-present authority to overrule prior decisions based on the competing perspectives of a majority of Justices means that stare decisis cannot consistently or reliably promote the rule of law. Part I thus concludes that stare decisis should be abandoned or re-envisioned.

Part II re-envisions horizontal stare decisis and argues that presumptive deference to precedent is best understood and evaluated as a mechanism for promoting the democratic

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14. "Agonism" is a social and political philosophy that sees ongoing conflict as essential to and constitutive of democracy. *See* CHANTAL MOUFFE, THE DEMOCRATIC PARADOX 102–03 (2000); Daniel Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. (forthcoming 2022); Glen Staszewski, Obergefell *and Democracy*, 97 B.U. L. REV. 31, 92–101 (2017) (describing agonistic democratic theory and explaining how its central features can be synthesized with deliberative democracy).

legitimacy of the American constitutional system. Presumptive deference to precedent facilitates reasoned deliberation within the judiciary and generates deliberative and agonistic dialogue regarding the most justifiable understanding of the Constitution outside the federal courts. Stare decisis has the capacity to promote the central principles of deliberative democracy and serve as an engine of constitutional dialogue. And this insight suggests normative principles that should guide the use of the precedent.

Part III sets forth normative principles of democratic judging that should guide the use of precedent from a deliberative perspective. It identifies certain features of precedential reasoning that are essential to facilitating reasoned deliberation within the courts and avoiding specious claims that "the law made me do it" and other authoritarian tendencies. It also emphasizes that precedent can be deeply entrenched or reasonably subject to dispute and that these two tiers of precedent correspond with the electoral and contestatory dimensions of republican democracy.[15] Finally, Part III argues that the democratically legitimate use of precedent requires interpretive pluralism and practical reasoning regarding the most justifiable decision on the merits in each case based on all the relevant considerations, rather than dogmatic adherence to any single foundational approach to constitutional interpretation. This has implications, among other things, for the Court's treatment of the fundamental right to an abortion.

Part IV contends that stare decisis should also be viewed as a mechanism to promote systemic deliberation. A systemic understanding of stare decisis provides guidance for thinking about the use of precedent in lower courts. It also sheds light on the relevance of the ease of political changes to the law for stare decisis doctrine and provides guidance on how the use of precedent should vary across different institutional domains and legal problems. This Article concludes that, contrary to widespread belief, the development of a grand unifying theory of precedent is not impossible. We just need to shift our focus from *law* to *democracy*. This new perspective will allow us to develop a coherent and normatively attractive theory of precedent that comports with the best understanding of American legal practice. While there is, unfortunately, little reason to believe

15. *See* Philip Pettit, *Republican Freedom and Contestatory Democratization*, *in* DEMOCRACY'S VALUE 163 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999) (describing these two aspects of republican democracy).

that this theory will be embraced by a majority of today's Court, this Article's positive lessons and normative claims both offer reasons for hope that our constitutional system can still be improved and democratized in the long run.

I. STARE DECISIS'S FAILURE TO PROMOTE THE RULE OF LAW

This Part describes the prevailing rule of law paradigm of stare decisis. It proceeds to explain that horizontal stare decisis cannot reliably promote the rule of law in our legal system. It therefore concludes that we should either abandon stare decisis or consider whether it performs other valuable functions that are worth preserving and that could serve as a superior guide to the use of precedent.

A. The Rule of Law Paradigm

The rule of law is a venerated ideal and its existence is generally considered vital to a nation's full participation in the global political economy. Yet there is little consensus regarding what this ideal entails, and many advocates of the rule of law give little thought to the term's precise meaning.[16] Scholars of the concept generally agree that there are formal and substantive variations, and that formal theories of the rule of law tend to "focus on the proper sources and form of legality."[17] Joseph Raz has explained that formal understandings of the rule of law are based on "the basic intuition" that "law must be capable of guiding the behaviour of its subjects."[18] The law should thus be prospective, general, clear, and relatively stable in nature.[19] Citizens should have the ability to learn what the law requires and shape their actions accordingly.[20] Formal understandings of the rule of law promote rational liberty because everyone is allowed to pursue their own versions of the

16. *See* Daniel B. Rodriguez et al., *The Rule of Law Unplugged*, 59 EMORY L.J. 1455 (2010).

17. BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 91–92 (2004).

18. JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 214 (1979); *see also* TAMANAHA, *supra* note 17, at 91–101 (discussing formal theories of the rule of law).

19. *See* TAMANAHA, *supra* note 17, at 99–101; LON L. FULLER, THE MORALITY OF LAW (1964) (setting forth a similar list of elements).

20. *See* Blake Emerson, *Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court's Political Theory*, 73 HASTINGS L.J. 371, 392–94 (2022) (referring to this capacity as "rational liberty").

good life provided they do not infringe the law, and people can rely on existing rules to remain in place for the foreseeable future and feel confident they will be given advance notice of changes to the status quo. This facilitates planning and protects reliance interests and is therefore thought to promote productive commercial activity.

Formal conceptions of the rule of law are designed largely to constrain the State's authority. While governmental officials are responsible for faithfully enforcing the rules on the books in independent courts of law, they cannot lawfully do anything else (short of adopting new or amended rules pursuant to the prescribed methods of lawmaking). This means that the rule of law includes a requirement of *rule by law*.[21] Public officials are typically expected to follow the rules on the books just like everyone else pursuant to a principle of generality. Accordingly, the rule of law results in a government that is *limited by law*.[22] When these features are combined with the requisite elements of prospectivity, generality, clarity, and stability, the rule of law strictly limits official discretion and promotes formal equality by treating similarly situated people alike. If public officials responsible for implementing, enforcing, or interpreting law are provided with sufficiently clear instructions, it is possible to say that we live in a government of laws rather than a "government of men."[23] Formal theories of the rule of law thus promote *impersonality*—executive and judicial officials will be capable of implementing, enforcing, and interpreting the law in precisely the same manner, regardless of who serves in those positions and their political affiliations or subjective policy preferences and regardless of the identities or personal characteristics of legal subjects. Legal systems of this nature also characteristically limit the possibility of official repression by strictly separating law from politics and by adopting other mechanisms or norms to reduce law's pliability.[24]

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21. *See* TAMANAHA, *supra* note 17, at 92 ("The thinnest formal version of the rule of law is the notion that law is the means by which the state conducts its affairs, 'that whatever a government does, it should do through laws.'") (quoting Noel B. Reynolds, *Grounding the Rule of Law*, 2 RATIO JURIS 1, 3 (1989)).

22. *See id.* at 114–19 (noting that this "thread" of thinking about the rule of law "has run for over 2,000 years").

23. *Id.* at 122–26 ("The inspiration underlying this idea is that to live under the rule of law is not to be subject to the unpredictable vagaries of other individuals – whether monarchs, judges, government officials, or fellow citizens.").

24. *See* PHILIPPE NONET & PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW 51 (1978) (describing the "cardinal features" of repressive law as "a *close integration of law and politics*" and "*rampant*

Formal conceptions of the rule of law thus depend on strict adherence to a system of rules.[25] Such theories therefore typically incorporate the broader jurisprudential perspective known as "legalism."[26] Judith Shklar famously defined legalism as "the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules."[27] Shklar claimed that legalism is common to both natural law theories of jurisprudence and legal positivism and that it commits lawyers to the formalist position that all questions posed by conflicting rights and duties are fully determined by existing law.[28] "Law, then, in the empire of legalism, has a static, given, autonomous, seamless, and complete nature, not only for formalists, who hold this thesis quite explicitly, but in some fashion, for virtually all lawyers."[29] Legalism is closely connected to "autonomous" conceptions of the rule of law, which Philippe Nonet and Philip Selznick famously identified as the evolutionary response to legal repression.[30] The rule of law is established under this model "when legal institutions acquire enough independent authority to impose standards of restraint on the exercise of governmental power."[31] The chief attributes of autonomous law include the strict separation of law from politics, an emphasis on proper procedure, and fidelity to law understood as strict obedience to a model of rules.[32] Nonet and Selznick recognized, perhaps paradoxically, that "close accountability to rules" is the chief advantage of autonomous law and that "legalism is its affliction."[33]

The judiciary's presumptive obligation to follow controlling precedent promotes a formal conception of the rule of law in

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official discretion, which is at once an outcome and a chief guarantee of the law's pliability").

25. *See* TAMANAHA, *supra* note 17, at 96–99 ("It is of paramount significance to recognize that the rule of law understood in terms of formal legality boils down to the nature of rules.").

26. JUDITH N. SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS (2d ed. 1986).

27. *Id.* at 1.

28. *See* Robin West, *Reconsidering Legalism*, 88 MINN. L. REV. 119, 119–25 (2003) (summarizing Shklar's arguments); Glen Staszewski, *The Dumbing Down of Statutory Interpretation*, 95 B.U. L. REV. 209, 254–55 (2015) (same).

29. West, *supra* note 28, at 120.

30. *See* NONET & SELZNICK, *supra* note 24, at 18, 53.

31. *Id.* at 53 (emphasis omitted); *see also* Staszewski, *supra* note 28, at 256–60 (discussing Nonet's and Selznick's theory).

32. *See* NONET & SELZNICK, *supra* note 24, at 54.

33. *Id.* at 64.

various ways. For starters, clearly established legal precedent is capable of guiding behavior since it provides citizens (or their lawyers) with reliable information about the law's content on previously decided issues. Indeed, the more entrenched the precedent, the more reliably it performs this predictive function. Moreover, to the extent the common law is *customary law*,[34] legal precedent should generally comport with prevailing commercial practices. While the proper scope of stare decisis remains controversial, binding precedent establishes legal rules for deciding future cases, which in principle are capable of being prospective, general, clear, and stable in nature. Stare decisis therefore facilitates planning and protects reliance interests.[35] Binding precedent also limits the judiciary's discretion in subsequent cases and ensures that similarly situated litigants are treated alike.[36] Stare decisis thereby promotes impersonal decision-making and enhances law's externality.[37] As Randy Kozel has explained, "Fidelity to precedent ensures that the law is not reduced to the preferences and personalities of a particular group of justices assembled at a particular moment in time."[38]

Of course, precedent is not the only source of binding legal rules in our constitutional system. The Constitution itself contains authoritative rules that are prospective, general, relatively clear, and stable in nature.[39] While much of the document is written in broad, abstract, vague, or even aspirational terms, the Framers anticipated that the Constitution's meaning would be fleshed out over time through

34. *See* Aaron-Andrew P. Bruhl, *Eager to Follow: Methodological Precedent in Statutory Interpretation*, 99 N.C. L. REV. 101, 108–09 (2020) (distinguishing "the older, declaratory theory of the common law," which viewed precedent as "customary general law," from the "honest-to-goodness binding effect in the modern sense in which federal courts understand precedent"); Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647 (1999) (tracing the modern understanding's development).

35. *See generally* Hillel Y. Levin, *A Reliance Approach to Precedent*, 47 GA. L. REV. 1035 (2013).

36. *See* THE FEDERALIST NO. 78 (Alexander Hamilton) (claiming that courts "should be bound down by strict rules and precedents" in order "[t]o avoid an arbitrary discretion"); Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1176–84 (2006) (describing these and other related benefits of stare decisis).

37. *See* Monaghan, *supra* note 5, at 752.

38. KOZEL, *supra* note 3, at 42.

39. *See, e.g.*, U.S. CONST. art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty five Years . . . ."); *id.* amend. XXII, § 1 ("No person shall be elected to the office of the President more than twice . . . .").

a course of practice.[40] James Madison recognized that "[a]ll new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."[41] Judicial precedent and the doctrine of stare decisis can therefore operate to fix the meaning of otherwise vague or ambiguous constitutional provisions over time.[42] As the Court and other public officials authoritatively resolve open questions and the Constitution's meaning is crystallized, constitutional law becomes more rule-oriented and our legal system moves closer to having "a static, given, autonomous, seamless, and complete nature."[43] In short, respect for precedent can gradually transform the Constitution into a mechanism for promoting "the rule of law as a law of rules."[44]

For stare decisis to work in this fashion, it may be necessary for courts to adopt what Larry Alexander has called a rule-based model of precedential constraint.[45] This conception holds that "[a] present court that, in the absence of the precedent, would decide A v. B in favor of A is, because of the precedent, constrained to decide in favor of B."[46] From this perspective, the constraining effect of precedent stems from its status as a binding source of legal authority, rather than the persuasiveness of its reasoning or the justifiability of its result. Under a rule-based model, precedent "can constrain a later court to decide a case in a way that it believes is incorrect at the time it decides it."[47] The formal nature of a rule-based model of precedential constraint and the limits it places on judicial discretion make

40. *See* McCulloch v. Maryland, 17 U.S. 316, 407 (1819) ("[W]e must never forget, that it is *a constitution* we are expounding.") (emphasis added).

41. THE FEDERALIST NO. 37 (James Madison).

42. *See* Nelson, *supra* note 6, at 10–14 (describing Madison's theory of liquidation); William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 3 (2019).

43. *See supra* note 29 and accompanying text (describing this "legalistic" vision).

44. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

45. *See* Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 17–28 (1989); Larry Alexander, *Precedential Constraint, Its Scope and Strength: A Brief Survey of the Possibilities and Their Merits*, *in* 3 ON THE PHILOSOPHY OF PRECEDENT 75 (Thomas Bustamante & Carlos Bernal Pulido eds., 2012).

46. Alexander, *supra* note 45, at 75.

47. *Id.* at 77.

this model well suited to advancing legalistic or autonomous conceptions of the rule of law.[48]

While the Supreme Court has not adopted a coherent theory of stare decisis or treated precedent consistently, it has declared that "*stare decisis* is a foundation stone of the rule of law."[49] It has emphasized that "the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable."[50] The Court has repeatedly stated that "[*s*]*tare decisis* 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."[51] In a clear nod to rule-based models of precedential constraint, the Court has also suggested that following precedent "is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right."[52] The Court has claimed that stare decisis "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact."[53] It has thus described deference to precedent as a mechanism for "maintaining public faith in the judiciary as a source of impersonal and reasoned judgments."[54] While such language could be taken with a grain of salt since the Court's treatment of precedent is often heavily laden with rhetoric,[55] the Court has

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48. *See* Glen Staszewski, *Precedent and Disagreement*, 116 MICH. L. REV. 1019, 1031 (2018).

49. Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 798 (2014); *see also* KOZEL, *supra* note 3, at 104 (providing examples of "the justices' statements in case after case about the centrality of precedent and the virtues of deference").

50. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 854 (1992) (plurality opinion).

51. Payne v. Tennessee, 501 U.S. 808, 827 (1991).

52. *Id.* (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)).

53. Vasquez v. Hillery, 474 U.S. 254, 265–66 (1986).

54. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970).

55. *See* Pintip Hompluem Dunn, *How Judges Overrule: Speech Act Theory and the Doctrine of Stare Decisis*, 113 YALE L.J. 493, 493 (2003) ("Judges sustain the fiction that they interpret the law, but never create it, by adhering to the doctrine of stare decisis."); Jerold H. Israel, Gideon v. Wainwright*: The "Art" of Overruling*, 1963 SUP. CT. REV. 211, 219 (1963) (recognizing that when the Court overrules prior decisions, it tends to invoke techniques "that, as a general pattern, tend to preserve the impersonal qualities of the judicial process by emphasizing factors other than the vicissitudes of changing personnel"); Richard M. Re, *Precedent as Permission*,

nonetheless routinely advanced the notion that stare decisis is designed to promote a formal conception of the rule of law.

B. The Failure of the Rule of Law Model

Formal conceptions of the rule of law are inadequate on their own because they lack substantive content. A society could be governed by prospective, general, clear, and stable rules that are not reasonably justified on their merits or are otherwise unconscionable.[56] Everyone would know the rules, those rules would collectively have "a static, given, autonomous, seamless, and complete nature,"[57] and their proper interpretation or application could be entirely impersonal. We may truly have a government of laws and not of people. And yet a legal system of this nature would lack democratic legitimacy because it would result in the arbitrary treatment or domination of the people.

One response is to say that the "rule of law" should be understood to include certain fundamental rights and thus to imbue the concept with at least minimal substantive content.[58] Another approach is to adhere to a formal conception of the rule of law and accept that this ideal can, and perhaps should, be supplemented by other similarly fundamental values. This could include a requirement that legal rules be established pursuant to minimally democratic procedures.[59] Moreover, the substantive rights that are deemed fundamental could also be protected through the establishment of bright-line rules that are

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99 TEX. L. REV. 907, 926 (2021) (recognizing that stare decisis has been fundamentally criticized as "*mere* rhetoric, as opposed to an accurate and complete account of the reasoning that actually underlies judicial decision-making in any given case").

56. *See* TAMANAHA, *supra* note 17, at 93 (recognizing "[t]he emptiness of formal legality" and explaining that this conception of the rule of law is "quite compatible with ruthless authoritarian regimes"); RAZ, *supra* note 18, at 211, 221 (recognizing that a legal system could "institute slavery without violating the rule of law," and that undemocratic regimes with serious normative deficiencies "may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies").

57. *See supra* notes 29, 43 and accompanying text (describing legalism's tenets).

58. *See, e.g.*, Ronald Dworkin, *Political Judges and the Rule of Law*, 64 PROC. BRITISH ACAD. 259, 262 (1978) (articulating a "rights" conception of the rule of law, which "requires, as part of the ideal of law, that the rules in the rule book capture and enforce moral rights"); *see also* TAMANAHA, *supra* note 17, at 102 ("All substantive versions of the rule of law incorporate the elements of the formal rule of law, then go further, adding on various content specifications.").

59. *See* TAMANAHA, *supra* note 17, at 99–101 (explaining that some formal "version[s] of the rule of law add[] democracy to formal legality").

prospective, general, clear, and stable in nature. The adoption of such a legal system would allow us to have our cake and eat it too because the government would be compelled to respect certain democratically established individual rights while adhering to a formal conception of the rule of law. This seems to be the predominant view of most formalistic theories of American constitutional law. From this perspective, the Constitution was adopted and ratified through a democratically legitimate process. The fundamental rights it establishes could, in turn, be grounded in either natural law or the original constitutional meaning—so long as the resulting body of constitutional law ultimately satisfies a formal rule of law ideal.

Of course, one would be hard-pressed to say that American constitutional law provides a totally clear and stable set of rules to guide the behavior of governmental officials and the American people. The proper understanding of the Constitution is in fact vigorously contested and many important issues have not been definitively resolved despite more than 200 years of adjudication with a doctrine of stare decisis. This is partly a result of the vagueness and indeterminacy of many aspects of the founding document, as well as the fact that legal rules are inherently over- and under-inclusive.[60] But it is also partly a result of the Court's inability to establish a consistent or uniform approach to the treatment of precedent.

One thing the Justices have uniformly agreed upon is that "[*s*]*tare decisis* is not an inexorable command," and the presumption in favor of following precedent is "a principle of policy" that can be overcome by other considerations.[61] The Court can therefore always overrule a prior decision if it concludes that there is a "special justification" for doing so.[62] A special justification plainly requires more than a conviction that the prior decision was wrong,[63] and the Court has identified various doctrinal considerations that should be taken into account in making this determination. These factors include the workability of the prior decision, the accuracy of its factual underpinnings, the fit between existing law and subsequent legal developments, and the amount of disruption that would

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60. *See* Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953 (1995).

61. Payne v. Tennessee, 501 U.S. 808, 828 (1991) (quoting Helvering v. Hallock, 309 U.S. 106, 119 (1940)).

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

63. *See, e.g.*, Kimble v. Marvel Ent., L.L.C., 576 U.S. 446, 455–56 (2015).

result from overruling established precedent.[64] The Court has also suggested that the impact of a decision on its own institutional legitimacy may be considered,[65] along with the quality of a prior decision's reasoning and the substantive harm that would result from continuing to follow an erroneous understanding of the Constitution.[66] Given the diversity and breadth of the relevant considerations, this analysis effectively requires the Justices to balance the benefits of continuing to follow existing precedent against the harm that would result from adhering to a mistaken decision.[67]

While balancing tests often fail to produce uniform or consistent decisions, the variation in the Court's treatment of precedent has been compounded by its interpretive pluralism.[68] The Justices have fundamentally different perspectives on the proper approach to constitutional interpretation, and the Court has therefore never adopted a legally binding interpretive method. The Court has instead used different methods to decide different cases, individual Justices have varied in the methods they have used to decide individual cases, and many decisions fail to reflect any single foundational approach. Within the bounds of legitimate judicial craft, constitutional interpretation—and legal interpretation more generally—has traditionally involved ongoing methodological choice.[69] There are reasons to believe that this may be changing, as the Court's majority seems determined to impose its own preferred originalist methodology onto the law, even if that means overruling previously settled precedent that was established on non-originalist grounds.[70]

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64. *See* KOZEL, *supra* note 3, at 108–21.

65. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 864–69 (1992) (plurality opinion).

66. *See* KOZEL, *supra* note 3, at 118–23 (discussing and criticizing these aspects of the Court's doctrine).

67. *See* Dobbs v. Jackson Women's Health Org., No. 19-1392, slip op. at 10 (U.S. June 24, 2022) (Roberts, C.J. concurring) ("Whether a precedent should be overruled is a question 'entirely within the discretion of the court.'") (quoting Hertz v. Woodman, 218 U.S. 205, 212 (1910)).

68. *See* KOZEL, *supra* note 3, at 96 (defining interpretive pluralism as "a vision of constitutional decision-making characterized by the absence of commitment to any particular interpretive theory").

69. Staszewski, *supra* note 48, at 1019. *But cf.* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079 (2017) (claiming the law of interpretation is shaped by preexisting legal rules in the American legal system).

70. *See infra* Section III.B.2 (discussing *Dobbs*). Strictly speaking, the majority's use of orthodox originalism does not mean a rejection of interpretive pluralism, because concurring and dissenting Justices can still use alternative

Randy Kozel has explained that in a regime characterized by interpretive pluralism, first-order methodological disagreement among the Justices regarding the proper approach to constitutional interpretation will carry over into each Justice's decisions regarding whether to follow or overrule a precedent.[71] This naturally occurs because different approaches to precedent tend to correspond with different interpretive methodologies, and similar interpretive methodologies will even lead to different approaches to precedent if those interpretive methodologies are premised upon different normative commitments.[72] For example, an originalist is likely to have a different perspective on precedent than a living constitutionalist, and a structural originalist is likely to have a different perspective on precedent than someone who follows originalism based on consequential considerations.[73] These competing methodological and normative orientations are incorporated into the Court's treatment of precedent under existing doctrine when different Justices assign different weights to the amount of harm that would result from continuing to follow a problematic decision and the corresponding benefits that would result from setting things right.[74] Kozel rightly concludes that this dynamic undermines stare decisis's ability to promote stability and the impersonality of law and thus precludes the Constitution from satisfying a formal rule of law ideal.[75]

In sum, the Court's omnipresent authority to overrule its prior decisions, coupled with principled variation in the treatment of precedent that is fostered by the Court's interpretive pluralism, undermines stare decisis's capacity to promote a formal conception of the rule of law. Simply put, the Court can always change the law if a majority of Justices concludes that a prior decision was wrong or is no longer

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interpretive methods. But the conservative majority has the votes to decide any case it wants pursuant to originalist methods, which effectively means that originalism is the prevailing interpretive approach on the Court. This may be a self-reinforcing phenomenon because litigants who want to win cases have an incentive to pitch their arguments in originalist terms.

71. *See* KOZEL, *supra* note 3, at 99; Staszewski, *supra* note 48, at 1021–22 (describing Kozel's insights).

72. *See* KOZEL, *supra* note 3, at 60–69.

73. *See id.* at 62–67.

74. *See id.* at 60–61, 92–99.

75. *See id.* at 12 ("[W]hen the decision to overrule tracks the interpretive preferences of the individual justices, the connection between stare decisis and judicial impersonality is severed.").

justified and if the expected benefits of overruling the decision outweigh the likely negative consequences.[76] Because the Court has a choice, and that choice will be dictated by the fundamental normative and jurisprudential commitments of the Justices, the law does not truly impose a binding legal constraint in difficult constitutional cases. The Justices, in turn, are never bound by stare decisis to decide a case in a way they believe is incorrect. While this system of judicial review certainly has potential advantages, it also undermines predictability and stability, leaves room for significant exercises of judicial discretion, and precludes establishment of the fixed and complete set of rules that is necessary for an autonomous legal system. As a result, stare decisis cannot reliably promote a formal conception of the rule of law—and the formalist justification for horizontal stare decisis must therefore be mistaken.

This situation cannot be fixed simply by making stare decisis stronger because the Court can also undermine the rule of law when it *follows* existing precedent. In particular, when the Court relies on stare decisis to follow an erroneous or unjustified decision, it is privileging the views of earlier Justices over its best understanding of the supreme law of the land.[77] The Court has therefore arguably departed from its own obligation to follow the law in such cases.[78] Stare decisis has frequently been criticized for undermining the rule of law in precisely this fashion by constitutional originalists because the Court's precedent often deviates from their conception of the Constitution's original public meaning.[79] Overruling such decisions in favor of the document's original public meaning is thus viewed as a path to constitutional redemption, promoting

76. *See* GARNER ET AL., *supra* note 1, at 36 ("Notably, some of the most important Supreme Court decisions in U.S. history were those in which the Court overruled or departed from one of its precedents . . . .").

77. *See* Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 7 (2012) ("[I]t is not hard to see stare decisis as crystallizing and entrenching the rule of men rather than the rule of law" because "[t]he obligation to follow precedent makes it much harder for [a judge] to decide on the basis of fidelity to the Constitution; instead he has to submit to the continuing effect of the decision of people in the past even though (as he sees it) their decisions are taking us in a direction contrary to that required by the independent source of law (the text of the Constitution).").

78. *See* Farber, *supra* note 36, at 1173 (explaining that "stare decisis has . . . been portrayed as a betrayal of the judge's duty to follow the law and thus of the rule of law itself").

79. *See, e.g.*, Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289 (2005).

the rule of law over the rule of men and women.[80] This attitude is clearly reflected in the majority opinion in *Dobbs*, and it also underlies Justice Thomas's stated preference for overruling entire lines of "demonstrably erroneous" precedent.[81]

Discarding stare decisis in favor of the Constitution's original public meaning would likely prove extremely destabilizing, however, because this approach could result in the elimination of numerous deeply entrenched features of American democracy. Beyond abortion rights, this approach could result in the elimination of fundamental rights of access to contraceptives,[82] to engage in private consensual sexual activities,[83] and to marriage equality.[84] The Court is considering doing two things: (1) deconstructing the regulatory state and (2) eliminating (a) prohibitions on racially segregate public schools and laws proscribing interracial marriage, (b) the power of judicial review, and (c) paper money.

In addition to its radically destabilizing potential,[85] this approach would also be in severe tension with the whole enterprise of stare decisis, which only has real teeth when a court disagrees with existing precedent (otherwise, the court would reach the same result based on its independent judgment).[86] Moreover, there is little reason to think that this approach would limit rather than increase judicial discretion—since most constitutional provisions do not have a single, objectively correct, original public meaning. For example, a fundamental right to decide whether to have a child could easily be grounded in the Constitution's original commitments to the protection of liberty and equality.[87] And, of course, overruling some non-originalist decisions, such as *Griswold*, *Lawrence*, *Obergefell*, *Loving*, *Brown*, and *Casey*, would have

80. For one example of a proposal along these lines, see Nelson, *supra* note 6.

81. *See infra* Section III.B.2.

82. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

83. *See* Lawrence v. Texas, 539 U.S. 558 (2003).

84. *See* Obergefell v. Hodges, 576 U.S. 644 (2015).

85. *See* Andrew Koppelman, *Why Do (Some) Originalists Hate America?*, 63 ARIZ. L. REV. 1033 (2021) (exploring originalism's radical potential).

86. *See* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 588 (1987) ("The most obvious consequence [of a system of precedent] is that a decisionmaker constrained by precedent will sometimes feel compelled to make a decision contrary to the one she would have made had there been no precedent to be followed.").

87. For a powerful argument based on equality, see Brief of Equal Protection Constitutional Law Scholars et al. as Amici Curiae Supporting Respondents, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392).

overwhelmingly negative consequences and may therefore not be reasonably justified on the merits.

Some "faint-hearted originalists," like Justice Scalia, have thus treated stare decisis as an exception to the Court's normal obligation to follow the Constitution's original public meaning.[88] As Scalia memorably put it in explaining his differences with Justice Thomas, "I am a textualist, I am an originalist, I am not a nut."[89] Other scholars, like William Baude and Stephen Sachs, have recently advanced an "original law originalism" that allows them to vaunt the original audience understanding of a constitutional provision while accepting contrary precedent, on the theory that the Constitution's original audiences recognized precedent as binding.[90] Yet it appears that a majority of today's Court may be increasingly willing to go nuts and jettison deeply established precedent in favor of their own preferred view of the Constitution's original public meaning.

The bottom line for now is that any system of precedent simultaneously promotes and undermines formal rule of law values, and the system cannot realistically be fine-tuned to eliminate that tension. This tension is particularly inescapable in a world of interpretive pluralism where justices and other people have fundamentally competing normative and jurisprudential commitments. The rule of law therefore cannot provide a stable anchor for justifying or guiding the use of precedent.

C. *Whither Stare Decisis?*

This analysis could lead some to conclude that stare decisis is just a ruse that should be eliminated. The Court follows precedent (or purports to follow precedent) when it agrees with existing law, and it overrules decisions (or declines to follow

88. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION, FEDERAL COURTS AND THE LAW 140 (Amy Gutmann ed., 1997); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) ("I hasten to confess that in a crunch I may prove a faint-hearted originalist.").

89. Nina Totenberg, *Justice Scalia, the Great Dissenter, Opens Up*, NPR, at 02:57 (April 28, 2008), https://www.npr.org/2008/04/28/89986017/justice-scalia-the-great-dissenter-opens-up [https://perma.cc/6DSU-KNXK].

90. *See* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2361 (2015) ("Because originalism permits a doctrine of precedent, many of its most obvious conflicts with modern practice go away."); William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1457 (2019); Anya Bernstein & Glen Staszewski, *Judicial Populism*, 106 MINN. L. REV. 283, 322–24 (2021) (critically evaluating this approach).

precedent) that conflict with the majority's normative or jurisprudential preferences. To make matters worse, the Court attributes many of its decisions to its presumptive obligation to follow precedent and thus avoids responsibility for many of its discretionary choices.

The Court *can* behave this way under a regime of stare decisis, and no doubt the Court *does* behave this way on certain occasions. If this were the entire story, we should probably just cut our losses and jettison a doctrine that always lets the Justices get what they want and frequently allows them to escape accountability for their decisions.

It is possible, however, that stare decisis might serve other functions that are worth keeping. These other functions might even counteract (or at least expose) the dangers associated with a more authoritarian style of judging and provide guiding values for the legitimate use of precedent. While there is no guarantee that the Court (and especially *this Court*) will use precedent in a legitimate manner that promotes its public-regarding functions, it is possible that re-envisioning stare decisis could help to justify and improve the use of precedent within the judiciary and provide guidance on ways in which stare decisis could be calibrated or recalibrated to improve the functioning of our political and legal systems. The remainder of this Article argues that by shifting our focus from law to democracy and recognizing the ways that stare decisis promotes deliberation within the judiciary and the broader legal system, we can develop a coherent and normatively attractive theory of precedent that comports with the best understanding of American legal practice. This theory also provides a normative framework to critique the approach of the current Court and a descriptive lens that may offer potential hope for the future.

II. STARE DECISIS'S SUCCESS AT PROMOTING DEMOCRATIC DELIBERATION

The formal rule of law paradigm of stare decisis is necessarily undone by the fact that the Court can always overrule itself, and precisely when to do so often turns on fundamentally competing normative and jurisprudential commitments. In other words, the use of precedent is inescapably governed by a significant degree of unpredictable, discretionary choice. Horizontal stare decisis's failure to promote a formal conception of the rule of law could lead us to reject it

entirely. However, we could instead reconsider the functions of presumptive deference to precedent. This Part takes the latter approach and highlights stare decisis's success at promoting democratic deliberation.

This points the way to a better understanding of stare decisis as a mechanism for promoting democratic legitimacy. Rather than fixing the law or providing a binding legal constraint, presumptive deference to precedent provides a structural safeguard that promotes republican principles of government and improves judicial decision-making.[91] Stare decisis operates in practice to facilitate reasoned deliberation within the federal courts and to generate deliberative and agonistic dialogue regarding the most justifiable understanding of the Constitution outside the federal judiciary. Stare decisis has both positive and negative features or constructive and deconstructive elements from this perspective—it simultaneously establishes the law and facilitates democratic contestation regarding constitutional meaning. These constructive and deconstructive features interact in different ways in different legal and policy contexts and create an ongoing dialectic that gives content to our constitutional law over time.

This Part begins to develop a deliberative democratic theory of precedent by exploring how stare decisis facilitates reasoned deliberation in judicial decision-making. It proceeds to explain that presumptive deference to precedent serves as an underappreciated engine of popular constitutionalism and dialogic theories of judicial review by facilitating reasoned deliberation about constitutional norms in other legal and political venues. This Part concludes by articulating the core commitments of deliberative democratic theory and explaining how presumptive deference to precedent has the capacity to promote democratic legitimacy from a deliberative perspective.

91. By the term "structural safeguard," I mean a procedural framework that also entails a set of preferred normative practices—like bicameralism and presentment or notice-and-comment rulemaking. *See* sources cited *infra* note 103. Each of these procedural frameworks can, should, and to some extent already does, promote deliberative values. We should do what we can to allow or encourage these procedural frameworks to perform that function as effectively as possible.

A. Deliberation Within Courts

Legal argument and judicial decision-making in the United States revolve heavily around the use of precedent.[92] The surest way to win your case as an advocate or to justify your decision as a judge is to have controlling precedent in your favor. Even if there is no binding precedent directly on point, litigants and judges tend to structure their arguments and decisions around a discussion of how previously decided cases support their positions, along with an analysis of the relevant provisions of authoritative sources of positive law. The import or meaning of positive law is also frequently ascertained or elaborated through the use or application of judicial precedent. It should therefore seem obvious that the use of precedent shapes the nature of judicial deliberation.

Stare decisis facilitates reasoned deliberation within the judiciary in a variety of important ways. For example, by taking potentially controversial but entrenched legal principles off the table, precedent helps to define the relevant issues in a lawsuit in a manageable way and forecloses the need to repeatedly debate first principles. Stare decisis thereby promotes efficiency and makes reasoned deliberation within the context of a single case or controversy possible.[93] Stare decisis also encourages decision-makers to give due respect to the work of their predecessors, which further promotes efficiency and encourages decision-makers to be humble and to learn from the past.[94] Respect for precedent thus encourages judges to consider competing interests and perspectives and facilitates a spirit of compromise between past decisions and today's preferred outcomes.[95] Stare decisis also encourages decision-makers to be thoughtful and relatively cautious on issues of first impression because they will typically want to avoid making "bad precedent" for the future. Finally, stare decisis encourages the

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92. *See* Levin, *supra* note 35, at 1040 (recognizing that virtually every legal brief and judicial opinion "cites to and reasons from precedent").

93. *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921) ("[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of courses laid by others who had gone before him.").

94. *See* Farber, *supra* note 36, at 1176–80.

95. *Cf.* AMY GUTMANN & DENNIS THOMPSON, THE SPIRIT OF COMPROMISE: WHY GOVERNING DEMANDS IT AND CAMPAIGNING UNDERMINES IT (2014) (discussing the importance of principled compromise in deliberative democracy).

principled development of legal authority because decision-makers will routinely give reasons for their decisions in cases of first impression. Such reasoning will typically be more general than the precise holding or decision in the case at bar and will therefore provide a basis for making analogies or drawing distinctions in the future.[96] The analysis of precedent over time fleshes out which similarities and differences matter and precisely why that is the case, thereby potentially rendering the entire legal system more coherent, responsive, and equitable.

Precedent's role in facilitating reasoned deliberation is widely recognized in traditional legal scholarship and is consistent with historical studies of the principle of stare decisis.[97] For example, prominent scholars have recognized that the "analogical reasoning" that courts use to assess the significance of previous decisions "is the classical reasoned decisionmaking that forms the basis of the legal process model."[98] Similarly, sitting Justices have reported that the Court's decision-making process "invariably involves a study and analysis of relevant precedents," which provides "the basis for analysis and discussion" during conference deliberations and also creates the analytical framework for most of the Court's opinions.[99] Polly Price's historical study found that although views on the extent to which precedent is "binding" have varied substantially in the United States over time, the central proposition that courts must carefully consider how an analogous case was decided in the past as a prerequisite to making a legitimate decision in the present has consistently been accepted.[100] Moreover, while varying standards have been used throughout American history for distinguishing or overruling prior cases, courts have consistently been expected to

96. *See* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 641–42 (1995) (explaining that "ordinarily, *to provide a reason for a decision is to include that decision within a principle of greater generality than the decision itself*"); Waldron, *supra* note 77 (suggesting that stare decisis promotes the rule of law by requiring judges to decide cases by articulating general norms which must be treated as law in subsequent cases).

97. Staszewski, *supra* note 48, at 1034.

98. Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. REV. 1156, 1163 (2005).

99. John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 4 (1983).

100. *See* Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. REV. 81, 84–85 (2000).

give reasoned justifications for those decisions.[101] These long-standing practices suggest that precedent's central role is—and likely always has been—to perform a deliberative function.

The type of reasoned deliberation that stare decisis facilitates is central to the democratic legitimacy of lawmaking in the American constitutional system. Republican democracy broadly seeks to promote the collective interests of the people and to protect their liberty from the possibility of domination by private actors or the State.[102] The federal legislative and administrative rulemaking processes therefore contain a variety of structural safeguards to prevent arbitrary governmental action.[103] By requiring judges to consider and respond in a reasoned fashion to prior decisions by courts that may have had a fundamentally different normative or jurisprudential perspective, stare decisis provides an analogous structural safeguard against the possibility of domination by the State. Judges are also likely to make better decisions in a legal system that attributes some weight to precedent because "a presumptive obligation to follow precedent can force a judge to confront opposing arguments and articulate strong reasons for disagreeing with them, thus improving her own decisionmaking."[104]

Contrary to the rule of law paradigm, stare decisis affirmatively embraces law's provisionality and is respectful of interpretive pluralism within the judiciary. As then-Professor Amy Coney Barrett recognized, stare decisis has the capacity "to mediate intense disagreements between justices about the

101. As William Cranch wrote in the preface of his reports of early Court decisions, "Every case decided is a check upon the judge. He can not decide a similar case differently, without strong reasons, which, for his own justification, he will wish to make public." *Id.* at 91–92 (quoting 5 U.S. (1 Cranch) iii–iv (1804) (preface by William Cranch)); *see also* Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM. J. LEGAL HIST. 28, 47, 52 (1959) ("[S]tare decisis requires that a court consider prior decisions and then choose whether to follow, distinguish, or overrule them. Merely to ignore a prior decision is hardly to heed the summons of the policy of stare decisis.").

102. *See generally* PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT (Will Kymlicka et al. eds., 1997).

103. *See* Glen Staszewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 IOWA L. REV. 849, 891–92 (2012); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985) (recognizing that the legislative and administrative rulemaking processes are designed to promote civic republican values).

104. Deborah Hellman, *An Epistemic Defense of Precedent*, *in* 33 PRECEDENT IN THE UNITED STATES SUPREME COURT 63, 70–74 (Christopher J. Peters ed., 2013).

fundamental nature of the Constitution" by facilitating reasoned deliberation about the substantive merits of the relevant issues and the practical value of standing by earlier decisions.[105] Stare decisis promotes doctrinal stability by creating a rebuttable presumption in favor of preserving the status quo, while simultaneously allowing disputes that involve fundamental differences of opinion to be aired in a manner that "is both realistic about, and respectful of, pluralism" on the Court and in society at large.[106] Presumptive reliance on precedent "helps the Court navigate controversial areas by leaving space for reargument despite the default setting of continuity."[107] The ability of litigants and the Court to contest existing precedent "enables a reasoned conversation over time between justices—and others—who subscribe to competing methodologies of constitutional interpretation."[108]

Rather than permanently fixing the law, stare decisis facilitates a distinctive form of deliberation within the judiciary that has both positive (or constructive) and negative (or contestatory) dimensions. On the constructive side, stare decisis promotes stability and respect for the reasoned decisions of the past, limits debate to manageable proportions, and performs other functions traditionally associated with the rule of law, thereby establishing an environment that is conducive to a mutually supportive dialogue. Yet by simultaneously creating a stable target for social criticism and allowing for legal change in special circumstances, stare decisis also plays an important "negative" role in deliberation by generating the potential for a conflictual dialectic and agonistic contestation of the status quo. Precedent is sometimes something that litigants (and social movements) are trying to destroy (or overrule), but it is also something they are affirmatively trying to establish and entrench and build upon. There is also an ongoing effort by both proponents and opponents of existing law *to shape precedent*

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105. Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, at 1711, 1722–23 (2013) (recognizing that overruling a prior decision requires a heightened burden of justification because "in a system of precedent, the new majority bears the weight of explaining why the constitutional vision of their predecessors was flawed and of making the case as to why theirs better captures the meaning of our fundamental law"); *see also* Philip P. Frickey, Stare Decisis *in Constitutional Cases: Reconsidering* National League of Cities, 2 CONST. COMMENT. 123, 123 (1985) (recognizing the dialogic nature of stare decisis).

106. Barrett, *supra* note 105, at 1723.

107. *Id.* at 1724.

108. *Id.* at 1737.

going forward, in addition to encouraging courts to follow or overrule prior decisions. Because constitutional meaning results from the ways in which these constructive and contestatory aspects of the dialogue involving precedent interact over time, we need stable precedent for deliberative democracy to function in our constitutional system, but its strength and scope should also be limited so there is ample space for agonistic development and deliberative legal reasoning to continue.[109]

Stare decisis can therefore facilitate reasoned deliberation within the judiciary regardless of whether the Court follows or overrules precedent in any individual case. Indeed, stare decisis's deliberative functions may be especially pronounced when the Court transparently overrules an otherwise controlling precedent because it will be obligated to provide a special justification for its decision in this situation. That is why a substantial portion of the majority opinion in *Dobbs* (and the bulk of Justice Kavanaugh's concurrence) was devoted to a discussion of *Roe* and *Casey* and the application of stare decisis doctrine.[110] That does not necessarily mean that the Court's decision was democratically legitimate on the merits. Before getting there, however, we need to consider how the Court got there, and that requires understanding how stare decisis promotes deliberation regarding constitutional norms in the broader political and legal system.

B. Deliberation Within the Political and Legal System

The formal rule of law paradigm of stare decisis implicitly suggests that the Court should follow the plain meaning of the constitutional text and that any latent vagueness or ambiguities should be resolved when the Court decides constitutional cases. Stare decisis allows the Court to fix the Constitution's meaning, and we should therefore ultimately have a complete set of relatively clear rules that could be used to resolve virtually any constitutional dispute in a neutral fashion. We could thus truly have a government of laws and not of people.[111]

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109. I am grateful to Blake Emerson for encouraging me to draw out these positive and negative features of stare decisis.

110. *See* Dobbs v. Jackson Women's Health Org., No. 19-1392, slip op. at 5–10, 39–72 (U.S. June 24, 2022) (Kavanaugh, J., concurring).

111. This theory is perhaps fatally undermined, however, by the fact that a small and exclusive subset of "the people" established the Constitution and have been responsible for how it has been construed and interpreted over the ensuing

So why, after more than two hundred years of constitutional adjudication, does this theory depart so markedly from reality? Sure, novel or previously unanticipated problems crop up periodically, but the prevailing understanding of the Constitution also changes—sometimes dramatically—over time.[112] And while some of these changes have resulted from formal amendments to the Constitution, most of the evolution has been the result of an ongoing dialogue involving the Court, other public officials, and attentive members of the public.[113]

This Section explains this dynamic by briefly describing dialogic theories of judicial review and providing examples of how constitutional meaning changes over time. It proceeds to explain that while social movement groups would undoubtedly prefer to win their cases in the Supreme Court and thereby establish binding precedent in their favor, it is also possible for those groups to prevail over the long run partly as a result of the benefits associated with losing. The Section closes by contending that stare decisis plays a crucial role in facilitating these dynamics and should therefore be recognized paradoxically as the unheralded engine of constitutional change.

1. Dialogic Theories of Judicial Review

Over the past several decades, a school of constitutional scholars have developed a variety of *dialogic theories of judicial review*,[114] which are tied loosely together by their recognition "that constitutional meaning is the result of an ongoing dialogue involving governmental officials and interested members of the public."[115] For example, Barry Friedman emphasizes the

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years. *See* James W. Fox, Jr., *Counterpublic Originalism and the Exclusionary Critique*, 67 ALA. L. REV. 675 (2016).

112. *See* DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010).

113. *See* Heather H. Gerken, *The Hydraulics of Constitutional Reform: A Skeptical Response to* Our Democratic Constitution, 55 DRAKE L. REV. 925, 929 (2007) (referring to this dynamic as "the informal amendment process").

114. This literature is increasingly vast. *See, e.g.*, CONSTITUTIONAL DIALOGUE: RIGHTS, DEMOCRACY, INSTITUTIONS (Geoffrey Sigalet et al. eds., 2019); NEAL DEVINS & LOUIS FISHER, THE DEMOCRATIC CONSTITUTION (2d ed. 2015); JACK M. BALKIN, LIVING ORIGINALISM (2011); LARRY D. KRAMER, THE PEOPLE THEMSELVES, POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); LOUIS FISHER, CONSTITUTIONAL DIALOGUES, INTERPRETATION AS POLITICAL PROCESS (1988); Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L. J. 2740 (2014).

115. Glen Staszewski, *Constitutional Dialogue in a Republic of Statutes*, 2010 MICH. ST. L. REV. 837, 865–66 (2010); *see also* Staszewski, *supra* note 14, at 98–100 (providing an overview of leading dialogic theories of judicial review).

importance of the public's reaction to the Court's decisions and claims that "it is through the dialogic process of 'judicial decision—popular response—judicial re-decision' that the Constitution takes on the meaning it has."[116] Bill Eskridge and John Ferejohn focus on how statutes and the decisions of regulatory agencies and state courts shape constitutional meaning in a way that involves republican deliberation by a broad range of participants in a variety of institutional settings.[117] Robert Post and Reva Siegel highlight the role of social movements, and they also recognize that constitutional meaning is influenced by "complex patterns of exchange" over time between private citizens and public officials in a range of institutional settings.[118] Dialogic theories suggest that the Constitution's meaning is the result of an ongoing, dialectical process involving multiple participants and stages.[119] Constitutional meaning is thus influenced not only by the original public meaning of the document but also by the subsequent views of presidents, legislators, and agency officials, as well as by the evolving views of state and federal judges and ordinary citizens.

While originalism requires today's people to be governed by the dead hand of the past, dialogic theories tend to square judicial review with democracy by identifying the available avenues for public officials and ordinary citizens to influence the Constitution's meaning.[120] They are *deliberative* theories of constitutional meaning in the sense that they tend to recognize the Court's obligation to reach the most justifiable decision on the merits based on the persuasiveness of the relevant legal and moral arguments. They are also deliberative, however, in the sense that they recognize that the Court may consider other prudential factors, including the perceived legitimacy of its decisions and the likely impact of alternative courses of action

116. BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 381–82 (2009).

117. *See* WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES, THE NEW AMERICAN CONSTITUTION 15 (2010).

118. Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 374 (2007) (emphasizing that judicial decisions do not foreclose political discussion of controversial issues).

119. *See* Staszewski, *supra* note 115, at 867–70 (describing the American process of constitutional change and identifying four interactive stages).

120. *See* Staszewski, *supra* note 14, at 99 (describing dialogic theories' connections to agonistic and deliberative conceptions of democracy).

on the political process.[121] Both aspects of the Court's deliberative decision-making are likely to be provisional and dynamic in nature. Dialogic theories therefore welcome dissent from the Court's constitutional vision and recognize that citizens should be provided with a wide range of opportunities to contest the status quo. For example, the theory of "democratic constitutionalism" articulated by Post and Siegel explicitly sees "interpretive disagreement as a normal condition for the development of constitutional law."[122] By emphasizing the role of social movements in facilitating the requisite dialogue, such theories also recognize the value of providing space for "enclaves of oppositional discourse" to facilitate democratic contestation.[123] Dialogic theories therefore recognize the constructive role that can be played by backlash.[124] Such theories suggest that the Court should be responsive to the considered judgment of the attentive public and their representatives, which gradually emerges from ongoing debates regarding constitutional meaning that are partly deliberative and partly agonistic in nature.

Dialogic theorists have not explicitly developed a distinctive theory of stare decisis. Yet the presumption that courts will follow controlling precedent is—perhaps counterintuitively—central to their model of constitutional change and judicial review. While controlling precedent's jurisgenerative role has thus far remained largely implicit, stare decisis is, in fact, the engine of dialogic theories of judicial review because it creates a stable baseline or target that can either be widely accepted and subsequently entrenched or vigorously contested and perhaps subsequently overruled. Dialogic theories of judicial review therefore make sense of both the positive and negative (or constructive and deconstructive) aspects of stare decisis described earlier, whereby precedent both creates the necessary conditions for reasoned deliberation within adjudication and provides a potential basis for challenging the prevailing status

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121. This approach may be reflected, at times, by the Court's use of the passive virtues. *See, e.g.*, Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567 (1985).

122. Post & Siegel, *supra* note 118, at 374.

123. *See* Jane Mansbridge, *Using Power/Fighting Power: The Polity*, *in* DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 46, 56–59 (Seyla Benhabib ed., 1996).

124. *See* FRIEDMAN, *supra* note 116, at 383 ("One of the most valuable things that occurs in response to a Supreme Court decision is backlash."); Post & Siegel, *supra* note 118, at 373–74.

quo. But either way, stare decisis also facilitates democratic deliberation regarding the most justifiable understanding of the Constitution in the broader political and legal spheres.

Dialogic theories recognize that Supreme Court decisions are not necessarily the final word on a legal issue and that reasoned deliberation on the best understanding of the Constitution often continues in private conversations and other institutional settings.[125] The constitutional norms that are developed and embraced in other venues can, in turn, subsequently influence the Court's understanding of the Constitution. Indeed, the widespread acceptance of a compelling understanding of the Constitution outside the courts (or, at least, outside *the Court*) may be a prerequisite to a legitimate decision by the Court to overrule established precedent.[126] And, while no one wants to *lose* a case in the Court, the existence of adverse precedent may be precisely what is needed to build and sustain an effective movement for constitutional change.[127] Winning the case establishes favorable precedent in the present (thereby illustrating the positive or constructive dimension of stare decisis), but losing a case provides the foundation for contesting the existing status quo going forward (thus illustrating its deconstructive potential).

2. The Possibility of Winning by Losing

Douglas NeJaime has persuasively argued that litigation loss can serve a productive function for social movements.[128] The key is to understand that social movement groups use impact litigation as one component of a broader, multidimensional strategy for legal change.[129] Constitutional litigation in federal court is typically only one option, and frequently not the most promising avenue, for using litigation to

125. *See* Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993).

126. *See* Neil S. Siegel, *Reciprocal Legitimation in the Federal Courts System*, 70 VAND. L. REV. 1183, 1183 (2017) ("When the Court intervenes in fierce political conflicts, it may proceed in stages, interacting with other federal courts in a way that is aimed at enhancing its public legitimacy.").

127. *See* FRIEDMAN, *supra* note 116, at 362 ("One of the greatest engines of constitutional change has been mobilization against Supreme Court decisions by those unhappy with the results.").

128. *See generally* Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2011).

129. *See, e.g.*, Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235 (2010).

achieve legal reform. Moreover, while losing a case in federal court is undoubtedly a setback, an adverse federal decision does not ordinarily preclude the use of other strategies for changing the law.[130] On the contrary, NeJaime contends that litigation loss can enhance the likelihood that these other strategies will prove successful.[131] Litigation loss provides internal benefits to social movement groups by helping them to establish an organizational identity and mobilizing their constituents to join the group and contribute time or money to the cause. Simply put, a disconcerting setback in litigation provides a visible and concrete target for social movements and their allies to rally against. At the same time, litigation loss increases the likelihood that state courts, other public officials, and the general public will be receptive to a social movement group's message and position. This provides external benefits to social movement groups, which stem largely from unsuccessful litigation's capacity to highlight the limitations of federal courts as a mechanism for achieving legal and social change. Rather than ending the matter, losing a case in federal court can affirmatively facilitate ongoing conversations about constitutional norms in a variety of other venues and may thereby ultimately contribute to social and legal change.

While NeJaime's analysis is insightful and compelling, it is important to recognize that the opportunities for winning by losing are greatly enhanced by the doctrine of stare decisis. The more prominent the adverse judicial decision, and the broader its precedential impact, the bigger target it provides for social movement groups and their allies.[132] Thus, Supreme Court decisions like *Bowers v. Hardwick*[133] or *Roe* (or *Dobbs*) have the capacity to provide social movement groups with greater

130. The Court's recognition of a constitutional right may, however, limit the legal options of the right's opponents. *See* DAVID COLE, ENGINES OF LIBERTY, THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW 284–85 (2016) (recognizing, for example, that the opportunities for using state law to change constitutional norms "are more promising where one seeks to expand rather than contract a constitutional right"). Even so, the work of the antiabortion movement has plainly demonstrated that the Court's recognition of a fundamental constitutional right does not foreclose continuing efforts to limit or contest that right.

131. *See* NeJaime, *supra* note 128, at 988–1011.

132. *See* FRIEDMAN, *supra* note 116, at 352–53 (noting that abortion and gay rights are two of the most divisive social issues for voters, and that "disfavored decisions" by the Court "actually were more useful politically [to activists] than preferred ones" because "[i]t was difficult to mobilize the base over something the base agreed with").

133. 478 U.S. 186 (1986).

internal and external benefits than relatively obscure decisions by state or federal trial courts. Moreover, the federal judiciary's ability to facilitate constitutional change is severely limited by its presumptive (and, in the case of lower courts, frequently absolute) obligation to follow controlling precedent. The effectiveness of social movement appeals in other venues may therefore be substantially enhanced by the fact that the federal judiciary's hands are tied by the principle of stare decisis. If federal courts cannot or will not update the law to reflect prevailing constitutional sentiments, then it becomes incumbent upon state courts and other public officials to do so. Social movement groups can thus use adverse precedent in federal court as a necessary and persuasive call to action in other venues. If it were easy to overrule judicial decisions on constitutional questions in federal court, social movement groups could repeatedly use litigation to try, try again. The federal judiciary's obligation to follow precedent generally makes this a losing, and indeed, counterproductive strategy. Stare decisis thus shifts authority as a practical matter from federal courts to other venues where social movement groups are more likely to be successful and simultaneously increases their likelihood of success by producing the potential internal and external benefits NeJaime has identified.

Scholars have produced a host of excellent case studies that illustrate these dynamics in numerous areas of constitutional law. For example, David Cole's monograph, *Engines of Liberty*, tells the stories of how social movement activists were instrumental in establishing constitutional norms recognizing marriage equality, recognizing an individual right to bear arms under the Second Amendment, and providing due process protections for suspected enemies in the "war on terror."[134] Both marriage equality and the right to bear arms were the products of orchestrated campaigns at the state level. Social movement activists used a state-by-state approach to target favorable venues, obtained smaller victories on related issues in an incremental fashion through the legislative and administrative processes, and then used this foundation along with other forms of persuasion to help build public support before seeking recognition of their proposed rights under the state constitution.

134. *See generally* COLE, *supra* note 130; JULES LOBEL, SUCCESS WITHOUT VICTORY, LOST LEGAL BATTLES AND THE LONG ROAD TO JUSTICE IN AMERICA (2003). *Cf.* ROGER C. HARTLEY, HOW FAILED ATTEMPTS TO AMEND THE CONSTITUTION MOBILIZE POLITICAL CHANGE (2017).

Once this approach was successful in one state, the victory was used as precedent for similar courses of action in other states with similar political climates. And once a critical mass of states recognized constitutional rights to same-sex marriage or to keep and bear arms under state law, these cases served as persuasive precedent *for federal officials* who eventually supported the recognition of those rights under the Constitution. Once a critical mass of states recognized these constitutional rights, and they were explicitly endorsed by prominent federal officials, it was only one more relatively small, incremental step for lower federal courts to recognize these rights as a matter of federal constitutional law[135]—especially when the Supreme Court seemed to be nudging the federal courts in that direction.[136] The Court's eventual recognition of those rights thus arguably reflected an emerging consensus among legal elites, and its decisions merely required the remaining, outlier states to come into line with what was becoming the mainstream understanding of the Constitution.

This dynamic will play out differently in different legal or policy contexts. For example, Cole points out that the scope of due process protections for suspected terrorists after 9/11 fell within the exclusive jurisdiction of the federal government. Social movement activists advocating on their behalf therefore relied heavily on international human rights norms and pressure generated by the media and foreign governments to achieve legal or policy change. Advocates used those tools successfully to encourage the federal government to moderate some of its most extreme positions, and to persuade the Court to overrule earlier decisions and provide enhanced procedural safeguards for noncitizens who were detained outside the territorial limits of the United States.[137]

The groundwork for federal constitutional change that was laid in the states or by multinational influences in the preceding examples may also be performed by Congress or by federal agencies. Indeed, Congress frequently amends federal statutes

135. *See* Katie Eyer, *Lower Court Popular Constitutionalism*, 123 YALE L.J. ONLINE 197, at 200, 209 (2013) (claiming that the Obama Administration's endorsement of same-sex marriage likely influenced decisions by lower federal courts to recognize a constitutional right to marriage equality).

136. *See* Siegel, *supra* note 126, at 1190–97 (explaining how *Windsor* nudged lower federal courts into recognizing a constitutional right to marriage equality, thereby laying the groundwork for *Obergefell*).

137. *See* COLE, *supra* note 130, at 173–208.

to overcome constitutional problems identified by the Court,[138] and the Court sometimes invites legislative responses of this nature and even provides Congress with suggested legislative fixes that would likely pass constitutional muster.[139] Congress can also amend statutes in ways that push back on the Court's understanding of the Constitution, and this "coordinate dialogue" can influence the Court's subsequent decisions.[140] The strength of stare decisis as a practical matter therefore depends in part on the precise nature of the Court's constitutional decisions, how Congress reacts, and the judiciary's receptiveness to subsequent legislative developments.[141]

Eskridge and Ferejohn have provided a variety of more elaborate examples of how lawmakers in Congress and agencies can influence constitutional development in their work on "super-statutes."[142] Not only does the federal regulatory state supplement and often supplant the Constitution on many of "the most fundamental features of governance,"[143] but the practices

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138. In the most comprehensive empirical study of legislative responses to Supreme Court decisions that invalidated federal statutes on constitutional grounds, Mitch Pickerill found that Congress amended the invalidated statute in an effort to achieve its original policy objectives in a constitutionally permissible fashion in 48 percent of the cases, while Congress repealed the invalidated statute in 14 percent of the cases and failed to respond in 38 percent of the observations. J. MITCHELL PICKERILL, CONSTITUTIONAL DELIBERATION IN CONGRESS, THE IMPACT OF JUDICIAL REVIEW IN A SEPARATED SYSTEM 41 (2004). For other recent empirical research on this subject, see Alicia Uribe et al., *The Influence of Congressional Preferences on Legislative Overrides of Supreme Court Decisions*, 48 LAW & SOC'Y REV. 921 (2014); Bethany Blackstone, *An Analysis of Policy-Based Congressional Responses to the U.S. Supreme Court's Constitutional Decisions*, 47 LAW & SOC'Y REV. 199 (2013); Ryan Eric Emenaker, *Constitutional Interpretation and Congressional Overrides: Changing Trends in Court-Congress Relations*, 3 J.L. (2 J. LEGAL METRICS) 197 (2013).

139. *See* Ronald J. Krotoszynski, Jr., *Constitutional Flares: On Judges, Legislatures, and Dialogue*, 83 MINN. L. REV. 1 (1998).

140. *See* Rainer Knopff et al., *Dialogue: Clarified and Reconsidered*, 54 OSGOODE HALL L.J. 609, 610–11 (2017) (distinguishing between "court centered" dialogue where the legislative body implements the Court's understanding of the Constitution and "coordinate dialogue" where the legislature implements its own constitutional vision).

141. For work that carefully evaluates Congress's ability to amend statutes in response to the Court's constitutional decisions in various doctrinal areas, see Dan T. Coenen, *The Rehnquist Court, Structural Due Process, and Semisubstantive Constitutional Review*, 75 S. CALIF. L. REV. 1281 (2002); Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575 (2001).

142. *See* Staszewski, *supra* note 115, at 862–65 (discussing this work and the example that follows); *see generally* ESKRIDGE & FEREJOHN, *supra* note 117; William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001).

143. ESKRIDGE & FEREJOHN, *supra* note 117, at 12–13.

and norms established by statutory and administrative law have the capacity to "transform constitutional baselines."[144] For example, Eskridge and Ferejohn claim that *Brown I*'s initial prohibition of de jure segregation was transformed into an obligation to eliminate or justify de facto segregation and thereby integrate the public schools as a result of administrative constitutionalism.[145] They point out that the Civil Rights Act of 1964 withheld federal funds from public programs that discriminated on the basis of race, and that subsequent legislation significantly expanded the amount of federal funds available to local schools.[146] Because these statutes were aggressively enforced by federal agencies to require local school districts to justify de facto segregation, Eskridge and Ferejohn claim that "public school integration occurred all over the country, especially in the South."[147] Significantly, these statutory and regulatory initiatives *preceded* the Court's decision in *Brown II*, which held that segregated school districts had an obligation to transition to a unitary school system.[148] While one can easily question whether this effort to integrate public schools has been successful, there is little doubt that the antidiscrimination norm that emerged from those efforts has stuck (at least until recently, with the rise of the "All Lives Matter" movement and backlash against critical race theory). This broader antidiscrimination norm was extended to other "suspect classifications," including sex, pregnancy, age, disability, national origin, religion, and sexual orientation—largely through the process of administrative constitutionalism.[149] Eskridge and Ferejohn thus contend that normative commitments in our constitutional system "are announced and entrenched not through a process of Constitutional amendments or Supreme Court pronouncements

144. *Id.* at 6–7.

145. *See id.* at 12–13; Brown v. Bd. of Edu. of Topeka, Shawnee County, Kan. (*Brown I*), 347 U.S. 483 (1954). For other compelling case studies of administrative constitutionalism, see Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799 (2010); Anuj C. Desai, *Wiretapping Before the Wires: The Post Office and the Birth of Communications Privacy*, 60 STAN. L. REV. 553 (2007). For a broader historical account, see Sophia Z. Lee, *Our Administered Constitution: Administrative Constitutionalism from the Founding to the Present*, 167 U. PA. L. REV. 1699 (2019).

146. *See* ESKRIDGE & FEREJOHN, *supra* note 117, at 7, 12–13.

147. *Id.* at 6.

148. *See id.*; Brown v. Bd. of Edu. of Topeka, Kan. (*Brown II*), 349 U.S. 294 (1955).

149. *See* ESKRIDGE & FEREJOHN, *supra* note 117, at 12.

but instead through the more gradual process of legislation, administrative implementation, public feedback, and legislative reaffirmation and elaboration."[150]

As these examples illustrate, constitutional change often requires a combination of concerted efforts within the states as well as by Congress and other federal officials—with potential influence from international developments. Scholars have provided rich histories of these dynamics in a variety of legal contexts involving criminal procedure,[151] racial and gender equality,[152] the legislative veto,[153] and a host of other constitutional rights.[154] The thrust of this work is that the Constitution's meaning at any particular moment in time is the result of an ongoing dialogue that is both deliberative and agonistic in nature, and that includes the Court as well as other governmental institutions and politically engaged members of the public.

These dynamics, of course, are vividly illustrated by concerted efforts over many years by the pro-life movement and its allies to overturn *Roe*.[155] They are also being demonstrated in real time by the powerful reaction of proponents of abortion rights and women's reproductive health to *Dobbs*. The Court's decision has galvanized unprecedented support for organizations that promote abortion rights and access to reproductive health services.[156] And the fight for those rights

150. *Id.* at 14; *see also id.* at 18 (listing other case studies of administrative constitutionalism developed in the book, along with their respective chapters).

151. *See* Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361 (2004).

152. *See, e.g.*, LOBEL, *supra* note 134; MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS (2004); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323 (2006).

153. *See* FISHER, *supra* note 114, at 224–30 (documenting rampant noncompliance with *INS v. Chadha*).

154. *See, e.g.*, William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002); Robert C. Post, *The Supreme Court, 2002 Term, Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003).

155. For pre-*Dobbs* analyses of those efforts, see, e.g., Post & Siegel, *supra* note 118; Neal Devins, *How* Planned Parenthood v. Casey *(Pretty Much) Settled the Abortion Wars*; 118 YALE L.J. 1318 (2009); Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694 (2008).

156. *See* Kalley Huang, *Abortion Funds Raise Millions in Donations to Help People Seeking the Procedure*, N.Y. TIMES (June 24, 2022, 5:36 PM), https://www.nytimes.com/2022/06/24/us/abortion-funds-donations-roe.html

and services has already resulted in the issuance of an Executive Order by President Biden, proposed legislation in Congress, and a wave of action in the states, including litigation, executive orders, proposed legislation, and efforts to utilize the ballot initiative process to codify *Roe* or otherwise limit *Dobbs*'s potential damage. One would need to be living under a very large rock to conclude that this particular legal and policy battle is over.

3. Stare Decisis as the Unheralded Engine of Constitutional Change

Yet the powerful influence of stare decisis in producing constitutional dialogue and generating constitutional change is largely overlooked (or left implicit) in the scholarly literature. It is crucial to recognize, however, that the backdrop for these dramatic stories of constitutional change is nearly always binding judicial decisions that reject a competing constitutional vision. The Court's authoritative understanding of the Constitution is *the target* that social movement groups are ultimately seeking to transform through their efforts. Social movement groups are seeking to lay a foundation to persuade the Court to change its mind, overrule existing precedent, and adopt a fundamentally different constitutional vision.

Stare decisis is also what makes constitutional change a difficult legal challenge. Thus, for example, Cole's stories of constitutional change all begin with adverse Supreme Court precedent—decisions rejecting same-sex marriage[157] (and allowing states to criminalize consensual homosexual conduct instead),[158] an individual right to bear arms,[159] and a right to habeas corpus for foreign nationals held outside the nation's borders[160]—and culminate with Supreme Court decisions that deviate from existing precedent and adopt fundamentally

[https://perma.cc/7AHZ-C52C]; Dustin Jones, *Abortion-Rights Groups See a Surge in Donations After* Roe v. Wade *Leak*, NPR (May 6, 2022, 5:42 PM), https://www.npr.org/2022/05/06/1097210720/roe-v-wade-abortion-groups-donations-surge [https://perma.cc/3TXD-9632].

157. *See* Baker v. Nelson, 409 U.S. 810 (1972).

158. *See* Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (upholding the sodomy laws of over twenty-five states).

159. *See* United States v. Miller, 307 U.S. 174, 179 (1939) (tying the Second Amendment's right to bear arms to militia service).

160. *See* Johnson v. Eisentrager, 339 U.S. 763, 789–91 (1950) (holding that German nationals, confined by the U.S. Army on German soil, had no right to challenge the legality of their detention pursuant to a writ of habeas corpus).

different constitutional understandings.[161] While constitutional dialogue may continue in perpetuity, and different issues will be located at different stages of this interactive process,[162] the Court's precedent plays an important role in setting the terms of the debate *and* establishing a very high bar for constitutional reform.[163]

This process for constitutional change is agonistic in the sense that it involves vigorous contestation and ongoing disagreement (not to mention ugly and sometimes even absurd rhetoric). Yet this process is also best understood as deliberative, rather than majoritarian, precisely because fundamental constitutional reform requires successful persuasion in multiple institutional venues. The broad, *supermajoritarian* support that

161. *See* Obergefell v. Hodges, 576 U.S. 644, 681 (2015) (holding that the Constitution requires states to recognize same-sex marriages); Lawrence v. Texas, 539 U.S. 558, 578–79 (2003) (holding that criminal prohibitions on consensual sodomy are unconstitutional); District of Columbia v. Heller, 554 U.S. 570, 595 (2008) (holding that the Second Amendment protects an individual right to bear arms); McDonald v. City of Chicago, 561 U.S. 742, 791 (2010) (holding that the Second Amendment's individual right to bear arms is enforceable against the states); Boumediene v. Bush, 553 U.S. 723, 798 (2008) (holding that noncitizens held in detention by the United States in Cuba had a right to petition for a writ of habeas corpus).

162. Of course, for most issues, nothing significant is happening at any moment to change the legal status quo, and the law is thus sitting in a state of stable equilibrium. *See* William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term–Foreword: Law As Equilibrium*, 108 HARV. L. REV. 26, 29 (1994).

163. The dynamic described here is almost certainly a result of the combination of horizontal and vertical stare decisis. One might posit that horizontal stare decisis is unnecessary to facilitate this type of constitutional dialogue because vertical stare decisis and the fact that the Court's decisions are treated as binding precedent in the lower courts would be sufficient to perform this function, even if the Court gave no deference to its own prior decisions. That is admittedly possible, and it is difficult to evaluate a counterfactual (and thus to disentangle the impact of precedent as law versus precedent as precedent). However, eliminating horizontal stare decisis within the Court would surely undermine the quality of the Court's own deliberations for reasons explored in Parts II.A and III. Moreover, eliminating the Court's obligation to give presumptive deference to its own prior decisions would likely generate confusion in the law and thus potentially obscure the most pressing targets for social movement activism. Eliminating horizontal stare decisis would also have uncertain and potentially pernicious consequences for the nature of constitutional dialogue in both the political and legal spheres, making the "end game" of constitutional litigation even more about power than persuasion. I am primarily interested in developing the best account of horizontal stare decisis in light of its impact on reasoned deliberation throughout our existing public law system (which includes both horizontal and vertical stare decisis). In that sense, I am seeking to follow the approach advocated in Part IV by thinking about stare decisis as a means of promoting systemic deliberation. If it turned out that horizontal stare decisis had a demonstrably negative impact on the democratic quality of constitutional deliberation, then I would likely conclude that it should be eliminated. However, as far I know, no one has made that case.

is needed for novel constitutional norms or institutional arrangements to gain acceptance is also consistent with basic principles of constitutionalism. Whereas most legal or policy issues are left for resolution pursuant to the ordinary political process, the Constitution reflects our nation's most deeply held and enduring values and commitments. The recognition or establishment of constitutional norms must therefore be the product of legitimate collective decisions regarding the proper contours of those fundamental values and commitments.[164]

Such legitimacy can only be achieved if the entire constitutional system incorporates an appropriate mix of agonistic and deliberative elements, and prevailing constitutional norms are the product of reasoned deliberation regarding which courses of action will promote the public good. Public officials must also make the most justifiable decisions on the merits under the circumstances. When those decisions are widely accepted, the underlying norms become deeply entrenched, thereby exemplifying stare decisis's constructive role and reflecting the electoral dimension of republican democracy. Meanwhile, however, the prospect of potentially overruling the prevailing understanding of the Constitution or otherwise challenging authoritative decision-makers provides mechanisms for contestatory democracy and ongoing space for the development of oppositional discourses. Our system treats the prevailing understanding of the Constitution as provisional and allows its meaning to evolve in ways that are responsive to the constitutional vision of the people, thereby harnessing stare decisis's deconstructive potential.

This understanding of the process for constitutional change suggests that advocates for reform will typically be required to work long and hard to promote their underlying vision and gain acceptance for their legal positions. They will generally be required to develop compelling substantive arguments regarding why their vision reflects the most justifiable understanding of the Constitution on the merits. Advocates for constitutional change must also persuade enough public officials and ordinary citizens of the merits of their position to establish widespread popular support. Only then, in most cases, will their position stand a reasonable chance of being accepted by the

164. While gradual and incremental, these constitutional changes are still analogous, in an important sense, to Bruce Ackerman's "constitutional moments." *See generally* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998).

Court and becoming the supreme law of the land. In contrast, this conception of legitimate constitutional change helps to explain why judicial decisions to overturn precedent based solely on a change in the Court's personnel are widely and understandably viewed as problematic.[165] Constitutional change should ideally result solely from the "unforced force of the better argument,"[166] rather than by the president's ability to force the views of his political base on the people through ideological appointments to the Court. The remainder of this Article further develops this normative perspective and, in the process, raises serious questions about the democratic legitimacy of *Dobbs*.

C. *Stare Decisis as a Mechanism of Deliberative Democracy*

While horizontal stare decisis does not—and cannot—reliably promote a formal conception of the rule of law, it can and does facilitate reasoned deliberation within the judiciary and the broader political and legal system. Such deliberation is vital to the legitimacy of coercive exercises of legal authority in a republican democracy. Stare decisis therefore *should* facilitate reasoned deliberation within the American system of government.

This Section briefly describes the core commitments of deliberative democratic theory and contends that stare decisis plays an important *democratizing function* that is worth keeping. Deliberative democratic theory also provides normative principles that should guide the judiciary's use of precedent and can help us to mold legal doctrine so that stare decisis can better serve its deliberative functions. That will be the focus of the remainder of this piece.

Deliberative democratic theory is premised on the notion that citizens and their representatives should be expected to

165. *See* Dobbs v. Jackson Women's Health Org., No. 19-1392, slip op. at 57 (U.S. June 24, 2022) (Breyer, J., dissenting) ("Neither law nor facts nor attitudes have provided any new reasons to reach a result different than *Roe* and *Casey* did. All that has changed is this Court."); Frickey, *supra* note 105, at 140 ("The usual concern about overruling a recent precedent is that it may have fallen victim simply to a change in personnel rather than reasoned reconsideration.").

166. *Cf.* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 305–06 (William Rehg trans., 1996) (describing an "ideal procedure" for deliberative politics in which positions are "motivated solely by the unforced force of the better argument").

justify coercive exercises of legal authority.[167] This means, first, that they have an obligation to give reasons for their positions on legal or policy issues "that should be accepted by free and equal persons seeking fair terms of cooperation."[168] This is a reciprocal obligation that all citizens and public officials owe each other, and their reasons should thus generally be expressed in public and be capable of being understood and accepted by others.[169]

In contrast to academic or private discussion, deliberative democracy is action-oriented and seeks to produce concrete decisions that will be legally binding for some period of time.[170] While discussion must cease at some point so that a decision can be made, the theory contemplates that deliberation about whether the original decision was justified should continue.[171] An ideal deliberative process is dynamic because "it does not presuppose that the decision at hand *will in fact be justified*, let alone that a justification today will suffice for the indefinite future."[172] Deliberative democracy thus "keeps open the possibility of a continuing dialogue, one in which citizens can criticize previous decisions and move ahead on the basis of that criticism."[173] While decisions must remain in place for a period of time, legal and policy decisions are understood to be "provisional in the sense that [they] must be open to challenge at some point in the future."[174] Amy Gutmann and Dennis Thompson have thus defined deliberative democracy

> as a form of government in which free and equal citizens (and their representatives), justify decisions in a process in which they give one another reasons that are mutually acceptable and generally accessible, with the aim of reaching

167. *See* AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 3 (2004).

168. *Id.*; *see also* Dennis F. Thompson, *Deliberative Democratic Theory and Empirical Political Science*, 11 ANNU. REV. POL. SCI. 497, 498 (2008) ("At the core of all theories of deliberative democracy is what may be called a reason-giving requirement.").

169. *See* GUTMANN & THOMPSON, *supra* note 167, at 4.

170. *Id.* at 5.

171. *Id.* at 5–6.

172. *Id.* at 6 (emphasis added).

173. *Id.*

174. *Id.*

> conclusions that are binding in the present on all citizens but open to challenge in the future.[175]

The provisional nature of decisions in a deliberative democracy and the theory's openness to change over time are based on a recognition that decision-making processes and human understanding are both fallible. "We therefore cannot be sure that the decisions we make today will be correct tomorrow, and even the decisions that appear most sound at the time may appear less justifiable in light of later evidence."[176] Moreover, most political and legal decisions are not consensual, and those decisions are therefore necessarily coercive even if they comport with the ideal requirements of deliberative democracy.[177] Jane Mansbridge has thus explained that "[r]ecognizing the need for coercion, and recognizing too that no coercion can be either incontestably fair or predictably just, democracies must find ways of fighting, while they use it, the very coercion that they need."[178] This requires the development of oppositional discourses,[179] and the best understandings of deliberative democracy therefore incorporate agonistic features such as a "recognition of the need for and value of vigorous dissent, the necessity of providing a variety of mechanisms for individuals and groups to challenge the validity of public decisions, and an understanding that all legal and policy decisions should be viewed as provisional."[180] Beyond these ethical considerations, critics are more likely to accept an original decision "if they believe they have a chance to reverse or modify it in the future."[181] And, of course, critics are more likely to succeed in changing the status quo if they have a meaningful opportunity "to keep making arguments."[182]

Deliberative democracy's animating goal is "to provide the most justifiable conception for dealing with moral disagreement in politics."[183] The theory is designed to facilitate legitimate

175. *Id.* at 7.
176. *Id.* at 6.
177. *See* Mansbridge, *supra* note 123.
178. *Id.* at 46.
179. *See id.* at 56–59.
180. Staszewski, *supra* note 14, at 96.
181. GUTMANN & THOMPSON, *supra* note 167, at 6–7.
182. *Id.* at 7.
183. *Id.* at 10; *see also* Thompson, *supra* note 168, at 502 ("Some basic disagreement is necessary to create the problem that deliberative democracy is intended to solve.").

collective decisions by ensuring that everyone's interests and perspectives are adequately considered and by requiring public officials to provide reasoned explanations for their decisions that could reasonably be accepted by people with fundamentally competing views.[184] "[T]he primary conceptual criterion for legitimacy, and the most important distinguishing characteristic of deliberation, is mutual justification—presenting and responding to reasons intended to justify a political decision."[185] Reciprocal reason-giving is also designed "to encourage public-spirited perspectives on public issues" and "to promote mutually respectful processes of decision making."[186] Finally, as indicated above, deliberative democracy requires mechanisms to improve the law and correct the mistakes that will inevitably occur when citizens and their representatives make collective decisions. "Through the give and take of argument, participants can learn from each other, come to recognize their individual and collective misapprehensions, and develop new views and policies that can more successfully withstand scrutiny."[187] While incomplete understanding and ongoing disagreement suggest that "the results of the deliberative process should be regarded as provisional,"[188] that does not mean that legal or policy disagreements can never be settled. Rather, some decisions are more rightly regarded as settled than others, depending on the strength of their underlying justifications.[189] The justification for treating such results as settled, however, "is that they have met the deliberative challenge in the past, and there is no reason to believe they could not do so today."[190] Deliberative democracy provides an appropriate level of deference to the past "[b]y allowing for orderly change" that "takes into account" the strength of the justification for existing laws.[191]

Deliberative democracy is not a panacea, of course, and it has certain well-recognized limitations. For starters, a deliberative process cannot *guarantee* just decisions. Nor does

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184. *See* Cohen, *supra* note 12.

185. Thompson, *supra* note 168, at 504.

186. GUTMANN & THOMPSON, *supra* note 167, at 10–11.

187. *Id.* at 11–12.

188. *Id.* at 12.

189. *See id.* at 53–54 ("The degree of institutional insulation that any law should have from democratic deliberation depends on the degree of confidence that people of any particular generation should reasonably have in its justification.").

190. *Id.* at 13.

191. *Id.* at 54.

deliberative democratic theory provide *a precise formula* for ascertaining which decisions are most justifiable. Partly as a result, critics have complained that deliberative democracy may tend to elide or paper over ongoing disagreement.[192] Critics have also suggested that the theory is hopelessly romantic or naïve,[193] while offering realist critiques of alternative perspectives. Finally, critics have noted that deliberative democrats tend to be intolerant of intolerance, which is itself intolerant.[194] While I have sought to be attentive to these concerns in what follows, a deliberative democratic theory of precedent is liable to incorporate the challenges and limitations of the broader theory from which it is drawn. Yet deliberative democrats are always striving to improve their own understanding and develop better ways to facilitate the most justifiable collective decisions in the face of ongoing disagreement. And, unlike most foundational theories of law or politics, deliberative democracy provides the means for its own correction and improvement.[195] Deliberative democratic theory also provides ideals (and a framework for analysis) that maximize our chances of making the most justifiable decisions on the merits *and* correcting our inevitable mistakes—which is probably the most that realistically can be expected from any theory of democracy (or law) in a pluralistic society.

This Part has already shown that horizontal stare decisis promotes the core commitments of deliberative democratic theory by facilitating reasoned deliberation within the judiciary and generating sustained constitutional dialogue of a deliberative and agonistic nature outside the courts. The Court's authority to overrule prior decisions to reach the most justifiable result on the merits under the circumstances is vital from this perspective, even though such authority creates irresolvable tensions with formal conceptions of the rule of law.

But it is also the case that courts and other legal actors can use or apply precedent in ways that either promote or inhibit

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192. *See, e.g.*, Chantal Mouffe, *Deliberative Democracy or Agonistic Pluralism?*, 66 SOC. RES. 745 (1999).

193. *See* Assaf Sharon, *Populism and Democracy: The Challenge for Deliberative Democracy*, 27 EUR. J. PHIL. 359, 362 (2018) ("The realist critique of deliberative democracy can be summed up as follows: would that it were possible!").

194. *See* Stanley Fish, *Mutual Respect as a Device of Exclusion*, *in* DELIBERATIVE POLITICS: ESSAYS ON *DEMOCRACY AND DISAGREEMENT* 88 (Stephen Macedo ed., 1999).

195. *See* GUTMANN & THOMPSON, *supra* note 167, at 57–58 (describing the "self-correcting capacity of deliberative democracy").

deliberation in practice. Indeed, a deliberative democratic theory of precedent may seem counterintuitive because stare decisis can limit or undermine reasoned deliberation in many circumstances as a result of its positive or constructive features. For instance, stare decisis takes debate about firmly established legal principles off the table and thereby limits the decision-making agenda, even if those principles could reasonably have been disputed as a matter of first impression. This promotes efficiency and makes reasoned deliberation on open questions possible,[196] but it also precludes discussion of previously decided issues that could merit reconsideration. Stare decisis thus threatens to leave erroneous, outdated, or otherwise unjustified legal or policy decisions in place in a manner that seems contrary to the spirit of deliberative democracy.[197] Even decisions that are plausible candidates for being overruled or limited are generally entitled to a presumption of correctness that can only be overcome in special circumstances. Stare decisis therefore establishes a bias in favor of the status quo that may be difficult to justify on the merits in many circumstances.

Stare decisis can also undermine the quality of deliberations by shifting legal argument away from the substantive merits of a dispute and allowing decision-makers to avoid responsibility for their choices. These tendencies are most obvious when decision-makers mindlessly follow precedent or claim that "the law" forced them to make a particular decision.[198] These tendencies also arise, however, when litigants and judges engage in overly technical debates about which lines of precedent "control" a dispute, without adequately considering the rationales for previous decisions or the most justifiable resolution of the instant case. Even when judges overrule prior decisions, they tend to do so "artfully" by claiming that the force of the earlier precedent was fatally undermined by changing conditions, the lessons of experience, or the requirements of

196. *See supra* note 93 and accompanying text.

197. As Justice Holmes once famously observed, "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

198. *See, e.g.*, Dunn, *supra* note 55, at 493 ("Judges sustain the fiction that they interpret the law, but never create it, by adhering to the doctrine of stare decisis."); Abner S. Greene, *The Fit Dimension*, 75 FORDHAM L. REV. 2921, 2934 (2007) (summarizing "the key points of the argument against settlement" by deference to precedent).

subsequent decisions, thereby minimizing the evident scope of their discretion to reach "the correct" result.[199] When courts rely on subsequent precedent to reverse an earlier decision, they can deviate from the principle of stare decisis while purporting to follow precedent.[200]

There are thus, admittedly, no guarantees that stare decisis will perform its central democratizing functions in practice. However, deliberative democratic theory also provides guidance regarding how precedent should be used and how stare decisis can be molded to better promote democratic values. The point is not that existing doctrine and practice are perfect, but rather that stare decisis can and should be molded to better serve its deliberative functions. That is, deliberative democracy, rather than the rule of law, should provide the governing set of values or criteria to evaluate and modify the use of stare decisis in practice.

III. DELIBERATION AS THE GUIDING VALUE OF STARE DECISIS

Stare decisis facilitates reasoned deliberation within the judiciary by obligating courts to consider and respond in a reasoned fashion to prior decisions that reflect competing points of view. Yet stare decisis also has the capacity to limit or undermine deliberation in some important ways. We should therefore seek to mold stare decisis to better serve deliberative democratic values. And deliberative democratic theory should provide the governing set of values to guide and evaluate precedent's use in practice.

This Part argues that the use of precedent can be improved and legitimized from a deliberative democratic perspective by adopting several subsidiary conditions or principles. Specifically, courts should mindfully extend prior decisions to similar cases or controversies and distinguish situations that are different in relevant ways from previous decisions. Courts

199. *See* Frickey, *supra* note 105, at 128; Israel, *supra* note 55, at 215–29; Dunn, *supra* note 55, at 510–31 (describing ways in which the judiciary uses "style" in an effort to maintain its legitimacy when it overrules decisions).

200. *See* Dunn, *supra* note 55, at 519 (recognizing that "the Court sometimes admits that it is departing from precedent but claims that the departure is more faithful to the doctrine of stare decisis than adherence to the precedent would be"); Israel, *supra* note 55, at 225 (recognizing that "borrowing support from the past . . . provides what is probably the primary benefit of the 'inconsistent precedent' rationale: a court can overrule a decision while purporting to follow the principles of stare decisis").

should also be authorized and encouraged to overrule prior decisions in a transparent fashion in appropriate circumstances and to dissent from today's decisions based on their flawed treatment of precedent or otherwise unjustified results. These familiar principles promote democratic judging by improving the quality of the deliberations that are facilitated by precedent's use and restricting the extent to which stare decisis limits or forecloses reasoned deliberation. They therefore strike a judicious balance between stare decisis's positive (or constructive) and negative (or deconstructive) features.

For similar reasons, this Part also claims that precedent should be understood to operate, and should in fact operate, on two conceptually distinct tiers, which correspond roughly with the electoral and contestatory dimensions of republican democracy. Moreover, decisions regarding the appropriate treatment of precedent in a particular case should be a function of practical reasoning rather than strict doctrinal rules or uncompromising adherence to foundational interpretive methods. This pragmatic, multimodal approach to stare decisis and constitutional interpretation promotes democratic judging and inhibits judicial authoritarianism of the kind displayed in *Dobbs*.

A. *The Importance of Mindful Extension, Distinction, Transparent Overruling, and Dissent*

As explained above, one of the biggest problems with the use of precedent from a deliberative perspective is that it tends to shift legal argument away from the merits of a dispute and allows judges to avoid responsibility for their discretionary choices.[201] This occurs in part when courts mindlessly follow precedent or engage in overly technical debates about which precedent to follow, without considering the underlying rationales of prior decisions, or when they disingenuously suggest that the law provides a single correct answer to the problems presented in litigation. Mindful extension and distinction are crucial to avoiding these tendencies and encouraging thoughtful analyses of the rationales underlying

201. For a defense of this tendency on the grounds that it has the potential to shield judges who are otherwise drawn to preserving precedent from political, social, or peer pressure, see Richard M. Re, *Narrowing Precedent from Below*, 104 GEO. L.J. 921, 925–29 (2016).

previous decisions to determine whether such reasoning compels a similar result in the case at hand.

In his classic article on this topic, Frederick Schauer recognized that the degree of constraint that is imposed by precedent necessarily depends on "rules of relevance" which determine precisely which similarities and differences matter in assessing whether a prior decision is presumptively binding in a subsequent case.[202] Yet *the concept of precedent* does not provide those rules of relevance, and while they are naturally influenced by the ordinary use of language and other normative considerations, institutions can generally choose whether to adopt relatively large or small "categories of assimilation."[203] According to Professor Schauer, "The task of a theory of precedent is to explain, in a world in which a single event may fit into many different categories, how and why some assimilations are plausible and others are not."[204]

The adoption of relatively large categories of assimilation gives precedent a broader scope and thereby leads to greater stability within a decision-making environment.[205] Meanwhile, however, "[a] system in which precedent operates as a comparatively strong constraint will be one in which decisionmakers ignore fine but justifiable differences in the pursuit of large similarities."[206] The resulting stability "comes only by giving up some of our flexibility to explore fully the deepest corners of the events now before us."[207] In contrast, the adoption of smaller categories of assimilation gives precedent a relatively narrow scope,[208] and the virtues of stability are sacrificed to some extent in an effort to reach the optimal result in each case. Schauer points out that, "[w]ith respect to many decisions, a theoretically justifiable distinction between two events may be drawn if the full richness of individual variation is allowed to be a relevant factor."[209] Because relatively fine "distinctions like these cannot be considered arbitrary," the key question is "how many nonarbitrary variations between events . . . a given decisionmaker [will] be allowed to pursue."[210]

202. *See* Schauer, *supra* note 86, at 576–80.
203. *Id.* at 582.
204. *Id.* at 579.
205. Think, for example, "all vehicles."
206. Schauer, *supra* note 86, at 595.
207. *Id.* at 602.
208. Think, for example, "all red Teslas."
209. Schauer, *supra* note 86, at 591.
210. *Id.*

Schauer's analysis suggests that the use of precedent poses an inherent conflict between stability and accuracy, consistent with the prevailing rule of law paradigm. Yet if we recognize that the central function of stare decisis is to shape the nature of judicial deliberation and not to achieve stability for its own sake, deliberative democratic theory can be particularly useful in seeking to answer the fundamental questions that he raises. Principles of deliberative democracy would suggest, moreover, that categories of assimilation should generally be small to leave room for further deliberation about whether the instant case is similar to prior decisions in the relevant respects,[211] and that the answer to this question should turn on the persuasiveness of the competing arguments. How many nonarbitrary variations between events should a given decision-maker be allowed to pursue? The best answer from a deliberative perspective is "*all of them*" because a failure to consider nonarbitrary differences between previous decisions and the instant case would itself be a form of arbitrary domination.

The best way to implement these principles as a practical matter would be to ask whether a prior decision affirmatively resolved the precise question at issue in the instant case, which would turn on whether the court that rendered the previous decision would necessarily have considered and rejected the arguments that allegedly compel a contrary result. If those arguments were previously considered and rejected on the merits, then the decision-maker need not reconsider them in the instant case unless circumstances have materially changed. Public officials have, in effect, already considered and responded in a reasoned fashion to the positions of the parties when rendering the prior decision in this situation, and those decisions do not necessarily need to be reconsidered for a decision that follows precedent to be democratically legitimate.[212]

Deliberative democratic theory would thus counsel in favor of a relatively narrow scope for the principle of stare decisis.[213]

211. Should, for example, a decision about red Teslas be extended to all vehicles?

212. *Cf.* Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312 (1997) (taking a similar position based on principles of majoritarian democracy).

213. *Cf.* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999) (advocating judicial minimalism based on principles of deliberative democracy). This is consistent with Richard Re's view that high courts can legitimately "narrow" precedent in appropriate circumstances. *See* Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861 (2014).

The theory, in turn, provides a substantial role for mindful extension and distinction in what are properly considered cases of first impression. Professor Schauer provides a running example involving "a request from a student for an excused absence from an examination in order to attend the funeral of his sister."[214] If the faculty were to grant this request based on the importance of giving priority to family obligations, the faculty should also honor a subsequent request by a student for an excused absence to attend the funeral of her brother.[215]

Let's say, however, that when the faculty receives the student's request to attend her brother's funeral, someone points out that the student who previously received an excused absence to attend his sister's funeral was on the Dean's List, while the petitioner in this situation is on academic probation. This would present a new question regarding the relevance of a student's academic standing to the availability of an excused absence for attending the funeral of a sibling. The faculty could "mindfully extend" the earlier precedent to this situation on the grounds that family obligations should take priority over scheduled

However, while Re claims that narrowing precedent is distinct from overruling, extending, or distinguishing it, *see id.* at 868–70, my view is somewhat different. I think that courts first decide whether existing precedent *controls*, and then, if so, whether it should be followed or overruled. If precedent does not control, then courts decide whether it should be extended to the current situation or distinguished from the case at hand. From this perspective, "narrowing precedent" results in a finding that existing law does not control, and this is a prerequisite to deciding whether the precedent should then be extended or distinguished. While narrowing precedent should be a regular feature of judicial decision-making from a deliberative perspective, it is not the functional equivalent of "stealth overruling," as Re contends. *See id.* at 1865. Stealth overruling involves narrowing precedent, but it also includes a failure to extend the prior decision to its logical conclusion based on disingenuous reasoning. *See infra* note 225 and accompanying text. Such a decision could be problematic for two separate reasons. First, the initial decision that existing precedent does not control (i.e., the narrowing itself) could be unpersuasive under the circumstances. In this situation, the court should be required to justify its decision, in effect, to overrule the prior decision, at least in part. Second, even if the decision that existing precedent does not control is reasonably justifiable, the refusal to extend the precedent to a new situation based on disingenuous reasoning necessarily involves a lack of integrity and candor and would characteristically result in decisions that are not reasonably justified on the merits. It is thus perfectly coherent to be in favor of narrowing precedent in appropriate circumstances and against the practice of stealth overruling.

214. Schauer, *supra* note 86, at 578.

215. While one could arguably characterize the latter decision as a "mindful extension" of the earlier decision to the funeral of a brother, I would be inclined to say that the former decision affirmatively resolved this question because there is no plausible difference between a sister and brother in this context. In other words, the court should find that the earlier precedent *controls* in this situation (and should thus refrain from "narrowing" the precedent).

examinations regardless of the academic standing of the student, or the faculty could deny the request on the grounds that students on academic probation cannot afford to fall behind in their coursework. Regardless of which alternative was chosen, the latter case raises a potentially persuasive basis for distinguishing the two cases, and this potential distinction should be considered and resolved in a reasoned fashion in making the subsequent decision. One potential solution would be to give the weaker student an excused absence to attend the funeral, but also to require her to complete additional coursework upon her return to school. Deliberative democratic theory tends to suggest that creative solutions of this nature are frequently available.

The situation could be further complicated, moreover, if the faculty pointed out that the first student was on the Dean's List when it granted his request for an excused absence to attend his sister's funeral. The faculty might then want to determine if this fact was essential to the "holding" or whether it could fairly be described as "dicta."[216] This formal characterization should be much less important from a deliberative perspective than the extent to which the faculty carefully considered the importance of the student's academic standing to its determination and justified its decision specifically on that basis (and, relatedly, the extent to which the faculty explicitly concluded that it would *not* grant an excused absence to a student with significant academic difficulties). In the absence of clear evidence that the faculty only granted an excused absence in the first case *because* the petitioner was on the Dean's List (and that the faculty *would not* have granted the request to a weaker student), the student in the second case should be permitted to argue that her academic standing is not determinative, and the faculty should be expected to give reasoned consideration to that issue.

Finally, a third student might petition the faculty for an excused absence to attend the funeral of a cousin or perhaps to watch her sister compete in the Olympics. Both cases would present new problems, which would require the faculty to refine the scope of the principle that gives higher priority to family obligations than to taking examinations on their originally scheduled dates. Perhaps the principle will be limited to deaths

216. *See* KOZEL, *supra* note 3, at 70 (explaining that the "inquiry into precedential scope is often framed by the distinction between necessary holdings and dispensable dicta," and observing that while this is "a useful starting point, . . . it creates difficulties in practice").

in the immediate family, or perhaps the principle will be extended to momentous occasions in the life (or death) of loved ones (which may or may not entail a requirement of proof that the individual at issue is or was "loved"), or perhaps the faculty will presumptively defer to the judgment of students regarding when such events should be given priority over their studies (with or without a requirement of makeup work to provide a disincentive for frivolous or pretextual invocations of this principle). In any event, the earlier decisions to grant requests by students for excused absences to attend the funeral of siblings will need to be considered, and the reasoning that was provided in those cases will need to be followed, extended, distinguished, or overruled.

This discussion should not seem especially strange or unfamiliar. Rather, this is how the use of precedent normally works in institutions that follow the principle of stare decisis. The point is simply to see how the use of precedent shapes the nature of deliberation in those venues and to understand that deliberative democratic theory would ascribe a relatively narrow scope to the concept of "controlling precedent"—it would rely instead on a decision-maker's ability to mindfully extend existing precedent or distinguish prior cases to promote reasoned deliberation about the most justifiable course of action on the merits in cases of first impression. Deliberative democratic theory would also encourage decision-makers to take responsibility for their choices, rather than seeking to evade responsibility by pretending that "the law made me do it."

In some situations, however, prior decisions will have affirmatively resolved the precise questions at issue and there will not be any persuasive grounds for distinguishing those earlier cases. This is when precedent should presumptively be followed under the principle of stare decisis. Deliberative democratic theory would suggest, however, that otherwise controlling precedent should be open for reconsideration in some situations, and the ability to overrule prior decisions should therefore be a potentially available option.

This is especially true when circumstances have significantly changed since the time of the initial decision such that one could fairly say that today's problem is materially different and that previous decision-makers did not consider and resolve the precise questions at issue in a reasoned fashion. These "evolutive" considerations would include evidence regarding the workability of prior decisions, the extent to which

prior decisions are consistent with the law's subsequent development in related areas, and changes in the world that could persuasively suggest a different outcome is warranted.[217] When decision-makers overrule prior cases based on evolutive considerations of this nature, they are not necessarily suggesting that the prior decision was wrong; they are merely concluding that a different result is more justifiable based on information that was not available when the prior decision was rendered.[218]

The Court's authority to update the law based on new information or changed circumstances—including evolved legal and social attitudes—is consistent with deliberative democracy's core commitments to open-mindedness and the provisionality of legal and policy choices, as well as its overarching goal of making the most justifiable collective decisions on the merits.[219] The same commitments suggest that Justices should have the authority to overrule prior decisions when they are persuaded that doing so would be the most justifiable option under the circumstances based on all the relevant considerations and when their decisions could reasonably be accepted by people with fundamentally competing views. Stare decisis's core purposes are served from a deliberative perspective when the Court considers and responds in a reasoned fashion to prior decisions and makes the most justifiable decisions on the merits, regardless of whether the Court follows or overrules precedent.

There are also circumstances when the Court would be warranted in overruling a prior decision on the grounds that it was wrong on the day it was decided. This situation arises when the original decision was not reasonably justifiable on the merits based on all the relevant considerations, and the prevailing legal and social culture was simply not yet enlightened enough to realize it.[220] *Brown I*'s reversal of *Plessy* and the Court's eventual disavowal of *Korematsu* are examples of cases that fall

217. *See generally* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994) (arguing that the law's meaning can legitimately change over time in response to evolutive considerations of this nature).

218. *See* Israel, *supra* note 55, at 220–21; Stevens, *supra* note 99, at 9.

219. *See supra* Section II.C.

220. *See* Jack M. Balkan, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27 (2005) (exploring how changing social attitudes, particularly among legal elites, can gradually change the prevailing understanding of the Constitution).

into this category.[221] Conversely, *Dobbs* does not fall into either category where overruling a prior decision based on new information or changed circumstances would be warranted because nothing significant had changed since *Casey* other than the composition of the Court (and the increased reliance interests of generations of women and girls).[222]

While the following Section will elaborate on the central role that practical reasoning should play in the judiciary's treatment of disfavored precedent and the deliberative shortcomings of *Dobbs*,[223] it is important to emphasize that a court's decision to overrule otherwise controlling caselaw should generally be done in a reasoned and transparent fashion. Artful overruling, whereby decision-makers seek to protect the perception of their legitimacy "by emphasizing factors other than the vicissitudes of changing personnel" when they overrule prior decisions,[224] is not necessarily undesirable from this perspective. On the contrary, the judiciary's tendency to justify the overruling of prior decisions by emphasizing changed circumstances, the lessons of experience, and the requirements of later precedent is entirely consistent with deliberative democracy.[225] Conversely, "stealth overruling," whereby a decision-maker knowingly or intentionally fails to extend a precedent to its logical conclusion or limits an existing rule based on disingenuous reasoning,[226] is highly problematic from this perspective.[227] Generally speaking, the rejection of controlling precedent should be limited under deliberative democratic theory to situations where there are compelling substantive reasons for changing the law along the lines discussed above, and decision-makers should candidly

221. *See* Brown I, 347 U.S. 483 (1954); Trump v. Hawaii, 138 S. Ct. 2392 (2018).

222. *See Dobbs*, Slip Op. at 57 (Breyer, J., dissenting).

223. *See infra* Section III.B.2.

224. Israel, *supra* note 55, at 219.

225. *See* THE SUPREME COURT AND THE JUDICIAL FUNCTION 89 (Philip B. Kurtland ed., 1960) (discussing the techniques of overruling and concluding that "they are not mere facades put forth as a matter of good public relations," but rather "changed conditions, the lessons of experience, and the course of later decisions are relevant factors that do and should have considerable bearing upon the Court's determination to overrule a prior decision").

226. *See* Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1, 8-16 (2010) (describing this practice).

227. *See supra* note 212. For a recent example, see Jones v. Mississippi, 141 S. Ct. 1307 (2021) (overruling two previous decisions by stealth and holding that the Constitution does not require a finding of "permanent incorrigibility" to sentence a juvenile convicted of homicide to life without parole).

justify their decisions by setting forth those reasons, thereby treating prior decisions with respect. Stare decisis has served its function when decision-makers provide reasoned explanations for overruling precedent that could reasonably be accepted by others and when they make the most justifiable decisions on the merits under the circumstances based on all the relevant considerations.

Because decisions to follow, extend, distinguish, or overrule precedent will often be reasonably debatable, decision-makers should also be provided with opportunities to issue concurring or dissenting opinions from the perspective of deliberative democratic theory. Kevin Stack has pointed out that dissenting opinions personalize judicial decision-making in a way that is contrary to traditional conceptions of the rule of law, and this practice is best justified based on principles of deliberative democracy.[228] In any event, concurring and dissenting opinions plainly facilitate reasoned deliberation about the most justifiable resolution of disputes by providing alternative views or perspectives that should ordinarily be taken seriously by the majority opinion. Concurrences and dissents are also sometimes influential when subsequent decision-makers attempt to ascertain precisely what was decided in the case at bar, and they can potentially provide persuasive grounds for extending, distinguishing, or perhaps eventually overruling a decision in later cases.[229]

B. The Two Tiers of Precedent and Role of Practical Reasoning

Many of the ways in which stare decisis limits deliberation can be counteracted by giving the doctrine relatively limited scope and relying upon mindful extension, distinction, transparent overruling, and dissent. Nonetheless, presumptive reliance on precedent is still biased in favor of the status quo—and when precedent is firmly entrenched, it takes issues entirely off the table and thus limits the decision-making agenda.

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228. *See* Kevin M. Stack, *The Practice of Dissent in the Supreme Court*, 105 YALE L.J. 2235 (1996).

229. *See generally* Thomas B. Bennett et al., *Divide and Concur: Separate Opinions & Legal Change*, 103 CORNELL L. REV. 817 (2017); Nina Varsava, *The Role of Dissents in the Formation of Precedent*, 14 DUKE J. CONST. L. & PUB. POL'Y 285 (2019).

This Section contends that this latter feature of stare decisis can also be squared with deliberative democracy. Such a conclusion, however, is premised on several further conditions. First, stare decisis should be understood to operate—and should, in fact, operate—on two conceptually distinct tiers, which correspond roughly with the electoral and contestatory dimensions of republican democracy. Second, decisions regarding the appropriate treatment of precedent in a particular case should be a function of practical reasoning rather than strict doctrinal rules or uncompromising adherence to foundational interpretive methods. Finally, it is also vital that—as explained above—judicial decisions are not final, and stare decisis effectively shifts responsibility for contesting established legal rules to other institutions that provide further opportunities for constitutional dialogue and thus create space for legal change pursuant to dynamics that are further described here.

1. Entrenched Versus Contestable Precedent

Precedent typically operates along two conceptually distinct tracks where (1) some legal principles are treated as settled, and (2) the litigation turns on other issues that are treated as reasonably subject to dispute.[230] The firmly established legal principles are often derived from precedent,[231] and no one seeks to challenge them because they have effectively become entrenched. These entrenched legal principles are effectively removed from the decision-making agenda and are no longer subject to serious debate even though reasonable persons could potentially differ on their validity or whether they provide the

230. Staszewski, *supra* note 48, at 1037 (identifying and discussing these two tiers of precedent).

231. The established legal principles can, of course, also stem from other sources, such as the clear text of the Constitution or applicable statutes or regulations. While the application of clear text could potentially be contested if it would lead to absurd results that were not intended by lawmakers, those established principles must otherwise be changed through the political process. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 4–5 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (characterizing "the central idea of law" as involving a "principle of institutional settlement" whereby "decisions which are the duly arrived at result of duly established procedures . . . ought to be accepted as binding upon the whole society unless and until they are duly changed").

most justifiable understanding of the law. Scholars have labeled entrenched precedent of this nature as "super precedent."[232]

While entrenched precedent may be superficially in tension with deliberative democracy, a closer examination of its mechanics suggests that this is not necessarily the case. First, entrenched precedent facilitates reasoned deliberation within the context of a single case or controversy by streamlining the disputed issues and avoiding the need repeatedly to debate first principles.[233] Super precedent therefore operationalizes the constructive or positive role of stare decisis discussed earlier.[234] Second, precedent only *becomes entrenched* through a gradual, multi-institutional deliberative process that requires a high degree of popular acceptance and thereby reflects the electoral dimension of republican democracy. And, as explained above, even entrenched precedent can be challenged or re-examined in other institutional venues and thus may subsequently become contestable.[235] It is therefore not necessarily exempt from stare decisis's deconstructive or agonistic potential.

Michael Gerhardt has explained that while super precedent often begins with a single decision, an underlying principle or practice only becomes entrenched over time as a result of a broader process in which public and private actors overwhelmingly accept the decision and use it as the foundation for subsequent courses of action.[236] Once a principle or practice achieves widespread social acceptance and serves as the basis for a host of subsequent activities, the prospect of overruling the original decision loses its feasibility because of the severe disruption that would result from a refusal to follow stare decisis. Critics of the original decision are ultimately persuaded to accept the principle or practice, even if it is incompatible with some of their fundamental jurisprudential commitments. Moreover, once a principle or practice becomes entrenched in this fashion, litigants stop trying to persuade courts to overrule

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232. *See* Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204 (2006); Barrett, *supra* note 105, at 1734–37 (discussing the mechanics of "superprecedent"); Farber, *supra* note 36, at 1180–82 (recognizing that some "bedrock precedents" have become so deeply entrenched that they cannot be overruled).

233. *See supra* note 232 and accompanying text.

234. *See* text accompanying *supra* note 109.

235. *See supra* Section II.B; Balkan, *supra* note 220, at 52 (describing how social movement activists can work to transform a proposed constitutional norm from "off-the-wall" to "on-the-wall," and perhaps eventually to "natural and completely obvious"); *infra* notes 246–250 and accompanying text.

236. *See* Gerhardt, *supra* note 232, at 1207–20.

the decision, even if some judges might be open to this possibility.[237] This process—which is analogous to the concept of "liquidation"[238] and the manner in which some legislatively-established norms develop into "super-statutes"[239]—helps to explain why, for example, judicial review, paper money, and, at least until recently, the regulatory state[240] and prohibitions on segregated public schools[241] could not realistically be eliminated, even if the constitutional validity of those institutions or practices could reasonably have been questioned as an original matter.

While one could conceivably understand super precedent merely as an example of a context in which there is widespread agreement that the need for stability trumps the need for legal accuracy, the important point for present purposes is that the process by which precedent becomes entrenched is consistent with republican democracy. Gerhardt claims that judicial decisions only become candidates for super-precedential status if, among other things, they have repeatedly been endorsed and supported by political institutions, they have served as the foundation for other important legal or political developments, and they have enjoyed widespread public support or societal acquiescence.[242] The latter characteristic of super precedent is reflected by the fact that those decisions are no longer challenged in adjudication. Gerhardt claims that once certain practices or norms are entrenched through this process, "they

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237. *See* Barrett, *supra* note 105, at 1735 (claiming that the force of entrenched precedent "derives from the people," and recognizing that litigants do not challenge decisions that have attained this status).

238. *See* Baude, *supra* note 42, at 13–21 (discussing the elements of Madison's theory of constitutional liquidation).

239. *See generally* Eskridge & Ferejohn, *supra* note 142.

240. *See* Gillian E. Metzger, *The Supreme Court, 2016 Term–Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017). For gradual moves toward the possible "deconstruction" of the regulatory state, see West Virginia v. EPA, 142 S. Ct. 2587 (2022); United States v. Arthrex, Inc., 141 S. Ct. 1970 (2021); Siela Law, LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020); Gundy v. United States, 139 S. Ct. 2131 (2019) (Gorsuch, J., dissenting).

241. *See* Laura Meckler & Robert Barnes, *Trump Judicial Nominees Decline to Endorse Brown v. Board Under Senate Questioning*, WASH. POST (May 16, 2019, 7:28 PM), https://www.washingtonpost.com/local/education/trump-judicial-nominees-decline-to-endorse-brown-v-board-under-senate-questioning/2019/05/16/d5409d58-7732-11e9-b7ae-390de4259661_story.html [https://perma.cc/254P-3LX4].

242. *See* Gerhardt, *supra* note 232, at 1213–14. *Cf.* Eskridge & Ferejohn, *supra* note 142, at 1267–75 (explaining that the analogous features of super-statutes make them a democratically legitimate and normatively attractive mechanism for updating constitutional norms).

may be un-done only through the most extremely radical, unprecedented acts of political and judicial will."[243] In other words, a decision to overrule a super precedent would constitute an extreme form of "judicial activism."[244]

This is true, however, precisely because the precedent at issue has been accepted by the public and has served as the basis for subsequent action by elected officials. One could say, in effect, that the original judicial decision was ratified by the political process. It would therefore be inappropriate for courts to reconsider this decision, not only because doing so would upset reliance interests, but also because doing so would be fundamentally undemocratic. Philip Pettit has explained that republican democracy should include an "electoral dimension," which includes mechanisms that prevent public officials from ignoring the interests or views of ordinary people.[245] While candidate elections are certainly one such mechanism, one could also understand the process by which super precedent becomes entrenched to be another. When citizens or their elected representatives affirmatively embrace norms or practices that have been authorized or established through litigation and build upon or extend those norms or practices in making other legal or policy decisions, the judiciary should generally respect the results of the political process and treat the underlying, foundational decisions as entrenched, and thus no longer seriously subject to contestation.[246]

This is not to say that super precedent should or will remain entrenched forever.[247] If litigants continue to contest the results of previous decisions, they could potentially prevent those decisions from becoming firmly entrenched in the first place. If

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243. Gerhardt, *supra* note 232, at 1207.

244. This may help to explain the newsworthiness of Amy Coney Barrett's refusal to identify *Roe* as a super precedent during her confirmation hearings. *See* Brian Naylor, *Barrett Says She Does Not Consider Roe v. Wade 'Super Precedent'*, NPR (Oct. 13, 2020, 03:55 PM), https://www.npr.org/sections/live-amy-coney-barrett-supreme-court-confirmation/2020/10/13/923355142/barrett-says-abortion-rights-decision-not-a-super-precedent [https://perma.cc/A8G8-8ZUR].

245. *See* Pettit, *supra* note 15, at 173.

246. For analogous views, see, e.g., William N. Eskridge, Jr., *Sodomy and Guns: Tradition as Democratic Deliberation and Constitutional Interpretation*, 32 HARV. J.L. & PUB. POL'Y 193, 209–17 (2009) ("In our democratic constitutionalism, the authoritative value of tradition is greatest when it is recognized and elaborated by legislatures after open and public deliberation."); Eskridge & Ferejohn, *supra* note 15.

247. As noted above, the constitutionality of certain aspects of the regulatory state—and even the vitality of *Brown*—may be in the process of losing their super-precedential status. *See supra* notes 239–240 and accompanying text.

a norm or practice nonetheless serves as the foundation for other legal or policy decisions and becomes widely accepted, the status quo could eventually become unsettled, and viable new challenges could potentially be pursued if and when the legal or policy environment is ripe for the possibility of reform—particularly if circumstances have significantly changed and policy entrepreneurs (including social movements, public officials, and judges) are willing to call the status quo into question.[248] As Jack Balkan and Reva Siegel have explained, "[F]undamental shifts in law can interact with other social and demographic trends to disturb the ecology of a principle's application, and supply the occasion and the motive for political actors to reinterpret the principle's meaning."[249] While legal reform of this nature may be slow, arduous, or even futile, the ability to challenge the status quo is an essential element of what Pettit calls the contestatory dimension of republican democracy.[250] The key point is that the mechanisms by which precedent becomes entrenched and then potentially becomes unsettled or "contestable"—in what may, over time, be an ongoing cycle[251]—are both central to republican democracy. Part II emphasized, moreover, that the ability to challenge existing precedent (whether deeply entrenched or not) is hardly limited to adjudication and that social movements can use litigation losses (and especially *adverse precedent*) to mobilize for change through the political process. This only enhances the democratic legitimacy of continued judicial reliance on super precedent.

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248. While the dynamics discussed in this Section are largely descriptive, a decision to call settled precedent into question plainly involves normative judgment. Justice Thomas's decision to question the continued validity of *Griswold*, *Lawrence*, and *Obergefell* in his *Dobbs* concurrence was therefore unmistakably an exercise of normative power (rather than a "neutral" decision). *See Dobbs*, Slip Op. at 3 (Thomas, J., concurring). So was the Court's decision in *Bruen*, which rejected the analytical framework for analyzing Second Amendment claims that was uniformly adopted by the lower courts (and supported by the government) in favor of a staunchly originalist approach that purported to rely solely on text and historical tradition. *See* New York State Rifle & Pistol Assn. v. Bruen, Slip. Op. at 9–15 (majority opinion) (June 23, 2022).

249. Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 937 (2006).

250. *See* Pettit, *supra* note 162, at 178–80.

251. *Cf.* Eskridge & Frickey, *supra* note 162 (viewing law as the product of an ongoing multi-institutional dialogue).

2. The Centrality of Practical Reasoning and Authoritarianism of *Dobbs*

While some precedent is deeply entrenched and thus unlikely to be changed through adjudication, other precedent is more readily contestable and its treatment—and, specifically, whether prior decisions should be followed, extended, distinguished, or overruled—becomes a central issue in litigation. The rule of law paradigm of stare decisis focuses on whether a controlling precedent was correct and, if not, whether it should be overruled, and it assumes that this analysis can be neatly segregated into two distinct inquiries.[252] This approach also assumes that most questions of constitutional law have a single correct answer that courts can neutrally and objectively ascertain if they follow the right methods.[253] A deliberative democratic theory of precedent, in contrast, questions these assumptions and maintains that the appropriate treatment of precedent requires interpretive pluralism and reasoned deliberation regarding the most justifiable decision on the merits in each case based on all the relevant considerations, rather than dogmatic adherence to any single foundational approach to constitutional interpretation.

My proposed theory of precedent therefore strongly rejects an authoritarian style of legal interpretation in favor of the characteristics or traits that Anya Bernstein and I have previously attributed to "democratic judging."[254] Democratic judging embraces pluralism in society by recognizing that legal issues are often subject to reasonable disagreement, and courts should consider the interests and perspectives of those affected by their decisions and provide reasoned explanations for their choices, striving to reach conclusions that could be accepted by people with fundamentally competing views.[255] Democratic judging also embraces pluralism in methodology, and thus

252. *See, e.g.,* KOZEL, *supra* note 3, at 23; Nelson, *supra* note 6.

253. This claim is central to the approach that Anya Bernstein and I have called "judicial populism," *see* Bernstein & Staszewski, *supra* note 90, at 327–44, and it is also a central element of what I mean by an "authoritarian style of legal interpretation." Authoritarian judging simply pronounces what the law means and brooks no dispute.

254. *Id.* at 344–49. *See also* William N. Eskridge, Jr. & Victoria N. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718 (2022) (criticizing textualism's foray into "statutory populism" and advocating consideration of "republican evidence").

255. *See* Bernstein & Staszewski, *supra* note 90, at 344.

favors a multimodal approach to legal interpretation.[256] This approach rejects ex ante presumptions that any one foundational method or set of data is always superior and seeks instead to use the interpretive methods that will result in the most justifiable decision in each case. Democratic judging also exhibits respect for democratic institutions—like legislatures and agencies—that mediate competing views, and it recognizes that judges inevitably participate in the lawmaking process. Democratic judging acknowledges the provisional nature of constitutional law—and perhaps most of all, the need for judges to justify their decisions on the merits.[257]

Judges who reject an authoritarian style of decision-making and embrace these democratic values will naturally tend to utilize an approach to precedent that is pluralistic all the way down.[258] This means, first, that they will adopt interpretive pluralism as an individual matter by declining to follow any one foundational approach to constitutional interpretation, preferring instead to use the methodology that leads them to what they regard as the most justifiable decision on the merits in cases of first impression or in formulating their initial views on the validity of prior decisions. It also means, however, that they will decide whether to follow or overrule existing precedent based on an all-things-considered practical judgment—which takes into account the factual accuracy of the prior decision, the quality of its reasoning, its procedural workability, the disruption that would result from overruling the decision, the extent to which changing course would promote jurisprudential coherence, the substantive harm that would result from competing interpretations, and the likely impact of the available options on the perceived legitimacy of the court, among other factors.[259]

256. *See id.* at 344–46. *See generally* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991) (describing the conventionally accepted modalities of constitutional interpretation).

257. *See* Bernstein & Staszewski, *supra* note 90, at 350–51.

258. *See* Staszewski, *supra* note 48, at 1026–27, 1038–39 (outlining the characteristics of this approach).

259. Some of these considerations would likely overlap with the judge's views on whether the original decision was reasonably justified in the first place, and a judge's assessment of the validity of the precedent on the merits could therefore be difficult to disentangle from the judge's assessment of whether the prior decision should be overruled. Indeed, most pragmatic judges will routinely follow controlling precedent unless existing law raises significant red flags on the merits. *See id.* at 1027.

A deliberative democratic theory of precedent is thus deeply pragmatic in nature because judges who follow this approach will use what they regard as the most appropriate method to reach what they regard as the most justifiable result in each case based on all the relevant considerations, including the views of lawmakers and agency officials who have expressed considered judgments on the relevant issues. This approach necessarily involves a central role for practical reasoning.[260] It also rejects a rule-based model of precedential constraint[261] in favor of a "natural model" in which judges are expected to reach what they regard as the best decision on the merits in each case, provided that they consider and respond in a reasoned fashion to the relevant aspects of prior decisions.[262] This latter obligation imposes a meaningful constraint without requiring most judges to reach decisions they believe are wrong.[263] A natural model of precedential constraint thus promotes a responsive—rather than autonomous—vision of the rule of law,[264] and it recognizes the importance of independent judgment and reasoned justification in furthering this ideal.[265]

A deliberative democratic theory of precedent openly accepts a substantial degree of judicial discretion, and it recognizes that legitimate judging in a constitutional democracy could not realistically be otherwise. However, it also obligates judges to consider and respond in a reasoned fashion to prior decisions and to provide reasoned justifications for their decisions that could reasonably be accepted by people with fundamentally competing views. Judges may follow their own preferred interpretive methods under this approach, provided their decisions and the resulting treatment of precedent could reasonably be justified to ordinary citizens and jurists with different normative and jurisprudential perspectives. This

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260. *Cf.* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990).

261. *See supra* notes 45–48 and accompanying text.

262. *See* Alexander, *supra* note 45, at 5–17, 48–56, 62–64, 75–76 (discussing the "natural model" of precedent). For a related argument in favor of a contextual approach to deciding when to follow precedent, see Nina Varsava, *How to Realize the Value of Stare Decisis: Options for Following Precedent*, 30 YALE J.L. & HUMAN. 62 (2018).

263. *See* Staszewski, *supra* note 48, at 1038.

264. *See* NONET & SELZNICK, *supra* note 24, at 73–113 (describing a responsive vision of the rule of law).

265. *See* Kevin M. Stack, *An Administrative Jurisprudence: The Rule of Law in the Administrative State*, 115 COLUM. L. REV. 1985, 1988 (2015) (recognizing independent judgment as a constitutive element of the rule of law).

means, for example, that judges cannot legitimately refuse to follow the principle of stare decisis as a general matter because that is not a reasonably acceptable position in our constitutional system, as evidenced by the fact that any judicial nominee who took this position would not be confirmed.[266] Similarly, invalidating the use of paper money or allowing the intentional creation of segregated public schools on the grounds that contrary decisions would conflict with the Constitution's original public meaning would not be reasonably justified decisions, even for a structural originalist.[267] Pragmatic judges who engage in practical reasoning about the most justifiable means and ends for resolving each case can operate comfortably within such a regime to reach what they regard as the best decision on the merits under the circumstances and justify their decisions accordingly.

This theory of precedent is admittedly in tension with the apparent inclinations of certain legal formalists or dogmatic fundamentalists, including a majority of today's Court. If a judge firmly believes that most issues of constitutional law have a single correct answer, then they are more likely to believe that some existing precedent is "demonstrably erroneous,"[268] and they may be irresistibly tempted to overrule those mistaken decisions to get things right and promote a formal conception of the rule of law regardless of the consequences. This would be especially likely if the judge maintains that there is only one legitimate method of constitutional interpretation, and this method yields a single, objectively correct answer to the question at issue.[269] This is the approach that Justice Thomas has explicitly adopted,[270] and it is implicitly reflected in the latest

266. *See* KOZEL, *supra* note 3, at 3 (recognizing that "every sitting justice has acknowledged the importance of deferring to precedent under certain circumstances"); Kurt T. Lash, *The Cost of Judicial Error: Stare Decisis and the Role of Normative Theory*, 89 NOTRE DAME L. REV. 2189, 2211–12 (2014) (observing that "nominees to the Supreme Court are regularly and successfully pressed in their confirmation hearings to affirm their commitment to the doctrine of stare decisis").

267. Staszewski, *supra* note 48, at 1026.

268. *See* Nelson, *supra* note 7, at 57 ("The people who believe most strongly in [the concept of demonstrable error], and who think that most legal questions have a relatively narrow set of right answers, are likely to believe that reasoned analysis can demonstrate which answers are right and which are wrong.").

269. *See supra* notes 79–90 and accompanying text (discussing the tension between stare decisis and originalism and the current Court's increasing inclination to prefer the latter over the former).

270. *See* Dobbs, slip op. at 3 (Thomas, J., concurring) ("Because any substantive due process decision is demonstrably erroneous, we have a duty to

work of other devoted originalists who still purport to pay homage to traditional stare decisis considerations.

I am referring, of course, to the Court's recent decision in *Dobbs* to overrule *Roe* and *Casey* and eliminate a woman's fundamental constitutional right to decide whether to have a child.[271] The Court purported to rely on neutral legal principles and promote democracy by ceding its own authority to regulate access to abortions to state legislatures and the people.[272] The Court thus framed the issue as a question of who should regulate abortion access—the Court or elected representatives and the people. Because the Constitution's text did not explicitly provide a right to terminate a pregnancy and such a right was not sufficiently rooted in the nation's history or tradition, the Court concluded that it lacked power to regulate abortion and was effectively obligated to return this authority to the people and their elected representatives.[273] According to Justice Kavanaugh, the Constitution "is neither pro-life nor pro-choice," and so the Court adopted the "neutral" position.[274]

As the dissenting opinion recognized, however, that is not the only way to frame the question.[275] Rather, the issue is who should decide whether a woman is required to have a child—the State or the woman (acting in consultation, perhaps, with her health care providers and family or loved ones). *Roe* and *Casey* held that the Fourteenth Amendment's protection of liberty preserved this choice during the early stages of a pregnancy for the woman, and the Court could lawfully have followed this precedent. By overruling *Roe* and *Casey*, the majority chose to transfer this authority from women to the State(s), which may lawfully prohibit a woman from terminating her pregnancy. There was no neutral position. Nor was there a position of judicial restraint: follow precedent and let a woman decide or overrule binding precedent and transfer authority from women to the state(s)—those were the options.[276]

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correct the error established in those precedents.") (citations and quotations omitted).

271. *See id.* at 5–6 (majority opinion).

272. *See id.*

273. *See id.* at 9–30.

274. *Id.* at 2–3 (Kavanaugh, J., concurring).

275. *See id.* at 6–12, 20–21 (Breyer, J., dissenting).

276. *But cf. id.* at 1–2 (Roberts, C.J., concurring) (arguing that Mississippi's prohibition on most abortions after fifteen weeks of pregnancy could be upheld without overruling *Roe* or *Casey*).

And, in fact, the Court's chosen option was significantly less "neutral" than the position of the *Casey* plurality, which *Dobbs* overruled. *Casey* reaffirmed a woman's right to decide for herself whether to have a child prior to viability and held that the state may regulate access to abortion during this period so long as it does not impose an "undue burden" on this right.[277] *Casey* also held that the State may prohibit abortions after viability except where necessary to protect the woman's life or health.[278] Prominent deliberative democrats viewed *Casey* as a reasonably justified deliberative compromise, partly because it gave recognition to the central position of "both sides" of the debate and left substantial room for additional discussion about how abortion should be regulated—that is, what constitutes an "undue burden"—going forward.[279] *Dobbs*, in sharp contrast, allows the State(s) (and presumably Congress) to prohibit access to abortions entirely, and therefore gives no recognition or protection to the interests and perspectives of individuals who can get pregnant and their allies who believe that access to reproductive health services of this nature is a fundamental constitutional and human right. In contrast to *Casey*, *Dobbs* is not a decision that could or should reasonably be acceptable to the majority of Americans who apparently hold this view.[280]

Dobbs is no less uncompromising or authoritarian as a methodological matter. The Court followed orthodox originalism (and selective precedent)[281] to conclude that *Roe* was

277. Casey, 505 U.S. at 876–79 (joint opinion).

278. *Id.* at 879.

279. *See, e.g.,* AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 87 (1996) ("The 'undue burden' standard has been recognized as acceptable from a variety of moral perspectives and is therefore a promising way of seeking an economy of moral disagreement on abortion."); Post & Siegel, *supra* note 118, at 429 ("*Casey* authorizes the Court to respond to both sides of the abortion dispute by fashioning a constitutional law in which each side can find recognition.").

280. *See, e.g.*, *Majority of Public Disapproves of Supreme Court's Decision To Overturn* Roe v. Wade, PEW RSCH. CTR. (July 6, 2022), https://www.pewresearch.org/politics/2022/07/06/majority-of-public-disapproves-of-supreme-courts-decision-to-overturn-roe-v-wade [https://perma.cc/TAZ9-VMTW] (reporting that 62 percent of Americans think abortion should be legal in all or most cases, consistent with polling from before the Court's decision).

281. Perhaps ironically, the Court rejected the plaintiff's argument that Mississippi's law violated the Equal Protection Clause on the grounds that it was foreclosed by binding precedent. Dobbs, slip op. at 10–11 (majority opinion). Moreover, the Court framed its substantive due process analysis around the framework utilized in Washington v. Glucksberg. *See, e.g.*, *id.* at 5 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)). But *Glucksburg* was decided after *Roe* and *Casey* in 1997, and its innovative analytical framework does not appear anywhere in the Constitution.

"egregiously wrong" and an "abuse of judicial authority,"[282] even though *Roe* and *Casey* were openly decided pursuant to competing multimodal, non-originalist methods. It examined several traditional stare decisis factors through an originalist lens to denigrate the reasoning and workability of those decisions and conclude that overruling them would not upset any concrete reliance interests.[283] It distinguished closely related substantive due process decisions solely because the issue of abortion is on a certain level sui generis,[284] and concluded that other stare decisis factors that the Court had found compelling in *Casey* could not legitimately be considered by the Court on the grounds that they were too intangible or extraneous to proper understanding of the law.[285] This meant that the decision's impact on the perceived legitimacy of the Court and "the ability of women to participate equally in the economic and social life of the Nation" were completely off the table.[286]

This layering of originalism on top of originalism on top of originalism led the Court to reject any consideration of the harmful societal consequences of its decision. Indeed, the Court proclaimed that taking those consequences into account would constitute *an abuse of judicial authority*.[287] The Court thus rejected any effort to seek fair terms of cooperation with citizens or judges with different normative or jurisprudential perspectives and relied almost entirely on originalism to avoid any obligation to justify the results of its decision on the merits. In the process, the majority imposed its own preferred interpretive methods and substantive understanding of the Fourteenth Amendment (not to mention the apparent religious views and policy preferences of those Justices) on the American people. An unjustified (and arguably unjustifiable) assertion of power of this nature has no reasonable basis for acceptance by others and is thus fundamentally undemocratic from the perspective of deliberative democracy.

From a deliberative perspective, a democratically legitimate decision to overrule *Roe* and *Casey* would need to go well beyond

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282. Dobbs, slip op. at 6 (majority opinion).

283. *Id.* at 43–64.

284. *See id.* at 31–32, 66, 71–72. *But cf.* Dobbs, slip op. at 24–29 (Breyer, J., dissenting) (pointing out that those decisions are not distinguishable in any principled way based on the majority's legal analysis).

285. Dobbs, slip op. at 64–69 (majority opinion).

286. *Id.* (quoting Casey, 505 U.S. at 856).

287. *Id.* at 65–69.

the Court's conception of the Constitution's original public meaning. A Justice who personally believed that those decisions should be overruled on originalist grounds would also be obligated to consider and respond in a reasoned fashion to contrary arguments suggested by other, widely accepted modes of constitutional interpretation and persuasively demonstrate that there is a special justification for overruling existing law based on all the pragmatic considerations recognized by the Court's stare decisis doctrine. This would require grappling, at a minimum, with the negative impact of such a decision on jurisprudential coherence and the perceived legitimacy of the Court, as well as the resulting harm to women's autonomy, disparate treatment of poor and minority adults and children with unwanted pregnancies, and potentially disastrous consequences for the political and legal climates within and among state and local governments.[288] The Court's refusal to consider those consequences (and claim that doing so would constitute an abuse of judicial power) was both callous and nothing short of reckless. The middle ground proposed by Chief Justice Roberts, which would have allowed Mississippi to prohibit most abortions after fifteen weeks of pregnancy without formally overruling *Roe* or *Casey*,[289] would have been far more justifiable from a deliberative perspective than the majority's decision,[290] although that approach was also not the most justifiable option on the merits, all things considered, given the serious problems associated with allowing further restrictions on the existing right to an abortion described above.

The Court took a similarly uncompromising and authoritarian approach two days earlier in *Bruen*,[291] when it held that New York's prohibition on possessing a weapon outside the home without obtaining a license that demonstrates a special need for self-defense violated the Second Amendment. Notice first that the Court's pretense of neutrality had disappeared: the Court asserted its own judicial authority to side

288. For discussion of some of the latter concerns, see Neal Devins, *Rethinking Judicial Minimalism: Abortion Politics, Party Polarization, and the Consequences of Returning the Constitution to Elected Government*, 69 VAND. L. REV. 935 (2016).

289. *See* Dobbs, slip op. at 1–11 (Roberts, C.J., concurring).

290. *Cf.* Caroline Kitchener, *Fla. Republicans Ditch Texas-Style Abortion Law for What They Call a 'Generous' 15-Week Ban, Drawing Criticism from All Sides*, WASH. POST (Feb. 7, 2022, 5:00 AM) https://www.washingtonpost.com/politics/2022/02/07/abortion-ban-florida-texas-roe-supreme-court [https://perma.cc/B5V2-4T2A].

291. Bruen, slip op. at 8–63 (majority opinion).

with gun owners over elected state legislators and the people, even though its decision severely restricted the ability of gun control advocates to achieve their preferred policy objectives through the political process. While the Court justified its assertion of power based on the Constitution's text and history,[292] it conspicuously ignored the Second Amendment's prefatory clause and treated the historical record in a blatantly slanted and selective manner.[293] And while *Bruen* "mindfully extended" *Heller* (which in turn had effectively overruled *United States v. Miller*)[294] to recognize a fundamental constitutional right to possess a weapon for purposes of self-defense outside the home, the Court in *Bruen* also overruled the approach that had uniformly been adopted by the lower courts for assessing the constitutional validity of gun control legislation.[295] Rather than applying heightened scrutiny and requiring the State to demonstrate that a restriction on the right to bear arms was "substantially related to the achievement of an important governmental interest,"[296] the Court held that the government was required to demonstrate that "the regulation is consistent with the Nation's historical tradition of firearm regulation."[297] The Court therefore rejected a pragmatic approach that countenanced ongoing, multi-institutional deliberation regarding contemporary needs and consequences, and could therefore reasonably be accepted by people with fundamentally competing interests and views, in favor of an orthodox originalist approach that relies solely on the Court's preferred understanding of the Constitution's text and its reading of the historical record and forces the rest of us to live with decisions

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292. *Id.* at 23–62.

293. *See id.* at 2, 25–50 (Breyer, J., dissenting) (identifying numerous conceptual difficulties and practical problems with the majority's new "history only" approach); Joshua Zeitz, *The Supreme Court's Faux "Originalism"*, POLITICO (June 26, 2022, 7:00 AM), https://www.politico.com/news/magazine/2022/06/26/conservative-supreme-court-gun-control-00042417 [https://perma.cc/7ZKU-M8CX] (claiming that the Justices lack the firm grip on history that is required for originalism to work and the majority got the history wrong in both *Dobbs* and *Bruen*).

294. *See* District of Columbia v. Heller, 554 U.S. 570 (2008); United States v. Miller, 307 U.S. 174 (1939). For discussion of the technique of mindful extension, see *supra* Section III.A.

295. Bruen, slip op. at 8–15 (majority opinion).

296. *Id.* at 10 (quoting Kachalsky v. County of Westchester, 701 F.3d 81, 96 (2d Cir. 2012)).

297. *Id.* at 8.

that were supposedly made in 1791 or 1868,[298] whether we like it or not.[299]

The adoption of a deliberative democratic theory of precedent that places a high value on multimodal interpretive methods and practical reasoning may seem at first glance like it could be unfair to committed originalists. But *non-originalists* invariably economize on their normative and jurisprudential disagreement with originalists by carefully considering and, in fact, giving substantial weight to originalism's preferred interpretive tools—including historical evidence from the founding era and the original public meaning of the Constitution's text.[300] Non-originalists, in other words, tend to view originalist sources of interpretive guidance as highly relevant but not necessarily dispositive. Committed originalists, in contrast, purport to apply the *only* legitimate interpretive methods and thus flatly refuse to consider other information or arguments that would be highly relevant from other interpretive perspectives—including moral or ethical considerations, contemporary understandings, the purposes of relevant constitutional provisions, or the policy consequences of competing interpretations—unless perhaps they are operating in the "construction zone."[301] Originalists also have a tendency to characterize other judges who regularly consider such information as "activists" who are imposing their own subjective values on the people.[302]

Originalists thus seem to maintain that they must only justify their preferred interpretive methodology once—ex ante—and this relieves them of the obligation to justify their decisions

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298. The Court acknowledged an intramural Federalist Society debate on this question and declined to specify the relevant date. *See id.* at 28–29; *id.* at 2 (Barrett, J., concurring) (discussing the "ongoing scholarly debate").

299. *See, e.g.*, *id.* at 17 (majority opinion) ("The Second Amendment 'is the very *product* of an interest balancing by the people' and it 'surely elevates above all other interests the right of law-abiding, responsible citizens to use arms' for self-defense. It is this balance–struck by the traditions of the American people–that demands our unqualified deference.") (quoting Heller, 554 U.S. at 635).

300. *See* GUTMANN & THOMPSON, *supra* note 278, at 84–85 (embracing the principle of an "economy of moral disagreement" in which points of convergence are sought "between one's own understandings and those of citizens whose positions, taken in their more comprehensive forms, one must reject").

301. *See* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 469–73 (2013) (recognizing that the communicative content of the Constitution's text is underdetermined on some issues and that constitutional construction in such cases requires normative judgment).

302. *See* Bernstein & Staszewski, *supra* note 90, at 318–24, 327–34 (discussing originalism's populist traits and associated rhetoric).

on the merits in individual cases (other than by their purported adherence to the only legitimate interpretive methods). This also relieves them of the obligation to justify the consequences of their decisions in a way that could (and often does) result in domination of the people. Democratic judging, in contrast, involves using the best methods for achieving the most justifiable result in every case and a concomitant obligation to provide reasoned justifications for those decisions on the merits.

These observations pose serious challenges to the legitimacy of exclusive reliance on originalist interpretive methods in all cases of first impression.[303] But they also shed light on the most justifiable approach to stare decisis for Justices who are otherwise inclined to follow originalism. Simply put, they should be faint-hearted originalists or follow an approach like original meaning originalism that is willing to accept non-originalist precedent (rather than behaving like "nuts").[304] They should also consider and respond in a reasoned fashion to non-originalist arguments when deciding whether earlier precedent was mistaken and carefully consider all the likely consequences in making all-things-considered judgments regarding whether prior decisions should be transparently overruled. Finally, they should provide a "special justification" that could reasonably be accepted by non-originalists when they overrule otherwise controlling precedent. The majority's decision in *Dobbs* badly fails on each of these metrics. The real problem, however, is not that the decision violates a formal conception of the rule of law. Rather, the Court's discretionary choice to exercise raw political power to take away a deeply established constitutional right that has proven vital to the dignity and equality of women for over half a century—while explicitly refusing to consider the consequences of its actions—is fundamentally undemocratic.

A deliberative democratic theory of precedent therefore ultimately suggests that even judges who are otherwise dogmatic fundamentalists regarding constitutional interpretation cannot legitimately be purists or authoritarians in their treatment of precedent. Stare decisis must include a prominent role for practical reasoning to ensure that the judiciary's treatment of precedent and resulting understanding of the Constitution is justified in a manner that could reasonably

303. Originalist interpretive methods *can* potentially fit the bill when they lead to the most justifiable results on the merits under the circumstances.

304. *See supra* notes 88–89 and accompanying text (quoting Justice Scalia).

be accepted by ordinary citizens and jurists with fundamentally competing normative and jurisprudential perspectives.

IV. STARE DECISIS AS A MEANS TO PROMOTE SYSTEMIC DELIBERATION

This Article has argued that the rule of law paradigm of stare decisis should be rejected in favor of a model that focuses on democratic legitimacy. Presumptive deference to precedent is best understood not as a binding legal constraint, but rather as a mechanism for facilitating reasoned deliberation within the judiciary and generating sustained constitutional dialogue outside the courts. Part III argued that deliberation should be the guiding value for the use of horizontal stare decisis by courts and provided a detailed analysis of what such an approach would entail.

This Part contends that stare decisis should also be viewed as a mechanism for promoting *systemic deliberation*, and it begins to explore some of the implications of this view. This Part briefly explains how a systemic approach can improve our understanding of the use of precedent in lower courts. It proceeds to suggest that a systemic understanding of stare decisis could also shed light on whether the ease of legislative amendment should affect the amount of deference that is accorded to prior judicial decisions as well as how courts should review modifications of prior interpretations of the law by administrative agencies. Finally, this Part claims that viewing stare decisis as a means of promoting systemic deliberation justifies the varying treatment of precedent across different institutional domains and legal problems, and that focusing on democratic legitimacy rather than the rule of law provides the foundation for a grand unifying theory of precedent.

A. Systemic Deliberation in the Lower Courts

One of the main lessons of a deliberative democratic theory of precedent is that stare decisis's operation should be understood and evaluated in a *systemic fashion*, rather than focusing narrowly on its effect in an individual case. Viewing stare decisis systemically, and appreciating its deliberative functions, provides a basis for understanding and assessing the use of precedent in lower federal courts. For instance, district court decisions and appellate decisions from other circuits are

formally treated as persuasive precedent in the federal judicial system, meaning that federal courts will voluntarily follow prior decisions that resolve an issue if they find the earlier court's reasoning sufficiently compelling.[305] While the entire notion of "persuasive precedent" could be a bit hard to explain under a rule of law model of stare decisis,[306] the idea makes perfect sense from a deliberative democratic perspective.[307] For similar reasons, a deliberative democratic theory of precedent would suggest that higher courts should sometimes defer to persuasive decisions by lower courts, even though such a practice would seem to turn the rule of law on its head.[308] As these examples suggest, a deliberative democratic approach to precedent will generally be substantially more practical and pragmatic and less "categorical" than the rule of law alternative.

At the same time, the fact that federal district court decisions are not entitled to binding stare decisis effect,[309] combined with the fact that circuit court decisions are only binding in subsequent cases within the same circuit,[310] facilitates the percolation of issues in the lower federal courts and encourages the airing of different views and perspectives.[311] Meanwhile, the fact that federal circuit court precedent is absolutely binding within the circuit that rendered the decision promotes the pragmatic benefits of stare decisis that are often associated with the rule of law and provides a concrete target for legal reform.[312] When a majority of the judges on a court of appeals are persuaded that an earlier decision may be misguided, the issue can typically be reconsidered pursuant to a

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305. *See* GARNER ET AL., *supra* note 1, at 786 (defining "persuasive authority").

306. In a closely analogous context, Justice Scalia criticized deference based on persuasiveness as "an empty truism and trifling statement of the obvious." U.S. v. Mead Corp., 533 U.S. 218, 239 (2001) (Scalia, J., dissenting) (criticizing "so-called *Skidmore* deference").

307. *Cf.* GARNER ET AL., *supra* note 1, at 170 ("An authority derives its persuasive power from its ability to convince others to go along with it.").

308. For the most comprehensive normative and empirical evaluation of this practice, see Aaron-Andrew P. Bruhl, *Following Lower Court Precedent*, 81 U. CHI. L. REV. 851 (2014).

309. GARNER ET AL., *supra* note 1, at 40.

310. *Id.* at 37.

311. *Cf.* Doni Gewirtzman, *Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System*, 61 AM. U. L. REV. 457 (2012) (providing a sophisticated analysis of how lower federal courts balance the "need for overall order and stability with demands for evolution and change" through reliance on both variation and interdependence).

312. *See* GARNER ET AL., *supra* note 1, at 37, 492–93; *cf. supra* Sections II.A & B.

rehearing en banc.[313] The operation of stare decisis within the lower federal courts therefore broadly comports with principles of deliberative democracy—in the sense that it facilitates reasoned deliberation about the most justifiable understanding of the law by many different litigants and judges with potentially competing perspectives, and it is generally capable of producing reasonably justifiable decisions that are legally binding in the present but open to challenge in the future.[314] Of course, this hardly means that the existing system is perfect, but it does suggest that specific reform proposals should be evaluated based on their likely impact on the quality of systemic deliberations regarding the most justifiable understanding of the law.[315]

The previous Part argued that principles of deliberative democracy would counsel in favor of a relatively narrow scope for controlling precedent,[316] and this would be particularly true in the context of "vertical stare decisis," where a lower court's obligation to follow prior decisions is considered absolute.[317] Lower courts should be especially active users of the techniques of mindful extension and distinction. Moreover, a deliberative democratic theory of precedent would recognize the potential value of "underruling" decisions by higher courts or issuing "critical concurrences" in appropriate circumstances.[318] A lower

313. *See* GARNER ET AL., *supra* note 1, at 495–508.

314. *Cf.* text accompanying *supra* note 174 (quoting Gutmann and Thompson's definition of deliberative democracy).

315. *Cf.* Michael Coenen & Seth Davis, *Percolation's Value*, 73 STAN. L. REV. 363 (2021) (claiming that percolation's benefits will only outweigh its costs in a narrow range of unusual circumstances and proposing a set of practices that could be adopted in response to the limited nature of percolation's benefits).

316. *See supra* notes 210–212 and accompanying text.

317. This suggests that lower courts should be free to "narrow" precedent in appropriate circumstances, as Richard Re contends. *See generally* Re, *supra* note 201. *But cf. supra* note 212 (explaining that narrowing precedent is a prerequisite to deciding whether it should be extended or distinguished).

318. *See* Evan H. Caminker, *Why Must Inferior Courts Obey Supreme Court Precedents?*, 46 STAN. L. REV. 817, 860–65 (1994) (describing and evaluating these practices); Michael Stakes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's "Justice Accused"*, 7 J.L. & RELIGION 33 (1990) (defending the practice of judicial "underruling" in certain exceptional circumstances); David Strauss, *SCOTUS Needs to Rein in Lower Courts Willing to Force Its Hand By Defying Its Precedent*, TAKE CARE (Sept. 19, 2019) https://takecareblog.com/blog/scotus-needs-to-rein-in-lower-courts-willing-to-force-its-hand-by-defying-its-precedent [https://perma.cc/R7XE-HV47] (arguing that a lower court's refusal to follow controlling Supreme Court precedent improperly interferes with the Court's ability "to decide the pace at which it will change the law," and suggesting that the Court should summarily reverse such decisions).

court "underrules" a decision by a higher court when the lower court refuses to follow precedent that is directly on point based on a firm conviction that the controlling decision is fundamentally wrong or perhaps indefensible. A lower court that uses this technique could be anticipating (and perhaps seeking to prompt) a decision by the higher court to overrule its precedent,[319] or the lower court could effectively be engaging in an act of civil disobedience. This seemingly occurred when the Montana Supreme Court refused to follow the U.S. Supreme Court's decision in *Citizens United*.[320] While the legitimacy of this technique would certainly depend upon the circumstances and, in particular, on the persuasiveness of the lower court's position on the merits, and while its use should surely be limited to exceptional circumstances,[321] the ability of lower courts to use this technique to contest the validity of the status quo could potentially perform a valuable systemic function from a deliberative democratic perspective, particularly since the technique effectively demands a response from the higher court.[322]

Similarly, a "critical concurrence" is a decision by a lower court that follows controlling precedent while simultaneously imploring the higher court to reconsider and overrule its prior decisions. While this practice may be in some tension with traditional conceptions of the rule of law because the lower court is rendering a judgment that it admittedly believes is wrong, the technique should be strongly embraced from the perspective of deliberative democratic theory precisely because it involves a candid discussion of the merits and provides a basis for contesting the prevailing status quo. My sense is that because higher courts can always overrule their own decisions under

319. The Court has explicitly rejected the validity of "anticipatory overrulings" of this nature. *See* Rodriguez de Quijas v. Shearson/Am. Exp., Inc., 490 U.S. 477, 484 (1989).

320. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010); *see* W. Tradition P'ship v. Att'y Gen. Montana, 2012 MT 10, 363 Mont. 320 (2011), *rev'd*, Am. Tradition P'ship, Inc. v. Bullock, 567 U.S. 516 (2012). The Montana Supreme Court claimed that *Citizens United* was not controlling because the State had its own distinctive history of political corruption that was not addressed by the U.S. Supreme Court. This argument was widely viewed as disingenuous, including by the Justices who unanimously granted a stay of the ruling on the grounds that "lower courts are bound to follow this Court's decision[s] until they are withdrawn or modified." Order Granting Stay, 132 S. Ct. 1307, 1307–08 (2012) (statement of Ginsburg, J., joined by Breyer, J.) (citing Rodriguez de Quijas, 490 U.S. at 484).

321. *See* Caminker, *supra* note 318, at 862–64 (discussing potential tests).

322. *But see* Strauss, *supra* note 318 (criticizing the technique for this reason).

existing doctrine if they are persuaded that a change in course is warranted, "critical concurrences" should be a fairly regular feature of decision-making in a deliberative democracy that presumptively relies on precedent. In contrast, "underruling" should probably be reserved for the type of rare situations in which civil disobedience is most warranted because it effectively forces the higher court to intervene. Nonetheless, the availability of these techniques would be vitally important from a deliberative perspective in any legal system that follows a regime of stare decisis that includes "absolutely binding precedent."

B. Systemic Deliberation as a Guide to Precedential Strength in Different Legal Contexts

While the Supreme Court could overrule any of its prior decisions, it has traditionally indicated that it is most willing to do so on questions of constitutional law—where it is nearly impossible for its decisions to be formally overruled through the political process via a constitutional amendment.[323] Meanwhile, federal courts claim to adhere to a super-strong rule of stare decisis in statutory interpretation cases because it is relatively easy to amend statutes to override these judicial decisions, and Congress, rather than the Court, should thus be responsible for correcting judicial errors.[324] This dichotomy provides a striking example of what Jonathan Marshfield has called "Amendment Creep"—"the phenomenon where judges explicitly draw on amendment rules to interpret constitutional provisions unrelated to formal amendment."[325] It also provides an example

323. *See* GARNER ET AL., *supra* note 1, at 352 ("Stare decisis is flexible in constitutional cases because 'correction through legislative action is practically impossible.'") (quoting Payne, 501 U.S. at 828).

324. *See* WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON STATUTORY INTERPRETATION 114 (2012). For empirical analyses of congressional responses to the Court's statutory interpretation decisions, see Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011*, 92 TEX. L. REV. 1317 (2014); Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205 (2013); William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361 (1988). For the apotheosis of this traditional view, see Lawrence C. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Stare Decisis*, 88 MICH. L. REV. 177 (1989).

325. Jonathan L. Marshfield, *Amendment Creep*, 115 MICH. L. REV. 215, 251 (2016) (observing that "the logic of this amendment-based argument" in the context of stare decisis is clear: "the Court must be willing to overturn its own constitutional rulings when it becomes evident that those rulings are in error *because* Article V

of well-established judicial doctrine that treats stare decisis as a means to promote systemic deliberation regarding the most justifiable legal rules by courts and lawmakers based on pragmatic assessments of institutional competence.

This traditional view is thus entirely compatible with a deliberative democratic theory of precedent in principle. The problem, however, is that both sides of the coin are insufficiently nuanced, and this approach may in fact be outdated in a modern regulatory state characterized by stark political polarization. For starters, Congress *can* potentially amend statutes to achieve its underlying policy objectives and avoid constitutional problems identified by the Court in many circumstances.[326] The extent of this authority turns in part on the precise nature of the constitutional doctrine established by the Court.[327] The Court can thus facilitate or inhibit constitutional dialogue by other lawmakers based on its substantive doctrinal frameworks. Replacing tiered scrutiny with proportionality review in due process and equal protection cases, for example, could have a far greater impact on the nature and quality of constitutional deliberations throughout our public law system than modest adjustments to stare decisis doctrine.[328] While I cannot even begin to do justice to all the possibilities in this short space, the impact of substantive constitutional doctrine on the nature and quality of constitutional dialogue within the judicial and political spheres is an important and complicated problem that merits substantially greater judicial and scholarly attention.

Although Congress has greater authority to amend statutes to overcome constitutional problems than is typically recognized, that same body has increasingly found it difficult to enact major legislation on any controversial subject in our current era of political polarization.[329] Accordingly, today's Congress may not accept the judiciary's invitations to amend statutes in ways that

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makes it 'practically impossible' for constitutional rulings to be corrected or updated through formal amendment.").

326. *See supra* notes 137–140 and accompanying text. For a high-profile example, see Shelby Cnty., Ala. v. Holder, 570 U.S. 529, 553 (2013) (advising that "Congress–if it is to divide the States [in a constitutionally permissible fashion]–must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. It cannot simply rely on the past.").

327. *See* Coenen, *supra* note 141.

328. *See* JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART (2021) (advocating a move in this direction).

329. *See* Jacob Bronsther & Guha Krishnamurthi, *Optional Legislation*, 107 MINN. L. REV. (forthcoming 2022).

would achieve a prior Congress's policy objectives in a constitutionally permissible fashion.[330] Similarly, Congress may be unable to enact legislation to override judicial interpretations of statutes even when most elected representatives would prefer a different construction.[331] Today's lawmakers may be adept at engaging in agonistic debate about legal and policy issues (and, unfortunately, this debate is all too often *antagonistic* in nature),[332] but it may be unrealistic to expect Congress to achieve the deliberative consensus necessary to keep statutory law up-to-date in a manner that is responsive to judicial decisions.[333]

A super-strong rule of stare decisis for statutory interpretation decisions is therefore based on questionable empirical assumptions, and it also ignores the dominant role of administrative agencies in implementing modern regulatory statutes and the fact that contemporary litigation regarding statutory interpretation typically involves challenges to the validity of agency action.[334] The best approach to stare decisis in the context of statutory interpretation therefore requires an appropriate role for agencies. Administrative agencies can generally modify how statutes are understood or implemented in response to judicial decisions far more easily and effectively than Congress based on their delegated authority and expertise.[335] And agencies can implement their statutory mandates by using a variety of different procedural methods, some of which are significantly more deliberative and participatory than others.[336] Courts can, in turn, give varying

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330. *See, e.g.,* Caitlin Huey-Burns & Adam Brewster, *Activists Want to Save the Voting Rights Bill by Killing the Filibuster*, N.Y. TIMES (Mar. 5, 2021, 8:30 AM), https://www.cbsnews.com/news/voting-rights-senate-filibuster [https://perma.cc/LL3K-C77L] (discussing the John Lewis Voting Rights Act, which would restore a key provision that was invalidated by the Court in *Shelby Cnty.*).

331. *See* Johnson v. Transp. Agency, Santa Clara Cnty., Cal., 480 U.S. 616, 671–72 (1987) (Scalia, J., dissenting).

332. *See* Mouffe, *supra* note 192, at 755 (distinguishing between "*antagonism* between enemies" and "*agonism* between adversaries" and claiming "that the aim of democratic politics is to transform an 'antagonism' into an 'agonism.'").

333. *But cf.* Christiansen & Eskridge, *supra* note 324 (reporting that Congressional overrides of statutory interpretation decisions, defined very broadly, are still quite common).

334. *See* Glen Staszewski, *Statutory Interpretation as Contestatory Democracy*, 55 WM. & MARY L. REV. 221, 227 (2013).

335. *See* Emily Hammond Meazell, *Deference and Dialogue in Administrative Law*, 100 COLUM. L. REV. 101 (2011).

336. *See* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383 (2004).

degrees of deference to agency decision-making. A deliberative democratic theory of precedent would seek to facilitate reasoned deliberation within the regulatory process and generate a productive dialogue among interested stakeholders and public officials in all three branches of government.[337]

Precisely what this would entail is another complex problem that deserves focused attention, but it is closely related to ongoing debates regarding the proper level of judicial deference to legal interpretations by agencies. The general idea would be to establish legal doctrines that encourage agencies to use relatively participatory and deliberative procedures in appropriate circumstances by giving their decisions stronger judicial deference if they were promulgated pursuant to such procedures.[338] The Court effectively followed this approach in *United States v. Mead* when it held that *Chevron* deference would only apply when the agency possesses delegated lawmaking authority and "the agency interpretation claiming deference was promulgated in the exercise of that authority."[339] This means, as a practical matter, that agencies will typically receive the benefits of *Chevron* deference when they resolve ambiguities in their statutory mandates pursuant to notice-and-comment rulemaking—often considered "one of the greatest inventions of modern government" because of its highly participatory and deliberative nature[340]—but not when they make policy decisions pursuant to less formal and less deliberative or participatory processes.[341] The Court took this approach one step further in *Brand X* when it held that a prior judicial interpretation of a statute only trumps an agency's interpretation under *Chevron* if the court held that its construction was mandated by the unambiguous terms of the

337. There are, of course, many ways to advance these goals directly that have little or nothing to do with judicial review or stare decisis. *See, e.g.*, Michael Sant'Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 92 WASH. U. L. REV. 793 (2021) (advocating strategies for agencies to engage the public during the early stages of administrative rulemaking). I am focused here, however, on how the judiciary's treatment of precedent can advance these goals.

338. For examples of proposals along these lines, see Emerson, *supra* note 20, at 435; David Fontana, *Reforming the Administrative Procedure Act: Democracy Index Rulemaking*, 74 FORDHAM L. REV. 81 (2005).

339. United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).

340. 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 6.15, at 283 (1st ed., Supp. 1970).

341. *See* Christensen v. Harris County, 529 U.S. 576 (2000) (holding that *Chevron* deference does not apply to informal guidance issued without opportunities for public notice-and-comment).

statute.[342] The Court explained that a contrary rule would unnecessarily "preclud[e] agencies from revising unwise judicial constructions of ambiguous statutes."[343] *Brand X* has the practical effect of allowing agencies to use notice-and-comment rulemaking to promulgate authoritative interpretations of ambiguous statutory mandates that differ from the constructions adopted by federal courts in cases of first impression—and thus substantially weakening judicial stare decisis.[344] Notwithstanding sharp criticism from legal formalists,[345] this doctrine is completely salutary from a deliberative perspective.

This general approach to judicial review of agency action could be expanded in other ways. For example, the Court held in *Fox TV* that an agency's change in policy is not subject to "more searching" judicial review than the agency's initial policy decision.[346] While the agency must "display awareness that it *is* changing position . . . [and] show that there are good reasons for the new policy," the agency

> need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates.[347]

The Court subsequently held in *Perez v. Mortgage Bankers Ass'n* that agencies can lawfully modify their interpretations of their authorizing statutes under the Administrative Procedure Act (APA) by issuing revised interpretive rules without using notice-and-comment procedures.[348] These decisions combine to make it substantially easier for agencies to change existing policies for political reasons without providing meaningful opportunities for

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342. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982–83 (2005).

343. *Id.* at 983.

344. *See* Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272 (2002) (advocating this approach prior to *Brand X*).

345. *See, e.g.*, Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

346. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 514–15 (2009).

347. *Id.* at 515 (internal citations omitted).

348. *See* 575 U.S. 92 (2014).

public participation or justifying their decisions as the best way to implement their statutory mandates on the merits. This is severely problematic from a deliberative perspective.[349]

While *Perez* seems to follow from the unadorned text of the APA and has the salutary effect of preventing agencies from "locking in" legal interpretations that were not adopted pursuant to a deliberative process,[350] federal courts could still encourage agencies to make policy changes or modify their interpretations of existing law pursuant to relatively participatory and deliberative procedures by tweaking the applicable deference doctrines. In particular, federal courts could review the validity of such changes under the more forgiving *Fox TV* standard when agencies voluntarily provide notice and an opportunity for public comment, while reviewing the validity of changes made without public notice-and-comment procedures under a standard that requires the agency to explain why its new position *is better than* its previous policy and the most justifiable option on the merits under the circumstances. This approach would retain flexibility for agencies to choose their own policymaking vehicles for overruling previous policy or interpretive decisions, while encouraging them to promulgate those new policies or interpretations pursuant to more participatory or deliberative procedures based on the carrot provided by a more deferential standard of judicial review. Think of this proposal as "mini-*Mead*."

The point here is not to provide comprehensive reform proposals of stare decisis doctrine or the treatment of precedent by federal agencies or courts, but rather to illustrate some of the possibilities that could be presented by adopting a deliberative democratic theory of precedent. This would include efforts to think more carefully about whether the ease with which laws or policies can be amended should affect the strength of stare decisis in a particular legal context, whether substantive principles of constitutional law could be developed to facilitate a more vibrant constitutional dialogue, and whether the proper treatment of precedent involving federal statutes could be reformulated to account for the dominant role of agencies in

349. For a comprehensive examination of the proper role of "political reasons" in administrative law from a deliberative democratic perspective, see Staszewski, *supra* note 103.

350. *See* 5 U.S.C. § 553(b) (exempting from notice-and-comment procedures "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice").

implementing and interpreting those laws in the modern regulatory state.

C. *Toward a Grand Unifying Theory of Stare Decisis*

The systemic approach to stare decisis that is endorsed by a deliberative democratic theory of precedent recognizes that the ability to contest existing precedent is not limited to adjudication, and that social movement groups and other activists can sometimes use adverse precedent to bolster their chances of achieving change through the political process.[351] The Court's decisions are rarely the last word on a matter, and binding judicial precedent can frequently be criticized, reconsidered, and rejected by decision-makers in other institutions. We should therefore think both about how stare decisis shapes the dialogue within courts *and* how it effectively transfers legal or policy issues to other institutions and shapes the dialogue there. Deliberative democratic theory suggests that stare decisis should be molded to promote robust deliberation within the judiciary and that when issues are authoritatively settled by federal courts (at least for the time being), they should be open for reconsideration in other venues that offer enhanced opportunities for public participation, a superior level of technical expertise, or simply an ongoing capacity for further discussion and debate.

These principles suggest an array of views about the proper use of precedent in various legal or institutional contexts that may otherwise seem incongruent. For example, Lou Mulligan and I have previously argued for a super-strong rule of stare decisis for civil procedure decisions by the Supreme Court, on the theory that major policy changes to the Federal Rules of Civil Procedure should generally be made pursuant to the more deliberative and democratically legitimate court rulemaking process than through adjudication.[352] In stark contrast, I have argued against giving any stare decisis effect to methodological decisions in statutory interpretation on the grounds that interpretive pluralism promotes the use of practical reasoning in cases of first impression and also advances other fundamental

351. *See supra* Section II.B; Staszewski, *supra* note 48, at 1041–42.

352. *See* Lumen N. Mulligan & Glen Staszewski, *The Supreme Court's Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188, 1233 (2012).

principles of republican democracy.[353] Consistent with the preceding discussion, I have also argued that when federal courts interpret ambiguous regulatory statutes in cases of first impression, their decisions should not be binding on administrative agencies with delegated authority to implement the statute if the agency subsequently takes a different position pursuant to notice-and-comment rulemaking.[354] The common thread that renders these seemingly disparate positions coherent—(1) super-strong stare decisis for certain civil procedure decisions; (2) no stare decisis effect for most methodological decisions in statutory interpretation; and (3) a weak form of stare decisis for federal judicial interpretations of ambiguous regulatory statutes—is that each of these positions would promote deliberative democracy by facilitating practical reasoning within the judiciary or effectively transferring legal or policy issues to other decision-making bodies or venues that are more broadly participatory, have greater expertise and institutional competence, and can otherwise act in a more deliberative and democratically legitimate fashion.

This effort to tailor the use of precedent to improve democratic deliberation within each institution that exercises coercive authority within our legal and political system, while also channeling legal or policy issues to more deliberative or democratically legitimate institutions for further dialogue in appropriate circumstances, provides the foundation for a grand unifying theory of stare decisis that has thus far proven elusive. The rule of law paradigm is not up to the task because high courts can always overrule themselves based on the idiosyncratic jurisprudential and normative commitments of a majority of justices, and both following and overruling precedent can simultaneously further and undermine the rule of law. Yet if we shift our focus from law to democracy, judges can always make the most justifiable decision on the merits in each case based on all the relevant considerations, and those decisions can subsequently be contested pursuant to an ongoing, multi-institutional dialogue that is both deliberative and agonistic in nature. This view of precedent is both coherent and normatively

353. *See* Glen Staszewski, *The Dumbing Down of Statutory Interpretation*, 95 B.U. L. REV. 209, 267–70 (2015); Evan J. Criddle & Glen Staszewski, *Against Methodological Stare Decisis*, 102 GEO. L.J. 1573 (2014); *accord* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982–83 (2005).

354. *See supra* notes 341–344 and accompanying text; Staszewski, *supra* note 28, at 277–78; Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1305–06 (2009).

attractive, and it comports with the best understanding of American legal practice.

CONCLUSION

This Article has argued that rather than providing a binding legal constraint, presumptive deference to precedent is best understood as a mechanism for promoting the democratic legitimacy of a constitutional regime by facilitating reasoned deliberation within the judiciary regarding the most justifiable understanding of the Constitution and generating sustained constitutional dialogue of a deliberative and agonistic nature outside the federal courts. The analysis presented here is descriptive in the sense that it explains how presumptive deference to precedent facilitates reasoned deliberation in judicial decision-making and highlights precedent's role in generating constitutional dialogue outside the federal courts. But the analysis is also normative in the sense that it identifies various systemic features or conditions that are necessary to promote reasoned judicial deliberation and productive constitutional dialogue. The implications of a deliberative democratic theory of precedent are also descriptive and normative, in turn, because this conception of stare decisis helps to explain many existing features of our judicial and political systems, while also suggesting potential avenues for reform. And, above all, this analysis presents a coherent way of thinking about the proper treatment of precedent that is more descriptively accurate and normatively attractive than the traditional rule of law model.

My proposed theory also has important implications for deliberative democratic theory and the nascent field of deliberative constitutionalism that have inspired this work.[355] First, as several leading political theorists have begun to recognize, the goal of deliberative democratic theory is not necessarily to maximize the amount of deliberation that occurs in each institution of government. Rather, deliberative democratic theory should be systemic in nature, focusing on creating the right level of deliberation in each particular institution, and seeking to improve the legitimacy and

355. *See generally* THE CAMBRIDGE HANDBOOK OF DELIBERATIVE CONSTITUTIONALISM (Ron Levy et al. eds., 2018); Hoi L. Kong & Ron Levy, *Deliberative Constitutionalism*, *in* THE OXFORD HANDBOOK OF DELIBERATIVE DEMOCRACY 625 (André Bächtiger et al. eds., 2018).

effectiveness of the legal and political system as a whole.[356] A deliberative democratic theory of precedent would operate in precisely this fashion. Second, this theory of precedent suggests the value of using deliberative and agonistic theories of democracy to evaluate and potentially reform real institutions of government and actual institutional practices, as opposed to engaging primarily in relatively abstract discussions of democratic legitimacy and the value or limitations of reasoned deliberation. We should be seeking to develop a structural theory of deliberative democracy that could provide a blueprint for designing legitimate and effective constitutional democracies in the real world. A deliberative democratic theory of precedent is a first step in this larger endeavor.

I am, sadly, under no illusion that a majority of today's Court will embrace a deliberative democratic theory of precedent or strive to justify its decisions on terms that could reasonably be accepted by others. Yet I am confident that my proposed theory is descriptively accurate, that normative and jurisprudential debates regarding the most justifiable understanding of the American Constitution will continue in the political and legal spheres, and that the prevailing understanding of the Constitution therefore can and likely will change (again). There is no reason to give up. I am also hopeful that the majority's substantive constitutional program and originalist interpretive methods will eventually be rejected because they do not reflect the most justifiable vision of a foundational charter for self-governance by a diverse and evolving nation. My optimism is tempered, however, by the understanding that it requires a very long view and that it is only a republic if we can keep it.

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356. *See* Jane Mansbridge et al., *A Systemic Approach to Deliberative Democracy*, *in* DELIBERATIVE SYSTEMS: DELIBERATIVE DEMOCRACY AT THE LARGE SCALE 1, 1–26 (John Parkinson & Jane Mansbridge eds., 2012); Thompson, *supra* note 168, at 513–16.