

THE LIMITS OF WEAKENED STARE DECISIS: CAUTIONARY LESSONS FROM THE UNITED STATES FOR AUSTRALIA

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Both the High Court of Australia and the United States Supreme Court have recently revisited the doctrine of stare decisis and its role in constitutional settings. This article examines how and when apex courts are willing to overturn their prior decisions on questions of constitutional interpretation, and whether a weakened application of stare decisis is appropriate in this context. Drawing on comparative representation-reinforcing theory, and applying it to contemporary United States constitutional experience, we identify cautionary insights for Australian constitutionalism. We argue that while a measured weakening of stare decisis in the constitutional context may be justified, such weakening goes too far when it is or is perceived to be the cause or side-effect of the politicisation of judicial decision-making.

I INTRODUCTION

The doctrine of *stare decisis* ('to stand by the thing decided') has long played an important role in the Australian legal system. In several significant recent decisions, the High Court of Australia ('HCA') has been (re)drawn into the question of if and when precedent should be overruled in the Australian constitutional setting. This has attracted controversy in some but not all cases. In *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* ('*NZYQ*'),¹ the HCA overruled *Al-Kateb v Godwin* ('*Al-Kateb*'), a precedent that was over two decades old.² *NZYQ* concerned whether non-citizens in immigration detention with no reasonable prospects of release or removal could be indefinitely detained. The result, against the Commonwealth, was the immediate release of 153 detainees into the community.³ In *Vanderstock v Victoria* ('*Vanderstock*'), the HCA divided on whether to

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¹ (2023) 280 CLR 137 ('*NZYQ*').

² (2004) 219 CLR 562 ('*Al-Kateb*').

³ Department of Home Affairs (Cth), 'Community Protection Summary April 2024' (Media Release, April 2024) 2 <<https://www.homeaffairs.gov.au/research-and-stats/files/community-protection-summary-april-2024.pdf>>. This figure has risen over time: see Rebecca Ananian-Welsh and Peter Billings, 'Lim After *NZYQ*: Delimiting Constitutional Constraints on State Power to Punish Non-Citizens' (2026) 54(1) *University of Western Australia Law Review* (advance), 13; see also Tamara Tulich, Mary Anne Kenny and Sarah Murray, 'The Changing Landscape of

overturn *Dickenson's Arcade Pty Ltd v Tasmania*.⁴ A majority departed from this precedent and held that Victoria's zero-or-low emissions vehicle tax was an excise (an exclusive power of the Commonwealth Parliament under s 90 of the *Australian Constitution*), and therefore unconstitutional. In *Commonwealth v Yunupingu* ('Yunupingu'), the HCA overruled *Teori Tau v Commonwealth*, and held that the 'just terms' guarantee in s 51(xxxi) of the *Australian Constitution* applies to legislative acts of the Commonwealth supported by the 'territories power' in s 122.⁵ And in *G Global 120E T2 Pty Ltd v Commissioner of State Revenue (Qld)*, the Court unanimously overruled *University of Wollongong v Metwally*.⁶ In other recent cases, the HCA has denied leave to reopen and overrule. In *Vunilagi v The Queen*, while the HCA was asked to reopen and re-explain or overrule *R v Bernasconi*, only Edelman J addressed this aspect of the appeal.⁷ In *MJZP v Director-General of Security* ('MJZP'), the HCA unanimously denied leave to reopen *SDCV v Director-General of Security*.⁸ And in *Babet v Commonwealth* ('Babet'), the Court unanimously denied leave to reopen *Mulholland v Australian Electoral Commission*.⁹

Meanwhile, in the United States ('US'), the same question has become a focal point of heated controversy and sustained public scrutiny following the landmark overruling of *Roe v Wade* ('Roe') in the 2022 decision of *Dobbs v Jackson Women's Health Organization* ('Dobbs').¹⁰ Together with other high-profile instances in which the current bench of the US Supreme Court ('SCOTUS') has overturned longstanding constitutional precedents, these developments have prompted intense judicial, scholarly, and public debate.

Drawing on the US and Australian experience, this article explores how and when apex courts are willing to overturn their prior decisions on questions of constitutional interpretation,¹¹ and whether a weakened application of *stare decisis* is

Immigration Detention in Australia: Preventive "Crimmigration" and the Legislative Response to NZYQ' (2026) 38(1) *International Journal of Refugee Law* 25, 45.

⁴ *Vanderstock v Victoria* (2023) 279 CLR 333 ('Vanderstock'); *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177.

⁵ *Commonwealth of Australia v Yunupingu* (2025) 99 ALJR 519 ('Yunupingu'); 536 [44] (Gageler CJ, Gleeson J, Jagot J and Beech-Jones JJ), 564–9 [179]–[200] (Gordon J), 580 [242] (Edelman J), 610–11 [373] (Steward J); *Teori Tau v Commonwealth* (1969) 119 CLR 564.

⁶ *G Global 120E T2 Pty Ltd v Commissioner of State Revenue (Qld)* (2025) 99 ALJR 1465, [89]; *University of Wollongong v Metwally* (1984) 158 CLR 447.

⁷ (2023) 279 CLR 259, 313–31 [170]–[220] ('Vunilagi'); *R v Bernasconi* (1915) 19 CLR 629 ('Bernasconi').

⁸ *MJZP v Director-General of Security* (2025) 99 ALJR 1108, 1111 [5] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ), 1116 [28] (Edelman J) ('MJZP'); *SDCV v Director-General of Security* (2022) 277 CLR 241.

⁹ (2025) 99 ALJR 883, [56] (Gageler CJ and Jagot J), [97]–[103] (Gordon J), [203] (Edelman J), [205], [209] (Steward J), [235] (Gleeson J), [259] (Beech-Jones JJ); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181.

¹⁰ *Roe v Wade*, 410 US 113 (1973) ('Roe'); *Dobbs v Jackson Women's Health Organization* 597 US 215 (2022) ('Dobbs').

¹¹ The article's scope is confined to express reversals of precedent. It does not consider what has been termed 'stealth' overruling — the practice by which a court effectively overturns or guts a

appropriate in this context. In doing so, we employ comparative representation-reinforcing theory as a framework for revisiting the justification for weakened *stare decisis* in the constitutional setting, as well as a lens through which to critique recent US developments. We argue that a measured weakening may be justified — in particular, to foster reasonable disagreement and inter-branch dialogue about fundamental rights and values, and to facilitate a court's role in democracy-promoting or 'representation-reinforcing' judicial review.¹² However, when departures from precedent reflect or are perceived to reflect ideologically driven reasoning, this risks eroding a court's sociological legitimacy and public trust. The broader institutional and political context, and outcomes produced by decisions to overrule, are an inescapable factor impacting the relationship between weakened *stare decisis* and both *perceived* and *actual* judicial legitimacy.

The selection of comparators is based on both baseline commonality and meaningful points of difference. Australia and the US are both common law legal systems where *stare decisis* and precedent play a similar role in judicial decision-making. The HCA and SCOTUS are both apex courts that are final arbiters in their respective court hierarchies on questions of constitutional law, and exercise strong-form judicial review in relation to Constitutions that are notoriously difficult to amend. Like the HCA, SCOTUS has indicated that different considerations arise when assessing whether to overrule precedent on questions of constitutional interpretation, versus those involving the prior interpretation of a statute. Arguments in favour of deference 'have special force' in statutory interpretation cases, as 'Congress remains free to alter what [SCOTUS has] done'.¹³ In contrast, as SCOTUS is the only institution that can correct an erroneous interpretation of the *United States Constitution* ('US Constitution') absent a constitutional amendment, the policy justification for *stare decisis* applies 'at its weakest' in the constitutional setting.¹⁴ As explained by Brandeis J in his seminal dissenting opinion in *Burnet v Coronado Oil & Gas Co*:

[I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions. The court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.¹⁵

prior decision without formally acknowledging that it has done so: see, eg, Barry Friedman, 'The Wages of Stealth Overruling (With Particular Attention to *Miranda v Arizona*)' (2010) 99(1) *Georgetown Law Journal* 1; Christopher J Peters, 'Under-the-Table Overruling' (2008) 54 *Wayne Law Review* 1067.

¹² This builds on the ideas expressed in Rosalind Dixon, 'The Forms, Functions, and Varieties of Weak(ened) Judicial Review' (2019) 17(3) *International Journal of Constitutional Law* 904.

¹³ *John R Sand & Gravel Co v United States*, 552 US 130, 139 (2008).

¹⁴ *Agostini v Felton*, 521 US 203, 235 (1997).

¹⁵ 285 US 393, 406–8 (1932) ('*Burnet*').

At the same time, there are important distinctions between Australia and the US that are relevant to the operation of *stare decisis*, which will be considered in more detail below in Part V. Rather than precluding or diminishing the value of comparative inquiry, it is argued that these differences *themselves* are part of the reason that the US is a helpful counterpoint in this area. For example, they focus attention on the importance of cultural and institutional factors to the relationship between weakened *stare decisis* and legitimacy and public perceptions.

The comparative inquiry is thus not undertaken for the purpose of positively transplanting aspects of the SCOTUS's approach into the Australian constitutional setting. Instead, we draw upon the work of scholars such as Kim Lane Scheppele and Sujit Choudhry who have explored how comparative constitutional analysis can usefully result in 'non-borrowing'¹⁶ — for example, by producing 'aversive' or cautionary insights of relevance to a local jurisdiction.¹⁷ Similarly, as Rosalind Dixon has explained, comparison can be 'reflective' in nature, aimed at identifying similarities and differences between one's own constitutional system and those in other countries in order to better 'understand the self'.¹⁸

The article is structured as follows. Part II introduces *stare decisis* in the constitutional setting. It outlines the competing considerations that both the HCA and SCOTUS acknowledge as coming into tension when deciding whether to overrule, and explains how the difficulties of constitutional amendment can be understood to justify a comparatively weakened approach to *stare decisis* in the constitutional context. It also sets out the formal factors that each Court has articulated as guiding the *stare decisis* inquiry. Part III introduces the comparative representation-reinforcing theory lens and argues that it provides a valuable framework for assessing when a weakening of *stare decisis* is appropriate in the constitutional domain. Drawing on this scholarship, it explores principled justifications for the weakening of *stare decisis* in relation to constitutional precedent, including its potential to enhance democratic dialogue, reasonable disagreement about fundamental rights and values, and judicial responsiveness. Part IV turns to recent US experience to examine the extent to which these concerns are reflected in SCOTUS's *stare decisis* case law, while also drawing out insights regarding the potential *limits* of those justifications — specifically, the conditions under which a weakened *stare decisis* may begin to undermine, rather than advance, the very values it is said to serve. In particular, it highlights the risks that arise when

¹⁶ On 'non-borrowing' see Lee Epstein and Jack Knight, 'Constitutional Borrowing and Nonborrowing' (2003) 1(2) *International Journal of Constitutional Law* 196.

¹⁷ See Kim Lane Scheppele, 'Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models' (2003) 1(2) *International Journal of Constitutional Law* 296; Sujit Choudhry, 'The *Lochner* Era and Comparative Constitutionalism' (2004) 2(1) *International Journal of Constitutional Law* 1.

¹⁸ Rosalind Dixon, 'How to Compare Constitutionally: An Essay in Honor of Mark Tushnet' in Madhav Khosla and Vicki Jackson (eds), *Redefining Comparative Constitutional Law: Essays for Mark Tushnet* (Oxford University Press, 2024) 1, 4.

flexibility in overruling constitutional precedent is perceived as being moulded by, or used as, a vehicle for political ideology. Part V considers the relevance of these lessons for Australia. It argues that while significant cultural, institutional, and structural differences insulate the HCA to some degree from the more acute pressures facing SCOTUS, the Court is not entirely immune from comparable risks. Part VI concludes.

This article thus makes several contributions. Drawing on comparative representation-reinforcing literature, it revisits the justification for weakened *stare decisis* in the constitutional context and evaluates the extent to which each jurisdiction adopts a weakened approach. Considering recent jurisprudential developments, this is an important doctrinal and critical contribution. This article also offers a novel comparative perspective on the question of when and how apex courts can and should overrule their prior constitutional decisions, drawing attention to the relationship between *stare decisis* and judicial legitimacy.

II STARE DECISIS IN THE AUSTRALIAN AND UNITED STATES CONSTITUTIONAL SETTINGS

A The Unique Nature of Constitutional Stare Decisis

It is well-recognised in Australia that the decision to overrule constitutional precedent is governed by different considerations than the decision to overturn precedent concerning statutory construction or the common law.¹⁹ While the precise considerations relevant to each setting are debated, one commonly adopted approach is to start with the questions set out in *John v Federal Commissioner of Taxation* ('John'),²⁰ which drew from the reasoning of Gibbs CJ in *Commonwealth v Hospital Contribution Fund of Australia* ('Hospital Contribution Fund').²¹ The 'John factors' are:

1. whether the earlier case rested upon a principle carefully worked out in a significant succession of cases;
2. whether there were differences in the reasoning in the earlier case;
3. whether the earlier case had achieved no useful result but led to considerable inconvenience; and

¹⁹ Anthony Mason, 'The Use and Abuse of Precedent' (1988) 4(2) *Australian Bar Review* 93, 94; Michael Kirby, 'Precedent Law, Practice and Trends in Australia' (2007) 28(3) *Australian Bar Review* 243, 247; Joshua Thomson and Madeleine Durand, 'Overruling Constitutional Precedent' (2021) 95(2) *Australian Law Journal* 139, 139.

²⁰ (1989) 166 CLR 417, 438–9 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ) ('John').

²¹ (1982) 150 CLR 49, 56–8 ('Hospital Contribution Fund').

4. whether the earlier case had not been independently acted on in a manner which militated against re-consideration.

However, the ‘answers to these questions rarely resolve the overall issue’, depend ‘upon broad questions of evaluation’, and ‘can point in different directions’.²²

In the constitutional setting, however, the ‘sworn loyalty’ of HCA Justices is to the ‘*Constitution* first of all’ rather than the doctrine of *stare decisis*.²³ In constitutional cases *especially*, it is ‘not ... better that the Court should be persistently wrong than that it should be ultimately right’.²⁴ This is at least partly because ‘[e]rrors in constitutional interpretation are not remediable by the legislature’.²⁵ As questions of constitutional interpretation can only be altered (outside of the referendum process) by the HCA reopening and overruling precedent,²⁶ a lower threshold is applied in this context compared with other matters.²⁷

However, that ‘the effects are more permanent than in ordinary litigation’ can also be taken to suggest that the HCA should have ‘as sound a basis as possible for overruling’.²⁸ Thus, applications to reopen and overrule constitutional precedent are subject to ‘the conservative cautionary principle, adopted in the interests of continuity and consistency in the law’.²⁹ Exceptional circumstances will be required to overrule a constitutional holding and caution should be exercised in so doing.³⁰ This was reiterated by Kitto J 70 years ago: ‘[e]ven in constitutional cases ... it is obviously undesirable that a question decided by the Court after full

²² *Vunilagi* (n 7) 310 [160] (Edelman J). One of us has argued elsewhere that the *John* factors do not reflect a complete understanding of the Court’s approach to questions of *stare decisis* in the Australian constitutional setting: Ashleigh Barnes, ‘Stare Decisis and Constitutional Guarantees: *Commonwealth v Yunupingu*’ (2024) 46(3) *Sydney Law Review* 347. For a novel restatement of the *John* factors and *stare decisis* in the Australian High Court, see Edelman J’s judgment in *Vunilagi* (n 7) 299–332.

²³ *Australian Agricultural Co v Federated Engine-Drivers and Firemen’s Association of Australasia* (1913) 17 CLR 261, 278 (Isaacs J) (‘*Australian Agricultural*’).

²⁴ *Ibid.*

²⁵ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 554 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) (‘*Lange*’). See also *Queensland v Commonwealth* (1977) 139 CLR 585, 598–9 (Gibbs J), 630 (Aickin J) (‘*Second Territory Senators’ Case*’); *Re Tyler*; *Ex parte Foley* (1994) 181 CLR 18, 38 (McHugh J) (‘*Re Tyler*’).

²⁶ *Cole v Whitfield* (1988) 165 CLR 360, 400; *Lange* (n 25) 554 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ). See also *Second Territory Senators’ Case* (n 25) 620 (Aickin J); *Hospital Contribution Fund* (n 21) 72 (Aickin J).

²⁷ *Second Territory Senators’ Case* (n 25) 620 (Aickin J); *Street v Queensland Bar Association* (1989) 168 CLR 461, 489 (Mason CJ), 518–19 (Brennan J), 549 (Dawson J), 588 (McHugh J) (‘*Street*’); *Re Tyler* (n 25) 38 (McHugh J).

²⁸ Gian Boeddu and Richard Haigh, ‘Terms of Convenience: Examining Constitutional Overrulings by the High Court’ (2003) 31(1) *Federal Law Review* 167, 168.

²⁹ *Wurridjal v Commonwealth* (2009) 237 CLR 309, 352–3 [70]–[71] (French CJ) (citations omitted); *NZYQ* (n 1) 150 [18] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ) (referring to the ‘strongly conservative cautionary principle’) (emphasis added); *Ravbar v Commonwealth* (2025) 99 ALJR 1000, 1016–17 [26] (Gageler CJ) (‘*Ravbar*’); *MJZP* (n 8) 1112 [10] (Gageler CJ, Gordon, Steward, Gleeson, Jagot, Beech-Jones JJ).

³⁰ *Second Territory Senators’ Case* (n 25) 599 (Gibbs CJ), 602 (Stephen J), 620 (Aickin J).

consideration should be re-opened without *grave reason*'.³¹ In the same case, Williams J observed that differences of opinion on the HCA were insufficient to disrupt constitutional precedents.³²

While decisions whether to overrule constitutional precedent are not exclusively concerned with correct constitutional interpretation, '*beyond a certain point correctness will be the overriding concern*',³³ This is demonstrated by a range of statements asserting, but not necessarily defining, certain thresholds of correctness.³⁴ Justice Isaacs advocated overruling when a precedent was 'clearly' or 'manifestly' wrong;³⁵ Barwick CJ considered overruling was necessary when an error in precedent was 'clearly made out';³⁶ McHugh J overruled where a line of precedent was 'fundamentally wrong';³⁷ and a unanimous HCA observed that it will overrule if the precedent concerns a question of 'vital constitutional importance' and is 'manifestly wrong'.³⁸ More recently, Edelman J declined to overrule where precedent was 'not manifestly wrong',³⁹ and was in favour of overruling where precedent was 'manifestly wrong'.⁴⁰ This approach was reiterated in the HCA's unanimous *NZYQ* decision. Here, the same factors that weighed against reopening the statutory construction holding in *Al-Kateb* weighed in favour of the reopening the constitutional holding.⁴¹ The HCA explained that

whilst considerations of legislative reliance and administrative inconvenience are appropriately treated as considerations having weight, 'it is necessary to stop short of treating them as relieving this Court of its duty of proceeding according to law in giving effect to the Constitution which it is bound to enforce'.⁴²

Like the HCA, SCOTUS has also recognised that the difficulty of constitutional amendment justifies application of a weakened approach to *stare decisis* in the constitutional setting. SCOTUS has described the doctrine of *stare decisis* as 'a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to

³¹ *Hughes and Vale Pty Ltd v New South Wales* (1953) 87 CLR 49, 102 ('*Hughes and Vale*') (emphasis added).

³² *Ibid.*

³³ *Boeddu and Haigh* (n 28) 170 (emphasis added).

³⁴ *Ibid* 173.

³⁵ *Australian Agricultural* (n 23) 279. See also *R v The Commonwealth Court of Conciliation and Arbitration* (1914) 18 CLR 54, 58 (Griffiths CJ), 69 (Barton J); *Geelong Harbour Trust Commissioners v Gibbs, Bright & Co* (1970) 122 CLR 504, 516 (Barwick CJ).

³⁶ *Damjanovic & Sons Pty Ltd v Commonwealth* (1968) 117 CLR 390, 396 (Barwick CJ).

³⁷ *McGinty v Western Australia* (1996) 186 CLR 140, 235.

³⁸ *Lange* (n 25) 554 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) (citations omitted).

³⁹ *Vanderstock* (n 4) 571 [609].

⁴⁰ *Vunilagi* (n 7) 300 [132] (Edelman J).

⁴¹ *NZYQ* (n 1) 150 [18], 156 [36] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ).

⁴² *Ibid* 156 [36] (citations omitted), quoting *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 295 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

gauge the respective costs of reaffirming and overruling a prior case'.⁴³ Rather than being 'an inexorable command' or 'a mechanical formula of adherence to the latest decision', *stare decisis* is better viewed as a flexible 'principle of policy'.⁴⁴ At the same time, 'overruling precedent is a serious matter' and 'is not a step that should be taken lightly'.⁴⁵ While a weakened form of *stare decisis* is accepted as applying in the constitutional versus statutory setting in the US, a high threshold (specifically, a 'special justification'⁴⁶ or 'strong grounds')⁴⁷ is still needed to justify overruling prior constitutional decisions. This is similar to the Australian position.

The question of 'whether to reexamine a prior erroneous holding' requires a court to 'balance the importance of having constitutional questions *decided* against the importance of having them *decided right*'.⁴⁸ In making this assessment a range of underlying (and at times competing) values are at play — those promoted by deference to precedent, but also, that might militate towards overruling in particular instances. Adherence to *stare decisis* 'promotes the even-handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process'.⁴⁹ It ensures 'that the law will not merely change erratically' and 'permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals'.⁵⁰ For these reasons, *stare decisis* is of 'fundamental importance' to the rule of law.⁵¹ Conversely, SCOTUS has recognised that departing from precedent will sometimes be a necessary form of 'error correction' — for example, when prior rulings are ill-founded, unworkable, superseded by subsequent legal developments, or premised upon outdated factual or social assumptions. Given the 'uniquely durable' nature of errors in constitutional cases,⁵² allowing erroneous or problematic interpretations to persist arguably itself detracts from the rule of law, and has its own judicial legitimacy implications.⁵³

⁴³ *Planned Parenthood v Casey*, 505 US 833, 854 (1992) (O'Connor, Kennedy and Souter JJ) ('Casey').

⁴⁴ *Payne v Tennessee*, 501 US 808, 828 (1991) (Rehnquist CJ) (citations omitted) ('Payne'). See also *Burnet* (n 15) 405–6 (Brandeis J dissenting).

⁴⁵ *Dobbs* (n 10) 267 (Alito J).

⁴⁶ See *Arizona v Rumsey*, 467 US 203, 212 (1984) (O'Connor J).

⁴⁷ *Janus v American Federation of State, County, and Municipal Employees, Council 31*, 585 US 878, 917 (2018) (Alito J) ('Janus').

⁴⁸ *Citizens United v Federal Election Commission*, 558 US 310, 378 (2010) (Roberts CJ) ('Citizens United') (emphasis in original).

⁴⁹ *Payne* (n 44) 827 (Rehnquist CJ).

⁵⁰ *Vasquez v Hillery*, 474 US 254, 265 (1986) (Marshall J).

⁵¹ *Welch v Texas Department of Highways and Public Transportation*, 483 US 468, 494 (1987) (Powell J). See also *Michigan v Bay Mills Indian Community*, 572 US 782, 798 (2014) (Kagan J); *Casey* (n 43) 854 (O'Connor, Kennedy and Souter JJ).

⁵² *Casey* (n 43) 954–5 (Rehnquist J).

⁵³ *Citizens United* (n 48) 378 (Roberts CJ).

Notwithstanding the prevailing attitudes towards *stare decisis* outlined above, recent US developments — most notably, the current SCOTUS majority's professed commitment to originalist reasoning⁵⁴ — have lent fresh salience to longstanding questions about the potential tensions between interpretive theory and precedent. As majority opinions place increasing weight on text, history, and tradition, this throws into sharper relief the question of how *stare decisis* fits within forms of originalism grounded in contract-based accounts of constitutional legitimacy.⁵⁵ On one view, if the *US Constitution*'s original public meaning is controlling, it is illegitimate for a judge to adhere to precedents that displace or depart from that meaning, as this effectively amounts to an 'improper amendment by judicial fiat' outside art V.⁵⁶ Justice Thomas, for example, has openly expressed a more sceptical stance toward precedent.⁵⁷ By contrast, other prominent originalists — such as the late Antonin Scalia J — treated *stare decisis* instead as a 'pragmatic exception' to originalist philosophy.⁵⁸

B Formal Factors

In the Australian context, in the late 1970s and 1980s a handful of judicial attempts were made to identify 'non-exhaustive and overlapping' questions, factors or considerations that may guide the choice as to whether to overrule precedent.⁵⁹ The most dominant approach is the four questions articulated in *John*, and set out above. It is also worth noting that in Australia, leave is required from the HCA to reopen constitutional precedent. Thus each attempt to overrule involves two questions for determination: first, whether the earlier precedent should be re-opened and, if so, whether it should be overruled. The *John* factors have been harnessed variably by members of the Court at either or both stages of the inquiry.

⁵⁴ We note that despite this *professed* commitment to originalism by a current majority, the Court's actual practice has been somewhat inconsistent in its invocation and treatment of historical sources. See Richard H Fallon, 'Selective Originalism and Judicial Role Morality' (2023) 102(2) *Texas Law Review* 221.

⁵⁵ Chad M Oldfather, 'Methodological Pluralism and Constitutional Interpretation' (2014) 80(1) *Brooklyn Law Review* 1, 23–4.

⁵⁶ *Ibid* 23 (citations omitted).

⁵⁷ See, eg, *Gamble v United States*, 587 US 678, 711 (2019). Thomas J stated: 'I write separately to address the proper role of the doctrine of *stare decisis*. In my view, the Court's typical formulation of the *stare decisis* standard does not comport with our judicial duty under Article III because it elevates demonstrably erroneous decisions — meaning decisions outside the realm of permissible interpretation — over the text of the Constitution and other duly enacted federal law.' See also *United States v Lopez*, 514 US 549, 584 (1995) (Thomas J).

⁵⁸ Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press, 2018) 138–40. ('The whole function of the doctrine is to make us say that what is false under proper analysis must nonetheless be held to be true, all in the interest of stability. It is a compromise of all philosophies of interpretation [S]tare decisis is not part of my originalist philosophy; it is a pragmatic exception to it.' at 139–40.)

⁵⁹ *Vunilagi* (n 7) 310 [160] (Edelman J), citing *Second Territory Senators' Case* (n 25) 630 (Aickin J).

In recent US cases, members of SCOTUS have also attempted to formalise the Court's approach to *stare decisis* analysis. Various iterations of a multi-factor *stare decisis* test have been articulated and applied. In *Janus v American Federation of State, County, and Municipal Employees, Council 31* ('*Janus*'), the majority opinion formally identified five 'important' factors 'that should be taken into account in deciding whether to overrule a past decision': 'the quality of [the precedent's] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision.'⁶⁰

Two years later, in *Ramos v Louisiana* ('*Ramos*'), a majority of the Court identified four factors that SCOTUS had 'traditionally considered' when revisiting a precedent as particularly relevant to the present case. These were: 'the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision.'⁶¹ This largely mirrored four of the *Janus* factors, but omitted the second and fourth factors: the workability of the decision and changed facts since the prior decision, respectively.⁶² In a concurring opinion handed down the same case, Kavanaugh J was critical of previous application of *stare decisis* factors, suggesting that the failure to establish 'any consistent methodology or roadmap for how to analyse all of the factors taken together' had created a 'muddle'.⁶³ His Honour suggested that these 'somewhat elastic *stare decisis* factors' could be better conceptualised as addressing 'three broad considerations' that 'can help guide the inquiry and help determine what constitutes a "special justification" or "strong grounds" to overrule an erroneous constitutional decision.'⁶⁴ First, 'is the prior decision not just wrong, but grievously or egregiously wrong' as a matter of law?⁶⁵ Second, 'has the prior decision caused significant negative jurisprudential or real-world consequences?'⁶⁶ Third, 'would overruling the prior decision unduly upset reliance interests' (that is, the 'legitimate expectations of those who have reasonably relied on the precedent').⁶⁷

⁶⁰ *Janus* (n 47) 917 (Alito J).

⁶¹ 590 US 83, 106 (Gorsuch J) ('*Ramos*').

⁶² It has been suggested that the omission of workability may have been 'a consequence of the subject matter at hand — ie, whether the Sixth Amendment requires unanimity in a jury verdict': Judge Joseph A Greenaway Jr, 'Reflections on Stare Decisis' (2023) 83(1) *Maryland Law Review* 2, 4.

⁶³ *Ramos* (n 61) 121.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.* This may be informed by examination of 'the quality of the precedent's reasoning, consistency and coherence with other decisions, changed law, changed facts, and workability, among other factors': at 122.

⁶⁶ *Ibid.* 122. This inquiry might consider the precedent's effect on the law and legal system (for example, its 'workability' and 'consistency and coherence with other decisions'), but notably, could also encompass the precedent's 'real-world effects on the citizenry'.

⁶⁷ *Ibid.* On this question, the Court might examine 'a variety of reliance interests and the age of the precedent, among other factors'.

In *Dobbs*, the majority explicitly cited the approach to *stare decisis* adopted by the *Janus* majority and the concurring opinion of Kavanaugh J in *Ramos*.⁶⁸ In arguing that *Roe* and *Planned Parenthood v Casey* ('*Casey*')⁶⁹ should be overruled, the majority in *Dobbs* reasoned based on five *stare decisis* factors that were asserted to 'weigh strongly in favor' of departing from the prior decisions: 'the nature of their error, the quality of their reasoning, the 'workability' of the rules they imposed on the country, their disruptive effect on other areas of law, and the absence of concrete reliance.'⁷⁰ This version of the test thus included the additional 'nature of the error' factor, and the slightly distinctive 'disruptive effect on other areas of law' criterion — a variation on the 'consistency with related decisions' and subsequent legal developments considerations articulated in *Ramos*. More recently, in *Loper Bright Enterprises v Raimondo* ('*Loper Bright*'), the majority again referenced *Janus* in identifying 'the *stare decisis* considerations most relevant here — "the quality of [the precedent's] reasoning, the workability of the rule it established, ... and reliance on the decision"'.⁷¹ It was asserted that all three of these factors 'weigh in favor of letting *Chevron* go'.⁷²

As is evident from these passages, there are parallels between many of these US factors and those espoused by members of the HCA as relevant to *stare decisis* analysis in the Australian constitutional context. The US inquiry into whether a precedent is egregiously wrong *as a matter of law* (capturing quality of reasoning and consistency and coherence with other decisions) has similarities with the first two *John* factors — whether the earlier case rested upon a principle carefully worked out in a significant succession of cases; and whether there were differences in the reasoning in the earlier case. Likewise, the US considerations of workability and reliance have close parallels with the latter two *John* factors — whether the earlier case had achieved no useful result but led to considerable inconvenience; and whether the earlier case had not been independently acted on in a manner which militated against re-consideration. At the same time, other US factors (for example, changed facts) do not have clear counterparts in Australian *stare decisis* jurisprudence.

III WHY WEAKEN? A COMPARATIVE REPRESENTATION–REINFORCING THEORY LENS

As outlined above, SCOTUS and the HCA both adopt a 'weakened' approach to constitutional *stare decisis*.⁷³ This distinction rests on institutional considerations:

⁶⁸ *Dobbs* (n 10) 267–8 (Alito J).

⁶⁹ *Casey* (n 43).

⁷⁰ *Dobbs* (n 10) 268 (Alito J).

⁷¹ 603 US 369, 407 (2024) (Roberts CJ) ('*Loper Bright*'), citing *Knick v Township of Scott*, 588 US 180 (2019), which quoted *Janus* (n 47) on *stare decisis* factors.

⁷² *Loper Bright* (n 71) 407 (Roberts CJ).

⁷³ Scalia (n 58); Dixon, 'The Forms, Functions, and Varieties of Weak(ened) Judicial Review' (n 12).

while legislatures can amend statutes to correct or respond to judicial (mis)interpretations, constitutional errors are comparatively difficult — sometimes virtually impossible — to remedy through ordinary political processes. This asymmetry supplies a principled basis for affording constitutional precedents less presumptive force than statutory ones.

But this general distinction does not exhaust the analysis. Once we move to case-specific decisions to overrule, a further set of considerations comes into play. Not all constitutional precedents are of equal weight, quality, systemic importance, or cultural significance. Courts therefore need to assess whether, within the already-weakened constitutional setting, there exist *additional* reasons to justify overruling a particular decision — or alternatively, that may caution against doing so. The inquiry therefore becomes calibrated not only by the constitutional–statutory distinction, but also by the distinctive features of the specific precedent under challenge. The formal factors outlined above — those the HCA and SCOTUS identify as ostensibly guiding the *stare decisis* inquiry — provide a useful starting point, in that they structure the apex courts' stated analysis. Yet these judicial formulations capture only part of the picture. Several reasons relevant to a decision to overrule may remain *unarticulated* by courts. Standing alone, the articulated reasons do not fully account for when and why courts ultimately choose to weaken, maintain, or reaffirm particular constitutional precedents.

In this article, we argue that comparative representation–reinforcing theory ('CRRT') offers a valuable theoretical framework for analysing the deeper relationship between the weakening of *stare decisis* and questions of judicial and institutional legitimacy.⁷⁴ Our concern extends beyond the well-established doctrinal distinction between constitutional and other precedent. Rather, our focus is on the insights this theoretical lens offers for identifying the circumstances in which a weakening of particular constitutional precedents (that is, the decision to overrule in specific cases) may be appropriate or justifiable from a democratic responsiveness perspective, as against those in which it carries significant risks. By applying this framework, we offer a novel basis for evaluating judicial decisions on *stare decisis* in a constitutional setting, and one that foregrounds the dynamic relationship between this doctrine and judicial legitimacy.

CRRT theorists focus on the role of courts as protectors and promoters of representative government. CRRT is an umbrella term. CRRT theorists revise and update the ideas advanced by John Hart Ely in *Democracy and Distrust*.⁷⁵ At the core is Ely's argument that courts have a valuable role to play in protecting the 'channels of political change', and the rights of electoral or 'discrete and insular'

⁷⁴ CRRT is also referred to as 'comparative political process theory' or 'CPPT'. We adopt CRRT in this article, for the reasons advanced in Rosalind Dixon, 'Courts and Comparative Representation–Reinforcing Theory' (2025) 14(2) *Global Constitutionalism* 206.

⁷⁵ John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980).

minorities.⁷⁶ Ely provided ‘an important theoretical defence of the legitimacy of judicial review in a democracy, while at the same time helping point to cases in which more restrained or deferential forms of review by courts may be appropriate.’⁷⁷ Ely’s work is revised to apply to the current age of constitutional courts with broad powers of review and which play a role in enforcing constitutional guarantees.⁷⁸ However, courts do not act alone and CRRT also recognises the collaboration and partnership between courts, the legislature, the executive and ‘fourth branch’ agencies to uphold constitutions.⁷⁹

A weakened approach to *stare decisis* in constitutional decision-making weakens the finality of judicial review more generally.⁸⁰ Weak-form judicial review, a term coined by Mark Tushnet, refers to constitutional courts that do not enjoy formal legal finality.⁸¹ This concept has dominated the field of modern constitutional studies. The normative claim, advanced by Tushnet and other ‘political constitutionalists’, is that weakened judicial review addresses democratic objections to judicial review (namely, that judicial review transfers contested moral and political questions from elected parliaments to unelected courts). This is also the claim developed by proponents of CRRT⁸² — weakened judicial review may enhance the Court’s role in democracy promotion. CRRT ‘responds to both the promise of courts as potential guardians of democracy and democratic values, and the inevitable *limits* on courts’ and their capacity and legitimacy in performing this role.’⁸³

Dixon has advanced a CRRT theory of ‘responsive judicial review.’ It is premised on two ideas regarding judicial review:

[F]irst, that judicial review should seek actively to protect and promote the capacity of a democratic constitutional system to respond to the needs and aspirations of democratic majorities; and second, that in doing so courts should be responsive to their own institutional position and role, including limits on their capacity and legitimacy.⁸⁴

One aspect of responsive judicial review is ensuring courts can respond to democratic deficit. And one mechanism for responding to such deficits is employing

⁷⁶ Ibid. Note that ideas of this nature have also been influential in Australia, most significantly as influences on the constitutional thinking and approach of (now Chief) Justice Stephen Gageler: Rosalind Dixon and Amelia Loughland, ‘Comparative Constitutional Adaption: Democracy and Distrust in the High Court of Australia’ (2021) 19(2) *International Journal of Constitutional Law* 455.

⁷⁷ Rosalind Dixon, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age* (Oxford University Press, 2023) 2–3 (‘*Responsive Judicial Review*’).

⁷⁸ Dixon, ‘Courts and Comparative Representation – Reinforcing Theory’ (n 74) 206–7.

⁷⁹ Ibid 208.

⁸⁰ Cass R Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard University Press, 2001) 19, 21; Dixon, ‘The Forms, Functions, and Varieties of Weak(ened) Judicial Review’ (n 12) 914.

⁸¹ Mark Tushnet, ‘Alternative Forms of Judicial Review’ (2003) 101 *Michigan Law Review* 2782.

⁸² Stephen Gardbaum, ‘Comparative Political Process Theory’ (2020) 18(4) *International Journal of Constitutional Law* 1429.

⁸³ Dixon, *Responsive Judicial Review* (n 77) 15.

⁸⁴ Ibid 204.

strategies that weaken the finality of judicial review. For Dixon, ‘appropriately weakened forms of *stare decisis* allow legislators broad — if somewhat more implicit — scope to engage in a “dialogue” with a court.’⁸⁵ A weakened form of *stare decisis* can therefore pursue democratic values in a way that recognises the limits on the capacity and legitimacy of courts to engage in representation-reinforcing review. On this account, the actual and perceived legitimacy of apex courts, as well as the democratic functioning of pluralist societies, weighs against an invariably strong approach to *stare decisis*.

However, the doctrine of *stare decisis* pursues a range of values, including but not limited to preserving the institutional legitimacy of courts (which in turn contributes to maintaining a functional democracy).⁸⁶ Thus, while CRRT theorists recognise that a weakened *stare decisis* doctrine may enable courts to preserve institutional legitimacy in the face of democratic dysfunction, advocates for a stronger approach to *stare decisis* maintain that institutional legitimacy is preserved by applying that doctrine. In brief, the doctrine of *stare decisis* involves balancing predictability, equality, certainty, efficiency and judicial restraint and their relationship to institutional legitimacy against legal correctness, which in turn serves rule of law values and also has implications for institutional legitimacy. An appropriate *stare decisis* framework must apply *stare decisis* with the necessary *strength* in any given case, so as to ensure the right balance is struck between these different values. This begs the question, *when* should *stare decisis* be weakened?

To conclude this section, we briefly advance two core circumstances where a weakened approach to *stare decisis* in constitutional law settings may be justified. First, where a precedent concerns a constitutional right or value. Second, to facilitate the Court’s role in promoting democracy. Each will be considered in turn. In Part IV, we consider whether and how these considerations have affected US application of the *stare decisis* doctrine. We demonstrate that misuse of such considerations has caused SCOTUS doctrine to come under strain.

A Fundamental Rights and Values

The first core circumstance where a weakened approach to *stare decisis* in the constitutional law setting may be justified is where the precedent concerns fundamental rights or values. It is well-recognised that a fundamental problem for rights protection and questions of constitutional justice in pluralist societies such

⁸⁵ Ibid.

⁸⁶ For discussion of the justifications for *stare decisis* see Earl Maltz, ‘The Nature of Precedent’ (1988) 66(2) *North Carolina Law Review* 367; Jeremy Waldron, ‘Stare Decisis and the Rule of Law: A Layered Approach’ (2012) 111(1) *Michigan Law Review* 1; Randy J Kozel, *Settled Versus Right: A Theory of Precedent* (Cambridge University Press, 2017); Steven J Burton, ‘The Conflict Between Stare Decisis and Overruling in Constitutional Adjudication’ (2014) 35(5) *Cardozo Law Review* 1687.

as Australia and the US is the reasonable disagreement among citizens that persists as to the concrete scope of rights.⁸⁷ For decades, constitutional scholars have divided over where the primary responsibility for the protection of rights should lie.⁸⁸ In recognition of the persistent reasonable disagreement on the scope of rights and other open-textured express or implied constitutional guarantees, CRRT theorists argue that the primary responsibility for answering these questions should be with the political branches of government. The most principled way to resolve this kind of disagreement, among free and equal citizens, is to give effect to the (considered) understandings of a majority of voters on these questions. In a representative democracy, this often means giving effect to the understandings of the Parliament and the executive government.⁸⁹

Yet legislative and executive actors are also imperfect agents of human rights protection in most real-world democracies. As Dixon has explained, they are subject to a range of blockages, pathologies or sources of ‘dysfunction’ that can undermine the protection of rights. Courts are often well placed to help counter these blockages — or to help reinforce, or complement, the functioning of the democratic process in respect of the protection of rights. However, it is important that courts do not overreach in the performance of this kind of ‘representation-reinforcing’ role.⁹⁰

One possible mechanism for avoiding such overreach is to apply a weakened *stare decisis* to questions of constitutional rights and guarantees.⁹¹ This has the potential to demonstrate both a recognition of the importance of questions as to the appropriate scope of constitutional rights and guarantees and a willingness on the part of courts to prioritise legal correctness in their interpretation.⁹² This approach enables courts to revise their answers to questions as to the appropriate scope of constitutional rights and guarantees, bringing them up to date with evolving understandings and factual circumstances.⁹³ It also encourages legislators and executive actors to take responsibility for the positive protection of

⁸⁷ Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999).

⁸⁸ Ely (n 75); Jeremy Waldron, ‘The Core of the Case against Judicial Review’ (2006) 115(6) *Yale Law Journal* 1346, 1353–4 (‘The Core of the Case’).

⁸⁹ Waldron, *Law and Disagreement* (n 87) 298–301; Waldron, ‘The Core of the Case’ (n 88) 1360–2; Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007) 13–16, 148–50.

⁹⁰ Dixon, *Responsive Judicial Review* (n 77) 42–7, 123–6; Rosalind Dixon, ‘The New Responsive Constitutionalism’ (2024) 87(4) *Modern Law Review* 799, 807–9, 815–17 (‘New Responsive Constitutionalism’).

⁹¹ Dixon, *Responsive Judicial Review* (n 77) 198–201; Dixon, ‘New Responsive Constitutionalism’ (n 90) 818–20; Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press, 2009) 22–5 (‘Weak Courts, Strong Rights’); Waldron, ‘The Core of the Case’ (n 88) 1353–4.

⁹² Dixon, *Responsive Judicial Review* (n 77) 200–1; Tushnet, *Weak Courts, Strong Rights* (n 91) 24–6.

⁹³ Dixon, ‘New Responsive Constitutionalism’ (n 90) 819–20. We note that changed facts (or understandings of the relevant facts) has been explicitly recognised as a *stare decisis* factor by SCOTUS, but not the HCA.

constitutional guarantees, as it facilitates a weak form of 'dialogue' between branches.⁹⁴ A 'second look' case, for example, involves a dynamic interaction between the court and the legislature regarding constitutional validity. When a court strikes down a law for violating a constitutional right or guarantee, the legislature may respond by attempting to rewrite the law. A 'second look' case occurs when the court is then asked to review the modified legislative sequel to determine if the revised law is cured of constitutional vices.⁹⁵ Parliament and the executive are more likely to engage in rights-protective action if they appreciate a court may apply a weaker *stare decisis* in an appropriate 'second-look' case.⁹⁶

If fundamental rights and values are relevant to the strength of the application of *stare decisis*, further questions arise. Should *stare decisis* always be weakened and weakened to the same degree or should *stare decisis* be weakened according to another set of considerations? Concerning the rights context specifically, the following question is also pertinent:

[I]s overruling only more appropriate where it will increase an individual right or does the same higher standard apply where it would restrict it? In other words, is *stare decisis* less important to incorrect interpretations of constitutional rights that had previously expanded such a right or should it be treated the same?⁹⁷

It is arguable, from a CRRT perspective, that a weakened *stare decisis* in the context of constitutional rights and guarantees generally is justified, on the basis that constitutional rights and guarantees are likely to be subject to reasonable disagreement among citizens in pluralist societies. This means a weaker form of *stare decisis* could arguably apply whether the argument to reopen constitutional precedent is one that proposes to weaken or to strengthen the scope of the constitutional right. But this argument does not constrain the weakened *stare decisis* according to any other considerations.

It is also arguable, from a *principled* CRRT perspective, that rights or values connected to the democratic system established by the relevant constitution should be protected against restriction by a strong application of *stare decisis*. This would apply to precedent interpreting, for example, the right to vote or to freedom of expression. In this case, the strong application of *stare decisis* is constrained by the additional CRRT values of democracy protection. But Dixon also suggests that *pragmatic* CRRT considerations may support a Court applying a

⁹⁴ Tushnet, *Weak Courts, Strong Rights* (n 91) 30–2.

⁹⁵ Peter W Hogg and Allison A Bushell, 'The Charter Dialogue Between Courts and Legislatures (Or Perhaps The Charter of Rights Isn't Such a Bad Thing After All)' (1997) 35 *Osgoode Hall Law Journal* 75, 85; Kent Roach, 'Dialogue or Defiance: Legislative Reversal of Supreme Court Decisions in Canada and the United States' (2006) 4 *International Journal of Constitutional Law* 347, 368–9.

⁹⁶ Dixon, *Responsive Judicial Review* (n 77) 205–7; Tushnet, *Weak Courts, Strong Rights* (n 91) 33–4; Mark Tushnet and Rosalind Dixon, 'Weak-Form Review and its Constitutional Relatives: An Asian Perspective' in Rosalind Dixon and Tom Ginsburg (eds), *Comparative Constitutional Law in Asia* (Edward Elgar Publishing, 2014) 102.

⁹⁷ Boeddu and Haigh (n 28) 173.

weakened *stare decisis* in these cases, in circumstances of foreseeable risks of backlash against a Court.⁹⁸ For Dixon, ‘democratic backlash’ refers to forms of backlash against a court, which erodes a Court’s capacity to implement democratic constitutional requirements.⁹⁹ In such cases, Dixon considers there may still be a role for weakening *stare decisis* even in cases involving attacks on constitutional democratic structures. Unlike cases concerning other fundamental rights and values, which may attract reasonable democratic disagreement, in cases attacking democracy

the argument for judicial weakness is wholly pragmatic rather than principled in nature: it is not that there is reasonable disagreement about what democracy is, or requires. Rather, it is that narrow rulings, or weakened remedies, may help courts ‘to live to fight another day’ in defense of democracy rather than further opportunities for the expression of reasonable democratic disagreement.¹⁰⁰

Pragmatic or prudential considerations of this kind will raise serious objections for some scholars, practitioners and judges.¹⁰¹ The alternative view is that Courts should exercise exclusively principled judgment, adopting the best legal interpretation of democratic constitutional requirements without regard to external considerations.¹⁰²

B Democratic Responsiveness and Institutional Legitimacy

The second core circumstance where a weakened approach to *stare decisis* in the constitutional law setting *may* be justified is where overruling or upholding the impugned precedent may facilitate democratic function — or, in other words, where overruling or upholding the impugned precedent may facilitate the Court’s role in promoting democracy. The overarching claim is that a weakened *stare decisis* may assist Courts to perform its democracy-protecting or representation-reinforcing role. It is rare for a Court to explicitly endorse such an approach.¹⁰³ Dixon has argued for Courts to appropriately weaken *stare decisis* ‘to allow legislators broad — if somewhat more implicit — scope to engage in “dialogue” with a court’.¹⁰⁴ In this article we consider a related question: how, *if at all*, an apex court should incorporate these purportedly democratic considerations into its *stare decisis* framework? One possibility is for an apex court to consider the role of public opinion when considering reopening and overruling constitutional precedent. There are at least two ways in which the Court’s role in democracy

⁹⁸ Dixon, *Responsive Judicial Review* (n 77) 216–28.

⁹⁹ *Ibid* 9.

¹⁰⁰ *Ibid* 217.

¹⁰¹ *Ibid* 225.

¹⁰² *Ibid*.

¹⁰³ Dixon, ‘The Forms, Functions, and Varieties of Weak(ened) Judicial Review’ (n 12) 915.

¹⁰⁴ Dixon, *Responsive Judicial Review* (n 77) 204.

protection may play a part of *stare decisis* analysis. First, an apex court applying *stare decisis* could be (either expressly or impliedly) influenced by public perception of the impugned precedent itself. Second, an apex court applying *stare decisis* could be (expressly or impliedly) informed by public perception of the Court as an institution, if it is to overrule its own precedent. In other words, the Court could be ‘responsive’ to foreseeable risks of democratic backlash.¹⁰⁵ The first type of case may weigh in favour of *either* a *strong* or *weak* application of *stare decisis*. The second type of case tends to support a *strong* application of *stare decisis*.¹⁰⁶

IV STARE DECISIS UNDER STRAIN IN THE US: TESTING THE LIMITS OF WEAKENING FROM A CRRT PERSPECTIVE

In Part III, we identified two possible justifications for a weakening of *stare decisis* (that is, a greater willingness to overrule) in relation to specific constitutional precedents: first, to foster reasonable disagreement and inter-branch dialogue concerning fundamental rights and values; and second, to facilitate the Court’s ‘representation-reinforcing’ or democracy promoting role. In this Part, we turn to recent US experience to examine what insights it offers about the potential *limits* of these justifications — specifically, the conditions under which a weakened *stare decisis* may begin to undermine, rather than advance, the very values it is said to serve.

Few constitutional issues have attracted more public attention and controversy in the US in recent years than the current SCOTUS majority’s willingness to overrule long-standing precedent. The immediate precursor to these developments was President Donald Trump’s appointment of three SCOTUS judges during one four-year term: Neil Gorsuch (2017), Brett Kavanaugh (2018), and Amy Coney Barrett (2020). These appointments dramatically altered the Court’s jurisprudential and ideological balance and firmly entrenched a 6:3 conservative ‘supermajority’. Justice Gorsuch filled the seat left by the late Antonin Scalia J after a prolonged Senate blockade prevented President Barack Obama’s nominee, Merrick Garland, from being considered. Justice Kavanaugh succeeded Anthony Kennedy J, a moderate ‘swing’ vote on key issues like abortion and LGBTQIA+ rights, in a confirmation hearing marred by allegations of sexual assault. Justice Barrett was nominated and then swiftly confirmed in the final months of Trump’s first presidency following the passing of Ruth Bader Ginsburg J, a stalwart of the Court’s liberal wing.

¹⁰⁵ Ibid 216. Recall that democratic backlash’ refers to forms of backlash against a court, which erode a court’s capacity to implement democratic constitutional requirements.

¹⁰⁶ Ibid 216, 231–2, 240–1. However consider also the prudential or pragmatic considerations Dixon suggests should inform the *stare decisis* analysis set out above, and which may support a weakened application of *stare decisis*.

Shortly following these appointments, SCOTUS handed down a series of high-profile decisions overturning long-standing precedents. In the 2022 decision of *Dobbs*, a bitterly divided Court overruled *Roe* and held that the *US Constitution* does not guarantee the right to an abortion.¹⁰⁷ The following year, in *Students for Fair Admissions Inc v President and Fellows of Harvard College*,¹⁰⁸ the Court effectively overruled two precedents to hold that race-conscious affirmative action programs in most university admissions processes violate the Equal Protection Clause of the Fourteenth Amendment.¹⁰⁹ In *Loper Bright*, handed down in 2024, the Court abolished the 40-year-old doctrine of ‘*Chevron* deference’,¹¹⁰ under which courts would defer to federal administrative agencies’ reasonable interpretations of ambiguous statutes — a reversal that has the potential to significantly reduce the regulatory power of the administrative state over time.

These decisions have coincided with — and likely contributed to — a sharp decline in public confidence in SCOTUS as an institution, accompanied by an unprecedented partisan divide in perceptions of its performance.¹¹¹ As Chief Justice Stephen Gageler of the HCA observed in 2023, the fact that all five Justices comprising the *Dobbs* majority had ‘been chosen by Republican Presidents running on successive party platforms committed to overturning *Roe*’ likely created a ‘realistic perception that a partisan process of judicial appointment had led to a partisan judiciary’.¹¹² Combined with other factors, including ethics scandals and

¹⁰⁷ *Dobbs* (n 10). The vote to overrule was 5:4 — John Roberts CJ would have upheld the challenged law, but declined to go as far as the majority in overruling *Roe* (n 10) and *Casey* (n 43) in this case. 600 US 181 (2023).

¹⁰⁸ This is arguably an example of ‘stealth’ overruling, as while the previous cases of *Regents of the University of California v Bakke*, 438 US 265 (1978) and *Grutter v Bollinger*, 539 US 306 (2003) were not formally overruled, the majority opinion in *ibid* effectively did so. While this technique falls beyond the scope of the current article, it is helpful to note that both ‘stealth’ overruling and distinguishing might also be examples of weakened judicial review.

¹⁰⁹ *Loper Bright* (n 71) 412 (Roberts CJ) (‘*Chevron* is overruled’).

¹¹⁰ Gallup polling indicates that while 58% of Americans expressed approval of SCOTUS’ performance in July 2020, this figure dropped to just 40% in September 2021 — at the time the lowest level recorded in the past two decades. For context, when Gallup first began tracking the question ‘Do you approve or disapprove of the way the Supreme Court is handling its job?’ in the early 2000s, ratings typically hovered near 60%. Since 2021, public confidence in the Court has remained persistently low. Approval ratings have not exceeded 44% since and, in July 2025, just 39% of Americans approved of the Court’s performance. Significantly, however, this decline in trust is deeply polarised along political lines. In July 2025, a record-breaking 64-point gap was recorded between Republican and Democrat evaluations of SCOTUS’ performance: 75% of Republicans said they approved of how SCOTUS is handling its job, compared to just 11% of Democrats — the lowest rating Gallup has measured for any party group. See Jeffrey M Jones and Sarah Hogenboom-Jones, ‘Record Party Gaps in Job Approval of Supreme Court, Congress’, *Gallup* (online, 7 August 2025) <<https://news.gallup.com/poll/693230/record-party-gaps-job-approval-supreme-court-congress.aspx>>.

¹¹¹ Stephen Gageler, ‘Judicial Legitimacy’ (2023) 97(1) *Australian Law Journal* 28, 31–2.

contentious confirmation hearings, this has fuelled a widespread perception of a crisis in sociological legitimacy for SCOTUS.¹¹³

It is the timing, subject matter, and practical consequences of these particular decisions that have led critics to argue that *stare decisis* has been selectively weakened in a partisan manner — deployed, in effect, as a vehicle for ideological outcomes rather than applied as a principled doctrinal constraint.¹¹⁴ On this view, the problem is not how often the Court overrules, but when, and why.

These developments have attracted extensive critique on both substantive and institutional grounds. The contribution of this article is distinct: we analyse these developments through the lens of CRRT in order to identify what that framework additionally offers — and, in particular, what it reveals about the *limits* of a weakened *stare decisis* in the constitutional setting. We argue that the US experience demonstrates the point at which *stare decisis* risks becoming *too* weak: when there is a reasonable perception that the doctrine has been moulded and deployed as an instrument of ideology, rather than applied as a genuine legal constraint. Such perceptions can threaten to erode a court's sociological legitimacy and public trust and, critically, to undermine the democratic-responsiveness rationale that could justify overruling in the first place. This is regardless of whether the decisions in question are *formally* defensible. In developing this argument, we turn now to apply the CRRT lens to recent US *stare decisis* case law — particularly, to consider the relevance of cases concerning constitutional rights and liberties and democratic responsiveness.

A Fundamental Rights and Values

In addition to the formally enumerated factors set out in Part II — including quality of reasoning, workability, reliance, consistency with other related decisions, and changed facts (or understanding of the relevant facts — there has also been a suggestion in US *stare decisis* jurisprudence that the strength of SCOTUS's adherence to precedent in a particular case is influenced by whether constitutional rights are implicated. For example, statements in recent decisions such as *Janus* and *Ramos* assert that *stare decisis* is weaker where the challenged precedent narrows rights protection. This can be contrasted with *Dobbs*, a case which overturned a rights-protective line of constitutional precedent.

Janus concerned a First Amendment challenge to public sector unions charging 'agency fees' to employees who declined to join a union but still benefitted from collective bargaining. In holding that this arrangement impermissibly

¹¹³ See, eg, Peter Coy, 'The Politicization of the Supreme Court Is Eroding Its Legitimacy', *New York Times* (online, 27 June 2022) <<https://www.nytimes.com/2022/06/27/opinion/dobbs-supreme-court-legitimacy.html>>. On sociological legitimacy, see Richard H Fallon Jr, 'Legitimacy and the Constitution' (2005) 118(6) *Harvard Law Review* 1789, 1795–6.

¹¹⁴ See, eg, David Schultz and Jacob Bourgault, 'John Roberts' Supreme Court: The Triumph of Partisanship and Ideology over Precedent' (2025) 109(2) *Minnesota Law Review Headnotes* 113, 131.

violated the free speech rights of such employees, the majority expressly overruled *Abood v Detroit Board of Education*,¹¹⁵ a 1977 decision which had upheld the agency-fee arrangement, provided that such fees were not used to fund political or ideological advocacy. Writing for the majority in *Janus*, Alito J opined:

[S]tare decisis applies with perhaps least force of all to decisions that wrongly denied First Amendment rights: ‘This Court has not hesitated to overrule decisions offensive to the First Amendment (a fixed star in our constitutional constellation, if there is one).’¹¹⁶

As discussed in Part II, ‘reliance’ on a prior decision has been a prominent SCOTUS *stare decisis* consideration that tends to militate against overruling. This inquiry ‘counts the cost of a rule’s repudiation as it would fall on those who have relied reasonably on the rule’s continued application’.¹¹⁷ In other words, it asks whether — and to what extent — people or institutions have ordered their affairs on the assumption of a precedent’s continued application: for example, by making investments, structuring relationships, or adopting policies that would be costly or disruptive to unwind if the rule changed. In *Janus*, however, the majority dismissed the asserted reliance interests of the public-sector unions on the *Abood* precedent as ‘not carry[ing] decisive weight’.¹¹⁸ This was in part because

[t]he fact that [public-sector unions] may view [agency fees] as an entitlement does not establish the sort of reliance interest that could outweigh the countervailing interest that [non-members] share in having their constitutional rights fully protected.¹¹⁹

These statements suggest that a weakened approach to *stare decisis* is appropriate when considering whether to depart from more rights-restrictive precedents, and that a particular subset of US constitutional rights (First Amendment speech rights) hold an especially privileged status in this context.

A similar approach was evident in *Ramos*. Here, the issue was whether the Sixth Amendment right to trial by jury, as incorporated against the States,¹²⁰ requires a unanimous guilty verdict in criminal trials. In overruling *Apodaca v Oregon* (‘*Apodaca*’) (under which non-unanimous verdicts had been permissible for state trials),¹²¹ the majority held that any asserted governmental reliance on *Apodaca* ‘cannot outweigh the interest we all share in the preservation of our

¹¹⁵ 431 US 209 (1977).

¹¹⁶ *Janus* (n 47) 917.

¹¹⁷ *Casey* (n 43) 855 (O’Connor, Kennedy, and Souter JJ).

¹¹⁸ *Ibid*.

¹¹⁹ *Ibid* 927.

¹²⁰ Although the first ten amendments to the US Constitution (the Bill of Rights) originally constrained only the federal government, SCOTUS has since held that most of these protections also apply to the states. This has occurred through ‘selective incorporation’ under the Fourteenth Amendment’s Due Process Clause.

¹²¹ 406 US 404 (1972).

constitutionally promised liberties'.¹²² The opinion placed emphasis instead on the reliance interests of 'the American people' on their constitutionally protected liberties.¹²³ In a concurring opinion, Sotomayor J stated that

[t]he force of stare decisis is at its nadir in cases concerning [criminal] procedur[e] rules that implicate fundamental constitutional protections.' And the constitutional protection here ranks among the most essential: the right to put the State to its burden, in a jury trial that comports with the Sixth Amendment, before facing criminal punishment. ... *Where the State's power to imprison those like Ramos rests on an erroneous interpretation of the jury-trial right, the Court should not hesitate to reconsider its precedents.*¹²⁴

Like *Janus*, these passages suggest that weakened *stare decisis* is particularly appropriate when assessing an earlier precedent that is more rights-restrictive, and where the consequence of overruling is a trend towards greater protection of rights.

Against this background, *Dobbs* provides a notable counterpoint. To see why, it is helpful to situate the case within SCOTUS' 'substantive due process' jurisprudence. Although the Due Process Clauses of the Fifth and Fourteenth Amendments are framed in procedural terms (no deprivation of 'life, liberty, or property, without due process of law'), SCOTUS has long read 'liberty' as having substantive content, including protection of certain unenumerated fundamental rights. In earlier substantive due process cases, it had been suggested that 'when a Court is asked to overrule a precedent recognising a constitutional liberty interest, individual or societal reliance on the existence of that liberty *cautions with particular strength against reversing course*'.¹²⁵

This calls for a *stronger* version of *stare decisis* applied to precedents that have previously conferred constitutional protection for a particular liberty interest, and when overruling would result in a narrowing (or even rejection) of the previously accepted right. It has been suggested that SCOTUS has an established practice of giving 'enhanced precedential weight' to the subset of constitutional decisions protecting individual liberties and implicating 'individual or societal reliance' (that is, where people or institutions have formed expectations about the continuing force of those rulings).¹²⁶

By contrast, in *Dobbs*, the consequence of overruling *Roe* and *Casey* was a *narrowing* of the liberty interests that receive protection under the Fourteenth Amendment Due Process Clause by withdrawing constitutional protection for abortion. The majority framed the earlier cases which had recognised this right as having 'usurped the power [of the people] to address a question of profound

¹²² *Ramos* (n 61) 110–11 (Gorsuch J).

¹²³ *Ibid.*

¹²⁴ *Ibid* 113 (Sotomayor J) (emphasis added), citing *Alleyn v United States*, 570 US 99, 116 n 5 (2013).

¹²⁵ *Lawrence v Texas*, 539 US 558, 577 (2003) (Kennedy J) (emphasis added), citing *Casey* (n 43) 855–6.

¹²⁶ Nina Varsava, 'Precedent, Reliance, and *Dobbs*' (2023) 136(7) *Harvard Law Review* 1845, 1859.

moral and social importance', referring to the question of abortion.¹²⁷ That framing also shaped the majority's approach to *stare decisis*: in analysing '[t]he nature of the Court's error' in the prior decisions (the first formally enumerated *stare decisis* factor addressed in the opinion), it was asserted that while '[a]n erroneous interpretation of the *Constitution* is always important', *Roe* and *Casey* were 'more damaging than others'¹²⁸ as they had 'wrongly removed an issue from the people and the democratic process.'¹²⁹ On the majority's account, therefore, the weakened approach to *stare decisis* in *Dobbs* was justified on democratic and institutional legitimacy grounds. In the analysis that follows, we critically interrogate the *Dobbs* majority's formal claims in this regard through the lens of responsive judicial review.

B Democratic Responsiveness and Institutional Legitimacy

In Part III we considered whether, in addition to fundamental rights and values, questions of *stare decisis* could be informed by democratic considerations. Several US cases have *expressly* addressed this question: whether public or legislative opinion on the subject matter of the precedent, or the actual or perceived legitimacy and institutional integrity of SCOTUS if it were to overrule or uphold the precedent, should influence the Court's willingness to overrule a prior precedent in a particular case.

Casey and *Dobbs* provide contrasting views. In *Casey*, public confidence in SCOTUS' institutional integrity was cited as a powerful factor influencing the plurality's decision to affirm *Roe*'s essential holding (that is, it weighed in favour of applying a *stronger* version of *stare decisis*). Writing jointly, O'Connor, Kennedy, and Souter JJ expressed concern that overruling a 'watershed' decision like *Roe* 'in the absence of the most compelling reason' would risk 'subvert[ing] the Court's legitimacy'.¹³⁰ Their Honours were of the view that '[a] decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, *at the cost of both profound and unnecessary damage to the Court's legitimacy*, and to the Nation's commitment to the rule of law'.¹³¹ By contrast, in *Dobbs* the majority was largely dismissive of this approach, declaring that 'we cannot allow our decisions to be affected by any extraneous influences such as concern about the public's reaction to our work'.¹³² The opinion cited Rehnquist CJ's *Casey* dissent, in which his Honour had stated *stare decisis* should not be 'subject to the vagaries of public opinion'.¹³³

¹²⁷ *Dobbs* (n 10) 269 (Alito J).

¹²⁸ *Ibid* 268.

¹²⁹ *Ibid* 269.

¹³⁰ *Casey* (n 43) 867.

¹³¹ *Ibid* 869 (emphasis added).

¹³² *Dobbs* (n 10) 291 (Alito J).

¹³³ *Ibid*, citing *Casey* (n 43) 963.

At the same time, the majority also referenced legislative opinion as to the constitutional question at hand — observing that ‘in this case, 26 States have expressly asked this Court to overrule *Roe* and *Casey* and allow the States to regulate or prohibit pre-viability abortions’.¹³⁴ This statement was not explicitly made as part of the justification for overruling, but offers an example of the Court having regard to state legislative activity on the substantive constitutional issue in question.

C *Dobbs*: Stare Decisis or Politics?

The weakening of *stare decisis* in *Dobbs* may, on one view, be seen as theoretically defensible within the CRRT framework, given that the case dealt with fundamental rights. Indeed, the majority explicitly appealed to notions of democratic deference as a justification for weakening it in this context. However, as Dixon contends, the ruling arguably exceeded what was required, or desirable, from a responsive judicial review perspective.

Tracing the jurisprudence from *Roe* onwards, Dixon suggests that while *Roe* ‘helped overcome persistent legislative inertia’ in relation to overly broad criminal prohibitions on access to abortion, the rigid trimester framework it established ‘imposed a clear obstacle to reasonable attempts by state legislatures to (re)define the balance between reproductive rights and fetal protection’.¹³⁵

Casey appropriately responded to these dangers by *effectively* overruling *Roe* ‘in so far as it was out of step with contemporary democratic constitutional attitudes’¹³⁶ — a weakening that was justified on democratic grounds and because it concerned a constitutional rights question. As such, Dixon argues that ‘the further retreat by the Court from the protection of abortion rights, in *Dobbs*, was both unnecessary and undesirable from a democratic constitutional perspective’.¹³⁷

Moreover, assessing the *formal* treatment of *stare decisis* in *Dobbs* in the abstract provides an incomplete picture. It overlooks the timing, subject matter and broader context of these decisions — factors crucial to understanding their institutional implications. The outcomes in *Dobbs*, *Janus* and *Loper Bright* each closely aligned with longstanding causes of the conservative right movement in the US: the rollback of access to abortion, weakening of public-sector unions, and curtailment of administrative agency power. These decisions shortly followed the appointments of Justices Gorsuch, Kavanaugh and Barrett — each nominated by President Trump following his 2016 campaign pledge to appoint justices who

¹³⁴ *Dobbs* (n 10) 230 (Alito J).

¹³⁵ *Ibid.*

¹³⁶ Dixon, *Responsive Judicial Review* (n 77) 202. This is notwithstanding that the plurality did not *formally* overrule from a *stare decisis* perspective, and purported to uphold the ‘essential holding’ of *Roe* (n 10).

¹³⁷ Dixon, *Responsive Judicial Review* (n 77) 201. See also David Landau and Rosalind Dixon, ‘*Dobbs*, Democracy, and Dysfunction’ (2023) 101(5) *Wisconsin Law Review* 1569.

would overturn *Roe*¹³⁸ — and were delivered by a bitterly divided Court split on partisan lines, with dissenting Justices explicitly alleging that the only material change explaining the outcome was the recent change to the Court's composition.¹³⁹ These dynamics undermine the claim by the *Dobbs* majority that overturning *Roe* was justified on democratically responsive or institutional grounds. Instead, *Dobbs*, when understood in context, exposes a relationship between a weakened application of *stare decisis* and the possible erosion of institutional legitimacy, sounding a warning for the HCA and other apex courts grappling with questions of constitutional justice.

This analysis raises a further possibility: that the perceived politicisation of judicial decision-making in SCOTUS has influenced not only outcomes, but also the evolution and application of *stare decisis* itself in constitutional decisions. While a notable feature of recent decisions to overrule is the overt and structured engagement with *stare decisis* methodology, this arguably obscures the underlying ideological influences potentially shaping *stare decisis* jurisprudence. For example, scholars such as Michael Gentithes have asserted that the Roberts Court has recalibrated its *stare decisis* framework by elevating 'quality of reasoning' as a decisive factor. This relates to an ongoing debate about whether considerations of the merits or 'correctness' of an impugned precedent's reasoning should play a substantive role in *stare decisis* analysis itself, or whether this is merely a condition precedent that then triggers the inquiry.¹⁴⁰ While doctrinal roots for both views can be traced to earlier SCOTUS cases,¹⁴¹ the increased emphasis placed on 'quality of reasoning' in decisions from 2018 onwards firmly aligns the current SCOTUS's approach with the former view. In *Janus*, *Ramos*, *Dobbs*, and *Loper Bright*, this factor was one of the first enumerated *stare decisis* considerations, and played a central role in the ultimate decision to overrule. The majority justified overturning what were asserted to be erroneous constitutional precedents in large part because they were characterised as being 'poorly reasoned',¹⁴² 'gravely mistaken'¹⁴³ and 'exceptionally weak'¹⁴⁴ as a matter of legal principle. Notably, the dissenting Justices in both *Dobbs* and *Janus* argued that these were not 'traditional *stare decisis* factors', and that it was inappropriate for the Court to overrule on this basis absent some 'special justification'.¹⁴⁵

¹³⁸ Note that *Janus* (n 47), handed down in 2018, predates Kavanaugh and Barrett JJ's appointments.

¹³⁹ See, eg, *Dobbs* (n 10) 364 (Breyer, Sotomayor and Kagan JJ dissenting).

¹⁴⁰ See Michael Gentithes, 'Janus-Faced Judging: How the Supreme Court Is Radically Weakening Stare Decisis' (2020) 62(1) *William and Mary Law Review* 83, 87 (citations omitted).

¹⁴¹ See Colin Starger, 'The Dialectic of Stare Decisis Doctrine' in Christopher J Peters (ed), *Precedent in the United States Supreme Court* (Springer, 2013) 19, 29–41 (tracing the origins of the 'weak' and 'strong' conceptions of *stare decisis* in modern discourse).

¹⁴² *Janus* (n 47) 917–18, 921 n 25 (Alito J).

¹⁴³ *Ramos* (n 61) 106 (Gorsuch J).

¹⁴⁴ *Dobbs* (n 10) 231 (Alito J).

¹⁴⁵ *Ibid* 390 (Breyer, Sotomayor and Kagan JJ dissenting).

Simultaneously, SCOTUS has narrowed the scope of interests considered relevant to the ‘reliance’ *stare decisis* factor, thereby diminishing the weight afforded to societal and individual expectations that may militate against overruling. In *Dobbs*, the majority distinguished between ‘conventional, concrete reliance interests’ (such as those involving property or contract rights)¹⁴⁶ and ‘intangible’ forms of reliance like those recognised in *Casey*, where the plurality had observed:

[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.¹⁴⁷

The *Dobbs* majority rejected this latter category as ‘novel’ interests that involve inquiries courts are ‘ill-equipped to assess’.¹⁴⁸ Yet commentators have argued that this tendency ‘to reject any kind of societal or cultural reliance’ is a ‘striking departure from the Court’s established practice’.¹⁴⁹ It also demonstrates SCOTUS is not necessarily striving to be democratically sensitive or responsive in its application of its weakened *stare decisis*.

There are further ways in which recent developments in US *stare decisis* jurisprudence, whilst framed neutrally, nonetheless reinforce the perception that these principles have been rendered a ‘malleable rhetorical tool’.¹⁵⁰ As Frederick Schauer points out, in cases such as *Janus* the majority offered ‘a lengthy catalog of the many ways in which the constraints of *stare decisis* could be overcome’, and concluded ‘that *all* of these ways applied to the case before the Court’.¹⁵¹ Yet in doing so, the majority’s approach both avoided the need to engage in the exercise of balancing the reasons for and against following a precedent, and ‘appeared to reaffirm that any of the reasons for rejecting a precedent might be available in future cases’.¹⁵² As such:

Although none of the justifications in *Janus* for disregarding or overruling a precedent was entirely new in that case, the very act of listing and purporting to use all of them

¹⁴⁶ Ibid 288 (Alito J).

¹⁴⁷ *Casey* (n 43) 856 (O’Connor, Kennedy, and Souter JJ).

¹⁴⁸ Ibid.

¹⁴⁹ William N Eskridge Jr, ‘Reliance Interests in Statutory and Constitutional Interpretation’ (2023) 76(3) *Vanderbilt Law Review* 681, 690. See also Michael Gentithes, ‘Concrete Reliance on Stare Decisis in a Post-*Dobbs* World’ (2022) 14 *ConLawNOW* 1; Varsava (n 112) 101.

¹⁵⁰ Note, ‘The Thrust and Parry of Stare Decisis in the Roberts Court’ (2023) 137(2) *Harvard Law Review* 684, 684 (‘Thrust and Parry’).

¹⁵¹ Frederick Schauer, ‘Stare Decisis: Rhetoric and Reality in the Supreme Court’ [2018] *Supreme Court Review* 121, 137 (emphasis in original).

¹⁵² Ibid.

lays the groundwork in future cases for a further weakening of whatever strength a norm of *stare decisis* may hold.¹⁵³

It is also revealing that many of the same *stare decisis* factors have been deployed across both majority and dissenting opinions in cases such as *Janus* and *Dobbs* in order to reach opposing conclusions about whether overruling is justified.¹⁵⁴ For some modes of reasoning, there is ‘indeterminacy’ because ‘the same trait about a precedent feeds into conflicting aphorisms’.¹⁵⁵ In others (such as whether a precedent is ‘egregiously’ wrong), it has been argued that ‘the relevant standard is so vague as to lack any concrete, neutral content, rendering the debate a free-for-all’.¹⁵⁶ The ‘thrust and parry’ of *stare decisis* in this way ‘illustrates the considerable leeway Justices enjoy in making outcome-driven decisions about whether to respect precedent’.¹⁵⁷ Again, this suggests a weakened *stare decisis*, but not necessarily one that is democratically sensitive or responsive.

V LESSONS FOR AUSTRALIA

Recent US constitutional experience illustrates how doctrinal shifts and interpretive debates can intersect with, or even mask, deeper ideological and political tensions. In doing so, it underscores the risks that arise when a weakening of *stare decisis* is perceived as ideologically driven or strategically deployed — in particular, the damage such perceptions can inflict on a court’s institutional legitimacy. The question for present purposes is the extent to which these risks translate to the Australian constitutional setting. As a starting point, we suggest that salient institutional and cultural differences between the two jurisdictions mitigate many of these dangers.

First, the cultural and political contexts differ in ways that reduce the likelihood of comparable legitimacy challenges in Australia. In the US, *stare decisis* has become a focal point in broader ideological debates and ‘culture wars’ to a degree that has no clear analogue in Australia. *Roe*, *Casey*, and most recently *Dobbs* carried — and continue to carry — profound moral, political, and symbolic significance, shaping public discourse far beyond the legal academy. The cultural salience of these decisions arguably magnified public scrutiny of SCOTUS’s approach to precedent in *Dobbs* a way that is distinctive to the US constitutional landscape.

Second, the judicial politics surrounding SCOTUS differ markedly from those surrounding the HCA. Even before the most recent developments, SCOTUS was frequently characterised as an ‘attitudinal’ institution, one in which Justices’ attitudes, values, and ideological preferences are seen as strong predictors of case

¹⁵³ Ibid 137–8.

¹⁵⁴ See discussion of further cases illustrating this trend in ‘Thrust and Parry’ (n 150) 686–96.

¹⁵⁵ Ibid 686.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

outcomes.¹⁵⁸ The close alignment between the conservative legal movement and the recent ascendancy of originalism as the dominant professed interpretive methodology on the current bench has further politicised debates over constitutional interpretation and judicial decision-making. By contrast, Australia's judicial culture has traditionally been more legalist and less overtly politicised.

Third, structural differences in appointment and tenure also limit the extent to which the US dynamic would be replicated in Australia. SCOTUS Justices enjoy life tenure and are appointed through a highly politicised confirmation process. HCA Justices, by contrast, are subject to a mandatory retirement age of 70 and are appointed through a process that has, to date, remained considerably less politicised. This also reduces the risk that particular doctrinal positions become entrenched over long periods, thereby lessening some of the concerns associated with the consequences of overruling.

Nonetheless, the US experience offers instructive lessons that the HCA cannot afford to ignore. Most significantly, it underscores the importance of attending carefully to the context in which *stare decisis* decisions are both made and received. The broader institutional and political environment surrounding a decision to overrule — together with the outcomes such decisions produce — affects the relationship between a weakened *stare decisis* and both the *perceived* and *actual* legitimacy of the judiciary. While the HCA is arguably currently insulated from the most acute pressures confronting SCOTUS, it is not immune from analogous dynamics. It is therefore important to grapple seriously with the broader social and political background in which the HCA's recent *stare decisis* case law has been developed and applied. Additionally, while Australia's judicial culture has traditionally been legalist and less politicised, alternative constitutional approaches have emerged and are gaining prominence.¹⁵⁹ The HCA should thus be alert to the relationship between disagreement over constitutional interpretation and weakened constitutional precedent that has played out in the US.

In the remainder of this Part, we turn to the HCA's *stare decisis* case law with these considerations in mind. We examine the extent to which the two principled justifications identified through a CRRT lens — fostering inter-branch dialogue about fundamental rights and values, and facilitating democratic resilience — are reflected in Australian judicial reasoning to date. We also consider whether comparable risks to those observed in the US context might be beginning to emerge.

¹⁵⁸ Jeffrey A Segal and Harold J Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge University Press, 2002).

¹⁵⁹ See generally Jeffrey Goldsworthy, 'Australia: Devotion to Legalism' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (Oxford University Press, 2007) 106; Rosalind Dixon, 'Functionalism and Australian Constitutional Values' in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 3; Rosalind Dixon, 'George Winterton Memorial Lecture 2024: A New Australian Constitutionalism? Constitutional Purposes, Proportionality and Process Theory' (2024) 46 *Sydney Law Review* 455.

A Fundamental Rights and Values

In Australia, the relevance to the *stare decisis* analysis of the impact of the impugned precedent on express and implied constitutional guarantees or rights has been inconsistent. It has been *expressly* relevant for certain members of the HCA in case law concerning s 117 of the *Australian Constitution*, a provision which prohibits discrimination on the basis of state residency,¹⁶⁰ and s 51(xxxi), a provision which guarantees the payment of ‘just terms’ by the Commonwealth for the acquisition of private property.¹⁶¹ However, it is not consistently recognised as a factor relevant to *stare decisis* in Australia.¹⁶² This patchy case law leaves unclear whether *stare decisis* is weakened solely to vindicate or uphold a constitutional right, or simply because it touched on a constitutional right — regardless of whether the revision of the earlier precedent would operate to strengthen or weaken that right.¹⁶³

Recent *stare decisis* jurisprudence has been in fields of varying political significance. Some of the cases raised questions concerning societal and individual rights and values.¹⁶⁴ Certainly, the subject matter of several of the Australian decisions is less politically and morally divisive than abortion. In *Vanderstock*, for example, the constitutional interpretation of the word ‘excise’ has enormous ramifications for federalist arrangements and certain elite publics, but matters less to the lay public. Conversely, decisions concerning immigration and refugees are of enormous significance in the Australian political landscape. In *NZYQ*, the question before the Court concerned whether alien detainees may be held indefinitely in Australian immigration detention — a question that clearly concerns the liberty interests of individuals under the power of the Australian government, though not of ‘Australians’ per se. The HCA overturned precedent to order, against the Commonwealth, the immediate release of 153 non-residents from immigration detention.¹⁶⁵ However, the HCA did *not expressly* articulate its decision to overrule as being affected by the way the precedent touched on constitutional immunities and values.

Yunupingu concerned an express constitutional guarantee under the *Australian Constitution* — the guarantee of the payment of just terms for the acquisition

¹⁶⁰ See *Street* (n 27).

¹⁶¹ *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 613 (Gummow J); *Yunupingu* (n 5) 564 [179] (Gordon J).

¹⁶² See *Barnes* (n 220).

¹⁶³ We note that in certain, heavily litigated aspects of Australian constitutional law there will be a layering of precedent, some of which expands and some of which contracts, an implied value, right or immunity. We thank Rebecca Ananian-Welsh for this point. In such circumstances, it may be that the stronger argument is that *stare decisis* should be weakened generally, regardless of the impact on the constitutional right, value or immunity in question.

¹⁶⁴ Recall however that the *Australian Constitution* does not contain a Bill of Rights.

¹⁶⁵ Department of Home Affairs (Cth) (n 3) 2; see also Ananian-Welsh and Billings (n 3) 13. Moreover, it is worth noting that while immigration is a politically sensitive issue, there is often bipartisan support of tough immigration policies.

of property. Only one Justice considered this relevant to the decision to overrule the impugned precedent.¹⁶⁶ The remainder of the Court articulated its decision to overrule as being informed by the correctness and authority of the impugned precedent.¹⁶⁷ Importantly, the case had the potential to be highly politically divisive, as it exposed the Commonwealth to significant liability to compensate Indigenous Australians in the Northern Territory for native title claims. However, the *stare decisis* questions were but one prong in a complicated trial, the Commonwealth's ultimate liability would be considered in a separate action and the arguments in favour of overruling were compelling. Indeed, *Teori Tau*, had very little weight by the time of the challenge, with several parties arguing that it had effectively been overruled already.¹⁶⁸ Thus, this was not a decision that could fairly be characterised as a shock departure from precedent.

The implied freedom of political communication ('the implied freedom') is a significant implied constitutional limitation on government in Australia. While no single precedent in Australia arguably occupies the same symbolic status or political significance as *Roe* in the US context, this doctrine may be emerging as a flashpoint for constitutional interpretation, judicial ideology, *stare decisis*, and dissent. While implied freedom jurisprudence has been relatively stable since the guarantee was first recognised in 1992, the 2025 case of *Ravbar* marks the resurgence of earlier tensions with renewed intensity.¹⁶⁹ Notably, no party or intervenor in that case sought leave to reopen the unanimous decision in *Lange v Australian Broadcasting Corporation* ('*Lange*'),¹⁷⁰ which confirmed the implied freedom, or the subsequent 30 years of jurisprudence applying it. Chief Justice Gageler was emphatic that

[u]nless and until such an application is made, and if made is determined in favour of reopening and overruling, the duty of each member of this Court as constituted from time to time is to apply *Lange* and the decisions which have elaborated upon it, 'not to be convinced by it'.¹⁷¹

His Honour expressly referred to the relationship between this approach to *stare decisis* and institutional legitimacy:

¹⁶⁶ *Yunupingu* (n 5) 564 [179] (Gordon J).

¹⁶⁷ *Ibid* 536 [44] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), 580 [242] (Edelman J), 609 [373] (Steward J).

¹⁶⁸ *Ibid* 587 [273]–[274] (Edelman J).

¹⁶⁹ *Ravbar* (n 29). For earlier criticism see *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 180–91 (Dawson J dissenting); *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 338–9 [347]–[348] (Callinan J); *Monis v The Queen* (2013) 249 CLR 92, 183–4 [249]–[251] (Heydon J); *LibertyWorks Inc v Commonwealth* (2021) 274 CLR 1, 111–12 [298], 113–14 [304] (Steward J); *Ruddick v Commonwealth* (2022) 275 CLR 333, 398 [174] (Steward J).

¹⁷⁰ *Lange* (n 25).

¹⁷¹ *Ravbar* (n 29) 1016 [25] (Gageler CJ) (citations omitted).

Respect for and fidelity to the past decisions of this Court must start with the individuals who are the current members of this Court. Observance of that individual constraint is an institutional imperative.¹⁷²

Conversely, Steward J stated that he was 'convinced' that the Court's implied freedom jurisprudence is 'very wrong'.¹⁷³ While his Honour acknowledged that he was 'obliged to apply it' in the present case (as 'no party sought to dispute the existence of the implied freedom'), he also expressed the view that 'a reconsideration (with leave if necessary) of the implied freedom's existence may be justified and a matter for full argument on another occasion'.¹⁷⁴ In short, Steward J volunteered his view as to the correctness of the constitutional precedent and invited a full consideration of the matter in a future case. His Honour considered that this was the 'orthodox and settled expression of the duty of a judge of this Court when confronted with a doctrine of law which that judge is strongly convinced to be fundamentally wrong'.¹⁷⁵ If the precedential authority for the implied freedom is subject to a reconsideration, it will be interesting to see whether the Court has regard to the relevance of the constitutional values and interests that underpin the implied freedom as a justification for or against overruling.

B Democratic Responsiveness and Institutional Legitimacy

In Australia, there is little evidence of public or legislative opinion on the substantive issue that is the subject of the precedent playing an express role in *stare decisis* jurisprudence. In the 1957 decision of *Victoria v Commonwealth* ('Second Uniform Tax Case'), only Fullagar J observed that 'only two of the six States' were challenging the legislation that was based on precedent. For his Honour, this indicated that the original decision should not be reopened.¹⁷⁶ In the 1982 decision of *Hospital Contribution Fund*, Wilson J observed that the impugned precedents had been decided 'in the face of united opposition from both the Commonwealth and State Governments'.¹⁷⁷ This, alongside other factors, put these precedents in a 'special category'. And in the 1999 decision of *Re Wakim*, Kirby J emphasised that the 'collective voice' of all the governments and Parliaments of the nation had been 'heard in ... Court, in unique harmony, to urge that the constitutional *status quo*, achieved after the Court's earlier decision, be maintained'.¹⁷⁸ Conversely, Gummow and Hayne JJ held that 'the support of all governments in Australia' could

¹⁷² Ibid.

¹⁷³ Ibid 1066 [273].

¹⁷⁴ Ibid 1070–1 [295].

¹⁷⁵ Ibid 1071 [296].

¹⁷⁶ (1957) 99 CLR 575, 655.

¹⁷⁷ *Hospital Contribution Fund* (n 21) 72.

¹⁷⁸ *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 598–9 [183].

not ‘relieve the Court of deciding what it is that the Constitution permits or requires’.¹⁷⁹

Even if one accepts the relevance to *stare decisis* analysis of reasonable legislative and public disagreement on a substantive constitutional issue, criticisms can be levelled at these instances of engaging with public or legislative opinion. In the Australian context, Gian Boeddu and Richard Haigh characterise the above judicial statements as the “‘counting of heads” as a means of illustrating the low degree of opposition to a precedent’.¹⁸⁰ However, this ‘lip service to public approval’ is inadequate. Indeed, if a Court is to meaningfully engage with reasonable legislative and public disagreement, a more sophisticated analysis is needed.¹⁸¹

There is also some evidence of public opinion of the HCA as an institution playing an express role in the HCA’s *stare decisis* framework. For example, Brennan J argued in *John* that overruling is an exceptional course to take as it ‘is in a sense a diminution of the Court’s authority as well as an acknowledgment of Justices’ past error’.¹⁸² However, a weakened and responsive *stare decisis* doctrine in the constitutional context may not need to expressly cite this consideration among the *stare decisis* factors. Public reaction to court decisions may be tempered by other ‘careful choices about the (i) authorship; (ii) tone; and (iii) narrative underpinning their decisions’.¹⁸³ We do not attempt to prescribe the weight of either public opinion on the substantive constitutional matter in issue or public opinion of the Court as an institution to *stare decisis* analyses. We instead have sought to demonstrate that both factors *may be* relevant to the *application* of weakened *stare decisis* and that consideration of them may assist a Court to avoid backlash. One’s view on the role of the Court will inform one’s view on the appropriateness, if any, of these considerations.

Returning to the recent HCA *stare decisis* jurisprudence, *NZYQ* — a decision of enormous political significance — was (ostensibly) unanimous.¹⁸⁴ This is relevant to institutional legitimacy because writing ‘in a single voice’ enabled the Court to put ‘its full institutional authority behind a decision’.¹⁸⁵ In *NZYQ*, this involved the presentation of a single judgment joined in by all Justices, but which identified an individual position taken by one Justice on one issue. Ordinarily, this individual position would be expressed in a separate judgment. This could be an example of an apex court making an appropriate responsive choice to shape how the parties to the case, as well as elite and popular audiences, react to and accept the decision to overrule on an important and politicised constitutional issue, where the decision is likely to be unpopular. *NZYQ* thus stands as a strong counterpoint to *Dobbs*,

¹⁷⁹ Ibid 572 [102].

¹⁸⁰ Boeddu and Haigh (n 28) 184.

¹⁸¹ Ibid.

¹⁸² *John* (n 20) 451.

¹⁸³ Dixon, *Responsive Judicial Review* (n 77) 245.

¹⁸⁴ *NZYQ* (n 1) 158 [43] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ).

¹⁸⁵ Dixon, *Responsive Judicial Review* (n 77) 249.

where we see a divided court and the publication of highly critical dissenting judgments. *Responsive* choices in judicial drafting were arguably made.

Additionally, in decisions where the HCA has decided not to reopen and overrule impugned precedent — for example in *Vunilagi* or *MJZP* — the judgments still engaged thoroughly with the arguments for overruling. This also contributed to the institutional legitimacy of the HCA by providing ‘disappointed parties with evidence that their arguments have been heard and considered’.¹⁸⁶ This in turn enhances ‘the perceived legitimacy of the majority as well as dissenting opinion’.¹⁸⁷

Questions of the relationship between *stare decisis* and institutional legitimacy bubbled to the surface in both *Ravbar* and the immediately preceding implied freedom case of *Babet v Commonwealth* (*‘Babet’*),¹⁸⁸ regarding the role of structured proportionality in this context. In the 2015 decision of *McCloy v New South Wales* (*‘McCloy’*),¹⁸⁹ a four-judge majority endorsed use of a three-part structured proportionality test to assess whether a law that burdens political communication can nonetheless be justified as ‘reasonably appropriate and adapted’ to a legitimate purpose. This approach was applied by various majorities over the following decade. In *Babet*, however, four Justices characterised structured proportionality as a mere ‘tool of analysis’, the ‘express or ritual invocation of which is by no means necessary in every case’.¹⁹⁰ The composition of this shifting majority on the justification test is noteworthy, as Gageler CJ and Gordon J (both long-standing critics of structured proportionality) were joined by the Court’s two most recent appointees, Jagot J (appointed October 2022) and Beech-Jones J (appointed November 2023). Those appointments, in turn, directly followed the retirement of two prominent supporters of structured proportionality, Kiefel CJ and Keane J. In contrast, across the 2025 implied freedom cases *Edelman J* was highly critical of this departure, on the grounds that ‘as a matter of fidelity and respect for precedent it should not be open to this Court, without submissions to the contrary, to depart from structured proportionality in the application of the [implied freedom]’.¹⁹¹

These remarks, along with the apparent exchange between the Chief Justice and Steward J in *Ravbar* discussed earlier, invoke questions about public perceptions of the Court itself. Should Steward J (as discussed above) have adopted

¹⁸⁶ Ibid.

¹⁸⁷ Ibid 250.

¹⁸⁸ (2025) 99 ALJR 883.

¹⁸⁹ *McCloy v New South Wales* (2015) 257 CLR 178 (*‘McCloy’*).

¹⁹⁰ Ibid 897 [49] (Gageler CJ and Jagot J, Gordon J agreeing at 901 [72], Beech-Jones J agreeing at 936 [242]).

¹⁹¹ Ibid 922 [174]. See also *Ravbar* (n 29) 1054–6 [215]–[225] (Edelman J). However, in the 2026 *Hopper v Victoria* decision, his Honour suggested that the majority’s ‘antipathy’ towards structured proportionality in *Babet* and *Ravbar*, together with the ‘inutility’ of suitability and ‘little role’ for the adequate in the balance question, ‘may mean that a test based on structured proportionality should now be treated as dead’: *Hopper v Victoria* (2026) 100 ALJR 582, 603 [87].

judicial restraint and refrained from expressing his view as to the implied freedom's constitutional foundations? Or is this an important expression of judicial dissent, one that also serves the institutional legitimacy of the HCA? Does structured proportionality form part of the ratio of *McCloy* and its progeny and, if so, should the majority have applied it in *Ravbar* and *Babet*? What implications will these approaches have for the HCA's actual and perceived institutional legitimacy? These are questions for another occasion. Nonetheless, the US experience offers important cautionary lessons. Specifically, the US experience highlights the risks that arise when the doctrine of *stare decisis* becomes overly malleable or inconsistently applied, particularly when this is perceived to be ideologically motivated and coincides with shifts in judicial composition. The HCA should remain alert to the relationship between questions of constitutional interpretation, *stare decisis* and institutional legitimacy.¹⁹²

VI CONCLUSION

This article examined the doctrine of *stare decisis* and the role it plays in the Australian and US constitutional settings. Specifically, it explored whether a weakened application of *stare decisis* is appropriate in constitutional cases. Drawing on CRRT, we revisited the justifications for weakened *stare decisis* in a constitutional setting, and employed this lens to critique recent Australian and US developments. We argued that, while a measured weakening may be justified, a court's sociological legitimacy and public trust is at risk when departures from precedent reflect or are perceived as reflecting ideologically driven reasoning.

The article provided an up-to-date doctrinal contribution, setting out the *formal* or *articulated* considerations that the HCA and SCOTUS acknowledge as relevant to the decision to overrule. More significantly, it applied the CRRT lens as a valuable framework for assessing when a weakening of *stare decisis* is appropriate in the constitutional domain. It articulated two core circumstances where there may be principled justifications for the weakening of *stare decisis* in relation to constitutional precedent, including its potential to enhance democratic dialogue, reasonable disagreement about fundamental rights and values, and judicial responsiveness. However, an examination of recent SCOTUS *stare decisis* case law exposed some of the *limits* on weakening *stare decisis*, by highlighting the conditions under which this approach might begin to undermine, rather than advance, the very values it is said to serve.

To conclude, this article returned home and considered the relevance of this comparative inquiry for Australia. Australia's score card was mixed. Significant cultural, institutional, and structural differences insulate the HCA to some degree from the more acute pressures facing SCOTUS. In addition, the HCA has made

¹⁹² It is clear from his judicial and extra-judicial writing that the Chief Justice is mindful of this: Gageler (n 112) 31, 32.

several *responsive* and meaningful choices in the tone, authorship and narrative of its decisions — as illustrated in *NZYQ*. However, the Court is not entirely immune from comparable risks. In particular, recent tensions in the implied freedom case law expose underlying rifts concerning *stare decisis* and the judicial role in the Australian constitutional setting. SCOTUS is our warning bell.