Notre Dame Law Review

Volume 95 | Issue 4 Article 11

5-2020

Stare Decisis and the Supreme Court(s): What States Can Learn from *Gamble*

Zachary B. Pohlman
Notre Dame Law School

STARE DECISIS AND THE SUPREME COURT(S): WHAT STATES CAN LEARN FROM *GAMBLE*

*Zachary B. Pohlman**

INTRODUCTION

In the October 2019 Term, the Supreme Court has been asked to overrule at least nine of its prior decisions.[1] Supreme Court litigants may be more emboldened to seek such a holding given the Court's recent willingness to reconsider its precedents[2]—a trend that has not gone unnoticed by the legal academy[3] nor by the Justices themselves.[4] These overrulings prove that stare decisis—the legal maxim that implores judges to "let the decision stand"[5]—is a prudential limitation, not an absolute rule.[6] The Court's recent

* Candidate for Juris Doctor, Notre Dame Law School, 2021; Bachelor of Arts in Economics, Philosophy, and Theology, Rockhurst University, 2018. I would like to thank Professor Randy Kozel, Professor Jeffrey Pojanowski, and Timothy Bradley for their valuable comments and feedback. I would also like to thank my colleagues on the *Notre Dame Law Review* for their scrupulous edits. Finally, thank you to my wife, Julia, my parents, and my family for their endless love and support. All errors are my own.

1 Adam Feldman, *Empirical SCOTUS: A New Term with Plenty of Hype*, SCOTUSBLOG (Sept. 11, 2019), https://www.scotusblog.com/2019/09/empirical-scotus-a-new-term-with-plenty-of-hype/.

2 *See, e.g.*, Knick v. Township of Scott, 139 S. Ct. 2162, 2179 (2019) (overruling Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985)); Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1490 (2019) (overruling Nevada v. Hall, 440 U.S. 410 (1979)); Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2460 (2018) (overruling Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977)).

3 *See, e.g.*, Anita S. Krishnakumar, *Textualism and Statutory Precedents*, 104 VA. L. REV. 157, 227 (2018); Derigan Silver & Dan V. Kozlowski, *Preserving the Law's Coherence:* Citizens United v. FEC *and* Stare Decisis, 21 COMM. L. & POL'Y 39, 52 (2016).

4 *See, e.g.*, *Knick*, 139 S. Ct. at 2190 (Kagan, J., dissenting) ("Just last month, when the Court overturned another longstanding precedent, Justice Breyer penned a dissent. He wrote of the dangers of reversing legal course 'only because five Members of a later Court' decide that an earlier ruling was incorrect. He concluded: 'Today's decision can only cause one to wonder which cases the Court will overrule next.' Well, that didn't take long. Now one may wonder yet again." (citations omitted) (quoting *Franchise Tax Bd.*, 139 S. Ct. at 1506 (Breyer, J., dissenting))).

5 "'Stare decisis' is short for *stare decisis et non quieta movere*, which means 'stand by the thing decided and do not disturb the calm.'" Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1016 (2003) (quoting James C. Rehnquist, Note, *The Power That Shall Be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66

reexamination of settled cases has sparked a renewed interest in exploring the contours of this judicially enforced doctrine at both the federal and state levels: When exactly should a precedent be overturned?

The Supreme Court grappled with this question in *Gamble v. United States*, in which it revisited its longstanding "separate sovereignty exception" to the Double Jeopardy Clause.[7] Justice Thomas voted with the majority to uphold the doctrine but wrote separately to expound his own views on the role that stare decisis ought to play in the Court's judicial decisionmaking.[8] Rooted in history and tradition, his concurrence offers both a scathing critique of the Court's current application of stare decisis and a detailed account of Justice Thomas's own textually grounded approach to precedent.[9]

While Justice Thomas's concurrence is understandably aimed at the Supreme Court, the current literature on stare decisis is likewise focused on federal law.[10] Given their comparative caseloads—the Supreme Court hears roughly eighty cases per year,[11] while 75,586 cases were filed with state supreme courts in 2016 alone[12]—treatment of precedent at the state level deserves greater doctrinal development. This Note attempts to advance that discussion by proposing new stare decisis considerations for state courts of last resort.

While almost all questions before the Supreme Court require statutory or constitutional interpretation, state courts of last resort occupy a unique place in the American judicial landscape. As common-law courts, state supreme courts are empowered to develop common-law doctrines in addition to interpreting democratically enacted texts. This Note argues that these two distinct state court functions—interpretation of statutes and constitutions, and common-law judging—call for two distinct approaches to stare decisis, a distinction that is often muddied in practice. Justice Thomas's concurrence in *Gamble* provides the framework for each approach, a framework

---

B.U. L. REV. 345, 347 (1986)); *see also Stare decisis*, BLACK'S LAW DICTIONARY (11th ed. 2019) (translating stare decisis as "to stand by things decided").

6 *See* Payne v. Tennessee, 501 U.S. 808, 828 (1991) ("*Stare decisis* is not an inexorable command . . . ."). Throughout this Note, "stare decisis" is used to refer to its "horizontal" effects, not its "vertical" effects—meaning "a court's obligation to follow its own precedent, rather than its obligation to follow the precedent of a superior court." Barrett, *supra* note 5, at 1015.

7 *See* Gamble v. United States, 139 S. Ct. 1960, 1963–64 (2019).

8 *Id.* at 1980–81 (Thomas, J., concurring).

9 *Id.* at 1981–89.

10 *But see infra* text accompanying notes 133–51 (discussing state-specific approaches to stare decisis).

11 *The Supreme Court at Work*, SUP. CT. U.S., https://www.supremecourt.gov/about/courtatwork.aspx (last visited Jan. 29, 2020) (noting also that "the Court typically disposes of about 100 or more [additional] cases without plenary review").

12 COURT STATISTICS PROJECT, NAT'L CTR. FOR STATE COURTS, STATE COURT CASELOAD DIGEST: 2016 DATA 19 (2018), http://www.courtstatistics.org/~/media/Microsites/Files/CSP/National-Overview-2016/SCCD_2016.ashx.

based on the genesis and development of stare decisis from its English common-law roots.

Specifically, this Note argues that even if the Supreme Court does not accept Justice Thomas's approach, state supreme courts should when deciding state statutory and constitutional questions. The distinct nature of state constitutions, the state legislative process, and state legislative power in general call for a textually grounded approach to stare decisis of the kind Justice Thomas proposed in his *Gamble* concurrence. Conversely, this Note argues that state supreme courts should adhere to traditional stare decisis formulations when resolving common-law disputes because the doctrine of stare decisis itself developed at common law and has greater legal and practical significance in the common-law context.

The analysis proceeds as follows. Part I explores the doctrine of stare decisis by reviewing the Supreme Court's recent decision in *Gamble*, its application of stare decisis in that case, and Justice Thomas's concurrence. Part II highlights some basic differences between federal and state courts and explores the state court doctrine of methodological stare decisis as a way to promote consistent treatment of precedent at the state court level. Finally, Part III encourages state supreme courts to adopt Justice Thomas's text-based theory of stare decisis for questions of state constitutional and statutory interpretation but proposes an approach that is informed by but not beholden to the one advanced by Justice Thomas when state supreme courts employ stare decisis in their common-law capacities.

I. Stare Decisis in Judicial Decisionmaking

Stare decisis is "a foundation stone of the rule of law."[13] Indeed, long before the Constitution was ratified, Aristotle gave his imprimatur to the practice, teaching that like cases should be treated alike.[14] Yet the rule is not absolute,[15] raising two questions: When and why does a court depart from the "foundation" that is stare decisis? In considering these questions, this Part first explains the Court's decision in *Gamble*, which serves as an illustrative application of classic stare decisis principles. It then turns to Justice Thomas's concurrence, which explores the common-law roots that underlie stare decisis and operates as a valuable guide to forwarding a fresh approach to this increasingly relevant debate.

A. Gamble v. United States

In November 2015, Terance Gamble was pulled over for a damaged headlight.[16] During the stop, officers found a 9 mm handgun, which Gam-

13 Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2036 (2014).

14 Peter Westen, *The Empty Idea of Equality*, 95 Harv. L. Rev. 537, 542–43 (1982) (citing Aristotle, Ethica Nicomachea bk. V, at 1131a–b (W. D. Ross trans., Oxford Univ. Press 1925) (c. 350 B.C.E.)).

15 *See supra* note 2.

16 Gamble v. United States, 139 S. Ct. 1960, 1964 (2019).

ble, having previously been convicted of a "crime of violence," was barred from possessing under Alabama and U.S. law.[17] Gamble was subsequently charged with and pleaded guilty to violating Alabama's felon-in-possession statute.[18]

Shortly thereafter, Gamble was indicted by federal prosecutors for the same instance of possession under 18 U.S.C. § 922(g)(1), which makes it unlawful for convicted felons "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition."[19] After the federal district court denied Gamble's motion to dismiss, Gamble pleaded guilty to the federal charge but retained his right to appeal the denial of his motion to dismiss.[20] The Eleventh Circuit affirmed the lower court's decision.[21]

Gamble's sole argument in his motion to dismiss and on appeal was that his successive prosecutions by state and federal authorities violated the Double Jeopardy Clause of the Fifth Amendment, which ensures that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb."[22] Gamble argued that his state conviction and federal indictment involved "the same offence" under the Fifth Amendment and that his successive prosecutions were therefore unconstitutional.[23] The lower courts were bound to rule against Gamble under decades of Supreme Court precedent consistently recognizing that "two offences 'are *not* the "same offence"' for double jeopardy purposes if 'prosecuted by different sovereigns.'"[24] Put another way, "a crime under one sovereign's laws is not 'the same offense' as a crime under the laws of another sovereign."[25] The Supreme Court granted certiorari to address one specific issue: Should this "dual-sovereignty" doctrine be overturned?[26]

The Court had good reason to consider the question again. Three years prior, in *Puerto Rico v. Sanchez Valle*,[27] Justice Ginsburg—joined by Justice Thomas—questioned the Court's continued adherence to the dual-sover-

17 *Id.*; *see* 18 U.S.C. § 922(g)(1) (2012); ALA. CODE § 13A-11-72(a) (2019); *see also id.* § 13A-11-70(2) (defining "crime of violence" to include robbery).

18 *Gamble*, 139 S. Ct. at 1964.

19 18 U.S.C. § 922(g)(1).

20 *Gamble*, 139 S. Ct. at 1964.

21 United States v. Gamble, 694 F. App'x 750, 751 (11th Cir. 2017) (per curiam), *cert. granted*, 138 S. Ct. 2707 (2018) (mem.), *aff'd*, 139 S. Ct. 1960 (2019).

22 U.S. CONST. amend. V; *Gamble*, 139 S. Ct. at 1964.

23 *Gamble*, 139 S. Ct. at 1964.

24 *Id.* (quoting Heath v. Alabama, 474 U.S. 82, 92 (1985)); *see also infra* Section I.B (explaining the 170 years of precedent affirming the dual-sovereignty doctrine).

25 *Id.*

26 *Id.* The Court assumed, as did the parties, "that the state and federal offenses at issue here satisfy the other criteria for being the 'same offence' under [the *Blockburger* test]." *Id.* at 1964 n.1 (citing Blockburger v. United States, 284 U.S. 299, 304 (1932)).

27 136 S. Ct. 1863 (2016). That case involved successive prosecutions of the same offense by Puerto Rico and the United States, and the Court held that such successive prosecutions are barred by the Double Jeopardy Clause "because the oldest roots of Puerto Rico's power to prosecute lie in federal soil." *Id.* at 1868.

eignty doctrine as applied to states, arguing for its reexamination "in a future case in which a defendant faces successive prosecutions by parts of the whole USA."[28] *Gamble* was that case.

Writing for the majority, Justice Alito began by examining the text of the Double Jeopardy Clause. The Fifth Amendment protects against successive prosecutions "'for the same *offence*,' not for the same *conduct*."[29] In other words, for an act to constitute an "offence," a law must be violated.[30] And because only a sovereign can enact a law, "where there are two sovereigns, there are two laws, and two 'offences.'"[31] This syllogistic, textual analysis strongly cut against Gamble. Yet Gamble argued that the Court's prior interpretations of the Double Jeopardy Clause, which largely tracked Justice Alito's textual analysis, departed from the original understanding of the Clause and that the time for overturning those interpretations had come.[32]

Proof of the original meaning of the Double Jeopardy Clause, while slightly ambiguous, still lent support to the dual-sovereignty doctrine. Neither Gamble nor the Court could find a reported pre–Fifth Amendment case that barred a successive prosecution by either an American or British court when the defendant had been convicted or acquitted by a foreign sovereign.[33] The Court likewise found other contemporaneous cases and treatises advanced by Gamble unconvincing.[34]

B. Stare Decisis and Gamble

In addition to this uphill historical battle, for Gamble, "*stare decisis* [was] another obstacle."[35] The Court's explicit stare decisis discussion in *Gamble* serves as an archetypal recitation and application of the long-adhered-to doctrine. The dual-sovereignty precedent was clear and its history slightly murkier. Had the time come for its overturning? Justice Alito began the Court's stare decisis analysis by reciting the oft-quoted language of *Payne v. Tennessee*, which explained that stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial

28 *Id.* at 1877 (Ginsburg, J., concurring).

29 *Gamble*, 139 S. Ct. at 1965 (quoting Grady v. Corbin, 495 U.S. 508, 529 (1990) (Scalia, J., dissenting)).

30 *Id.* (citing 2 RICHARD BURN & JOHN BURN, A NEW LAW DICTIONARY 167 (London, A. Strahan & W. Woodfall 1792) (defining "offence" as "an act committed against law, or omitted where the law requires it")).

31 *Id.* (citing *Grady*, 495 U.S. at 529 (Scalia, J., dissenting); Moore v. Illinois, 55 U.S. (14 How.) 13, 17 (1852)).

32 *Id.*

33 *Id.* at 1970.

34 *Id.* at 1970–78. The Court also considered and rejected Gamble's alternative arguments that prior Supreme Court decisions rejected the dual-sovereignty doctrine, that incorporation necessitated reversal of the dual-sovereignty doctrine, and that the relatively recent proliferation of federal criminal law is a fact warranting a structural change that should eradicate the dual-sovereignty doctrine. *Id.* at 1977–80.

35 *Id.* at 1969.

process."[36] Thus, stare decisis fundamentally rests on three policy preferences: consistency, reliance, and judicial integrity.[37]

"Of course," Justice Alito reminded, "it is also important to be right."[38] While getting the case "right" is surely a chief concern of the Justices, the weight that a precedent is afforded, at least doctrinally, depends on the legal question it resolved. The Court has long adhered to the notion that both theoretically and practically, it is more important for its constitutional interpretations to be "right" than it is for its statutory interpretations. Theoretically, if the Court incorrectly interprets a statute, Congress could "override [that] error[ ] by ordinary legislation."[39] Congressional silence, conversely, signals congressional acquiescence in the Court's interpretation.[40] While an incorrect constitutional interpretation could in theory be overturned by constitutional amendment,[41] as a practical matter—given the arduous amendment process and historically rare recourse to Article V[42]—the Supreme Court itself is de facto the only governmental body that can correct its erroneous constitutional pronouncements.[43] This bifurcation of the weight of statutory and constitutional precedent at the federal level, widely accepted in the legal academy and by the Court itself, does not, however, enjoy universal acceptance.[44]

Nevertheless, in constitutional cases like *Gamble*, "a departure from precedent 'demands special justification.'"[45] The Court required that more

36 *Id.* (quoting Payne v. Tennessee, 501 U.S. 808, 827 (1991)).

37 *See* Payne, 501 U.S. at 828 ("*Stare decisis* is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.'" (quoting Helvering v. Hallock, 309 U.S. 106, 119 (1940))).

38 *Gamble*, 139 S. Ct. at 1969.

39 *Id.*

40 *See* William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 71–78 (1988). *But see* Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 323–27 (2005) (explaining an alternative view that separation of powers, rather than congressional acquiescence, justifies a heightened stare decisis standard for statutory interpretations).

41 And the Amendments Clause has been invoked to do just this. *See* Akhil Reed Amar, Plessy v. Ferguson *and the Anti-Canon*, 39 PEPP. L. REV. 75, 79 (2011) ("Just as *Dred Scott*'s racist result was overruled by the Fourteenth Amendment, so *Minor*'s sexist result was overruled by the Nineteenth Amendment." (footnote omitted)). Moreover, Congress cannot, via legislation, overturn a constitutional decision of the Supreme Court. *See* Dickerson v. United States, 530 U.S. 428, 432 (2000).

42 Since the passage of the Bill of Rights in 1791, the Constitution has only been amended seventeen times in the last 228 years. *See* U.S. CONST. amends. XI–XXVII.

43 *See* Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 MICH. L. REV. 1, 19–20 (2011); *cf.* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1367 (1988) (noting that theories of heightened stare decisis for statutory interpretations rest in part upon practical considerations as well).

44 *See infra* note 85 and accompanying text. For a discussion of both sides of this debate, see generally Kevin M. Stack, *The Inference from Authority to Interpretive Method in Constitutional and Statutory Domains*, 102 CORNELL L. REV. 1667 (2017).

45 Gamble v. United States, 139 S. Ct. 1960, 1969 (2019) (quoting Arizona v. Rumsey, 467 U.S. 203, 212 (1984)); *see also* Kurt T. Lash, *The Cost of Judicial Error: Stare Decisis and the*

than "ambiguous historical evidence" be presented before "flatly overrul[ing] a number of major decisions."[46] And Justice Alito posited that as a case's "antiquity" grows, so too does the case for adhering to it.[47]

The Court, accepting Gamble's invitation, then reexamined a number of its precedents. The survey revealed an unbroken record of the Court's reaffirming of the dual-sovereignty doctrine. The reasoning behind that line of cases was based largely upon the aforementioned textual clues and the different interests that two sovereigns may have in punishing the same criminal act.[48] The cases spanned back as far as 1847 and had been reaffirmed as recently as 2016.[49] Thus, given that the earliest antebellum case on point was announced over 170 years ago, Gamble faced a stringent burden of proof with regard to the evidence he needed to muster to convince the Court to abandon a doctrine that it had historically affirmed without exception.

The somewhat ambiguous original meaning of the Double Jeopardy Clause in this context, bolstered by nearly two centuries of precedent, proved to be too great an obstacle to overcome. In a 7–2 decision, the Court reaffirmed its dual-sovereignty doctrine and affirmed Gamble's federal conviction.[50] The duality that *Gamble* highlights—the "settled versus right"

Role of Normative Theory, 89 NOTRE DAME L. REV. 2189, 2206–09 (2014) (arguing that popular sovereignty, as a normative principle, should guide applications of stare decisis).

46 *Gamble*, 139 S. Ct. at 1969 (quoting Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 479 (1987) (plurality opinion)).

47 *Id.* (quoting Montejo v. Louisiana, 556 U.S. 778, 792 (2009)).

48 *See, e.g.*, Moore v. Illinois, 55 U.S. (14 How.) 13, 20 (1852) (explaining that an assault on a U.S. Marshal offends the United States by "hindering" the "execution of legal process" and a state by "breach[ing]" the "peace of the State"); United States v. Marigold, 50 U.S. (9 How.) 560, 569 (1850) ("[T]he same act might, as to its character and tendencies, and the consequences it involved, constitute an offence against both the State and Federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each."); Fox v. Ohio, 46 U.S. (5 How.) 410, 435 (1847) ("[O]ffences falling within the competency of different authorities to restrain or punish them would not properly be subjected to the consequences which those authorities might ordain and affix to their perpetration."). This "different interest" justification is especially enlightened by considering, as the Court did, successive prosecutions by the United States and by a foreign country, when jurisdiction is warranted by two international sovereigns. *Gamble*, 139 S. Ct. at 1967 (listing many reasons the United States may want to prosecute criminal acts abroad, which include crimes committed against American nationals abroad, crimes committed *by* American nationals abroad, distrust of a foreign country's legal system, and national security and foreign relations interests).

49 *See Gamble*, 139 S. Ct. at 1966–67; *supra* notes 27–31 and accompanying text; *see also* Heath v. Alabama, 474 U.S. 82, 88 (1985) (reasoning that a single act can constitute two distinct offenses); Abbate v. United States, 359 U.S. 187, 193–96 (1959) (holding that double jeopardy does not prevent federal and state prosecutions based on the same underlying acts); Bartkus v. Illinois, 359 U.S. 121, 131–32 (1959) (same); Westfall v. United States, 274 U.S. 256, 258 (1927) (same); Hebert v. Louisiana, 272 U.S. 312, 314 (1926) (same); United States v. Lanza, 260 U.S. 377, 382 (1922) (same).

50 *Gamble*, 139 S. Ct. at 1963.

problem of stare decisis—is an ever-existing tension in appellate court decisionmaking.[51]

C. Justice Thomas, Gamble*, and Stare Decisis*

Justice Thomas discerns no tension between confronting incorrectly settled precedent and his constitutional obligation to decide a case correctly. He concurred in *Gamble* but wrote separately "to address the proper role of the doctrine of *stare decisis*."[52] His thesis is simple: the modern stare decisis doctrine is not consistent with the Court's judicial duty "because it elevates demonstrably erroneous decisions . . . over the text of the Constitution and other duly enacted federal law."[53] This Section explores and elaborates upon Justice Thomas's critique of and subsequent proposal to remedy the Court's current stare decisis doctrine.

Justice Thomas begins by observing that in the federal system, the courts alone are vested with the "judicial power," which by all accounts obliges federal courts to faithfully interpret the Constitution and federal law.[54] That power is simply "to say what the law is" when a "case" or "controversy" comes before a federal court.[55] For Justice Thomas, two truths emerge from this traditional understanding of the judicial power. First, it encompasses neither "force" (executive power) nor "will" (legislative power).[56] And second, it implies a duty to correctly ascertain the meaning of the law.[57] This understanding of the judicial power is derived from the judicial function at common law. The common law's application of stare decisis is therefore instructive for federal courts, which apply the doctrine in their own decisionmaking.

Turning to Blackstone's *Commentaries*, Justice Thomas explains that at common law judges were duty bound to apply precedent. Common law was custom inscribed, such that the principles articulated by the judges were "seen as principles that had been discovered rather than new laws that were being made."[58] As such, "'precedents and rules must be followed, unless

51 *See* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) ("*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right."). For a thorough discussion of the intricacies of this tension and normative proposals for rectifying the gap between the two, see generally RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT (2017).

52 *Gamble*, 139 S. Ct. at 1981 (Thomas, J., concurring).

53 *Id.*

54 *Id.* at 1982; *see also* U.S. CONST. art. III, § 1, cl. 1.

55 *Gamble*, 139 S. Ct. at 1982 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

56 *Id.* (quoting THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

57 *Id.*

58 *Id.* at 1983 (quoting 3–4 G. EDWARD WHITE, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE, 1815–35, at 129 (Paul A. Freund & Stanley N. Katz eds., 1988)).

flatly absurd or unjust' because a judge must issue judgments 'according to the known laws and customs of the land' and not 'according to his private sentiments' or 'own private judgment.'"[59] Nonetheless, common-law judges could have—and should have—rejected precedent when it was contrary to "divine law," for a judge "may *mistake* the law."[60] Justice Thomas argues that this objective approach to judging, which on occasion implored common-law jurists to consider the veracity of prior decisions, supports the American understanding that the judicial power requires judges to decide cases and controversies without extrajudicial policy preferences influencing their legal decisionmaking.[61]

Justice Thomas's historical claim is further bolstered by the English jurisprudence contemporaneous to the Founding. The common law operated under the "declaratory theory," whereby the law was thought to have a "Platonic or ideal existence."[62] Lord Coke explained that "all causes [should] be measured by the golden and streight metwand of the law, and not to the incertain and crooked cord of discretion."[63] When judges departed from this ideal, later courts were free to correct the error. Thus, under the declaratory theory, common-law courts faced the same conundrum that plagues the Supreme Court today: Get the decision "right" or apply "settled" (but incorrect) precedent? As the common law evolved, however, the declaratory theory largely became a legal fiction, with judges believing they had a "duty to articulate some justification for setting aside the evidence of the law found in prior decisions."[64] One exception did persist though: "[I]f it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*."[65]

Moreover, a brief survey of the English caselaw shows both the rigor with which judges deferred to stare decisis as well as their occasional willingness to depart from it. For example, in *Braimer v. Bethune*, Lord Gillies warned that "[i]f we depart from [stare decisis], the law, in place of possessing certainty or stability, would be shaken to the foundation."[66] And it was candidly stated in another case that "stare decisis is a very good maxim."[67] Stare decisis was decisively the rule, not the exception, as the resolute language with which the doctrine was defended shows.[68] Yet the rule, consistent with the observations

59 *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *69–70).

60 *Id.* (quoting 1 BLACKSTONE, *supra* note 59, at *70–71).

61 *Id.*

62 Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 660 (1999).

63 EDWARD COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 41 (London, E. & R. Brooke 1797) (1644).

64 Lee, *supra* note 62, at 661.

65 *Id.* at 662 (quoting 1 BLACKSTONE, *supra* note 59, at *70).

66 Braimer v. Bethune (1839) 1 D 383, 391 (Scot.).

67 Parker v. Drew (1754) 96 Eng. Rep. 935, 936; 1 Keny. 114, 117.

68 *See, e.g.*, Bishop of London v. Ffytche (1801) 102 Eng. Rep. 188, 191; 1 East 487, 495 ("The rule stare decisis is one of the most sacred in the law . . . ."); The King v. Inhabitants of Saint Mary (1799) 101 Eng. Rep. 1365, 1366; 8 T.R. 236, 239 ("[I]t is of great impor-

above, was not absolute. The Court of King's Bench once held that stare decisis "is not always to be adhered to; and [the court] must be allowed . . . to depart from what was holden" when confronted with an erroneous decision.[69] And indeed, Blackstone's *Commentaries* supports the dichotomy that emerges from the caselaw. As one commentator observed, "Blackstone's venerable statements on the law of precedent . . . seem to chart a compromise course between the classic adoption of the declaratory theory and a strict notion of stare decisis."[70] This tension, which values both stability and objective truth seeking, supports the legitimacy of the common law by establishing clear expectations for potential litigants while being just flexible enough to evolve when a prior decision is no longer (or never was) tenable.

But common-law judging differs from federal judging in important ways. Most saliently, Justice Thomas posits that because federal courts do not (generally) make common law[71] but rather interpret and apply only written law,[72] stare decisis does not operate in the same way in the American federal system that it did at common law.[73] The role of a federal judge is thus "modest": to "interpret and apply written law to the facts of particular cases."[74] Combined with the fundamental assumption that written laws have an objective and ascertainable meaning, Justice Thomas believes that "there are right and wrong answers to legal questions."[75] Thus, if a prior decision incorrectly interpreted a written law, a court reviewing that decision must decide

---

tance that decided cases should be adhered to; and on this subject in particular I applaud the rule stare decisis."); Ringer v. Churchill (1840) 2 D 307, 324 (Scot.) ("I am strongly impressed with the importance of the judicial maxim, *stare decisis*; and, in adopting the view which I have formed of this case, I am satisfied that I do not trench upon any one of the decisions referred to. Whether all these decisions were well founded or not, I shall not even presume to offer an opinion. It is enough for me that there they are, a *series rerum judicatarum*, which are not now to be the subject of question or revision."). There was, however, variation among common-law judges as to whether they believed stare decisis allowed for review of the rationale, in contrast to simply the holding, of a prior decision. *Compare* Menzies v. Murdoch (1841) 4 D 257, 262 (Scot.) ("I certainly agree that we cannot overturn the decisions which have been referred to, although I cannot conceive what was the *ratio* for these decisions, except the maxim, *stare decisis*."), *with* Evans v. George (1823) 147 Eng. Rep. 660, 679; 12 Price 76, 139 ("[I]t would be a departure from the dignity of this Court to consider ourselves bound by the single decision of a contemporaneous authority, which we cannot but see was founded on only one doubtful case in point . . . .").

69 Rex v. Inhabitants of St. Botolph (1755) 96 Eng. Rep. 851, 852; Sayer 198, 200; *see also* Mutrie v. Haldane's Trustees (1844) 6 D 1045, 1071 (Scot.) (observing that there are matters where "we are bound to bend our minds to the duty of deciding according to the truth").

70 Lee, *supra* note 62, at 662.

71 Gamble v. United States, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring) ("There is no federal general common law." (alteration omitted) (quoting Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938))).

72 *But see* Henry J. Friendly, *In Praise of* Erie*—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 384, 405–21 (1964).

73 *Gamble*, 139 S. Ct. at 1984.

74 *Id.*

75 *Id.* (quoting Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 5 (1996)).

between one of two options: affirm the (incorrectly decided) precedent under stare decisis principles or reject the precedent and decide the case correctly.

Justice Thomas unabashedly prefers the latter. In his view, "if the Court encounters a decision that is demonstrably erroneous—*i.e.*, one that is not a permissible interpretation of the text—the Court should correct the error, regardless of whether other factors support overruling the precedent."[76] Justice Thomas's approach to stare decisis thus differs from the modern formulation of the doctrine; the Court recently acknowledged that "[r]especting *stare decisis* means sticking to some wrong decisions."[77] The modern formulation, Justice Thomas warns, permits the Court to disregard the supremacy of the Constitution; its text should be favored over precedents interpreting it. In this way, Justice Thomas's approach reflects the common-law conception of stare decisis. Whereas Justice Thomas measures the correctness of a prior decision by its fit with the text of the instrument under review, judges at common law reviewed prior decisions for their consistency with the general law. In each situation, whether to abide by precedent depends upon some objectively discernable source of law that reflects the pre- and postpositivist legal theories at play: general law and text, respectively. Justice Thomas additionally argues that faithfulness to the modern formulation usurps the legislative function because affirming erroneous interpretations is not law deciding based on the interpretation of a text but lawmaking by the Court itself.[78]

Prior decisions are not, however, to be completely ignored under Justice Thomas's formulation. Precedent is still relevant to judicial decisionmaking when it is not demonstrably erroneous.[79] Justice Thomas allows that the Court may uphold an incorrect decision out of respect for stare decisis "but only when traditional tools of legal interpretation show that the earlier decision adopted a textually permissible interpretation of the law."[80] If jurists undertake a textually constrained approach to interpreting a statute or constitution but disagree about the correctness of an interpretation,[81] or if the text and history are too ambiguous to support only one correct interpreta-

76 *Id.*

77 Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401, 2409 (2015).

78 *Gamble*, 139 S. Ct. at 1984.

79 *Id.* at 1986 ("Although precedent does not supersede the original meaning of a legal text, it may remain relevant when it is not demonstrably erroneous. As discussed, the 'judicial Power' requires the Court to clarify and settle—or, as Madison and Hamilton put it, to 'liquidate'—the meaning of written laws." (quoting THE FEDERALIST NO. 37, at 229 (James Madison) (Clinton Rossiter ed., 1961))); THE FEDERALIST NO. 78, at 468 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). Of course, even under Justice Thomas's view, precedent is "relevant" even when it is demonstrably erroneous. The Court cannot overturn a demonstrably erroneous decision unless it first confronts said precedent.

80 *Id.* at 1984.

81 *Id.* at 1986 (observing that Justice Thomas and Justice Scalia did not always agree on what the history revealed of the original public meaning of the Constitution).

tion using an originalist methodology,[82] the (arguably incorrect) precedent can stand. Faithful interpretations of ambiguous texts that fall within this "range of indeterminacy" are the only ones, Justice Thomas argues, that may "but need not" be affirmed under stare decisis as such, and they ought to be upheld even if a later court disagrees with the textually permissible interpretation.[83]

Additionally, Justice Thomas disavows the idea that constitutional and statutory interpretations ought to be afforded differing precedential weight for stare decisis purposes. Finding that arguments in favor of their distinct treatment are based on the practical challenges of correcting erroneous constitutional holdings, not on strictly legal grounds, Justice Thomas emphasizes that "our judicial duty is to apply the law to the facts of the case, regardless of how easy it is for the law to change."[84] And he moreover argues that even if congressional silence signaled Congress's acquiescence in the Court's interpretation, making law through judicial fiat would contravene the Bicameralism and Presentment Clauses of Article I.[85]

Lastly, Justice Thomas attacks the Court's current application of stare decisis as "policy-driven, 'arbitrary discretion.'"[86] Whatever "uncertainty" would result were the Court to adopt Justice Thomas's view in its entirety, Justice Thomas argues that such a move would be significantly less uncertain than the multifactor balancing test currently favored.[87] Rethinking stare decisis as requiring a foundation in the text being interpreted would also, he opines, reduce the Court's tendency to invoke the doctrine to defend its "least defensible" decisions.[88]

* * *

In sum, Justice Thomas offers his colleagues a candid solution to the stare decisis debate: "When faced with a demonstrably erroneous precedent, my rule is simple: We should not follow it."[89]

---

82 *Id.* at 1987 (noting that the historical arguments in *Gamble* were by themselves inconclusive).

83 *Id.* at 1984–86. For greater discussion on what makes a precedent "demonstrably erroneous," see Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 5–8 (2001) (analogizing the inquiry to the *Chevron* "permissibility" analysis to narrow when a precedent falls outside the "range of indeterminacy" and is demonstrably erroneous).

84 *Gamble*, 139 S. Ct. at 1987. I advocate an approach that is slightly less formal when it comes to stare decisis and the practicability of legislative change at the state level. *See infra* Section III.A.

85 *Id.* at 1988.

86 *Id.* (quoting THE FEDERALIST NO. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

87 *Id.*

88 *Id.*

89 *Id.* at 1984.

II. Stare Decisis in State Supreme Courts

While stare decisis is an important principle of federal judging, state courts of last resort likewise rely upon the doctrine in their own judicial pronouncements. This Part analyzes how the similarities and differences between federal and state courts affect, if at all, state court applications of stare decisis. It is, of course, important to remember that any general claims about state governments are subject to the caveat that each state is its own sovereign with its own judicial system. That is, from constitutions to high courts and beyond, "states" are fundamentally a "them" and not an "it."

A. State Supreme Courts Distinguished

State courts of last resort differ from the Supreme Court in many respects. Those differences are compositional, structural, and functional, and they affect not only which cases state supreme courts hear but how those cases are—and ought to be—decided.

The most basic differences are the features of the federal judiciary that appear on the face of the federal Constitution but are (mostly) not applicable to state judiciaries. For one, Supreme Court Justices enjoy life tenure and salary protection,[90] while "more than eighty-seven percent of state judges go before the voters at some point in their careers."[91] Moreover, state supreme court justices are not bound by the jurisdictional restraints of Article III, such that many states allow their highest court to issue advisory opinions,[92] and state justiciability doctrines are often looser than their federal counterparts.[93] As a structural matter, the strict separation of powers lines drawn at the federal level are often relaxed at the state level, as many state courts are involved in rulemaking, political questions, and the administration of criminal cases.[94]

In exercising their judicial function, state courts are bound to follow and apply federal law and the federal Constitution,[95] and they must abide by decisions of the Supreme Court on questions of federal law,[96] but they are free to interpret their own states' statutes and constitutions as they see fit. The nature of state constitutions differs markedly from the federal Constitution. The federal Constitution is a barebone, largely structural framework of government.[97] State constitutions, on the other hand, while also establishing

90 U.S. Const. art. III, § 1, cl. 2.

91 G. Alan Tarr, *Designing an Appointive System: The Key Issues*, 34 Fordham Urb. L.J. 291, 291 (2007).

92 Randy J. Holland et al., State Constitutional Law: The Modern Experience 848–49 (2010).

93 Robert F. Williams, The Law of American State Constitutions 298–99 (2009).

94 *See* Hans A. Linde, *Observations of a State Court Judge*, *in* Judges and Legislators: Toward Institutional Comity 117, 117 (Robert A. Katzmann ed., 1988).

95 U.S. Const. art. VI, cl. 2.

96 Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 304, 315 (1816).

97 *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) ("The Constitution is a framework for government.").

the basic structure of state governments, are in-depth, specific documents that largely focus on limiting the otherwise plenary power of state governments and consequently read more like statutes.[98] And unlike the federal Constitution, which is amended only on the rarest of occasions, state constitutions are amended with relative frequency. From 1776 to 1998, nearly six thousand amendments to state constitutions were adopted,[99] and today in all but one state, direct electoral approval is required before a constitutional amendment takes effect.[100] Likewise, state legislation is introduced and enacted at a significantly faster rate than is federal legislation,[101] a fact that some claim is bolstered by the "single subject rule" employed by over forty states.[102] Under that rule, as the name indicates, state legislation can address only one subject,[103] making it easier for state legislatures to address a specific perceived evil without having to navigate the rocky political waters that accompany an omnibus bill.[104]

Moreover, while all state courts have the power of judicial review, the scope of that review—unlike the federal power, which was not made explicit until *Marbury v. Madison*[105]—is often given in the text of the state constitution.[106] But state constitutions can also make state supreme court judicial review more difficult to exercise. Some state constitutions *remove* jurisdiction over certain questions and others require a supermajority vote of the supreme court before declaring a legislative act unconstitutional.[107]

---

98 WILLIAMS, *supra* note 93, at 28.

99 G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 24 (1998). State constitutional amendments are adopted in four primary ways: "(1) voter adoption of legislatively-referred proposals, (2) voter adoption of citizen-initiated proposals, (3) voter adoption of commission-referred proposals, or (4) through constitutional conventions." Teresa Stanton Collett, *Judicial Independence and Accountability in an Age of Unconstitutional Constitutional Amendments*, 41 LOY. U. CHI. L.J. 327, 334–35 (2010).

100 WILLIAMS, *supra* note 93, at 26.

101 *See* John Haughey, *12 Emerging Trends from the 2016 State Legislative Sessions*, CQ (Aug. 1, 2016), https://info.cq.com/resources/12-emerging-trends-from-the-2016-state-legislative-sessions/ (reporting that as of July 2016, states passed 29,122 laws (for an average of 582 per state) while Congress passed only 199); Kevin King, *State Legislatures vs. Congress: Which Is More Productive?*, QUORUM, https://www.quorum.us/data-driven-insights/state-legislatures-versus-congress-which-is-more-productive/176/ (last visited Jan. 28, 2020) (noting that state legislatures introduce twenty-three times more bills than does Congress).

102 *See Working Together to Break the Gridlock*, SINGLE SUBJECT AMEND., http://singlesubjectamendment.com (last visited Jan. 24, 2020) (arguing that a single subject amendment to the federal Constitution "will allow Congress to conduct its business in a more productive, efficient, transparent and less acrimonious way and thereby improve the way Americans view Congress").

103 Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. PITT. L. REV. 803, 805 (2006).

104 *But see id.* at 849–58 (arguing that at least some logrolling is politically beneficial).

105 5 U.S. (1 Cranch) 137, 180 (1803).

106 WILLIAMS, *supra* note 93, at 288–90.

107 *Id.* at 289–90.

Lastly, and most importantly for purposes of this Note, state courts create and develop common law;[108] federal courts do not.[109] That is, state courts *are* common-law courts. Chancellor James Kent defined the common law as "those principles, usages, and rules of action applicable to the government and security of person and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature."[110] Adopting Kent's view, the Supreme Court explained that the common law is "the accumulated expressions of the various judicial tribunals in their efforts to ascertain what is right and just between individuals in respect to private disputes."[111] Today, state courts continue to decide cases in this common-law tradition in two respects.

First, state supreme court justices judge according to the English common-law method: individual cases are decided, and precedent is established and relied upon in later cases. As discussed above, Blackstone, whose *Commentaries* educated the first generation of colonial lawyers, taught that judges did not write the law but merely "discovered" or "declared" the preexisting general law.[112] As more nuanced issues arose and more nuanced "discoveries" were made, a premium was placed on the consistency of past precedents, all while the common law continued to develop and apply these newfound legal principles.[113] In this manner, "the doctrine of precedent allows for the evolution of the law," for as more narrowly tailored precedents are added to existing authority, the common law "change[s], becoming broader, wider, deeper, and more articulated."[114] Early state court decisions touted this "pliant nature"[115] of the common law and its ability to "adapt[ ] to [the present] circumstances, state of society[,] and form of government."[116] While amenable to changing social conditions, state common-law judging necessarily stuck to the doctrine at the heart of the English common law: stare deci-

108 *But see* J. Lyn Entrikin, *The Death of Common Law*, 42 HARV. J.L. & PUB. POL'Y 351, 357–59 (2019) (arguing that the rise in state legislative pronouncements on private law issues has effectively made American common law a legal fiction). Entrikin seems to make an empirical claim that as states regulate in fields historically governed by common law, state courts will have less of an opportunity to develop common law. *Id.* Entrikin does not claim, however, that the rise in state legislation over private disputes formally or legally deprives state courts of their inherent common-law authority. This Note thus assumes that, no matter the extent to which common-law decisions have been preempted by state legislative pronouncements, state courts retain their common-law nature.

109 *But see* Friendly, *supra* note 72, at 405.

110 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 640 (John M. Gould ed., Boston, Little, Brown & Co., 14th ed. 1896).

111 Kansas v. Colorado, 206 U.S. 46, 97 (1907).

112 *See supra* note 58–61 and accompanying text.

113 *See* Lee, *supra* note 62, at 683, 701.

114 Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 191 (2006).

115 Richard C. Dale, *The Adoption of the Common Law by the American Colonies*, 30 AM. L. REG. 553, 559 (1882) (quoting Boyer v. Sweet, 4 Ill. (3 Scam.) 120, 121 (1841)).

116 *Id.* at 560 (quoting Lindsley's Lessee v. Coats, 1 Ohio 243, 245 (1823)).

sis.[117] This steady progression of the common law in state courts of last resort, rooted in stare decisis, gives credence to Lord Mansfield's famous maxim that the common law "works itself pure."[118]

Second, every state court, with the exception of Louisiana,[119] adopted as its own law—either through reception statutes or judicial decisions—the common law of England.[120] Thus, the earliest conceptions of the states' tort, property, and contract law were imparted from decisions of the King's Bench. While state courts continue to develop common-law doctrine in the manner that English courts did, however, the substance of state common-law doctrines gradually lost the uniformity enjoyed by the English common law.[121] The earliest state court decisions were considered strong evidence of the general law in other state courts, but the deference given to such decisions did not bind state courts foreign to the jurisdiction in which the law was declared.[122] The rise of legal positivism in the first half of the twentieth century moreover empowered common-law judges to decide common-law cases based not upon an answer dictated by an objective, preexisting body of law, but upon their own understandings of equality and justice.[123] Thus, state court decisions—bolstered by a positivism reinforced by stare decisis—departed from one shared "common law" and gave rise to forty-nine unique iterations of the common law in the United States.[124]

The practice so continues in state courts today. Modern common-law decisions are based, of course, on precedent—but state court judges must at times fill in the gaps of their court-created doctrines. Justice Cardozo would have the common-law judge do so based on "what best serves social welfare and 'the [judge's] sense of justice,'"[125] while Judge Posner would have com-

117 Herbert Pope, *The English Common Law in the United States*, 24 HARV. L. REV. 6, 17 (1910).

118 Omychund v. Barker (1744) 26 Eng. Rep. 15, 23; 1 Atk. 22, 33 (argument of Solicitor General Murray, who would later become Lord Mansfield) (emphasis omitted).

119 Dale, *supra* note 115, at 571.

120 *Id.* at 569–71. The precise date when the English common law and statutes ceased to be authoritative law within each state varied by state. Some states drew the line at the founding of Jamestown in 1607, while others chose July 4, 1776, and others yet chose the dates they were admitted to the Union. *Id.* Moreover, many states, in light of the recently fought Revolutionary War, were reluctant to afford controlling legal weight to English common law. *See* John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 567–68 (1993).

121 Pope, *supra* note 117, at 17–18.

122 *Id.* at 7–12.

123 *See* Charles E. Carpenter, *Court Decisions and the Common Law*, 17 COLUM. L. REV. 593, 594–96 (1917).

124 *See* Pope, *supra* note 117, at 17–18.

125 Edward J. Normand, *Damages for Deceit: A Case Study in the Making of American Common Law*, 71 N.Y.U. ANN. SURV. AM. L. 333, 400 (2016) (quoting BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 150 (1921)); *see also* Percy H. Winfield, *Public Policy in the English Common Law*, 42 HARV. L. REV. 76, 76 (1928) (noting that Cardozo would have common-law judges "refer to legal analogy, to legal history, to custom, to the force of justice, morals, and social welfare").

mon-law courts decide on the basis of predictability, efficiency, and wealth maximization.[126] No matter which school a judge favors, and there are many other schools in between, most judges believe that modern common-law decisions are inevitably based, to some degree, on extralegal considerations—namely, policy.[127] While policy-oriented decisions are disfavored in the text-laden world of the federal courts (especially in more formalist interpretive camps)[128] "policy" considerations, whatever form they may take, are the contemporary backbone of common-law judging in state supreme courts.

B. Stare Decisis in State Supreme Courts

State supreme courts, as common-law courts, occupy a unique space in our federalist system. The remainder of this Part explores how state supreme courts' common-law roots do and ought to shape their articulation and application of stare decisis.

1. State Court Stare Decisis

Continuing the English common-law practice, all state supreme courts purport to abide by stare decisis. How the doctrine is articulated, much like the state-by-state variance in substantive law, likewise varies by state, though the differences are often subtle and its basic tenet remains consistent throughout: there is a rebuttable presumption that precedent is to be followed. This relative uniformity makes sense given that stare decisis is itself a common-law principle—that is, it is *common* among American courts. Thus, a brief overview of the federal factors will lay the groundwork for a discussion of stare decisis as the doctrine is applied in state courts of last resort.

In its most prominent discussion of stare decisis principles, the Supreme Court in *Planned Parenthood v. Casey*[129] articulated a number of "prudential and pragmatic" considerations that it would use to "gauge the respective costs of reaffirming and overruling a prior case."[130] Those factors include considering whether the precedent is unworkable, whether the precedent's continued existence has been reasonably relied upon, whether the evolution of the law has disturbed the doctrinal foundations of the precedent, and whether the factual assumptions of the prior decision are no longer applica-

126 *See* Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 487–88 (1980); Robert S. Summers, *Judge Richard Posner's Jurisprudence*, 89 MICH. L. REV. 1302, 1304–05 (1991) (reviewing RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE (1990)).

127 *See* Winfield, *supra* note 125, at 76–77 (observing that Anglo-American common-law courts necessarily make decisions rooted in "public policy"). *But see* Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 VA. L. REV. 1, 7–8 (2015) (arguing that when judges "make" law, they should not think of themselves as enacting quasi-legislation, but should (and do) draw common-law rules from preexisting legal sources).

128 *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 261–65 (1990).

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

130 *Id.* at 854.

ble such that the precedent has little continued justification.[131] Curiously, as one scholar points out, on "the substantive value of interpreting the Constitution correctly," the *Casey* Court "said precious little."[132]

State court articulations of stare decisis often track this well-rehearsed federal doctrine. For example, the Michigan Supreme Court considers the following (similar) factors before overturning a precedent:

> (1) "[W]hether the rule has proven to be intolerable because it defies practical workability," (2) "whether reliance on the rule is such that overruling it would cause a special hardship and inequity," (3) "whether upholding the rule is likely to result in serious detriment prejudicial to public interests," and (4) "whether the prior decision was an abrupt and largely unexplained departure from precedent."[133]

The similarities between the various state court formulations and the federal doctrine should not be surprising given that many states cite *Casey* itself when explaining their stare decisis principles.[134] Thus, despite slight differentiations among the states, state courts' recitations of stare decisis principles adhere to now-orthodox conceptions of how precedent is to be applied. Moreover, as an empirical matter, the rate at which state supreme courts overrule prior decisions is fairly consistent across the states.[135] Despite the big-picture uniformity, however, state supreme courts do not always agree on

131 *Id.* at 855.

132 Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 TEX. L. REV. 1843, 1876 (2013).

133 McCormick v. Carrier, 795 N.W.2d 517, 535 (Mich. 2010) (quoting Petersen v. Magna Corp., 773 N.W.2d 564, 574 (Mich. 2009)).

134 *See, e.g.*, Pratt & Whitney Can., Inc. v. Sheehan, 852 P.2d 1173, 1175 (Alaska 1993); People v. Novotny, 320 P.3d 1194, 1202 (Colo. 2014); Conway v. Town of Wilton, 680 A.2d 242, 246 (Conn. 1996); State v. J.P., 907 So. 2d 1101, 1109 (Fla. 2004); State v. Garcia, 29 P.3d 919, 925 (Haw. 2001); Conover v. Conover, 146 A.3d 433, 441 (Md. 2016); State v. Quintero, 34 A.3d 612, 620 (N.H. 2011); State v. Outagamie Cty. Bd. of Adjustment, 628 N.W.2d 376, 383 (Wis. 2001).

135 For example, from 1885 to 1999, the Pennsylvania Supreme Court overruled itself on 136 occasions for a rate of 1.19 per term. *See* Richard B. Cappalli, *What Is Authority? Creation and Use of Case Law by Pennsylvania's Appellate Courts*, 72 TEMP. L. REV. 303, 366 (1999). Likewise, the Iowa Supreme Court overruled 246 cases from 1857 to 2018, for a rate of 1.53 per term. *See* Tyler J. Buller & Kelli A. Huser, *Stare Decisis in Iowa*, 67 DRAKE L. REV. 317, 338 (2019). And the Wisconsin Supreme Court, from 2008 to 2017, overruled itself eleven times (out of a total 546 cases heard in that time) for a rate of 1.1 per term. *See* Joseph S. Diedrich, *The State of Stare Decisis in Wisconsin*, WIS. LAW., Nov. 2018, at 30, 32. At the highest end, from 1999 to 2008, the supreme courts of Alabama, California, and Michigan overruled their prior decisions sixty-three, thirty-nine, and thirty-four times, respectively, for a combined average of 5.04 overrulings per term. *See* Trent B. Collier & Phillip J. DeRosier, *Understanding the Overrulings: A Response to Robert Sedler*, 56 WAYNE L. REV. 1761, 1774 (2010). Other states overrule cases at a similar rate as those mentioned. *See* Allen Lanstra, Jr., *Does Judicial Selection Method Affect Volatility?: A Comparative Study of Precedent Adherence in Elected State Supreme Courts and Appointed State Supreme Courts*, 31 SW. U. L. REV. 35, 67–69 (2001). Moreover, whether state supreme court justices are appointed or elected has no statistically significant bearing on how likely a given court is to overturn precedent. *Id.* at 69.

the finer aspects of stare decisis. States that have explicitly considered the issue vary on how to conceptualize stare decisis principles within the state constitutional, statutory, and common-law contexts.[136]

2. Methodological Stare Decisis

The above discussion raises the question: What precedential effect, if any, do the *Casey* factors—or the various state court variations on the theme—have on future courts? That is, is a court's doctrinal formulation of stare decisis *itself* a precedent?[137] While stare decisis typically attaches to substantive legal issues, its force in the realm of legal methodology is less clear, at least at the federal level.[138] Some commentators have observed that when it comes to statutory interpretation, the Supreme Court picks and chooses when to adhere to the methods by which it reached a prior textual interpretation.[139] Moreover, the federal Constitution is silent on stare decisis, and no legislation directs the Court to use precedent in a specified manner.[140]

136 *Compare* Rutherford v. Talisker Canyons Fin., Co., 445 P.3d 474, 510 n.10 (Utah 2019) (Lee, J., dissenting) ("This court has only ever applied a single, uniform standard. In statutory, common law, constitutional, and other cases we have consistently inquired into the same [stare decisis] considerations . . . ."), *and* Farmers Ins. Co. of Or. v. Mowry, 261 P.3d 1, 7–8 (Or. 2011) (en banc) ("In applying *stare decisis* to decisions construing statutes, we will rely upon the same considerations we do in constitutional and common-law cases, although, as noted, the weight given to particular considerations will not necessarily be the same."), *with* People v. Hobson, 348 N.E.2d 894, 902 (N.Y. 1976) ("Precedents involving statutory interpretation are entitled to great stability . . . . [I]f the precedent or precedents have 'misinterpreted' the legislative intention, the Legislature's competency to correct the 'misinterpretation' is readily at hand."), *and* City of Rocky River v. State Emp't Relations Bd., 539 N.E.2d 103, 108 (Ohio 1989) ("[T]he doctrine of *stare decisis* is less important in the constitutional context than in cases of either pure judge-made law or statutory interpretation.").

137 Professor Paulsen has taken up the normative aspect of this question in regard to the Supreme Court's application of stare decisis and has concluded, ironically, that the justification the Court gives for stare decisis does not itself justify its continued use as the doctrine is currently applied. *See* Michael Stokes Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, 86 N.C. L. REV. 1165, 1167 (2008).

138 *Compare* Jordan Wilder Connors, Note, *Treating Like Subdecisions Alike: The Scope of Stare Decisis as Applied to Judicial Methodology*, 108 COLUM. L. REV. 681, 714 (2008) (noting that the Supreme Court varies in the consistent use of statutory interpretation methodologies), *with* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1754 (2010) (noting that many state courts of last resort use "[m]ethodological stare decisis" in which rules of interpretation themselves become binding precedent).

139 *See* Chad M. Oldfather, *Methodological Pluralism and Constitutional Interpretation*, 80 BROOK. L. REV. 1, 32–39 (2014); Connors, *supra* note 138, at 696–708.

140 Query whether Congress could do so without violating separation of powers principles. *See* Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1567–99 (2000) (arguing that such a law would lie within Congress's necessary and proper powers and would not infringe upon Article III's case-deciding function).

Given that stare decisis is self-promulgated and self-policed, how the federal doctrine is framed and applied depends, to a certain extent, on who writes the opinion.[141]

Is there a better way? One that state supreme courts, given their unique status as common-law courts, could and perhaps should implement? Because the goals of stare decisis include encouraging stability in the law and fostering the courts' institutional legitimacy, a consistent framing and application of the doctrine, at least within each jurisdiction, seems like desirable doctrinal development. If state supreme courts were required by law to articulate and apply their stare decisis rules in a predetermined fashion, as if the rules were agreed upon in a legal vacuum disconnected from any immediate case or controversy, then judicial majorities would have less leniency in disrupting the force with which precedent is applied to reach desirable policy outcomes—an oft-alluded-to critique of the Supreme Court's own stare decisis applications.[142] Moreover, state supreme courts are no strangers to giving precedential effect to not only the "what" of prior decisions but also to the "how."

State courts of last resort, to varying degrees, adhere to so-called "methodological stare decisis." When a judicial "subdecision"—i.e., the methodology by which a prior decision was reached—is not followed, the natural progression of the law faces uncertainty.[143] To rectify this problem, every state has legislatively enacted certain rules of interpretation, and some state supreme courts have further bound themselves by adhering to interpretive norms promulgated via court decisions.[144] Typically, this methodological stare decisis attaches to rules of statutory and constitutional interpretation.[145] For example, the Connecticut Supreme Court announced in *State v. Courchesne* that it would no longer follow the "plain meaning rule" for inter-

141 *Compare* Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2478–79 (2018) (Alito, J., for the Court) ("[A]s we have often recognized, *stare decisis* is 'not an inexorable command.' . . . An important factor in determining whether a precedent should be overruled is the quality of its reasoning . . . ." (quoting Pearson v. Callahan, 555 U.S. 223, 233 (2009))), *with* Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2036 (2014) (Kagan, J., for the Court) ("[T]his Court does not overturn its precedents lightly. . . . [*S*]*tare decisis* is a foundation stone of the rule of law, necessary to ensure that legal rules develop 'in a principled and intelligible fashion' . . . ." (quoting Vasquez v. Hillery, 474 U.S. 254, 265 (1986))).

142 *See, e.g.*, Gamble v. United States, 139 S. Ct. 1960, 1988 (2019) (Thomas, J., concurring) ("The true irony of our modern *stare decisis* doctrine lies in the fact that proponents of *stare decisis* tend to invoke it most fervently when the precedent at issue is least defensible."); William S. Consovoy, *The Rehnquist Court and the End of Constitutional Stare Decisis:* Casey, Dickerson *and the Consequences of Pragmatic Adjudication*, 2002 UTAH L. REV. 53, 105; Silver & Kozlowski, *supra* note 3, at 42–43.

143 *See* Connors, *supra* note 138, at 709 (arguing that a consistent methodology would promote judicial consistency and efficiency).

144 Gluck, *supra* note 138, at 1754. Professor Gluck specifically studied the methodological stare decisis of Oregon, Connecticut, Texas, Wisconsin, and Michigan. *Id.* at 1771.

145 *Id.* at 1814.

preting statutes.[146] In less than a year, however, the Connecticut legislature overrode that decision via statute and prohibited consideration of any "extratextual evidence" in statutory interpretation, unless the statute is ambiguous or a plain reading would produce absurd results.[147] In the years following the legislative override, the Connecticut Supreme Court resisted applying the statute with much vigor,[148] but this rulemaking back and forth (a common feature among states that take seriously methodological stare decisis)[149] has not destroyed the court's interpretive consistency. To the contrary, the caselaw elucidating the interpretive guidance statute has developed in such a way that litigants now know how the Connecticut Supreme Court will interpret statutes before it.[150] And in Wisconsin, where the most prominent rules of statutory interpretation are almost exclusively judge made, the experiment has likewise bred more consistent interpretations:

> Indeed, despite the fact that several of the Wisconsin justices disfavor the more restrictive approach to legislative history that [the current test] imposes, what may be most significant is that most of the court's disputes are about *how* the . . . framework should be applied, not *whether it controls*.[151]

Rules of statutory interpretation are thus a means to an end—namely, elucidating the meaning of an ambiguous statute. But is stare decisis a similar means to a similar end? Or is it an end in itself?

Stare decisis is arguably methodological. It does not prescribe *what* a court should decide but rather *how* it ought to decide[152]: instead of starting a legal inquiry from scratch, a court is to rely upon and apply past decisions, but not always. While drawing distinctions that parallel the substance-procedure line is impossible to fully expound,[153] there is a strong case to be made

146 State v. Courchesne, 816 A.2d 562, 578, 582 (Conn. 2003).

147 Gluck, *supra* note 138, at 1792 (citing 2003 Conn. Acts 154 (Reg. Sess.) (codified at CONN. GEN. STAT. ANN. § 1-2z (West 2019)).

148 *Id.* at 1794.

149 *Id.* at 1776–97 (recounting similar interactions between the state legislatures and supreme courts of Oregon and Texas).

150 *Id.* at 1794–95 ("The court has continued to cite favorably to *Courchesne* . . . so long as the statutory text is ambiguous. . . . [A]s long as the parties are arguing over statutory meaning, as litigating parties are likely to do, the Connecticut Supreme Court finds the text ambiguous and holds [the statutory override] inapplicable.").

151 *Id.* at 1799–1802. Moreover, of the eighteen statutory interpretation cases decided after the interpretive rules were adopted that were based upon the Wisconsin Supreme Court's interpretive rules, the justices who initially disagreed with the rules "in only one [of those] case[s] wrote to object generally to the lack of a more eclectic approach." *Id.* at 1802–03.

152 *See* DANIEL CHANDLER & ROD MUNDAY, A DICTIONARY OF MEDIA AND COMMUNICATION 276 (2011) (defining "methodology" as "[t]he philosophical evaluation of *how* . . . [an] inquiry [is] framed" (emphasis added)).

153 *See, e.g.*, Hanna v. Plumer, 380 U.S. 460, 471 (1965) ("The line between 'substance' and 'procedure' shifts as the legal context changes."); Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 841 (2010) (arguing that not only is procedural law inherently substantive but that substantive law is inherently procedural). *But see* Jennifer S. Hendricks, *In Defense of the Substance-Procedure Dichotomy*, 89 WASH. U. L.

that stare decisis is methodological because it principally serves as a "particular action-guiding legal norm[ ]."[154] But even if stare decisis were substantive or "outcome-determinative,"[155] state courts announce and adhere to substantive precedents all the time! Indeed, stare decisis emerged from the common law not as a procedural tool but as a substantive necessity for comparing and applying a previously decided case to a presently considered one. Thus, there seems to be no principled reason that the rules governing a court's adherence to stare decisis should not enjoy the same doctrinal certainty that methods of statutory interpretation and substantive common-law rules themselves enjoy in state courts of last resort.[156]

Given that this proposed methodological stare decisis *for* stare decisis is (a) legally desirable and (b) legally possible, state courts of last resort, to the extent they do not already, should consider adopting it in both their statutory and constitutional interpretation and common-law capacities.[157] How the stare decisis rules are to be formulated within this methodological framework, however, is context dependent and is explored in detail below.

III. WHAT STATE SUPREME COURTS CAN LEARN FROM *GAMBLE*

Common-law judging is a fundamentally different exercise of the judicial power than is constitutional or statutory interpretation. In the former, judges are the first and final decisionmakers, while in the latter, judges are famously to exercise "neither force nor will[,] but merely judgment" as to what a democratically enacted text means.[158] In both contexts, judges use precedent to inform how a present case is to be decided.

My overall claim is a modest one: the unique judicial power that state courts of last resort exercise in each context requires unique, context-dependent stare decisis principles. More specifically, for constitutional and statutory interpretations, state supreme courts should adopt Justice Thomas's textually driven theory of stare decisis that he laid out in his *Gamble* concurrence. For common-law decisions, state supreme courts should be informed by the common-law principles expounded in *Gamble* but must ultimately

---

REV. 103, 107 (2011) (defending the substance-procedure distinction); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 225 (2004) (attempting to distinguish substance and procedure and positing that "the real work of procedure is to provide particular action-guiding legal norms").

154 Solum, *supra* note 153, at 225 (defining "procedure").

155 *See* Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945) (suggesting that a rule is substantive where the rule determines the outcome of a case).

156 I do not wish to suggest, however, that all states should necessarily adopt the same stare decisis formulation, at least in the common-law context. *See infra* Section III.B.

157 *But cf.* Larry Alexander & Saikrishna Prakash, *Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation*, 20 CONST. COMMENT. 97, 108 (2003) (arguing against congressionally enacted, mandatory rules of statutory construction).

158 THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis omitted); *see also id.* at 467 ("The interpretation of the laws is the proper and peculiar province of the courts.").

depart from Justice Thomas's theory in favor of more traditional stare decisis considerations.

A. State Constitutional and Statutory Stare Decisis[159]

Recall that the common-law conception of the "judicial power," upon which Justice Thomas bases his theory, obliged a judge to get the case "right."[160] And "right" legal answers were possible because common-law judges did not invent law but—either correctly or mistakenly—discovered the general law.[161] If a precedent was correctly decided, even arguably so, common-law judges upheld it; if it was obviously mistaken—i.e., contrary to divine law—the precedent would be overturned. While that conception has largely been abandoned, it is no less true today than it was in 1789 that certain legal questions have objectively "right" answers.

Such is the case for the interpretation of constitutions and statutes. Either a precedent comports with the text of the instrument or it does not. For Justice Thomas, when a prior interpretation is "demonstrably erroneous," a court's exercise of the judicial power—that is, the power to say what the law is—requires that it do just that: faithfully say what the law is, contrary precedent notwithstanding.[162] To elevate the doctrine of stare decisis over this key function of the judicial power is to aggrandize the judicial role. No amount of legislative acquiescence (for those who believe in it) can save an interpretation that departs from a permissible reading of the text from being legislative in function. If the legislature did not enact via statute or the people themselves through constitutional amendment the rule that an impermissible interpretation advances, then the judiciary, through its erroneous interpretation, must have. As a matter of history and separation of powers, in accordance with the doctrinal underpinning of the judicial power, such interpretations cannot stand—and stare decisis must not serve as a barrier to faithful exercises of the judicial power when said power requires that precedent be abandoned.

State supreme courts, when they exercise their judicial power as expounders of constitutions and statutes, are no less bound by the text than is the federal judiciary. As some commentators have pointed out, however, "[t]he 'judicial power' is not monolithic."[163] Textually and historically, it

159 This Note is limited to state court stare decisis principles for *state* constitutional and statutory interpretations and leaves for another day state court stare decisis principles in regard to the interpretation of the federal Constitution and federal statutes and regulations. While the main arguments in favor of a textually driven stare decisis hold true when it comes to the interpretation of federal texts, the arguments that states are even better forums for the theory are not necessarily applicable when it comes to interpreting federal texts.

160 *See supra* text accompanying notes 59–64.

161 *See supra* notes 58–59 and accompanying text.

162 Gamble v. United States, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring).

163 Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215, 1239 (2012).

would be unfair to assume that each state's judicial power, so conferred by each state's constitution, tracks that vested in the federal courts by Article III.[164] But the differences that these commentators raise—many of which I highlight above[165]—do not affect the core of the judicial power that state and federal courts exercise when it comes to the interpretation of constitutions and statutes. No state supreme court would seriously contest the notion that the "general concept of judicial power" includes the fair interpretation of democratically enacted texts.[166] To the extent that the judicial power varies between federal courts and state courts, state courts exercise greater judicial power, not less,[167] which necessarily leaves intact the textual interpretation function state courts have in common with the federal courts. Thus, Justice Thomas's arguments about what the "judicial power" requires of the federal judiciary likewise apply to state judiciaries, at least when it comes to interpreting constitutions and statutes.

Justice Thomas's approach to stare decisis might not garner doctrinal acceptance in the Supreme Court, but that does not mean that state courts of last resort should not adopt it. The theory is defensible on its own terms: it comports with a judge's judicial duty and is true to the text of the democratically enacted instrument under judicial review. There are, however, even stronger arguments for the theory's applicability in state supreme courts than there are for its usage by the Supreme Court. While this textually rigorous approach to stare decisis for constitutional and statutory interpretations is convincing in its own right, the distinct nature of state constitutions, legislatures, and judiciaries points to at least four reasons that state supreme courts should adopt Justice Thomas's theory, even if the Supreme Court ultimately does not.

First, the frequency with which state constitutions are amended, combined with the fact that direct voter approval is needed to pass a state constitutional amendment, gives modern voters far greater control over their state constitutions than they have over the federal Constitution. While none of us had a say at Philadelphia in 1787, we the people have made some momentous changes to the liberties recognized by and the obligations of our state governments in recent years via popular votes to amend our state constitutions.[168] At least some defenses of living constitutionalism home in on this point: the people today should develop a contemporary meaning of the Constitution to retain the Constitution's democratic legitimacy and avoid dead-

164 *Id.*

165 *See supra* Section II.A.

166 WILLIAMS, *supra* note 93, at 287, 298.

167 *Id.* at 287–88.

168 *See, e.g.*, ALA. CONST. art. I, § 36.06 (adopted 2018) (recognizing the "sanctity of unborn life" and extending legal rights to unborn children); COLO. CONST. art. XVIII, § 16(1)(a) (adopted 2012) (legalizing recreational marijuana use); FLA. CONST. art. III, § 20(a) (adopted 2010) (prohibiting political gerrymandering); N.C. CONST. art. VI, § 2(4) (adopted 2018) (requiring that voters show photo identification at polls).

hand control.[169] Given the people's frequent and direct control over state constitutions, however, the state courts' role in giving modern society a voice in state constitutional interpretation is limited at best.[170] If the text of a state constitution no longer comports with contemporary social mores or political necessities, the people can simply change the text themselves—but this reality goes beyond the practical to the philosophical. When the people do amend their state constitution, it really is *the people*, as opposed to their elected representatives, who make the constitutional change.[171] In light of these practical and philosophical realities, the role of a state court judge in interpreting a state constitution is to give effect to the text that was enacted, regardless of what prior interpretations have decided. If a precedent is not a textually permissible reading of the constitutional provision, the state supreme court must not give it precedential treatment. To do so would see that court exceed the bounds of its judicial power by imparting on the state's constitution a meaning that was not endorsed by the people of the state.

Second, the nature of state constitutions themselves call for a more formalist interpretive methodology, and thus a more text-based stare decisis, than does the federal Constitution. For one, the specific and "overelaborate detail[ ]" with which state constitutions are written suggests "a built-in orientation toward strict construction"[172]—i.e., textual analysis. Moreover, the length and specificity of state constitutions derives from the fact that—unlike the federal Constitution—state constitutions do not grant the government enumerated powers but rather limit the otherwise plenary power of the state.[173] Thus, courts can and must be particularly attentive to the limitations placed upon the states' exercises of their sovereign power. Thirty state constitutions contain over twenty thousand words, which, as one commentator put it, "offer[s] textualists a lot of text to interpret."[174] For stare decisis, this means that prior demonstrably erroneous interpretations, especially those that do not accurately limit the state's power according to the constitution's text, deprive the people of their agreed-upon choice to limit certain aspects of the state's otherwise plenary sovereign power. There is perhaps no

169 *See* Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1755–57 (2007); Ethan J. Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 CONST. COMMENT. 353, 358–59 (2007); Richard A Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 196–97 (2008).

170 Even in states where the constitution specifies that constitutional construction must give weight to the intent of the people, see WILLIAMS, *supra* note 93, at 315–18, the intent of the people can be gleaned from the text and history of the provision under review. None of the examples cited by Williams suggest that Justice Thomas's interpretive approach is inconsistent with these states' constitutional construction clauses.

171 *See supra* note 100 and accompanying text.

172 William F. Swindler, *State Constitutions for the 20th Century*, 50 NEB. L. REV. 577, 593–94 (1971); *see also* G. Alan Tarr, *State Constitutional Design and State Constitutional Interpretation*, 72 MONT. L. REV. 7, 9–12 (2011) (arguing that the distinctive nature of state constitutions requires that they be interpreted based on text and original meaning).

173 *See supra* note 98 and accompanying text.

174 Tarr, *supra* note 172, at 13.

other context in which getting the answer "right," as opposed to upholding erroneous interpretations for the sake of adhering to precedent, is as significant for state courts of last resort.[175]

Third, the relative frequency with which state constitutions are amended is analogous to the relative frequency with which state legislation is passed. Similar to the state constitutional amendment process, the people have real recourse in their state legislative process—bolstered by the "single subject rule"—to repeal an unwanted law or pass a desirable one.[176] While state legislation is not subject to direct popular approval, as constitutional amendments are, state legislators represent more discrete electorates[177] and usually face elections more often than their federal counterparts do,[178] giving the people, at least in theory, greater control over state legislation than they have at the federal level. These features of the state legislative process, contrary to the view of one prominent federal jurist, eliminate any need for state court judges to judicially update state statutes that have potentially fallen out of modern favor.[179] Rather, state courts of last resort can be assured that deciding a statutory question consistent with the text not only comports with their judicial duty but likewise leaves open the real possibility that the underlying law is subject to change through the democratic process if the people disagree with its merits. In this way, this "[i]nterpretive formalism" is "an extension of the common law tradition in its respect for compromise, modest aspirations for coherence, and its preference for normative salience over abstract moral vision."[180] State courts that employ a text-based stare decisis doctrine leave abstract debates over such moral predilections to the branch in which they are legally committed and in which the people may rightfully participate: the legislature.[181]

To be clear, some who argue for "super-strong" stare decisis for statutory interpretations make an argument that has a similar ring to the preceding

175 Civil liberties, which are arguably the most precious rights protected by courts, are adjudicated based on whether the state's exercise of its sovereign power was lawful—a power limited by the text of the state constitution.

176 *See supra* notes 101–04 and accompanying text.

177 *2010 Constituents Per State: Legislative District Table*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/research/about-state-legislatures/2010-constituents-per-state-legislative-district.aspx (last visited Feb. 6, 2020) (the average U.S. Congress member represents 709,760 constituents, while state House members represent anywhere from 465,674 constituents (California) to as few as 3291 constituents (New Hampshire)).

178 *See Number of Legislators and Length of Terms in Years*, NAT'L CONF. ST. LEGISLATURES (Aug. 9, 2019), http://www.ncsl.org/research/about-state-legislatures/number-of-legislators-and-length-of-terms.aspx.

179 *See* Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339, 353 (7th Cir. 2017) (Posner, J., concurring) (advocating that federal judges ought to undertake "judicial interpretive updating" for statutory interpretations).

180 Jeffrey A. Pojanowski, *Reading Statutes in the Common Law Tradition*, 101 VA. L. REV. 1357, 1415 (2015).

181 *But see* Eskridge, *supra* note 43, at 1407 (arguing that leaving controversial decisions to Congress does not work because Congress drafts broad statutes, letting the courts make politically unpopular decisions).

argument.[182] Such commentators argue that once a court renders an interpretation, whether textually permissible or not, the legislature may correct it by enacting *another* statute. Thus, so goes the argument, the court must uphold even its textually impermissible precedents because the legislature can always correct the interpretation if it so desires; if the legislature does not act, it acquiesces in the interpretation.[183] But this argument misses the point. The legislature expressed its will in the text of the statute *the first time around*. That the burden shifts to the legislature to correct the courts' erroneous interpretation of one of its statutes seems indefensible,[184] especially in light of the court's judicial power. Additionally, it is unclear why a later legislature, one that did not enact the statute under review, is a more salient body to determine the meaning of an ambiguous statute than are the courts—which, it bears repeating, exclusively enjoy the judicial power to "say what the law is."[185] While these arguments could apply at the state or federal level, the relative pace at which state legislation is enacted and the more discrete constituencies represented by state lawmakers again bolsters the case for a text-based stare decisis in state supreme courts.

Fourth, the (often) unequal distribution of power among the state branches of government requires greater judicial deference to state legislatures than is owed by federal judges to Congress. During the Founding era, state constitutions "tended to exalt legislative power at the expense of the executive and the judiciary."[186] And while attempts to curb such legislative dominance persist,[187] it remains true that "[s]tate legislative power is plenary, whereas federal legislative power is enumerated."[188] The disparate placement of power in state legislatures calls for heightened judicial deference to state legislatures when it comes to statutory interpretation—and this deference affects the role that stare decisis should play for statutory questions.[189] Consider a judge who is faced with deciding whether to uphold an incorrect interpretive precedent or to correct that error by rendering a deci-

182 *See infra* note 200 and accompanying text.

183 Eskridge, *supra* note 43, at 1366–67.

184 Professor Eskridge has made a similar observation. *Id.* at 1403.

185 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

186 WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 21 (1972); *see also* Gordon S. Wood, *Foreword: State Constitution-Making in the American Revolution*, 24 RUTGERS L.J. 911, 916 (1993) ("The powers and prerogatives taken from the governors were given to the legislatures, marking a revolutionary shift in the traditional responsibility of government.").

187 WILLIAMS, *supra* note 93, at 236.

188 Robert F. Williams, *Rhode Island's Distribution of Powers Question of the Century: Reverse Delegation and Implied Limits on Legislative Powers*, 4 ROGER WILLIAMS U. L. REV. 159, 163 (1998).

189 "Deference," as used here, should not be confused with overbreadth. Deference to the legislature requires that reviewing courts give effect to the *text* that the legislature has enacted. Admittedly, tension exists between the notion that that state legislatures deserve deference when reviewing courts undertake textually based statutory interpretations and the notion that because states have plenary legislative authority, state courts must use a textually rigorous methodology for constitutional interpretations. The two are reconcila-

sion that is a permissible interpretation of the text of the statute. Given its current practice, the Supreme Court would not worry too greatly about affirming such a precedent.[190] But Justice Thomas argues that to do so would be more akin to lawmaking than it would be to law deciding.[191] At the state level, where judges must be particularly attentive to legislative dominance, judges must stray far away from lawmaking unless they are exercising their common-law powers. This requires that state court judges overturn statutory interpretations where the precedent presents an impermissible interpretation of the text, stare decisis notwithstanding. This interpretive deference remains intact when state legislatures regulate in fields historically occupied by judge-made common law; state judges retain common-law powers over certain doctrines until it is democratically displaced from judicial authority, at which time the statutory text, and not judicial precedents, must control as it otherwise would. Importantly, such legislative preemption does not destroy the common law but merely shifts it "from courts to legislatures[,] and the concomitant judicial deference to reasonably clear statutory formality . . . [i]s a natural development in the common law tradition, not a rupture."[192]

Practically, this text-based approach to stare decisis does not render all interpretive precedents obsolete, and it is not an invitation for judges to consider anew every interpretive question that comes before them. Rather, stare decisis still requires that judges start their analysis by considering prior decisions. If a prior interpretation comports with the text but the sitting court disagrees with the nuances of the prior interpretation, the court may invoke stare decisis to uphold that interpretation. Where it can be shown, however, that a prior decision was demonstrably erroneous, the court can—and in fact must, in accordance with its judicial duty—overturn the precedent and render a textually permissible interpretation.[193] To the extent that "reliance" should be a stare decisis consideration for statutory and constitutional precedents,[194] this approach provides a baseline for future litigants to reasonably predict when a prior interpretation is likely to be upheld, which would additionally assist would-be litigants in deciding whether to challenge a precedent in the first place. As Justice Thomas put it, "if we replaced our malleable balancing test with a clear, principled rule grounded in the mean-

ble, however, if the state court applies a consistent brand of textualism for its statutory and constitutional interpretations.

190 *See supra* note 77 and accompanying text.

191 *See supra* note 78 and accompanying text. For Justice Thomas, when it comes to the Constitution, because it "is supreme over other sources of law, it requires us to privilege its text over our own precedents when the two are in conflict." Gamble v. United States, 139 S. Ct. 1960, 1985 (2019) (Thomas, J., concurring).

192 Pojanowski, *supra* note 180, at 1416.

193 For a historical perspective on this argument, see Nelson, *supra* note 83, at 8–52.

194 *See* Randy J. Kozel, *Precedent and Reliance*, 62 EMORY L.J. 1459, 1470–85 (2013) (questioning the utility of backward-looking reliance interests as a stare decisis consideration).

ing of the text," this "would eliminate a significant amount of uncertainty and provide the very stability sought."[195]

One paradoxical consequence of adhering to the proffered approach at the state level is worth mentioning. If a state were to pass a constitutional amendment that required its supreme court to employ a dynamic interpretive methodology, that court would have to interpret its state's statutes and constitution in that light.[196] Ironically, then, a textualist judge would be text bound (and duty bound via the constitutional provision) to dynamically update the statutory and constitutional provisions under judicial review. The stare decisis implication is that when considering whether a precedent is demonstrably erroneous, a judge in such a jurisdiction would not ask whether the prior interpretation is textually permissible and falls within the "range of indeterminacy."[197] Instead, such a judge would consider whether the prior interpretation comports with contemporary legal and social norms, or whether the prior interpretation is otherwise in accordance with the requirements of the constitutional provision that established the interpretive norm. While the stare decisis approach advanced herein favors an originalist and textualist interpretive baseline, essential to any conception of the judicial power is the idea that judges themselves must follow the law. This necessarily includes judging in accordance with the requirements of a written constitution[198]—constitutionally prescribed interpretive methodologies included.

* * *

In sum, the judicial power exercised by state supreme court justices requires that they employ judgment and not will by interpreting state constitutions and statutes according to the democratically enacted text before them. Where adhering to precedent would render a textually impermissible interpretation, stare decisis must yield. Judicial deference to the text and ultimately to the state legislature, as opposed to prior indefensible interpretations, is especially salient at the state level, where the people have a real opportunity to influence their state constitution and legislation. In light of the above arguments, Justice Thomas's summary of his stare decisis thesis is worth repeating: "When faced with a demonstrably erroneous precedent, my rule is simple: We should not follow it."[199]

---

195 *Gamble*, 139 S. Ct. at 1988.

196 *See* People v. Mezy, 551 N.W.2d 389, 393 (Mich. 1996) (laying down, by judicial decision, the interpretive baseline that the Michigan Supreme Court is to construe the Michigan constitution by giving it the meaning "the great mass of the people themselves[ ] would give it" (quoting People v. Nash, 341 N.W.2d 439, 443 (Mich. 1983))).

197 Nelson, *supra* note 83, at 7.

198 *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation . . . .").

199 *Gamble*, 139 S. Ct. at 1984.

B. Common-Law Stare Decisis

Without a text in which to ground their decisions, state supreme courts need a different stare decisis framework for their common-law precedents. Unlike some courts and commentators, I do not propose that common-law precedents are owed a certain "weight" in relation to the constitutional and statutory framework described above. The view of the Supreme Court is that "[c]ommon law precedents enjoy a strong presumption of correctness," while this presumption for constitutional precedents is weaker and the presumption for statutory precedents is "super-strong."[200] There is nothing wrong with affording common-law precedents a strong presumption of correctness—indeed, there should be such a presumption. It was and continues to be precisely that strong presumption that fosters the steady progression of common-law doctrines and well-founded reliance on previous common-law decisions. Even Justice Thomas concedes that the Supreme Court's requirement of a "special reason over and above the belief that a prior case was wrongly decided"[201] to overrule a precedent "might have made sense in a common-law legal system in which courts systematically developed the law through judicial decisions apart from written law."[202] But I remain skeptical that taxonomizing the weight of common-law precedents in relation to statutory and constitutional precedents is the best doctrinal conceptualization for this very reason: common-law stare decisis is different in kind, not merely in degree, from statutory and constitutional stare decisis. At least it should be.

Stare decisis grew up in the common-law tradition. It should not be surprising, therefore, that the modern stare decisis formulations employed by state courts of last resort are better suited for the common-law context than they are for the statutory and constitutional interpretation contexts. I do not wish here to propose specific stare decisis factors that state supreme courts should adopt because—like the American common-law experience itself—there are many defensible articulations that could further the purposes of the common law, and in so doing, further a more just or more efficient society (or both).[203] For example, Michigan's doctrine, which emphasizes workability, reliance, public interest, and reasoning of the prior decision,[204] is a widely agreed-upon stare decisis formulation. But that is not to say that a state like Wisconsin, which additionally considers "whether [the precedent] has produced a settled body of law" and explicitly disavows looking at whether a large majority of other states have decided similar questions con-

200 Eskridge, *supra* note 43, at 1362. As Section III.A demonstrates, I likewise reject the idea that statutory and constitutional precedents should be afforded differing stare decisis "weight," at least at the state level.

201 *Gamble*, 139 S. Ct. at 1981 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864 (1992)).

202 *Id.* at 1981–82.

203 *See supra* notes 125–27 and accompanying text.

204 *See supra* note 133 and accompanying text.

trary to the Wisconsin Supreme Court,[205] are not likewise legitimate common-law stare decisis factors.

An additional benefit of a nonuniform approach to common-law stare decisis among states is that it preserves the states' unique place in the federalist structure as "laboratories of democracy."[206] Each state may adopt its own common-law stare decisis principles and then learn not only from its own experiences but from the experiences of its sister states. And is that not the beauty of the common law in the first place? The possibility that, as generations come and go, as more complex lawsuits are initiated, and as community values themselves evolve, our legal doctrines—stare decisis included—might adapt so as to heed the changing legal and moral landscape?[207]

One small caveat: to allow for the state-by-state development of common-law stare decisis factors is not to endorse stare decisis relativism. Certain stare decisis principles, especially within the common-law context, must remain true. While its finer points are subject to debate among the states, stare decisis remains a "very good maxim" that all state supreme courts abide by and is rooted in a rich history that cannot be ignored wholesale.[208] At a bare minimum, common-law stare decisis requires the strong presumption that a prior decision is to be upheld. Indeed, this presumption is what "keep[s] the scale of justice even and steady, and not liable to waver with every new judge's opinion."[209]

Conclusion

The textually grounded approach to stare decisis that Justice Thomas laid out in his concurrence in *Gamble* is not likely to be adopted by the Supreme Court anytime soon. But the merits of his position can—and, as this Note argues, should—garner the attention and adherence of state supreme courts. When it comes to state statutory and constitutional interpretations, the distinct role that state courts of last resort and the state-level instruments they interpret play in our federalist system requires a conception of stare decisis that is distinct from that of the federal Supreme Court—a stare decisis doctrine that is indubitably rooted in the text to avoid usurping

205 Johnson Controls, Inc. v. Emp'rs Ins. of Wausau, 665 N.W.2d 257, 287–88 (Wis. 2003).

206 *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

207 Advocating a uniform—that is, textual—stare decisis for state supreme courts in no way undermines this "states as laboratories" argument in the common-law context. State *legislatures* act as the "laboratories" when enacting statutes that surely vary by state, whereas courts themselves are the source of differing common-law doctrines. Therefore, even if all states adopted Justice Thomas's approach to stare decisis for statutory and constitutional precedents, the resulting interpretations would produce substantive variance among the states because his approach requires adherence to the text of the statute or constitution, which are necessarily state specific.

208 Parker v. Drew (1754) 96 Eng. Rep. 935, 936; 1 Keny. 114, 117.

209 1 Blackstone, *supra* note 59, at *69.

the constitutional and statutory decisions of the people.[210] And when state courts of last resort develop common law—another facet unique to state supreme courts—they ought to afford judicial precedents the common-law presumption of correctness, and where necessary, develop the finer aspects of the doctrine in the common-law tradition that gave rise to stare decisis in the first place. As Justice Thomas notes, "the common law was based in the collective, systematic development of the law through reason."[211] The state-court-specific, textually grounded view of stare decisis advanced in this Note may be a next, reasonable step in that development.

210 *See* Gamble v. United States, 139 S. Ct. 1960, 1985 (2019) (Thomas, J., concurring) ("In sum, my view of *stare decisis* requires adherence to decisions made by the People—that is, to the original understanding of the relevant legal text—which may not align with decisions made by the Court.").

211 *Id.* at 1983.