Political Stare Decisis

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Abstract

The doctrine of stare decisis famously instructs judges to respect past decisions even if they believe these decisions are wrong. Many believe stare decisis serves venerable values and bemoan its apparent demise in various apex courts around the world. But can something like stare decisis appear in politics too? In other words, can we expect public officials, much like we expect judges, to also adhere to past decisions even if they think these decisions are wrong? Or when they face temptations to ignore the past?

If we rely on our normal intuitions about politics, or observe its current state around the world, the answer seems to be "no." And while previous scholarship presents a more qualified view, this literature is greatly incomplete. It focuses on a limited set of domestic and international institutions that primarily resemble judicial ones. Alternatively, this scholarship is preoccupied with the normative or interpretive question of how domestic and international courts should incorporate what looks like a political analogy to stare decisis into legal doctrine. As a result, we are left uncertain about how broad the phenomenon of constraint by the past in politics really is. We are also left unsure about where the phenomenon is likely to appear, how exactly it operates, and what we might be able to do to achieve more (or less) of this type of constraint. In a world where so much of what seems wrong in domestic and global politics appears connected to the rushed erosion of the past, or its increased stickiness, this omission is significant.

This Article fills this gap by offering a comprehensive explanatory and functional theory of the role of the past as a constraint in domestic and global politics, or, in short, a theory of political stare decisis. *Given the stakes of the past in politics today, the Article suggests what public officials and institutional designers in domestic and international politics might be able to do to deliberately "tinker" with political stare decisis. For example, how officials can establish entirely new political precedents that will constrain in the future, how they might strengthen*

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existing political precedents that they like (or weaken political precedents they dislike), and what solutions are generally available to make political stare decisis more robust.

The Article concludes with a more jurisprudential point. While much in the discussion demonstrates that political stare decisis and the more familiar institution of judicial stare decisis substantially diverge, the Article claims that these differences may be much less meaningful than meets the eye. Instead of completely divergent practices, judicial stare decisis may ultimately be nothing more than one species of political stare decisis. The Article argues that acknowledging this fact significantly improves our understanding of judicial stare decisis. Among other things, it shows us when judicial stare decisis is "for suckers" and when it is not; it flags new ways to strengthen judicial stare decisis in jurisdictions where it seems to have dramatically weakened; and it illuminates how those who work to achieve their goals through domestic and international courts and their precedents should appropriately (and effectively) approach this task.

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I. INTRODUCTION

Stare decisis is a well-known doctrine commonly employed by courts working in the common law tradition, including the U.S., the U.K., Canada, and Australia.[1] It instructs judges to regularly respect past decisions—to "stand by things decided"[2]—even if those decisions appear to them wrong today.[3] And it is meant to serve a variety of values, including stability,[4] epistemic humility,[5] and even integrity.[6]

The law in general and the judicial process in particular are sites wherein arguments relying on the logic of stare decisis are undoubtedly common. And it may very well be that this feature of legal decision-making is in large part what makes the law distinctive—why, in other words, "thinking like a lawyer"[7] is different from thinking like any other kind of professional.[8] Perhaps for this reason as well it is not surprising that even in systems that expressly reject the doctrine of stare decisis, including in civil law jurisdictions or at the international level, judges seem to have tacitly adopted it nonetheless.[9]

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1 *See* Maria Angela Jardim de Santa Cruz Oliviera & Nuno Garoupa, *Stare Decisis and Certiorari Arrive to Brazil: A Comparative Law and Economics Approach*, 26 EMORY INT'L. L.J. 555, 572–79 (2012) (discussing the evolution of stare decisis in the U.S., the U.K. Canada, and Australia, among other systems).

2 This is the usual translation of the Latin term stare decisis. The full Latin expression is "stare decisis et non quieta movere." *See Stare Decisis et non Quieta Movere*, *Black's Law Dictionary* (11th ed. 2019).

3 *See*, *e.g.*, Kimble v. Marvel Entertainment, LLC, 576 U.S. 446, 455 (2015) ("[r]especting stare decisis means sticking to some wrong decisions"). *See generally* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987); Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1 (1989); Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988).

4 *See* Aaron-Andrew P. Bruhl, *Following Lower Court Precedent*, 81 U. CHI. L. REV. 851, 879–81 (2014).

5 *See* Deborah Hellman, *An Epistemic Defense of Precedent*, *in* PRECEDENT IN THE UNITED STATES SUPREME COURT 66 (Christopher J. Peters ed., 2013).

6 *See* Frederick Schauer, *On Treating Unlike Cases Alike*, 33 CONST. COMMENT. 437 (2018). For an extended treatment of this claim, see RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT (2017).

7 FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING (2009).

8 *See* Alexander, *supra* note 3, at 3.

9 For judges at the international level, see, for example, Harlan Grant Cohen, *Theorizing International Precedent*, *in* INTERPRETATION IN INTERNATIONAL LAW (Andrea Bianchi et al. eds., 2015); Krzysztof J. Pelc, *The Politics of Precedent in International Law: A Social Network Application*, 108 AM. POL. SCI. REV. 547 (2014); Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 2 J. INT'L. DIS. SETTLE. 5 (2011); Mattias Derlen & Johan Lindlom, *Peek-A-Boo, It's A Case-Law System! Comparing the European Court of Justice and the United States Supreme Court from a Network Perspective*, 18 GERMAN L.J. 647 (2018). For judges at the domestic level, see, for example, John Zhuang Liu et al., *Precedent and Chinese Judges: An Experiment*, 69 AM. J. COMP. L. 93 (2021); JOHN HENRY MERRYMAN & ROGELIO PEREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL

Yet stare decisis does not appear entirely restricted to the legal domain, or to judges and lawyers. We occasionally see references to traditions, practices, and even "precedents" of the past in other important places too. And these references are sometimes accompanied by claims that call for respecting those traditions, practices, or precedents even if some believe they are wrong for today.

Consider for instance the kid who demands that her parents let her stay up late (or watch TV for just a bit longer) because that is what they used to allow when her older siblings were the same age. Or consider commercial firms that insist that lenders offer them loans on the same terms they used to offer in the past just because that is what they did then. In advancing their claims, both the kid and these firms clearly rely on stare decisis-like logic. And to the extent that the parents and these lenders ultimately cave in despite having good reasons not to, they are proving themselves amenable to it.

But can something like stare decisis appear in *politics* too? In other words, can we realistically expect public officials across the enormously diverse institutions of domestic and international politics to also "stand by things decided" in the past even if they believe these decisions are wrong? Or when respecting past decisions will operate against their more immediate interests?

It is understandable why many would dismiss the possibility of something analogous to stare decisis in politics out of hand. After all, we do not normally consider politics an arena that creates much constraint. And observing politics around the world in this particular moment, which features officials ignoring, discarding, or unsettling many traditions and practices of the past almost daily,[10] suggests that this skepticism is doubly justified.

To take an especially blunt contemporary example from the U.S. for how the past is treated so dismissively in politics: During President Barack Obama's final year in office, then Senate Majority Leader Mitch McConnell refused to provide a hearing for Obama's Supreme Court nominee, Judge Merrick Garland, citing to an alleged political precedent that bars presidents from appointing a Supreme Court justice in their final year in office.[11] Fast forward to less than four

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SYSTEMS OF EUROPE AND LATIN AMERICA 47 (3d ed. 2007) ("Everybody knows that civil law courts do use precedents."). *See also* Anthony M. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1032 (1990):

> Respect for past decisions, for precedent, is not a characteristic of certain legal systems only. It is rather a feature of law in general, and wherever there exists a set of practices and institutions that we believe are entitled to the name of law, the rule of precedent will be at work, influencing, to one degree or another, the conduct of those responsible for administering the practices and institutions in question.

10 *See*, *e.g.*, David E. Pozen, *The Shrinking Constitution of Settlement*, 68 DRAKE L. REV. 335 (2020).

11 *See* Robin Bradley Kar & Jason Mazzone, *The Garland Affair: What History and the Constitution Really Say About President Obama's Powers to Appoint a Replacement for Justice Scalia*, 91 N.Y.U. L. REV. ONLINE 53 (2016) (discussing Senate Majority Leader McConnell's claims and criticizing them on historical grounds).

years later, however, and McConnell, still Senate Majority Leader at the time, saw no problem with proceeding with, and ultimately confirming, President Donald Trump's nominee to the Supreme Court, Justice Amy Coney Barrett, despite the nomination also occurring during Trump's final year in office.[12]

In contrast to the skepticism that our experience with politics justly breeds, scholarship appears to present a much more optimistic view about the possibility of something akin to stare decisis in politics. In particular, a growing body of work has now identified crucial domains in which non-judicial institutions and officials in both domestic and international politics also seem to stick, sometimes powerfully so, with decisions of the past, very much like the kind of effects we attribute to judicial stare decisis.[13]

As it currently stands, however, this literature is greatly incomplete. Much of it focuses on a limited set of institutions in politics, which primarily resemble judicial ones.[14] Alternatively, this scholarship is mostly concerned with the *normative* or *interpretive* question of how judges in domestic and international courts should incorporate what appears to be a political analogy to stare decisis into legal doctrine—for example, in the context of identifying customary international norms or when interpreting domestic constitutional and statutory texts.[15] As a

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12 *See* Marianne Levine, *McConnell Fends Off Accusations of Hypocrisy Over Holding Supreme Court Vote*, POLITICO (Sept. 21, 2020, 5:34 PM), https://perma.cc/46AZ-YDBC.

13 *See*, *e.g.*, Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448 (2010); Jonathan S. Gould, *Law Within Congress*, 129 YALE L.J. 1946 (2020); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012); Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255 (2017); Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109 (1984); Shalev Roisman, *Constitutional Acquiescence*, 84 GEO. WASH. L. REV. 668 (2016); William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019); KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999); Anita S. Kirhsnakumar, *Longstanding Agency Interpretations*, 83 FORDHAM L. REV. 1823 (2015); Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. REV. 112, 137–41 (2011).

14 *See* Morrison, *supra* note 13 (focusing on the Office of Legal Counsel in the Department of Justice); Gould, *supra* note 13 (focusing on the office of congressional parliamentarians); Michael R. Dreeben, *Stare Decisis in the Office of the Solicitor General*, 130 YALE L.J. F. 541 (focusing on the Office of the Solicitor General). For a more ambiguous example, see Nestor M. Davidson & Ethan J. Leib, *Regleprudence—at OIRA and Beyond*, 103 GEO. L.J. 259 (2015) (discussing the possibility of stare decisis in the Office of Information and Regulatory Affairs in the Executive Office of the U.S. President).

15 *See* Bradley & Morrison, *supra* note 13 (elaborating a theory of historical gloss); Glennon, *supra* note 13 (discussing the use of past custom in constitutional interpretation); Roisman, *supra* note 13 (discussing the role of "acquiescence" to the past in constitutional interpretation); Nelson, *supra* note 13 (discussing the role of original interpretive conventions and practices); Baude, *supra* note 13 (elaborating a theory of "constitutional liquidation" through past practice); WHITTINGTON, *supra* note 13 (discussing "constitutional construction" by past practices); Krishnakumar, *supra* note 13 (discussing how courts should treat longstanding agency interpretations); Kozel & Pojanowski, *supra*

result, we lack tools to understand how broad the phenomenon of constraint by the past in politics really is. We are also left unsure about when and where to expect this phenomenon to occur, how it operates in politics, and what we might be able to do to facilitate more of this type of constraint. In a world where so many valuable traditions and practices of the past appear to be all too easily discarded for short-term political gains—partly given the rise of "tradition-threatening"[16] regimes around the world and a "backlash against global norms and institutions"[17]—this last inquiry seems particularly urgent.

In this Article, I seek to fill this gap in existing scholarship by developing a comprehensive explanatory and functional theory of constraint by the past in domestic and international politics—or, in short, a theory of *political stare decisis*. Given the stakes of the past in politics today, I moreover suggest what public officials and institutional designers in politics might be able to do to deliberately "tinker" with political stare decisis. For instance, I consider how officials might behave to establish completely *new* political precedents that will powerfully constrain in the future; what they might do to strengthen existing political precedents that they like (or weaken those they dislike); and what solutions are available to make political stare decisis in general, and beyond specific political precedents, more robust.

In Section II, I start by illustrating the conceptual and empirical possibility of political stare decisis. I argue that the key to seeing why, notwithstanding whatever skeptical intuitions we have, political stare decisis *is* possible and even inevitable across the enormously diverse institutions of domestic and international politics relates to the prevalence of what a burgeoning literature in law and the social sciences terms political norms. More specifically, I argue that we can expect political stare decisis to occur and systematically constrain officials in politics in one of two conditions. The first is when political events or decisions serve as a "proof" for the emergence (or previous existence) of a norm in domestic and international politics. The second is when political institutions or environments

note 13. For a discussion of the role of past practice and custom in statutory interpretation in jurisdictions outside the U.S., see Neil Duxbury, *Custom as Law in English Law*, 76 CAMB. L.J. 337 (2017); Marius van Staden, *In Defence of Custom in Statutory Interpretation*, 2020 J. S. AFR. L. 369. I note that partial exceptions for this exclusively interpretive or normative focus are Mark Tushnet, *Legislative and Executive Stare Decisis*, 83 NOTRE DAME L. REV. 1339 (2008); Michael J. Gerhardt, *Non-Judicial Precedent*, 61 VAND. L. REV. 713 (2008); MICHAEL J. GERHARDT, THE POWER OF PRECEDENT 111–46 (2008). This Article, however, goes beyond these prior treatments by, among other things, offering a *comprehensive explanatory* theory of political stare decisis.

16 Samuel Issacharoff & Trever Morrison, *Constitution by Convention*, 108 CALIF. L. REV. 1913, 1920 (2020).

17 Peter Danchin et al., *Navigating the Backlash Against Global Law and Institutions*, *in* AUSTRALIAN YEARBOOK OF INTERNATIONAL LAW 38 (forthcoming 2021). *See also* Eric A. Posner, *Liberal Internationalism and the Populist Backlash*, 49 ARIZ. ST. L.J. 795 (2017); Erik Voeten, *Populism and Backlashes Against International Courts*, 18 PERS. POL. 407 (2020).

are characterized by another norm, but one that operates on the *second-order level*: a norm that instructs public officials to generally respect decisions (or lessons learnt from past events) even if they disagree with them. I argue that the existence of such a norm is highly plausible across a wide variety of settings in domestic and international politics for reasons that are very similar to those that enable the parallel second-order norm we are familiar with from law: the norm of *judicial* stare decisis.

In Sections III–VI, I theorize how political stare decisis operates "on the ground," including which decisions or events in domestic and international politics are likely to establish constraining political precedents in the first place, how public officials will reason with these precedents, and when and how political precedents will be overruled. Since, as Section II shows, there is some resemblance between political and judicial stare decisis, and given moreover that the latter is familiar, my technique in these Sections is largely to compare and contrast the two phenomena. And as I hope to show, this technique proves highly productive.

On one hand, as I show in Section III, this comparison illuminates important commonalities in the way political and judicial stare decisis operate. For instance, constraining political precedents can also arise from situations where events and decisions in domestic and international politics sharply divide between winners and losers—like how judicial precedents emerge from winning or losing cases in courts. Moreover, officials in domestic and international politics will reason about these political precedents and determine their applicability to the present in a manner that tracks how judges and lawyers reason with judicial precedents (which can be termed, as we will see, a *common law-like way*).

On the other hand, as I show in Sections IV–VI, the comparison also helps emphasize that political stare decisis operates dramatically differently from how judicial stare decisis is conventionally conceived. Among the key differences that I will highlight, and later summarize in Tables 1–3, are:

(*) Political precedents can also arise from situations that do not have a clear analogy to legal decisions that announce winners and losers (and which involve, as we will see, *political cooperation*).

(*) While in law winning and losing a judgment has clear effects on the establishment of judicial precedents, winning and losing in politics can have *perverse* effects on political precedents (in particular, *overzealous winners* can create political precedents that undermine the precedential effects of their "win" and *sore losers* can aggravate the precedential effects of their "loss").

(*) Contrary to judicial precedents, in many situations political precedents will likely not emerge immediately—in "one go"—but only with time and either *cumulatively* or in a *retrospective* fashion.

(*) Compared to judicial precedents, political precedents can prove *very fragile*—for example, because they can be "overruled" without notice or

explanation or because political precedents can become "anti-canonical"[18] much more easily than judicial precedents.

(*) Conversely, there are also important cases where political precedents can prove much *more resilient* and "sticky" than judicial precedents, particularly when they reach a level of cognitive and political hegemony that allows them to survive in the precedential pool even if in law they would have been easily discarded already.

(*) And, finally, compared to judicial precedents, political precedents enjoy a decreased level of "acoustic separation"[19] from the public and must, therefore, be much more attuned to the public in order to effectively constrain.

Being able to identify these differences will also go a long way toward figuring out what public officials might be able to do to deliberately "tinker" with political stare decisis, a craft that I will call, in short, "precedenting" and which is the topic of Section VII. For example, because political precedents are likely to be generated only retrospectively or in a cumulative fashion, I argue that precendenting requires *continuous* work and is not a "single-shot" enterprise as we think of precedential constraint in the law. Moreover, since political precedents tend to become anti-canonical more easily than judicial precedents, officials should also be extremely mindful of their "image," even to the point of excessively valorizing them to make sure that they actually stick and constrain.

Of course, as we will see, sometimes political officials may want to weaken political precedents instead of strengthening them. In these cases, I suggest that public officials engage in precedenting in the *opposite* direction, which includes, among other things, eliminating opportunities for the reaffirmation of political precedents and increasing the chances that these precedents will indeed become anti-canonical (even to the point of "trash-talking" or unfairly blaming these precedents for policy failures).

Section VII also discusses two additional issues relating to the task of precedenting. First, it asks who is likely to prove a *more successful* "precedentor"—both in the sense of benefitting from existing political precedents and being able to establish such precedents in the first place—and who is likely to be a *less successful* precedentor. Second, Section VII identifies some solutions that institutional designers can adopt to increase the force of political stare decisis more generally and beyond the focus on specific political precedents.[20]

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18 *See* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 382, 386 (2011) (defining anti canonical precedents as, among other things, cases whose holdings "cannot reasonably be relied upon" because they come to be perceived as "wrongly decided.").

19 *See generally* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1983) (introducing and explaining the concept of "acoustic separation").

20 *See infra* Tables 4–7.

Throughout much of the discussion in the Article, I will frequently emphasize the importance of the differences between political and judicial stare decisis, at least as the latter is conventionally understood. But I conclude in Section VIII with a twist: As we will see, much of what separates political and judicial stare decisis has to do with certain "craft" norms that are prevalent in the legal profession and that will likely not appear in politics. Yet, insights from legal realism suggest that these craft norms are quite weak and far from strictly adhered to. To the extent that this is true, I argue that the much of the basis for the distinction between political and judicial stare decisis collapses. Instead of completely divergent practices, judicial stare decisis is revealed to be nothing more than one species of the broader phenomenon of political stare decisis.

I suggest in Section VIII that at least those who accept this legal realist insight will benefit from seeing judicial stare decisis in this way. First, this political gloss on judicial stare decisis highlights when judicial precedents are truly constraining—in other words, when stare decisis is, as a common meme now puts it, "for suckers"[21] and when it is not. Second, this political gloss also flags new ways to strengthen it in various jurisdictions where it seems to have dramatically weakened in recent times, such as in the U.S., Israel, Canada, and India. Finally, this gloss illuminates how those interested in achieving their goals through domestic and international courts and their precedents should appropriately (and effectively) approach this task.

II. THE POSSIBILITY OF POLITICAL STARE DECISIS

A. An Initial Skepticism

Can we cogently speak of something like stare decisis in politics? Many might sense that the idea is almost nonsensical. Let me unpack that intuition further before attempting to refute it.

To be sure, public officials across the vast institutions of domestic and global politics do regularly respect past decisions even if they disagree with them in one common scenario. This happens most clearly when these decisions originate from their political superiors. Consequently, politics has something analogous to what we describe in the law as the practice of *vertical precedents*,[22] in which lower courts are expected to abide by the past decisions of higher-ranking ones. Yet, in situations where such relation of hierarchy is absent in politics, which in law we also describe as *horizontal precedents*,[23] we seem to be standing on much weaker ground. And skepticism is entirely understandable.

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21 *See* Richard M. Re, *Is "Stare Decisis…for Suckers"?*, PRAWFSBLAWG (March 24, 2020), https://perma.cc/2QVM-RQJD.

22 *See*, *e.g.,* Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1015 (2003).

23 *See id.*

The reason for this is not that in politics references to the past (outside these relations of institutional hierarchy) are entirely rare to begin with. True, in politics we usually want to know why adopting one course over another is good for us *today*, rather than why it was right for yesterday. In other words, our patience for sticking with the "wrong" things in politics might be more limited than it is in law.[24] At the same time, invocations of the past do occasionally appear in politics. In fact, it is far from unheard of for officials to invest significant resources in trying to pin down what happened in the past before making decisions, even to the point of "binging" the past.[25]

If not the total lack of past or historical references in politics, what primarily fuels this sense of skepticism regarding the possibility of political stare decisis is something else—namely, the difficulty of identifying cases in politics where the past functions as a genuine constraint on officials. For one, when politicians invoke the past in political argumentation, it is usually not to constrain decision makers. Rather, the most frequent use of the past in politics is probably as a form of *persuasion*—when public officials draw on "usable" past analogies to emphasize why one political choice rather than another is in fact preferable today.[26]

But even when public officials explicitly refer to the past as a source of constraint rather than mere persuasion, the credibility of such an argument could easily be questioned. A public official who seems to be relying on the past as a constraint may be suspected of using the past as "window dressing" or as disguised persuasion.

One reason for the public's suspicion of invoking the past as a constraint is that it is quite rare to witness such an invocation when obedience to the past is not also conducive to the official's immediate goals. Indeed, politicians are often

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24 Perhaps given the strong need in law to secure a "jurisprudential system that isn't based upon an 'arbitrary discretion.'" Patterson v. McClean Credit Union, 491 U.S. 164, 172 (1989) (citing THE FEDERALIST NO. 78, at 490 (Alexander Hamilton) (H. Lodge ed., 1888)).

25 Hal Brands & Jeremi Suri, *Introduction: Thinking about History and Foreign Policy*, *in* THE POWER OF THE PAST: HISTORY AND STATECRAFT 1 (Hal Brands & Jeremi Suri eds., 2015) (discussing how, during a certain period of the Obama administration, national security officials were engaged in such "binging" of the past).

26 The precise ways through which the past serves this purpose of persuasion vary. Sometimes those invoking the past believe that it illustrates the contemporary wisdom of a desired course of action—the past, in other words, is part of a process of learning. *See*, *e.g.*, RICHARD E. NEUSTADT & ERNEST MAY, THINKING IN TIME: THE USES OF HISTORY FOR DECISION MAKERS (1986). At other times, those who rely on the past wish to build on a specific kind of emotional attachment that they or their audiences have with it. *See*, *e.g.*, Andrew J. Taylor & John T. Rourke, *Historical Analogies in the Congressional Foreign Policy Process*, 57 J. POL. 460 (1995) (finding that historical analogies in congressional debates on foreign policy were utilized as "post-hoc justifications"); William Inboden, *Statecraft, Decision-Making, and the Varieties of Historical Experience: A Taxonomy*, 37 J. STR. STUD. 291, 310–15 (2014) (identifying "public conscience mobilization," "identity construction," and "existential succor" as functions of past references in politics).

conceived of as caring only "about interests and power."[27] Even if they said they will abide by the past before, it is more than reasonable to think that they will "flip-flop"[28] when adhering to the past no longer suits them. Another issue, though, is that we may be suspicious of the accuracy of the account of the past that politicians present. After all, public officials are often not historians (at least not usually).[29] Furthermore, and more importantly, any description of the past can be easily questioned given that a choice is almost always involved when picking among possible narratives or descriptions of the past.[30] Then-U.S. Senate Majority Leader McConnell's claim[31] that there is a precedent that limits presidents from appointing Supreme Court Justices in their final year in office is a clear example of this. It was an obvious case of a precedential claim that proved unreliable, McConnell flip-flopped when it was convenient to do so. Many believe that McConnell's assertion was inaccurate from a historical point of view as well.[32]

This lack of credibility in invoking the past as a source for constraint is ever-present in politics. It is, however, much more expressed in times of high political polarization, which characterizes politics today in many places across the globe.[33] After all, in non-polarized times, it is relatively easy to find common ground on what exactly the past entails and on the most persuasive narrative through which we should view it. By contrast, during times of increased polarization, the sense of "shared epistemic foundation"[34] that makes choosing between narratives of the past possible shrinks dramatically. And partisans

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27 Ian Shapiro, *Enough of Deliberation: Politics Is About Interests and Power*, *in* DELIBERATIVE POLITICS (Stephen Macedo ed., 1999).

28 *See*, *e.g.*, Maria Liasson, *How Do We Define A Political Flop-Flop?*, NAT'L PUB. RADIO (JUL. 10, 2008), https://perma.cc/C4EL-HVBG; Eric A. Posner & Cass R. Sunstein, *Institutional Flip-Flops*, 94 TEX. L. REV. 485 (2016) (documenting pervasive flip-flops and self-interestedness in political position taking).

29 The literature on what makes policymakers "bad" historians is vast. In addition to the sources cited *supra* in notes 25–26, an influential publication, whose title dramatically conveys the message and the stakes, is MARGARET MACMILLAN, DANGEROUS GAMES: THE USES AND ABUSES OF HISTORY (2009).

30 *See generally* Josh Chafetz, *Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past*, 131 HARV. L. REV. 96 (2017) (presenting a recent statement of this dynamic about the use of historical references in politics).

31 *See supra* notes 11–12 and accompanying text.

32 *See* Kar & Mazzone, *supra* note 11. For an account that suggests that things may be more complicated than that, see generally Chafetz, *supra* note 30.

33 *See*, *e.g.*, Thomas Carothers & Andrew O'Donohue, *Introduction*, *in* DEMOCRACIES DIVIDED: THE GLOBAL CHALLENGE OF POLITICAL POLARIZATION (Thomas Carothers & Andrew O'Donohue eds., 2019).

34 Aziz Huq & Tom Ginsburg, *How to Lose A Constitutional Democracy*, 65 UCLA L. REV. 78, 130 (2018).

become significantly invested in both promoting competing narratives of the past and exposing the partisanship and one-sidedness of their opponents' narratives.[35]

Politics in many domestic contexts and on the global arena exemplify this dynamic with increasing frequency—where each side blames the other for "unprecedented" behavior.[36] Consequently, if we are to be forgiven for skepticism that something like political stare decisis exists in general, we most certainly should be forgiven for being skeptical that it exists in world politics today.

B. Complicating Our Intuitions

But the case against the existence of political stare decisis seems to have clear limits. For one, the intuition on which it is based does not capture the entire world of politics. It seems to have in mind the political dynamics that occur when matters in politics involve "high stakes." Domestic and international politics, however, are more diverse than that. Indeed, much of politics is vastly more banal than this picture assumes. In these circumstances, reliance on the past as a constraint may both increase in frequency and become much more credible. And while this sort of routine, day-to-day operation of politics is harder to observe—perhaps because it is less "newspaper worthy," memorable, or even visible—this does not mean that we should not also search for (or care about) the constraining force of the past and political stare decisis in these contexts.[37]

In addition, the intuitive case fails to account for an important difference between the legal world and the world of domestic and international politics. Although in law the expectation of addressing precedents of the past and reasoning about them in the open is quite robust,[38] in politics that expectation may be weak and even nonexistent. In other words, the discursive burdens that are cast on lawyers and judges to address past precedents are simply much heavier than

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35 In ways that parallel what Duncan Kennedy terms the "hermeneutic of suspicion" in law. *See* Duncan Kennedy, *The Hermeneutic of Suspicion in Contemporary American Legal Thought*, 25 L. & CRIT. 91 (2014).

36 For the U.S., see Chafetz, *supra* note 30, at 107–08. For an example from world politics, see Jessica Elgot, *What Is Prorogation and Why Is Boris Johnson Using It?*, THE GUARDIAN (Aug. 28, 2019), https://perma.cc/UG5N-KDF2.

37 In law, this claim appears under the rubric of "selection effects." *See*, *e.g.*, Frederick Schauer, *Legal Realism Untamed*, 91 TEX. L. REV. 749, 757 (2013). In politics, a more fitting explanation is probably availability or representativeness bias. *See*, *e.g.*, Barbara Vis, *Heuristics and Political Elites' Judgment and Decision-Making*, 17 POL. STUD. REV. 41 (2019).

38 For law's significant argumentative burdens, see, for example, PHILIPP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 7 (1982) (identifying various modalities of constitutional arguments in the form of a closed set); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1194 (1987).

the ones that are cast on political decision makers.[39] There are no strict "canons" of interpretation or closed list "modalities" of argumentation in domestic and international politics that give pride of place to the need to examine decisions of the past. Political rhetoric is more open and less disciplined. Thus, we should be careful not to draw quick conclusions about the existence of political stare decisis from the way political argumentation operates. The past may constrain in politics even if not explicitly uttered.

Finally, one must keep in mind the nature of constraint we should expect to observe when searching for something like political stare decisis. After all, judicial stare decisis in all the jurisdictions that embrace it today—including Canada, the U.K., Australia, the U.S., and many more—is only a *relative* or *presumptive* constraint, not an absolute one.[40] It can be discarded in appropriate circumstances.[41] When considering the possibility that something like political stare decisis exists, we must therefore recall this presumptive structure as well. It would be a mistake, therefore, to simply infer from usages of the past as mere persuasion in politics, or from the past's insincere invocation as a constraint, the total lack of political stare decisis. There remains the possibility that, in such instances, the past was presumptively constraining even if it was ultimately not dispositive. In these cases, the issue is not that there is no political stare decisis. It may be that there is *not enough* of it.

C. Two Sources of Precedential Constraint (in Politics)

Having complicated the intuitive, skeptical case against political stare decisis, let me now make an affirmative case for its existence. Consider three examples of events or decisions in politics that have been identified as akin to "political precedents" and therefore as evidence for what I call political stare decisis:

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39 *See generally* David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729 (2021) (emphasizing the differences between legal reasoning and other modes of reasoning, including political reasoning).

40 On the U.S., see Steven J. Burton, *The Conflict Between Stare Decisis and Overruling in Constitutional Adjudication*, 35 CARDOZO L. REV. 1687 (2014). The usual reference for this view of stare decisis in case law in the U.S. is Payne v. Tennessee, 501 U.S. 808, 828 (1991) (stare decisis is not an "inexorable command"). On Canada, see Debra Perks, *Precedent Unbound? Contemporary Approaches to Precedent in Canada*, 32 MAN. L.J. 135, 137 (2006). On other countries, see Cruz Oliviera & Garoupa, *supra* note 1.

41 For memorable examples of the presumptive nature of stare decisis in the U.S., see, for example, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (effectively overruling Lochner v. New York, 198 U.S. 45 (1905)); Brown v. Board of Education, 347 U.S. 483 (1954) (overruling Plessy v. Ferguson, 163 U.S. 537 (1896)); Lawrence v. Texas, 539 U.S. 558 (2003) (overruling Bowers v. Hardwick, 478 U.S. 186 (1986)). For the presumptive nature of precedential constraint and stare decisis outside the U.S., see generally INTERPRETING PRECEDENTS: A COMPARATIVE STUDY (D. Neil MacCormick & Robert S. Summers eds., 1997).

(*) In the U.S. in 1937, President Franklin D. Roosevelt failed in implementing his program to "pack" the Supreme Court. Until today, and despite some recent pressures, many still describe this incident as establishing a political precedent against changing the number of U.S. Supreme Court justices.[42]

(*) In the U.K. in 1976, Prime Minister Harold Wilson announced to his Cabinet that he "would resign as Prime Minister as soon as the Parliamentary Labour Party had completed the necessary constitutional procedures for electing a new Leader."[43] Until today, this decision is referred to as the "Wilson precedent"[44] according to which prime ministers who wish to resign must wait before they do so until their substitute is definitively chosen by their party.[45]

(*) In Canada in 1992, a consultative referendum on whether to approve the Charlottetown Accord, proposing a major overhaul of the Canadian Constitution, had been initiated. This referendum ended up being rejected by the electorate and the Accord was never implemented. Until today, many believe that this established an important political precedent according to which, despite the lack of legal obligation in Canada to rely on referendums in the context of constitutional amendments, such a referendum is effectively required, at least for significant constitutional amendments.[46]

My claim in what follows is that identifying these past political events or decisions as "precedents" is far from farfetched. These can indeed constrain public officials even against their powerful interests, much like we think of precedents in law. This can occur under one of two conditions. The first is when these decisions or events "signal" the existence of what legal and social science literature calls *political norms*. The second is if the political systems in the U.S., the U.K., and Canada are characterized by another political norm, but of a second-order nature: a *norm* of political stare decisis. I discuss each condition in turn.

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42 *See*, *e.g.*, Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 512–17 (2018). For how this precedent has been exposed to important degree of pressure, see, for example, Mark Tushnet, *Court-Packing on the Table in the United States?*, VERFASSUNGSBLOG (Apr. 3, 2019), https://perma.cc/7HRG-G3UW.

43 RODNEY BRAZIER, CHOOSING A PRIME MINISTER: THE TRANSFER OF POWER IN BRITAIN 118 (2020).

44 *Id.*

45 The "Wilson precedent" is now codified in the U.K. Cabinet Manual. *See* CABINET OFFICE, THE CABINET MANUAL, Chapter 2 para. 2.18 (2011).

46 *See* Jeffrey Simpson, *The Referendum and Its Aftermath*, *in* THE CHARLOTTETOWN ACCORD, THE REFERENDUM, AND THE FUTURE OF CANADA 193, 193 (Kenneth McRoberts & Patrick J. Monahan eds., 1993); Mary Dawson, *From the Backroom to the Front Line: Making Constitutional History or Encounters with the Constitution: Patriation, Meech Lake, and Charlottetown*, 57 MCGILL L.J. 955, 997 (2012).

1. Political norms and the past events that cause them to emerge

Perhaps there was a time when we could divide the political world into two neat boxes of "politics" and "law." If so, this is certainly not the case today. Law is no longer recognized as the exclusive domain of constraint in governmental affairs. Literature on politics and constitutionalism now fully recognizes an additional category of restraint—that of political norms.[47]

Political norms are very much like the social norms that exist in our non-political lives, such as norms against smoking in public or against overt sexual discrimination.[48] For present purposes, political norms have two principal characteristics. First, they determine "rules of conduct" that instruct public officials what to do or what to avoid doing in politics. These "rules" are usually informal in nature and not written down.[49] Second, political norms constrain decision makers' choices in politics beyond the bounds of the law.[50] This constraint can, in principle, stem from two distinct sources. Sometimes it stems from the possibility of political sanctions that may ensue should public officials not abide by what the norms dictates. These sanctions can be of various kinds depending on context, and include shame or embarrassment, loss of employment, or diminished likelihood of reelection.[51] Other times, though, the constraint can be independent of such sanctions and stem from the concern that, by refusing to adhere to a norm, public officials may be encouraging others to *defect* from certain *cooperative arrangements*, even though these officials have a long-term interest in maintaining them.[52]

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47 *See* Adrian Vermeule, *The Third Bound*, 164 U. PA. L. REV. 1949 (2016) (arguing that political "conventions" constrain executive discretion).

48 The literature on political norms is now vast. For particularly valuable contributions, see, for example, Jon Elster, *Unwritten Constitutional Norms* (Feb. 24, 2010) (unpublished manuscript), http://perma.cc/YPN8-764G; Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523 (2004) [hereinafter Tushnet, *Hardball*]; Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163 (2013); Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 U. ILL. L. REV. 1847; David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2 (2014); Mark Tushnet, *The Pirate's Code: Constitutional Conventions in U.S. Constitutional Law,* 45 PEPP. L. REV. 481 (2018) [hereinafter Tushnet, *The Pirate's Code*]; Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187 (2018); Neil S. Siegel, *Political Norms, Constitutional Conventions, and President Donald Trump*, 93 IND. L.J. 177 (2018). For my own attempt to contribute to this literature, see Oren Tamir, *Constitutional Norm Entrepreneuring*, 80 MD. L. REV. 881 (2021).

49 *See*, *e.g.*, Jonathan S. Gould, *Codifying Constitutional Norms*, 109 GEO. L.J. 703 (2021).

50 Jon Elster puts this condition in slightly different terms by describing norms as possessing "causal efficacy." *See* Elster, *supra* note 48, at 36.

51 *See, e.g.*, Vermeule, *supra* note 48, at 1182.

52 In game theoretical terms, there is an important distinction between *coordination* and *cooperation* arrangements or games. In coordination games, all players benefit from the equilibrium where parties coordinate their behavior, even if they may prefer a different sort of coordinating arrangement. By contrast, in cooperation games, players have short-term interests to defect. *See*

As ample literature has now shown, political norms are pervasive in domestic and global politics, much like the norms in our social lives.[53] But what, precisely, is the connection between these norms and political stare decisis? How can political norms give the past a constraining force in politics?

To see this, we need to address how political norms emerge. The issue is complex because the processes that lead to the emergence of norms are somewhat mysterious.[54] Nonetheless, there is little doubt that much of what is involved in the generation of norms depends on the sources of information from which people can learn what other people believe and expect. Indeed, information is the lifeblood of norms. Absent relevant information, it is simply impossible to learn about the chance of establishing cooperative arrangements in politics or about the existence of expectations that apply to official conduct.

There are many available sources for the information that is crucial for the emergence of political norms. Much depends on whom we take our cues from.[55] The media certainly has a role[56] and so do "opinion leaders."[57] And it is not surprising that norms have been found especially effective in "close-knit"[58] environments where exchange of information is relatively easy and trustworthy.

For present purposes, however, one source of information dissemination is particularly important: the informational power of political *events* or of political *decisions*. Indeed, certain events or decisions in politics can have a dramatic, indeed decisive, effect on the emergence of norms. These events or decisions can deliver information to those who participate in them, observe them, or learn about them in hindsight about the potential emergence of a political norm that applies to them. More specifically, they can illustrate that there are prevalent beliefs that some political conduct will simply not be tolerated going forward and so subject actors to relevant political sanctions. Alternatively, they can serve as evidence of

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Elster, *supra* note 48, at 36, 43–44. *See generally* Richard H. McAdams, *Beyond the Prisoners' Dilemma: Coordination, Game Theory, and Law*, 82 S. CAL. L. REV. 209 (2009). For present purposes, I bracket the importance of this distinction and lump both coordination and cooperation under the category of "cooperation." I will relax this simplification later. *See* notes 201–07 and accompanying text.

53 *See supra* sources cited in note 48. For the international context, see generally Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999).

54 *See, e.g.*, Cristina Bicchieri & Ryan Muldoon, *Social Norms*, STAN. ENCYC. PHIL. (March 1, 2011), https://perma.cc/BG9P-7BTJ (highlighting that norms arise as "the unplanned, unexpected result" of human interaction).

55 The relevant technical term is "cascade." *See, e.g.*, Sushil Bikhchandani et al., *A Theory of Fads, Fashion, Custom, and Cultural Change as Informational Cascades*, 100 J. POL. ECON. 992 (1992).

56 For a study of evolution of social norms that emphasizes the role played by the media, see Lior Jacob Strahilevitz, *Charismatic Code, Social Norms, and the Emergence of Cooperation on the File-Swapping Networks*, 89 VA. L. REV. 505, 539–42 (2003).

57 Robert C. Ellickson, *The Market for Social Norms*, 3 AM. L. & ECON. REV. 1, 16–17 (2001).

58 *See, e.g.*, Lior Jacob Strahilevitz, *Social Norms from Close-Knit to Loose-Knit Groups*, 70 U. CHI. L. REV. 359 (2003).

the emergence of a cooperative arrangement, which parties may have a long-term interest to uphold, has been potentially established.[59]

When events or decisions have this sort of informational value—that is, when they signal or serve as a kind of political "proof"[60] for the potential emergence of a political norm, these events will likely have significant "pull" on political behavior. Simply put, public officials will tend to take these events or decisions as constraining "precedents" that limit their future options, very much like we see in judicial stare decisis in law. And they will do so because they are concerned about the consequences of breaking a political norm.

Returning to the examples at the beginning of this Section, we can now see why they may indeed credibly constrain public officials. One potential explanation for this is that these examples are exactly the kinds of events or decisions in politics that have the sort of informational value discussed above; they signal that certain political norms have begun emerging: a norm against changing the number of Supreme Court justices (in the U.S.), a norm against allowing prime ministers to resign before their substitutes have been chosen (in the U.K.), or a norm that compels the use of referenda prior to major constitutional amendments (in Canada).

2. Political stare decisis as a second-order norm

The story does not end here, though. We need to consider the possibility of *another* source that can provide the past with a constraining force: the existence of a practice in politics that instructs public officials to *generally* honor the past and not merely in specific instances as discussed before.

It is easy to imagine why officials may regularly want to adhere to the past. Sensible decision makers in domestic and international politics may find it appealing because of the complexity of the issues with which they are confronted[61] or because of the limited resources they have to revisit new issues that come before them.[62] Some public officials may also find general adherence to the past

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59 *See* Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 352–53 (2000) (highlighting that one possible way through which people may come to realize the existence of norms is when they "*observe* and *interpret* the behavior of others") (emphasis in the original).

60 This is my adaptation of a term that appears in ROBERT H. CIALDINI, INFLUENCE—HOW AND WHY PEOPLE AGREE TO DO THINGS 117 (1984) (discussing how events and behavior constitute "social proof" about the existence of norms).

61 *See* David Patrick Houghton, *The Role of Analogical Reasoning in Novel Foreign-Policy Situations*, 26 BRIT. J. POL. SCI. 523 (1996).

62 *See, e.g.*, Tushnet, *supra* note 15, at 1339–40 (suggesting that public officials may generally benefit from adopting something like judicial stare decisis in the interest of saving time). *Cf.* Franklins Pty Ltd v. Metcash Trading Ltd (2009) 76 NSWLR 603 at 685 [332] (Australia):

> [T]he operation of the system of precedent provides an invaluable service to the effective operation of the law, by enabling a new start to be made from time to

attractive because they are acutely aware of their own historical position and wish to be associated with continuing a certain historical arc.[63] At times, public officials may even be drawn to it in less conscious ways—perhaps because they are particularly risk-averse (or work within institutions that have a particularly heightened "risk culture"),[64] exhibit a "déjà vu syndrome,"[65] or simply lack in imagination.[66] The past might even have a comforting power on political decision makers.[67]

All these situations are plausible but are ultimately fragile in terms of the degree of constraint they generate. They are highly dependent on the decision maker's reliability and consistency. But even if that level of reliability or consistency can be reasonably expected, the arrangements may prove temporary at best. They might hold so long as the relevant officials maintain their positions, but not necessarily when these officials are ultimately replaced. Can the past be internalized more powerfully than that in this general sense?

My suggestion is that the answer is yes. This will happen when the commitment to sticking to the past becomes a political norm *in and of itself*—when, in other words, if abiding by the past becomes in a particular political institution

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> time, on the basis of a principle recently adopted by the High Court, that makes unnecessary what would otherwise be a time-consuming and difficult analysis of case law.

McCulloch v. Maryland, 17 U.S. 318 (1819):

> [A] doubtful question, one on which human reason may pause and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted, if not put at rest by the practice of the Government, ought to receive a considerable impression from that practice.

63 They possess, in other words, an intense preference for historical association or integrity. Consider, for instance, the following description of former national security adviser to U.S. President Nixon, Henry Kissinger: "More than any chief foreign affairs policymaker in U.S. history, he decided his actions and measured his accomplishments with his eye on the fit between history's long stream and his own brief moment." Robert L. Beisner, *History and Henry Kissinger*, 14 DIPLOM. HIST. 511, 511 (1990).

64 *See*, *e.g.*, Barry Bozeman & Gordon Kingsley, *Risk Culture in Public and Private Organizations*, 58 PUB. ADMIN. REV. 109 (1998).

65 *See* Yaacov Y.I. Vertzberger, *Foreign Policy Decisionmakers as Practical-Intuitive Historians: Applied History and Its Shortcomings*, 30 INT'L. STUD. Q. 223, 235 (1986) (defining decision makers who suffer from such a syndrome as having a "strong sense of history, and to them the past is a living reality to be almost always consulted and a rod against which present and future realities are to be measured").

66 For a recent fascinating discussion, see Avshalom M. Schwartz, *Political Imagination and Its Limits*, 199 SYNTHESE 3325 (2020).

67 This is suggested in a new draft essay by Professor Jeremy Waldron. *See* Jeremy Waldron, *'A Previous Instance'—Yamamoto and the Uses of Precedent* 19 (N.Y.U. Sch. L. Pub. L. Rsch. Paper No. 21-51, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3937519.

or setting a *second-order* norm that regulates how public officials should generally make their decisions.[68]

That this can in principle occur should not surprise. It is exactly how we should view stare decisis in law. True, we may have good reasons to value judicial stare decisis because of the need for stability, epistemic humility, and integrity (among others).[69] But, to the extent that stare decisis actually explains judicial behavior and decision-making in a more systemic way, which also makes realistic assumptions about judicial behavior, it is precisely because of its potential effectiveness as a second-order norm.[70] In other words, judges who fail to address or reason on the basis of the constraining force of precedents are in some important sense breaching expectations about their proper role, expectations that originate either from their peers in the legal profession, on the bench, or from the public at large.[71] Additionally, judges who refuse to embrace stare decisis and the constraining force of precedents signal to others on the bench their uncooperativeness, which, in turn, may undermine their ability to make sure some judgments that they themselves care about will stick.[72]

I will have more to say about the efficacy and working of this second-order norm of judicial stare decisis in Section III and VIII. For now, the key puzzle to focus on is this: Is there some sound reason to think that the norm of stare decisis is unique to the legal context? It is hard to see why. Indeed, the exact similar forces that make judicial stare decisis possible can also support a parallel second-order norm in domestic and international politics: a norm of *political stare decisis*.

Begin with the cooperative logic behind the norm of judicial stare decisis. Public officials in domestic and international politics, like judges in the law, almost always work in an environment where they would benefit from the cooperation of others whom they interact with on a regular, repeat basis. They also want some decisions to stick and require the help of others to make sure they do (both *within*

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68 For the idea of second-order decision-making, see generally Cass R. Sunstein & Edna Ullmann-Margalit, *Second-Order Decisions*, 110 ETHICS 5 (1999).

69 *See, e.g.*, Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1 (2012).

70 *See, e.g.*, Richard H. Fallon, Jr., *Constitutional Precedent Viewed through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107 (2008).

71 *See, e.g.*, Jack Knight & Lee Epstein, *The Norm of Stare Decisis*, 40 AM. J. POL. SCI. 1018, 1021 (1996).

72 *See, e.g.*, Stefanie A. Lindquist, *Stare Decisis as Reciprocity Norm*, *in* WHAT'S LAW GOT TO DO WITH IT? 173, 175 (Charles G. Geyh ed., 2011). To be sure, the preference for "settlement" can vary in contexts and with judges. It can stem from the judge's approval of the previous precedent substantively, her desire to decrease her workload, her sincere belief in the value of legal "craft," or her desire that the body of doctrine be rationally comprehensible and acceptable. The literature on the topic is vast and is surveyed effectively in Fallon, Jr., *supra* note 70.

specific political institutions and *between* them).[73] And embracing a kind of informal decision protocol that instructs adherents to regularly respect what was "decided" in the past can be one effective way, just as in law, that public officials can signal their general willingness to cooperate and to encourage others to reciprocate.[74]

Furthermore, public officials in domestic and international politics, much like lawyers and judges, may also be exposed to the possibility of substantial penalties if they regularly diverge from past decisions or lessons learnt from past events. First, these penalties can originate from the institutions of politics themselves, whether it is legislatures, executives, administrative agencies, or any other political organization at either the domestic or international level. As many have highlighted, these institutions often develop a sense of "institutional loyalty"[75] that calls for their officials to adhere to past decisions, no matter whether they personally happen to agree with them. And officials within these institutions who break with that loyalty can accordingly find themselves exposed to significant costs, whether these are material costs or others.[76]

Second, penalties for not abiding by the past in politics might also stem from the reality of political professionalization. As growing literature demonstrates, domestic and international politics has been substantially professionalized in recent decades,[77] so much so that it is now common to speak of the existence of

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73 For one classical analysis of the collective action problem that a political institution such as the legislature faces, see Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L. REV. L. & ECON. 239 (1992). Similar analysis has been extended to other political institutions and contexts. *See*, *e.g.*, Adrian Vermeule, *The Judiciary is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549 (2005); Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915 (2005). For the collective action problem on the inter-institutional level, see, for example, Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595 (2014), and at the international level, see, for example, Annmaria Orban, *How to Solve International Collective Action Problems? Cooperation for Preserving the Global Environment*, 25 SOC'Y & ECON. 97 (2003).

74 *See* Pierre-Hugues Verdier & Erik Voeten, *Precedent, Compliance, and Change in Customary International Law: An Explanatory Theory*, 108 AM. J. INT'L. L. 389, 390 (2014). Though Professors Verdier and Voeten's discussion is in the context of international affairs, I believe their argument can be generalized and applied to other political contexts, including to domestic politics. *See also* Jack Goldsmith & Daryl J. Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1792 (2009) (discussing similarities between international relations and domestic politics). From a game theoretical point of view, my argument is essentially that the norm of political stare decisis is either a kind of coordination norm about what is considered as a cooperative move or a cooperation norm that operates on the second-order level. *Cf.* McAdams, *supra* note 52, at 228.

75 David Fontana & Aziz Z. Huq, *Institutional Loyalties in Constitutional Law*, 85 U. CHI. L. REV. 1 (2018). *See generally* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970).

76 *See* Fontana & Huq, *supra* note 75, at 20–25 (discussing the relevant costs of institutional disloyalty).

77 *See, e.g.*, Gordon S. Black, *A Theory of Professionalization in Politics*, 64 AM. POL. SCI. REV. 865 (1970) (discussing the increased professionalization of U.S. politics); Jean d'Aspremont, *The Professionalisation of International Law*, *in* INTERNATIONAL LAW AS A PROFESSION 19 (Jean d'Aspremont et al. eds., 2017) (same for international politics).

a domestic and international "political class."[78] This professionalization by definition brings with it a certain set of expectations about the way public officials in politics ought to conduct themselves in relevant dealings with other officials.[79] And one such expectation may involve a sense of political fairness, which can include the expectation that it is important to abide by "things decided" in the past, even if those who are required to do so think past decisions are wrong today.[80]

Finally, the public might also be an important source of political discipline and an originator of a norm of political stare decisis. Indeed, it is far from unimaginable that the public itself develops a special taste for respecting the past in domestic and international politics. After all, the public may not have the patience to reopen issues that seem to have been settled previously. And it may expect some measure of fairness in its public officials' dealings too, which may entail abiding by what was previously settled.[81] For the public, in short, an unprecedented political behavior can also be a "dirty word."[82]

Returning to the examples in the beginning of this Section, we can now see an *additional* reason they may in fact constrain public officials. Even if these past decisions or events do not have the informational value that signals the potential emergence (or previous existence) of first-order political norms, the lessons implied by them will be followed and constrain if political systems (in the above examples, those of the U.S., the U.K., and Canada) exhibit the conditions that facilitate the creation of a *norm* of political stare decisis.

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To recap: My claim in this Section has been that notwithstanding potentially strong intuitions to the contrary, political stare decisis is real. The past can exert credible constraint in politics. Two conditions make it so. First, the past can have a "compliance pull"[83] in domestic and international politics when political decisions or events of the past contain information that indicates the emergence, or confirm the previous existence, of a political norm that officials believe applies to them. These events will then have a stare decisis-like "effect," so to speak. Second, the past can prove constraining in politics if the relevant political

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78 *See, e.g.*, Peter Allen & Paul Cairney, *What Do We Mean When We Talk about the "Political Class"?*, 15 POL. STUD. REV. 18 (2017).

79 *See* Herbert B. Asher, *The Learning of Legislative Norms*, 67 AM. POL. SCI. REV. 499 (1973).

80 For the claim that people are strongly motivated by their sense of fairness, see generally TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990).

81 *See* Adrian Vermeule, *The Atrophy of Constitutional Powers*, 32 OXF. J. LEG. STUD. 421, 426 (2012) (discussing the plausibility of a "political precedent heuristic" that publics use to judge political affairs).

82 *See* Chafetz, *supra* note 30, at 96.

83 I draw this term from THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 43 (1990).

environment gives rise to a norm instructing officials to respect the past in general terms, what I have called a second-order norm of political stare decisis.

Some clarifications and qualifications are in order before I proceed with my claims. First, note that the issue is ultimately an empirical one. Political events or decisions that have the relevant informational value to support or prove the emergence of a first-order political norm (or confirm it) may succeed in delivering it, but they may also fail.[84]

Similarly, the question of whether politics in a particular environment is indeed characterized by the cooperative or sanction-based conditions that may give rise to a norm of political stare decisis discussed above is, again, an open one and must be tested empirically. My own view, for what it is worth, is that these conditions generally exist in mature democratic systems as well as in the international system. The fact that both public officials and commentators in domestic and international politics speak regularly about the prospect that some particular event or decision will generate a "precedent" in politics is, I believe, strong evidence of that.[85] It reflects an awareness not only of the possibility that some events will give life to political norms of the first-order but also, and I think more plausibly in many cases, of the cooperative and sanction-based conditions that give life to a norm of political stare decisis.

Second, by suggesting that the past can constrain in politics and that political stare decisis is real, I do not mean to imply that the constraint produced by it would necessarily be a powerful one. As we will see below, this issue is complex and depends on a multitude of factors, including the robustness of the political norms in question, the political stakes of the matter, the opportunities politics happen to present for decision makers, and these decision makers' savvy and sophistication.

Again, I will have more to say about all of this in due course. For now, let me bracket these issues and forge ahead.

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84 We will see later that one reason they might fail to do so has to do with the greater involvement of the public in politics. *See infra* VI.

85 For a recent illustration in the U.S. context, see Bob Bauer, *The Trump Impeachment and the Question of Precedent*, LAWFARE (Jan. 16, 2020), https://perma.cc/F7CN-FKAZ. And for extensive exposition of the use of precedential rhetoric in the context of presidential powers in the U.S., see generally Deborah Pearlstein, *The Executive Branch Anticanon*, 89 FORDHAM L. REV. 597 (2020). For an example from the U.K., see Annette Dittert, *The Politics of Lies: Boris Johnson and the Erosion of the Rule of Law,* THE NEW STATESMAN (July 15, 2021), https://perma.cc/B8VD-4EFZ. And for an example from the Australian context, see Peter H. Hogg, *The Governor's General's Suspension of Parliament: Duty Done or Perilous Precedent?*, *in* PARLIAMENTARY DEMOCRACY IN CRISIS (P. H. Russell & Lorne Sossin eds., 1983).

III. STARE DECISIS: IN LAW AND IN POLITICS

Section II argued that political stare decisis is real and identified two sources from which it can possibly originate. But how exactly does political stare decisis "behave"? More specifically, which events or decisions will likely emerge as constraining *political precedents*? How will officials reason with these precedents and decide to apply them to contemporary events? And when and how are these precedents likely to be overruled?

In law and in relation to the practice of judicial stare decisis, we seem to have good answers to these questions. Accordingly, and especially now that we have seen that there may be a norm of *political* stare decisis that resembles *judicial* stare decisis, it seems only logical to inquire if there are similarities between them also at this operational level rather than work on a blank slate. This is what I do next.

A. Does the Law Analogy Make Sense?

For some, the attempt to compare judicial and political stare decisis may seem inapposite. And on initial reflection, this intuition seems powerful, simply because the differences between the legal world and the world of domestic and international politics appear far too significant for judicial stare decisis to serve as a useful analogy for the operation of political stare decisis.

To be sure, there are important debates and controversies concerning many issues related to the operation of judicial stare decisis.[86] Nonetheless, it is hard to deny that there is some measure of consensus about judicial stare decisis as well. For example, there is little controversy that for a legal precedent to be established, a court that possesses the authority to decide the matter should have reached the decision. There is little controversy, too, that a judicial precedent is set when a judgment garners a specific number of votes.[87] Even within the debates being waged about the practice of judicial stare decisis, there is some important agreement worth flagging. All agree, for instance, that written judicial opinions play an important role in determining the precedent's scope.[88] And there are also legal metrics that lawyers and judges tend to systematically apply to the analysis of

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86 *Compare* Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to* Miranda v. Arizona), 99 GEO. L.J. 1 (2010), *with* Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861 (2014).

87 In many systems a simple majority will usually be enough, but, in some instances, a supermajority might be required. *See, e.g.*, Joon Seok Hong, *Signaling the Turn: The Supermajority Requirement and Judicial Power on the Constitutional Court of Korea*, 67 AM. J. COMP. L. 177 (2019).

88 *See* Schauer, *supra* note 6, at 444.

judicial precedents—metrics that, like judicial stare decisis, are themselves in a sense "craft" norms of the legal profession.[89]

This consensus is again quite thin and leaves much in the practice of judicial stare decisis open to debate. But even this thin consensus is essential to judicial stare decisis's functioning. Consider, for instance, how judicial stare decisis would operate absent the idea that some specific courts or panels have authority to make precedents that bind future decisions. Or consider how judicial stare decisis would work without the recognition that a precedent is set after a judgment has garnered the requisite number of votes of the authoritative panel, or without the existence of any written opinion. Without doubt, these changes would dramatically transform judicial stare decisis itself.

But this is exactly what we seem to have in both domestic and international politics. No parallel institution authoritatively can render political decisions that have a constraining effect on the future.[90] Political precedents might originate from a myriad set of institutions or settings, not just one.[91] Moreover, in many of the settings from which political precedents arise, no rule or practice necessarily indicates that what has transpired is in fact decisive about what comes next. Events in politics do not, in the same way as judicial decisions, announce that they "hereby create a political precedent" that public officials should follow in the future. They most certainly do not announce that they signal the emergence or existence of a political norm whose force can, as we saw in Section II, constrain public officials and give life to political stare decisis.

Politics is also much more informal than law. Often there are no written opinions in politics. Even when a text exists, it is often written by someone *other* than the relevant public official who rendered the precedential political decision or was personally involved in the precedent-generating event.[92] In other words, there is often no unique "canonical" expression to political precedents.

Finally, politics seems to lack even the minimal metrics or standards that regulate how legal argumentation works—the "craft" norms that exist in the legal

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89 For these craft norms, see, for example, Dan M. Kahan, *The Supreme Court 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 27 (2011). *Cf.* RICHARD H. FALLON JR., LAW AND LEGITIMACY IN THE SUPREME COURT 88 (2018) ("American constitutional law is . . . constituted by the shared understandings, expectations, and intentions."). And for these craft norms in the context of judicial stare decisis in the U.S., see BRYAN GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 18 (2016) (seeking to provide a treatise that offers a "conventional description of contemporary practice useful to the working lawyer and judge").

90 Recall that the phenomenon of interest here is akin to horizontal, not vertical precedents. *See supra* note 22 and accompanying text.

91 Philip Bobbitt, *War Powers: An Essay on John Hart Ely's War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath*, 92 MICH. L. REV. 1364, 1383 (1994) ("[T]here are as many kinds of precedent as there are constitutional institutions creating them.").

92 Indeed, the written account of a political event can come from an eyewitness or even from hearsay.

profession.[93] Thus, even if a norm of political stare decisis exists and instructs officials to generally respect "things decided" in the past, or political precedents, its operation seems wholly unpredictable.

B. Modeling Political Stare Decisis on Law

Not so fast. While the worlds of domestic and international politics undoubtedly differ from the legal one, thinking about political precedents in similar terms to those we use to conventionally describe judicial precedents is far from a stretch. The legal analogy can reveal important insights into the operation of political stare decisis.

1. Political authoritativeness

For one, politics does not lack the idea of authoritativeness that exists in law and makes judicial stare decisis workable. Though political precedents can be generated from a diverse set of institutions, it is unlikely that any political institution can determine a precedent for any other institution. For instance, an internal political precedent in the executive branch in one jurisdiction generated by that branch's official will not bind a *legislator* if that precedent has no relevance outside that branch. And a completely internal political precedent in the legislature will similarly not be able to constrain an official of the executive branch.[94] For each institution in domestic and international politics, and the public officials who operate within them, then, the list of potential political precedents is not infinite or wholly unpredictable. There is clearly some notion of authoritativeness operating in politics as well.[95]

2. Political decisiveness: winners and losers

Additionally, events in politics sometimes appear decisive in ways that highly resemble the decisiveness we attribute to judicial judgments. One obvious

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93 *See, e.g.*, Bradley & Siegel, *supra* note 13, at 262 (discussing the lack of a legal "metric" for determining the meaning of past practices in politics).

94 *See, e.g.*, Michael J. Gerhardt, *Practice Makes Precedent*, 131 HARV. L. REV. F. 32, 35–36 (2017).

95 Two comments seem appropriate here. First, this notion of political authoritativeness can stem either from formal law or from informal political norms. For some of the complications that can arise in law, at least in the context of the U.S., see generally Anne Joseph O'Connell, *Actings*, 120 COLUM. L. REV. 613 (2020). For discussion of the role of informal political norms in shaping notions of authoritativeness in politics, see RICHARD H. MCADAMS, THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS 98 (2015). Second, the notion of authoritativeness in politics may prove "fuzzy," at least around the edges. This is so because there are two levels at play. On one level, there is a difference between public officials that serve or represent different institutions. On another level, though, everyone belongs to the broader category of "public officials." Much, then, will depend on the level of abstraction with which actions will be taken. *Cf.* Daphna Renan, *The President's Two Bodies*, 120 COLUM. L. REV. 1119 (2020) (illustrating this dynamic or "two bodies" problem with respect to the position of the U.S. president).

example is when political institutions are "quasi-judicial" and issue written and often thickly reasoned statements that have pretensions about setting a future course. The office of the Attorney-General in the U.K. and the Office of Legal Counsel in the U.S. Department of Justice (OLC), both of which have recently garnered important political and scholarly attention, are salient illustrations in domestic politics.[96] But quasi-judicial political institutions are common also in the international arena, and in fact increasingly so—part of what has been called the "judicialization of international relations."[97]

However, even when political institutions operate in less "judicialized" forms, similar decisiveness to what we see in law can be achieved in domestic and international politics. This seems to occur most clearly when political events serve the most basic function attributed to judicial opinions in courts of law: first, they present a sharply "competitive and polarized"[98] dispute and, second, they appear to resolve that dispute decisively, indicating who the winners and losers are and, by implication, what politics seems to allow or prohibit.

There are at least three distinct ways that such decisive resolution can be achieved in politics. First, decisive political resolution can stem from the way *political contests* or *standoffs* ultimately end. Indeed, when a political contest is at play in which one side is clearly trying to achieve some sort of political action while the other is clearly trying to block it, the decisive success or failure of either of the sides might plausibly give rise to claims for the existence of political precedents.

Second, such decisive political resolution can arise from *authoritative political decisions*. As previously mentioned, any institution has public officials authorized to "speak" for it.[99] And when these officials make decisions, and when these decisions are moreover made against the background of a sufficiently "competitive and polarized" dispute, they can give rise to forceful claims of constraining political precedents even if they don't seem exactly like decisions in a court of law.

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96 For discussion of the position of the U.K Attorney-General in the context of recent controversies, see, for example, Klearchos A. Kyriakides, *The Law Officers of the Crown and the Rule of Law in the United Kingdom*, *in* PUBLIC SENTINELS 185 (Gabrielle Appleby et al. eds., 2014). For discussion of the Office of Legal Counsel, see, for example, Morrison, *supra* note 13. For changes that OLC has experienced in recent years and that put pressure on its "quasi-judicial" nature, see Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805 (2017). For a somewhat similar example, see Gould, *supra* note 13.

97 *See, e.g.*, Karen J. Alter et al., *Theorizing the Judicialization of International Relations*, 63 INT'L. STUD. Q. 449, 453 (2019)

98 Paul A. Anderson, *Justifications and Precedents as Constraints in Foreign Policy Decision Making*, 25 J. POL. SCI. 738, 743 (1981).

99 *See supra* notes 94–95 and accompanying text.

Finally, decisive political resolution that might generate political precedents can occur when the institutions of politics do rely, as in law, on a *voting procedure* to arrive at political determinations.

All of these have some important support in real political dynamics. For instance, the "court-packing" precedent from the U.S.[100] seems to fit the mold of a political precedent that has been established after a sharp political standoff was decisively resolved. The "Wilson precedent" to delay resignation until a successor to the British prime minister is chosen[101] seems to capture the way authoritative decisions in politics, even if lacking judicial characteristics, can prove precedential. And the potential of voting outcomes to establish political precedents is also supported by various examples. The way the failed referendum for the approval of the Charlottetown Accord in Canada created a precedent for compelling referenda in advance of major constitutional amendments is clearly relevant here.[102] But there are other illustrations. For instance, U.S. President Franklin Delano Roosevelt's electoral wins that allowed him to serve a third and fourth consecutive presidential term occurred against a widespread belief that presidents could not serve more than two consecutive terms. Accordingly, these "wins" were believed by many to generate precedents according to which presidents could in fact serve more than two consecutive terms (at least prior to the restoration of this limit through the ratification of the Constitution's Twenty-Second Amendment).[103]

Moreover, in 1962, French President Charles de Gaulle initiated a referendum on changing the presidential election process. At the time, many believed that the constitution prohibited referendums in such circumstances.[104] Nonetheless, de Gaulle's referendum proved successful and, later, was viewed by some as a precedent according to which the French Constitution now allows the adoption of amendments in this manner.[105] Finally, in the U.K., the executive branch is traditionally believed to possess unilateral authority to engage in military affairs without parliamentary approval.[106] In 2013, however, the British government agreed to hold a vote in Parliament on the question of whether it would commit its armed

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100 *See supra* note 42 and accompanying text.

101 *See supra* notes 43–44 and accompanying text.

102 *See supra* note 46 and accompanying text.

103 *See generally* MICHAEL J. KORZI, PRESIDENTIAL TERM LIMITS IN AMERICAN HISTORY: POWER, PRINCIPLES, & POLITICS 124–42 (2011).

104 *See* Elster, *supra* note 48, at 33.

105 *Id.*

106 *See* Claire Mills, *Parliamentary Approval for Military Action*, HOUSE OF COMMONS LIBRARY BRIEFING PAPER NO. 7166 at 4 (May 8, 2018).

forces to a military action in Syria.[107] The government ended up losing that vote.[108] To this day, many consider this a crucial political precedent according to which Parliament should be involved in some way in the future and that the government can no longer act unilaterally in these matters.[109]

3. Reasoning about precedents in law and politics

So far, I have suggested that politics can be both authoritative and decisive in ways that resemble judicial precedents. Let me now add a final similarity between politics and law in this context: the way public officials in politics reason about political precedents may not be that different from the way judges and lawyers reason about judicial precedents.

Note first that it is not clear that politics lacks "craft" norms that regulate political argumentation in ways similar to how legal craft norms regulate legal arguments. As mentioned above, politics has been professionalized to a great extent in recent decades.[110] And every process of professionalization always carries with it not only an expectation of fairness—which brings the possibility of political stare decisis in the first place—but some sort of regulation of the permissible scope of argumentation.[111]

Moreover, law and politics consistently interact. As is well known, lawyers exert a significant influence on politics, either because many political institutions are exposed to judicial scrutiny and consist of lawyers (who are either serving in legal positions[112] or political positions, given that many politicians have legal training)[113] or because lawyers, including law professors, are active and often

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107 *See* Philippe Lagassé, *Parliament and the War Prerogative in the United Kingdom and Canada: Explaining Variations in Institutional Change and Legislative Control*, 70 PARL. AFF. 280, 289 (2017).

108 *Syria Crisis: Cameron Loses Commons Vote on Syria Action*, BBC (Aug. 30, 2013), https://perma.cc/TT2B-4R4N.

109 *See* Mills, *supra* note 106 at 5.

110 *See supra* note 77 and accompanying text.

111 *See, e.g.*, Julie Gainsburg et al., *Argumentation and Decision Making in Professional Practice*, 55 THEORY INTO PRACTICE 332, 333 (2016) (asserting that "[a]ll professions have norms—tacit and explicit—for what counts as a valid argument"). For the claim that normative arguments and persuasion are increasingly important in international affairs, see Thomas Risse, *Let's Argue!: Communicative Action in World Politics*, 54 INT'L. ORG. 1 (2000); Darren Hawkins, *Explaining Costly International Institutions: Persuasion and Enforceable Human Rights Norms*, 48 INT'L. STUD. Q. 779 (2004).

112 *See generally* CORNELL W. CLAYTON, GOVERNMENT LAWYERS: THE FEDERAL LEGAL BUREAUCRACY AND PRESIDENTIAL POLITICS (1995).

113 *See* Nick Robinson, *The Decline of the Lawyer Politician*, 65 BUFF. L. REV. 657 (2017) (offering a recent study that shows how the lawyer-politician trend has been significant, though declining in recent years).

influential participants in political debates.[114] Thus, the same metrics that lawyers use to analyze judicial precedents may end up spilling-over into discussions of political precedents.[115]

Lastly, and perhaps most ambitiously, the structure of reasoning in law and politics about precedents may essentially be the same. Consider an official facing a claim that some past political event or decision is precedential and should constrain her from making a contrary decision. How is she likely to proceed? Very plausibly, she will adopt what we may term a *common law-like* approach,[116] including by interpreting the previous precedent using all kinds of sources that legal analysis usually permits (including the reasons or justifications that underlie the precedent and any written or verbal characterization that may shed light on it) and drawing on the same tools that are familiar from common-law reasoning to "treat" a pending case, such as extending it, distinguishing it, or "narrowing-it-down."[117]

Though all this is quite abstract, there are in fact many illustrations of this common-law like reasoning in real political dynamics.[118] And it suggests that, like other facets of legal argumentation, reasoning about precedents in common law-like ways is not unique to legal institutions.[119]

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For all these reasons, the analogy to judicial stare decisis does appear to capture something meaningful about the operation of political stare decisis. Authoritative and decisive political standoffs, decisions, or votes—which sharply distribute between political winners and losers—may indeed become constraining political precedents, just like legal judgments. And public officials in domestic and

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114 *See, e.g.*, Amy Davidson Sorkin, *What the Law Professors Brought to the Trump Impeachment Hearings*, NEW YORKER (Dec. 5, 2019), https://perma.cc/C9X7-358S. On the different role legal academics have in different jurisdictions, see William Twining et al., *The Role of Academics in the Legal System*, *in* THE OXFORD HANDBOOK OF LEGAL STUDIES 920 (Mark Tushnet & Peter Cane eds., 2005).

115 For more on this, *see infra* Section IV.D.2.

116 *See* Tushnet, *supra* note 48, at 493–94 (suggesting this formulation). *See also* David A. Strauss, *Non-Judicial Precedent and the Removal Power*, U. CHI. L. REV. ONLINE (discussing the "ideology of the common law" as existing also in relation to non-judicial precedents).

117 A useful survey of these "tools" can be found in Richard M. Re, *Narrowing Precedent from Below*, 114 COLUM. L. REV. 1861 (2014). My view is that the most dramatic difference between common law-like reasoning in politics and in law will probably exist in the type of sources that decision makers would be allowed to draw on. For example, in politics the written "evidence" that decision makers will rely on would be broader and might include written evidence or accounts from outside observers of potentially precedential events. In law, the ability to draw on such outside evidence is likely to be more limited.

118 For examples, see Philip Bobbit, *The War Precedent*, FOREIGN POL'Y (Sept. 2, 2013), https://perma.cc/EYC2-KCZN (showing how decision-makers think of past precedents in common-law-like terms); N.W. BARBER, THE CONSTITUTIONAL STATE 82–85 (2010).

119 The use of analogies is another argumentative practice that can be found within and outside law. *See generally* Frederick Schauer & Barbara A. Spellman, *Analogy, Expertise, and Experience*, 84 U. CHI. L. REV. 249 (2017).

international politics will draw on common law-like reasoning when deciding on their meaning and import, especially when lawyers are involved, but not only then.

C. Why the Law Analogy Is Partial (At Best)

It would have made our lives easy if it were possible to model political stare decisis entirely on law. Unfortunately, however, this is not the case. The legal analogy is at best partial in the context of political stare decisis. At worst, it can prove misleading. The basic problem is twofold. First, the analogy to law is not sufficiently attentive to the sources from which precedential constraint in politics stem, discussed in Section II.[120] Second, the analogy ignores the crucial effects some *other* conventional legal "craft" norms have on the practice of judicial stare decisis, "craft" norms which politics would probably lack.

In the subsequent Sections of this Article, I therefore proceed to illustrate this limitation of the analogy between political and judicial stare decisis and expose how they indeed sharply differ from one another. In other words, I use judicial stare decisis as a *negative analogy* to flesh out what is special about political stare decisis and how exactly it operates. In Section IV, I focus on the stage of the initial establishment of constraining precedents. In Section V, I address the overruling stage. And in Section VI, I highlight how the involvement of the public in politics creates further complications in thinking about political stare decisis the way we think about judicial stare decisis.

IV. ESTABLISHING POLITICAL PRECEDENTS

Political precedents can be established in ways that differ significantly from judicial precedents. This Section shows why. Subsection A discusses the emergence of political precedents *beyond* scenarios of winners and losers that characterize judicial precedents. Subsection B shows that in politics winners and losers can also have *perverse* results. Subsection C then argues that, unlike judicial precedents that are created in "one go," political precedents will most likely be created with the passage of time, in a *cumulative* or *retrospective* way. Finally, Subsection D suggests important qualifications to this claim.

A. Beyond Winners and Losers: Political Cooperation

Recall again the sources that Section II claimed can give rise to political stare decisis. Given these sources, it is clear why situations in which politics resolves decisively a "competitive and polarized" dispute, like in judicial judgments that create judicial precedents, can have a constraining force. After all, losing is a significant political penalty. And given how political norms often rely on the

120 *See supra* Section II.A.

existence of sanctions,[121] significant losses may indeed signal the emergence or existence of a political precedent that prohibits the attempted—now losing—behavior. Moreover, an event that captures a decisive loss in politics, or a political decision that rules against a certain course of action, may well be "identified" as a constraining precedent by the operation of a second-order norm of political stare decisis—because not accepting past losses might trigger institutional, professional, or public impatience with those who haven't made peace with their losses.

But winning and losing in politics is not all that matters. The existence of political sanctions in the background of political events may be a *sufficient* condition for the generation or identification of political precedents.[122] Yet it is not a *necessary* one. As Section II highlighted, political norms of the first-order can also stem from cooperative arrangements that parties have a long-term interest in maintaining, even without the existence of sanctions.[123] As Section II further emphasized, the existence of cooperative arrangements also matters for environments characterized by the second-order norm of political stare decisis.[124]

Consequently, in thinking about the decisions and events that are likely to generate political precedents, and hence constrain public officials in politics, we need to go beyond the situations in which politics distributes decisively between winners and losers—as in law—and look, too, for decisions or events that signal political cooperation.

Of course, domestic and international politics will not always "announce" the existence of these forms of cooperation in explicit terms. More likely, we will see cases in which such cooperation will be indicated *implicitly*—in the practice of political institutions themselves.[125] That does not mean, however, that it is impossible to identify cases of political cooperation in politics. Indeed, a large strand of scholarship in the U.S. deals with the (mostly) tacit cooperative "agreements" that seem to have arisen between the legislature and the executive in myriad areas, including war powers,[126] international diplomacy,[127] and fiscal

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121 *See* Section II.C.1.

122 Though how much exactly is questionable, as we will see soon in Subsections B & C *infra*.

123 *See* Section II.C.1.

124 *Id.*

125 *See* Bradley & Morrison, *supra* note 13, at 434 (highlighting how in the inter-branch context there is typically no "direct evidence of [inter-branch] agreement"). *But see* Adam Perry & Adam Tucker, *Top-Down Constitutional Conventions*, 81 MODERN L. REV. 765 (2018) (discussing the existence of explicit "agreements" that are deliberately meant to create constitutional norms or precedents).

126 *See* Bradley & Morrison, *supra* note 13, at 465–66 (discussing OLC's view that there is a "practical understanding" between Congress and the presidency on some scope of unilateral war powers authority).

127 *See, e.g.*, H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 539 (1999).

matters.[128] And it is not surprising that this scholarship observes that these kinds of agreements have often had precedential force.[129] For an additional example, consider this: during the Gulf War in 1991, the U.S. considered invading Iraq even absent the U.N. Security Council's approval. Nonetheless, despite pressures from some of its allies that urged it to act unilaterally and notwithstanding the fact that it clearly had the ability to act unilaterally, the U.S. ended up choosing to cooperate by awaiting the Security Council's approval. This choice was later described as a "galvanizing event"[130] and as a political precedent for future cooperation in international affairs through the Security Council.

In short, some events in politics might signal the existence of cooperative agreements. And when this is the case, these events, like decisive political wins and losses, may also generate constraining political precedents.

B. Overzealous Winners and Sore Losers

Another crucial difference between political and judicial stare decisis relates to the nature of winning and losing itself. In law, winners generate legal precedents about what is allowed as a legal matter, and losers generate precedents about what is disallowed.[131] In politics, this dynamic is often similar but not necessarily so. On some occasions, it might matter *how* one wins or loses. Consider the following:

(*) The British Prime Minister enjoys broad patronage powers to appoint and dismiss ministers. In 1962, Prime Minister Harold Macmillan decided to use his broad power to fire no less than *seven* ministers from his cabinet at the same time. This event—later known as "the night of the long knives"—was seen as an unseemly use of the Prime Minister's patronage, and some believe that such use of that power will not be permitted today.[132]

(*) Section 33 of the Canadian Charter of Rights and Freedoms allows the central and provincial legislatures in Canada to temporarily override certain portions of the Charter. As many have observed, however, resorting to the use of Section 33 has atrophied[133] or fallen into "desuetude"[134] such that it is very hard to resort to it again in practice. According to an influential account,

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128 *See* Huq, *supra* note 73, at 1627–31.

129 *See, e.g.*, Bradley & Morrison, *supra* note 13, at 430.

130 Erik Voeten, *The Political Origins of the UN Security Council's Ability to Legitimize the Use of Force*, 59 INT'L ORG. 527, 544–46 (2005).

131 For the importance, even obsession, of winning in courts in our system, see generally LAWRENCE M. FRIEDMAN, TOTAL JUSTICE (1994).

132 *See* Anthony King & Nicholas Allen, '*Off with Their Heads': British Prime Ministers and the Power to Dismiss*, 40 BRIT. J. POL. SCI. 249 (2010).

133 *See* Vermeule, *supra* note 81, at 425.

134 Richard Albert, *Constitutional Amendment by Constitutional Desuetude*, 62 AM. J. COMP. L. 641, 661 (2014).

one of the reasons that led to this result is that its first use by the province of Quebec was done in such a "sweeping and indiscriminate" way that it gave the override power an aura of illegitimacy.[135]

(*) In international relations, some believe that a new rule that legitimizes what is known as the "responsibility to protect" (or R2P) has begun to emerge. However, the 2011 NATO operation in Libya is understood as a major blow to R2P and to the "falling away"[136] of the emerging consensus. And many believe that this can be attributed to NATO's intent to significantly exceed the mandate of R2P in Libya—not only to protect civilians from oppressive governments but also to exact regime change.[137]

In all these examples, the "winners" certainly prevailed in the specific instance. Macmillan was able to dismiss his ministers, Quebec was able to override the Canadian Charter, and NATO intervened in Libya. Nonetheless, given the way these "wins" were achieved, they all have created precedents that seem to have *limited* those same winners, or others similarly situated, in the future.

These examples expose a dynamic that we do not normally attribute to judicial precedents. They illustrate that when political winners are overzealous, the precedents they create may have perverse results. On a more strategic note, these examples also suggest that credible and sympathetic political losers who can portray their opponents as extraordinarily aggressive can take (at least some of) the sting out of political wins and out of their own losses. A dramatic illustration of this strategy comes from the well-known story of the Masada battle in the First Jewish-Roman War (73–74 CE). As told by Flavius Josephus, the "pleasures of victory" in Masada were ultimately denied to the Romans because, having witnessed the communal suicide of 960 men, women, and children who were blockading Masada in resistance to the Romans' invasion, the Romans could "not help but wonder at the courage displayed by the dead."[138]

Credibility and sympathy in this context seem important, though, even if they need not arise from a similarly morbid scenario as Masada. More specifically, losers should beware not to become sore losers who might unintentionally establish political precedents that strengthen their opponents and harm similarly

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135 Jeffery Goldsworthy, *Judicial Review, Legislative Override, & Democracy*, 38 WAKE FOREST L. REV. 451, 468 (2003).

136 As suggested, for example, by former Australian Former Minister Gareth Evans. *See* Gareth Evans, Fmr. Australian Cabinet Minister, The Responsibility to Protect After Libya and Syria, Address to Annual Castan Centre for Human Rights Law Conference, Melbourne, (July 20, 2012), https://perma.cc/9UK6-BQG2.

137 *See, e.g.*, Jonathan Eyal, *The Responsibility to Protect: A Chance Missed, in* SHORT WAR, LONG SHADOW: THE POLITICAL AND MILITARY LEGACIES OF THE 2011 LIBYA CAMPAIGN 53 (Adrian Johnson & Saqeb Mueen eds., 2012).

138 *See* FLAVIUS JOSEPHUS, COMPLETE WORKS: THE WARS OF THE JEWS 603 (1960).

positioned future losers.[139] As an example of the real risk sore losers in politics face, consider that Theodore Roosevelt's decision in 1911 to split from the Republican Party and to run on a third-party ticket after he had lost the Republican nomination ultimately led many states to introduce laws that prohibit such a move. These laws are even known as "sore loser" laws.[140]

C. The Challenge of Establishing Political Precedents

The issues discussed in Subsections A and B might be addressed by "qualifying" the analogy between political stare decisis and judicial stare decisis—recognizing the potential precedential force of events that signal political cooperation (Subsection A) and acknowledging the occasional perverse effects of winning and losing (Subsection B). Here, I discuss a more fundamental issue—namely, that there is a systematic difference between how political precedents and judicial precedents are likely to emerge. I develop the argument in two steps.

1. Judicial and political precedents: an unequal informational burden

First, precedents in law and politics both must serve an extremely basic function. That function is informational in nature. To be established, both judicial and political precedents need to convey to those who will later seek to adhere to them the information needed to illustrate their precedential nature.

But the informational burden imposed on political and judicial precedents is dramatically different. In law, the informational burden is relatively light; in politics, it is relatively heavy. Partly, this is because law is formalized and mostly written down, whereas in politics this is not necessarily (or even usually) the case. Indeed, it is much easier to track legal judgments than, say, implicit cooperative arrangements in politics.[141] But what makes the informational burden diverge is also, and crucially, the existence of the following two "craft" norms that apply to the context of judicial stare decisis. The primary effect of these craft norms is to limit the information that lawyers and judges need to acquire before they classify a decision as precedential and hence constraining.

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139 A related concern of sore losers is that they develop a "siege mentality" or enter a "spiral of silence" that causes them to retreat from politics altogether. *See* Daniel Bar-Tal & Dikla Antebi, *Beliefs About Negative Intentions of the World: A Study of the Israeli Siege Mentality*, 13 POL. PSYCH. 633, 642–43 (1992) (explaining "siege mentality" as a group mental state in which the group believes that out-groups have negative intentions towards them and can lead to increased sensitivity, greater group cohesion and drastic measures to avoid danger); Elisabeth Noelle-Neumann, *The Spiral of Silence: A Theory of Public Opinion*, 24 J. PUB. COM. 43 (1974).

140 For scholarly treatment of these laws, see generally Michael S. Kang, *Sore Loser Laws and Democratic Contestation*, 99 GEO L.J. 1013 (2011). And, at least on one account, as of August 2014, all but three states in the U.S. (Connecticut, Iowa, and New York) had these sore loser laws. *See* Barry C. Burden et al., *Sore Loser Laws and Congressional Polarization*, 39 LEG. STUD. Q. 299, 305 (2014).

141 *See also* Gerhardt, *supra* note 15, at 112–13 (identifying "discoverability" as a condition for the generation of non-judicial precedents).

The first craft norm is that judicial precedents come "neatly packaged"[142] and are set in "one go"[143] or as a "one-off."[144] As some have put it, in law, "[i]t only takes one case to lock in a resolution."[145]

A second relevant craft norm is that to determine the precedential value of judicial decisions, judges and lawyers need not inquire into the psychology behind a judge's vote. Indeed, the fact that, say, the "swing" or "pivotal" judge on a panel in a domestic or international court[146] concurs half-heartedly or the fact that that this judge was potentially insincere about the reasons that led her to vote are not probative of the judgment's precedential force. A judge in a future case, and according to accepted legal craft norms, cannot simply disregard a previous judicial decision that garnered enough votes just because she is skeptical of the "true" beliefs or motives of one of the voting judges or of his or her insincerity.[147] Half-heartedly produced judicial precedents are still valid precedents.

Things are different in politics. Even if politics has been professionalized to a substantial extent, as discussed above,[148] it is unlikely that it will be characterized by the exact identical "craft" norms as exist in law. Rather, public officials will *not* be restricted, as judges and lawyers are, to examine exclusively what appears to be a "neatly packaged" event or restricted in asking after that event has concluded, "What comes next?" And public officials will *not* be similarly restricted from questioning what the people involved in the event were truly thinking during the relevant event or what motivated them to behave as they did.

And here lies a crucial twist: It is not only that politics will probably not limit such inquiries about the nature of supposedly precedential events in politics; *these sorts of inquiries will very likely be called for* as part of the process of generating political precedents and the emergence of precedential constraint.

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142 Schauer, *supra* note 3, at 573.

143 Baude, *supra* note 13, at 39.

144 David S. Schwartz, *Madison's Waiver: Can Constitutional Liquidation Be Liquidated?*, 72 STAN. L. REV. ONLINE 17, 20 (2019).

145 Joseph Blocher & Margaret H. Lemos, *Practice and Precedent in Historical Gloss Games*, 105 GEO L.J. ONLINE 1, 10 (2016). Of course, this hasn't always been the case. *See*, *e.g.*, Baude, *supra* note 13, at 37–39 (explaining that the judicial precedent model evolved over the nineteenth century from requiring a line of cases to requiring a single case).

146 For the role of pivotal and swing judges in international courts, see Erik Voeten, *The Impartiality of International Judges: Evidence from the European Court of Human Rights*, 102 AM. POL. SCI. REV. 417, 426 (2008); Christoph Honnige, *The Electoral Connection: How the Pivotal Judge Affects Oppositional Success at European Constitutional Courts*, 32 WES. EUR. POLIT. 963 (2009).

147 *See generally* Charles R. Barzun, *Impeaching Precedent*, 80 U. CHI. L. REV. 1625 (2013) (arguing that, despite the judicial norm to the contrary, considering historical evidence of the motives behind judicial decisions is a useful way to weigh its precedential value). We will see exceptions to this legal craft norm later. *See infra* notes 257–66 and accompanying text.

148 *See generally* Black, *supra* note 77 (explaining sets of values defining what it means to be professional in politics); Asher, *supra* note 79 (describing how freshmen congressmen learn professional norms).

To see this, recall again the sources from which political stare decisis originates discussed in Section II. The first source is when events indicate the emergence or existence of first-order political norms. But to determine whether an event in politics is in fact indicative in this way—asking "What comes next?" after the political event has transpired and "What made the involved parties behave as they did?"—is crucial. Political norms exist precisely because in some important sense, public officials have internalized beliefs about what ought to be done in politics. And without inquiring into the nature of the beliefs underlying the behavior and the degree to which future public officials are willing to adhere to what happened previously (or how other relevant actors will react if they fail to repeat that behavior), it would be impossible to understand whether an event in politics indicates the emergence or existence of a political norm that political decision makers may be reluctant to upset.

An identical inquiry will similarly occur even when the constraining force of the past stems from its additional political source—the *norm* of political stare decisis. True, in principle, this norm constrains even when events do *not* themselves indicate the existence or emergence of political norms of the first-order.[149] But when a public official in an environment where the norm of political stare decisis exerts force considers whether to identify an event as a constraining political precedent, she is likely to be very much aware of the consequences of doing so. And if she perceives these consequences as costly, this official will ultimately ask whether the past event should be understood as constraining in a more significant way. In effect, a decision maker who is compelled by the norm of political stare decisis will end up asking the same questions that a decision maker who is *not* compelled by that norm would ask. And that again goes to the actual beliefs and motivations of those involved in the event and to the issue of, "What comes next?"

The upshot, then, is that the informational burdens that precedents face in law and in politics are significantly unequal. Judicial precedents will be established and hence constrain relatively easily—in "one go"—given that there is no need to inquire into the actual beliefs or motives of the presiding judges or into the future to identify a judicial decision as precedential. Conventional legal craft norms in fact *forbid* lawyers and judges from doing so. By contrast, political precedents will be generated after a much more labored process of inquiry and speculation into the nature of the supposedly precedential event. The informational burden on them is, thus, much heavier. More concretely, a political precedent will be generated and hence constrain only when decision makers become sufficiently convinced that, given the actual beliefs and motivations of those involved in the relevant political event and given the prospects of behaviors and reactions, what

149 *See supra* Section II.C.2.

has transpired truly indicates the emergence or existence of a political norm that they would be reluctant to upset.[150]

2. The difficulty of living up to the informational burden in politics

But how likely is it that political events or decisions will meet this high informational burden? True, we have seen in Section II that political events and decisions might in principle "signal" the generation of political norms of the first-order or confirm their existence.[151] At this point, though, it is important to recognize that the ability of political decisions or events to fulfill this function by themselves and at the moment of their occurrence is systematically low.[152] Indeed, even decisive political wins or losses and "galvanizing events" that signal political cooperation will not necessarily generate or become identified as precedential shortly after they have transpired.

In part, this is because no one is a fortune teller or a mind reader. But in part, and more interestingly, this is also because political events and decisions are not like a slap on the face. They are much more ambiguous about what they convey.[153] There are three types of political ambiguities that I will highlight here that systematically decrease the likelihood of political decisions or events to live up to the informational burden necessary to establish a constraining political precedent at the moment of their occurrence.

a) *The indecisiveness of single political events*

The first type of ambiguity has to do with the nature of single political events or decisions. As previously discussed, a political event that captures a decisive political loss by vote, decision, or standoff may serve as an important informational signal that a political precedent has been generated.[154] But in politics, single political events are rarely truly decisive by themselves.

Indeed, the fact that political losers lost one time does not mean that they have decided to forgo trying to win again. Consider some of the examples discussed in Section III. FDR won a third and then fourth term in office contrary to a widespread belief that U.S. presidents cannot serve more than two terms. But ultimately, the Twenty-Second Amendment was introduced and then ratified,

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150 Another way to put this point is that judicial precedents are what literature in psychology describes as "descriptive norms" while political precedents are "injunctive norms." *See generally* Robert H. Cialdini et al., *A Focus Theory of Normative Conduct: A Theoretical Refinement and Re-Evaluation of the Role of Norms in human Behaviors*, 58 J. PERS. SOC. PSYCH. 1015 (1990).

151 *See supra* Section II.C.2.

152 *See*, *e.g.*, William Hubbard, *Inventing Norms*, 44 CONN. L. REV. 369, 378–79 (2011) (highlighting the systemic difficulty of identifying norms).

153 I take the example of slaps on the face from James M. Fields & Howard Schuman, *Public Beliefs About the Beliefs of the Public*, 40 PUB. OP. Q. 427, 427 (1976).

154 *See supra* Section III.B.2.

which operated to neutralize FDR's achievement and restored the limit to two presidential terms.[155] Or consider British parliamentary involvement in military affairs. The British government lost the vote in Parliament on military involvement in Syria, and that in turn generated expectations that Parliament should be involved in such matters going forward. But relatively soon after this loss, the government insisted that the vote should be understood narrowly and that there remain military affairs in which the government would continue to operate unilaterally.[156] The losers in these examples have, in some important sense, recuperated.

From a different angle, the fact that winners in politics have won once does not mean that those wins will be omnipresent or that the winners will necessarily be victorious again. What if the win was merely lucky or exceptional? And what if it otherwise did not attest to the reality of the winners' political strengths?[157] Recall that French President de Gaulle's 1962 referendum proved successful, and changes to the French Constitution were accepted despite widespread understanding at the time that the Constitution could not be amended through referendum.[158] But in 1969, de Gaulle initiated *another* referendum on a different matter and ultimately lost. And that loss was later understood, plausibly, as neutralizing the earlier precedent.[159]

Sophisticated political observers and participants are obviously aware of this ambiguous nature of single wins or losses. Drawing on a military analogy, they know that some political victories that appear decisive may in fact be only *tactical* or *operational* wins—they have won the battle but not the war.[160] Consequently, political decision makers will be very cautious about taking such events as precedential and constraining in "one go," as would be conventional to do for a legal decisionmaker. Rather, the political decision maker will wait to see whether

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155 *See* KORZI, *supra* note 103, at 5.

156 *See* Lagassé, *supra* note 107, at 289.

157 "Wins" based on words alone are also not necessarily indicative. *See* Peter J. Spiro, *War Powers and the Sirens of Formalism*, 68 N.Y.U. L. REV. 1338, 1356 (1993) (asserting that in thinking about precedents in the context of inter-branch disputes, "[i]t is actions that count, not words").

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158 *See* Section III.

159 *See* Elster, *supra* note 48, at 47.

160 *See generally* COLIN S. GRAY, DEFINING AND ACHIEVING DECISIVE VICTORY (2002) (arguing that decisive victories are still possible in modern warfare, exploring how they can be achieved, and recognizing the difficult bridge between military and political victories). They may also know that even if political losers admit their loss, they may be engaged in perfidy. *See generally*, *e.g.*, Sean Watts, *Law-of-War Perfidy*, 219 MIL. L. REV. 106 (2014) (discussing perfidy in the law of war and its strained relation to modern methods of warfare).

the political battle is truly decisive—whether the losers are fully, as Carl von Clausewitz famously put it, "incapable of further resistance."[161]

The same problem regarding the imperfect informational signal of single political events applies with similar force to the *other* scenario from which a political constraint may arise—the scenario of political cooperation. After all, even if public officials have cooperated in one instance, it is far from clear that this cooperation will recur in future interactions. Indeed, it is quite possible that the other side might benefit from a different kind of cooperative arrangement[162] or even from not cooperating at all.[163] To draw on an example mentioned previously,[164] the fact that the U.S. chose to rely on the Security Council during the Gulf War might have been a galvanizing event regarding the functioning of the Security Council as a cooperative arrangement in matters of international use of force. But not too long after the war had concluded, the U.S. often proceeded unilaterally in ways that suggested that the cooperative advantages it drew from the Security Council were limited at best.[165]

Again, sophisticated political observers and participants are aware of the potential fragility of a single-shot cooperative event. They know that in politics, the Oracle in the *Matrix* movie series was correct: the "real test for any choice is having to make that choice again."[166]

Note another important issue that emphasizes how single political events or decisions in politics have low informational quality and cannot normally by themselves generate a political precedent in "one go." In law, part of what strengthens the craft norm that judicial precedents are created immediately relates to institutional features of the judiciary. Given that judicial institutions are mostly passive, often have limited and even discretionary dockets, and can entertain

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161 *See* CARL VON CLAUSEWTZ, ON WAR 75 (Michael Howard & Peter Paret eds., 1976). In the constitutional law literature on the role of past practice in constitutional interpretation the term often used to describe a similar idea is "acquiescence." *See generally*, *e.g.*, Bradley & Morrison, *supra* note 13, at 415; Roisman, *supra* note 13; Baude, *supra* note 13, at 18–20. I refrain from using this term here because of the more normative content that is given to it by this body of literature, which also raises disputes about its meaning. For further discussion, see *infra* Section IV.D.2.

162 In game theoretical terms, the problem is known as that of multiple equilibriums. *See*, *e.g.*, Daryl Levinson, *The Inevitability and Indeterminacy of Game-Theoretic Accounts of the Legal Order*, 42 L. & SOC. INQ. 28 (2017) (asserting that a fundamental limitation of game theory to predict legal compliance is an inability to predict the size and shape of multiple simultaneous equilibria).

163 *See*, *e.g.*, Jon Elster, *Constitutional Conventions* 25 (unpublished manuscript) (on file with author) (emphasizing the fragility of cooperative norms precisely because of the possibility that unilateralism may be tempting).

164 *See supra* note 139 and accompanying text.

165 I note, though, that the U.S. did cooperate with the Security Council on at least one occasion in the immediate aftermath of the Gulf War. Its unilateralism effectively began after some time had passed. *See* Voeten, *supra* note 130, at 546.

166 THE MATRIX REVOLUTIONS (Warner Bros. Pictures 2003).

various evasive strategies,[167] the pace with which similar matters come before courts again for reconsideration is relatively slow—in some cases, extremely slow.[168] Accordingly, even if we were to suspect that a certain judicial precedent might be overruled if reconsidered, that "if" is potentially significant. By contrast, political institutions regularly lack these features. They do not necessarily have slow "jurisprudential cycles" like courts.[169] Worrying about what comes next in politics and the fulfillment of what can be thought of as the Carl von Clausewitz/*Matrix* tests are therefore pressing issues, even *immediately* after the event has transpired.

b) *Observational Equivalence*

Another source of ambiguity in politics that systematically decreases the chances of establishing political precedents in "one go" and at the moment of occurrence is that there is often serious uncertainty about what motivates those involved in generating those precedents. This relates to the well-known issue of "observational equivalence," according to which a certain observed behavior can be explained by different causal theories at the same time.[170] What observational equivalence highlights here is that it is often difficult to confidently identify that a political behavior in a particular event or decision, and even in a series of events and decisions, can be explained by something that truly indicates the emergence or existence of a political norm.

We can further divide the challenge stemming from observational equivalence in the generation of political precedents into two typical scenarios. The first scenario occurs when there are *multiple valid explanations* that can account for the event or decision. Consider again the political resolution by voting which, as we saw,[171] might settle political disputes in ways that give rise to political precedents. But on further reflection, can votes really do so on their own? For

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167 These features of the judiciary are usually mentioned in the literature that builds on Alexander Bickel's claim that courts should entertain the passive virtues. *See* Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

168 On the phenomenon of slow jurisprudential cycles, see, for example, Jack Goldsmith, *Zivotofsky II as Precedent in the Executive Branch*, 129 HARV. L. REV. 112, 133 (2015) (noting how separation of powers conflicts in the U.S. arise all the time but are "rarely adjudicated"). For a discussion of the use of "avoidance" strategies by courts from a comparative perspective, see Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE L.J. 1 (2016).

169 For pushback on the generalization in the text, see Sharon B. Jacobs, *The Administrative State's Passive Virtues*, 66 ADMIN. L. REV. 565 (2014) (arguing that administrative agencies have passive virtues similar to courts such as using restrain to avoid unnecessary conflict with other institutional actors).[170] For discussion of the problem of "observational equivalence" in related contexts, see, e.g., Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1402 (2012).

170 For discussion of the problem of "observational equivalence" in related contexts, see, e.g., Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1402 (2012).

171 *See supra* Section III.B.2.

instance, when FDR was voted in for a third and then a fourth term, did that suggest that voters at the time believed that the tradition prohibiting more than two terms had become obsolete in general? Or just in the specific circumstances at hand? Did the voters have that tradition in mind, or were they only voting to express their support of FDR? Indeed, the act of voting is notoriously difficult to interpret.[172] There are numerous explanations for the vote, and not all align with the conclusion that the emergence of a political norm brought about its result.[173]

The other scenario where observational equivalence proves important occurs when the relevant political event or decision has a dominant alternative explanation that does not coincide with understanding the event as indicating the emergence or existence of a constraining precedent.

Two potential dominant-but-disruptive explanations seem especially likely in politics. The first is *adherence to law*.[174] For instance, it was suggested that it is impossible to view the behaviors associated with filibuster use in the U.S. Senate as creating what is akin to political precedents about that practice.[175] On this view, because the U.S. Constitution grants unlimited discretion to the Senate to change the filibuster, merely observing the relevant changes around it has no determinative informational value as to the existence of norms around this practice. The relevant players might simply be motivated by the fact that the law enables them to behave as they do; they are not bound to the practice in any other way.[176]

The second frequent explanation that can have disruptive implications is *self-interested behavior*. Indeed, self-interest in politics is highly correlated with

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172 *See* Elster, *supra* note 48, at 46–47; GERHARDT, *supra* note 15, at 138–39 (highlighting the ambiguity of the voting procedure).

173 Note that similar issues beset political cooperative agreements. As discussed in Section IV.A, many of these agreements are created tacitly, through practice and political events themselves. Consequently, we are often able to interpret them in multiple ways. For instance, perhaps the agreement is just a matter of convenience, and the parties have no long-term interest in sticking to it. If the agreement was achieved in silence, maybe it was not an agreement at all. *See*, *e.g.*, Bradley & Morrison, *supra* note 13, at 448. Maybe the involved political institutions did not even consider the event as signaling an agreement, but it was in fact created in an accidental or spontaneous way. *See*, *e.g.*, Roisman, *supra* note 13, at 686–88. And maybe it was just a matter of casual habit rather than deep commitment. On the difference between norms and habits, see, e.g., Joseph Jaconelli, *Do Constitutional Conventions Bind?*, 64 CAMB. L.J. 149, 150 (2005).

174 *Cf.* Michael C. Dorf, *How the Written Constitution Crowds Out the Extraconstitutional Rule of Recognition*, *in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION 69, 74–75 (Matthew Adler & Kenneth Einar Himma eds., 2009) (assessing the interaction between written constitution and extraconstitutional customary law and asserting that the existence of a written constitution can crowd out some customs).

175 *See* Richard Albert, *How Unwritten Constitutional Norms Change Written Constitutions*, 38 DUBLIN U. L.J. 387, 399 (2015).

176 *See id.*

negative conclusions about the existence of political precedents. Consider the following:

> (*) The person who fills the role of the German chancellor is always selected from the largest party in the coalition. Accordingly, some have suggested that this practice constitutes a constraining political precedent. But others have powerfully argued that what drives the choice about who becomes the chancellor is often the interests of the negotiating parties that form the coalition. Therefore, no political precedent can be said to exist.[177]
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> (*) Many believe that a political precedent instructs the U.K. House of Lords not to intervene in financial legislation that the House of Commons passes. But some have argued against this view that because the House of Commons safeguards its powers against the House of Lords *only when* it is politically convenient for it to do so, the political precedent is more imaginary than real.[178]

c) *Deliberate ambiguity: negating and self-negating statements*

A final source of ambiguity that systematically hampers the generation of political precedents worth highlighting is *deliberate* in nature. I have previously alluded to the possibility that political institutions and decision makers are aware that their conduct could sow the seeds of political precedents.[179] What we can now add is that being aware of this possibility, political decision makers may therefore have good reasons to purposefully obfuscate the precedential potential of the event.

We can distinguish between two different types of such deliberate obfuscation that we are likely to observe in real political dynamics. One type is when the political institution or decision maker actively tries to prevent the precedential effect because they know that it will be contrary to their interests. In these cases, the decision maker will simply accompany her behavior with a *negating statement* that seeks to deny the precedential effects of that behavior. For example, when the Canadian government agreed to hold a parliamentary vote before approving future military deployments to Afghanistan, the government

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177 *See* Greg Taylor, *Convention by Consensus: Constitutional Conventions in Germany*, 12 INT'L J. CONST. L. 303, 328 (2014). *See also* Bruce G. Peabody & Scott E. Gant, *The Twice and Future President: Constitutional Interstices and the Twenty-Second Amendment*, 83 MINN. L. REV. 576 (1999) (arguing that the practice against more than two presidential terms was not in fact a norm given the self-interested behavior of U.S. presidents throughout time).

178 Specifically, the House of Commons interferes in decisions by the House of Lords only in the context of budget cuts rather than with increases. *See* Robert B. Taylor, *The House of Lords and Constitutional Conventions: The Case for Legislative Reform*, U.K. CONST'L L. BLOG (Nov. 16, 2015), https://perma.cc/6T5G-6Y8L.

179 *See supra* text accompanying note 85.

announced that whatever the results of the vote, it should not be understood to be a precedent limiting its unilateral executive powers.[180]

Another option, though, is that the party that tries to obfuscate the precedential effects of a political event or decision is in fact the one *who might benefit* from these effects. At first, this situation might seem counterintuitive. But it has real bite. Sometimes the ability to "get" something in politics might be conditioned on such obfuscation, either because the side who will be benefitting is in a relatively weak position (and the stronger side insists on it) or simply because the beneficiary is uncertain how the thing it is "getting" will eventually be perceived (either by other political elites or, as we will see later, the public).[181] In such a case, the political technique would be to accompany the event with *self-negating statements*.[182]

3. Summing up: the retrospective & cumulative nature of political precedents

In sum, despite initial similarities, it is hard to escape the conclusion that political stare decisis is likely to operate in vastly different ways from its judicial counterpart. First, given the lack of similar craft norms, events and decisions in politics will face a much more significant informational burden before they can emerge as political precedents. That burden relates to these decisions or events being able to signal or serve as "proof" for the emergence or existence of political norms of the first-order. This involves questions about the true beliefs and motivations of those involved in the event as well as about "What comes next." Law restricts the ability of judges and lawyers to address these issues. By contrast, in politics, much of the "action" will be exactly there, probably more so than will any common law-like reasoning.

Second, because the ability of events or decisions in politics to face up to this informational burden at the time of their occurrence is systematically low (in light of politics' deliberate and non-deliberate ambiguities discussed above), it is likely that contrary to judicial precedents that are established in "one go," political precedents will be generated, or become identified as such, if at all, only *after* the event or decision. More concretely, decisions and events in politics will establish constraining political precedents *retrospectively*—when sufficient evidence has been gathered that confirms that the event indicated the emergence or contemporary

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180 *See* Philippe Lagassé, *Parliament and the War Prerogative in the United Kingdom and Canada: Explaining Variations in Institutional Change and Legislative Control*, PARL. AFF. 1, 13 (2016).

181 *See* Section V.

182 For discussion of a good example of this dynamic in real constitutional politics, see Elster, *supra* note 48, at 47–48.

existence of a political norm that decision makers would not wish to upset.[183] Alternatively, political precedents will emerge in a *cumulative* fashion, after they have been followed again[184] and in a pattern of gradual affirmation.[185]

D. Qualifications: Easily Established Political Precedents

The argument above needs to be importantly qualified. On occasion, precedents in politics can be generated or identified more easily than what Subsection C has suggested. In some cases, political precedents might even emerge very quickly, in much the same way we understand judicial precedents to emerge in "one go."

1. Meeting the informational burden

I have described above the various ways in which politics can be ambiguous and thus why political events and decisions—by themselves and in the moment they occur—will likely fail to convey the information from which observers can confidently conclude the existence or emergence of political precedents. But not all political events are equal in this sense.

For one, though we now know that even the most decisive events in which politics resolves a "competitive and polarized" dispute by a vote, decision, or the winding down of a political standoff and even those "galvanizing events" that vividly demonstrate the existence of political cooperation between political institutions or officials are, in important respects, ambiguous about whether they reflect the emergence or existence of a political norm. Yet, there is no doubt that such events may serve as a relatively strong indication of that possibility. They are certainly more powerful candidates for becoming political precedents than, for example, events that at the time they occurred did not present a "competitive and polarized" dispute in the first place or were not resolved decisively and that only in hindsight we have come to see them as such.

In addition, sometimes events in politics will occur in circumstances that can amplify their informational value. Consequently, the likelihood that they will be taken as constraining political precedents and the pace with which this occurs will quicken. For instance, we have seen before the ambiguities associated with voting procedures and why votes may be a low value signal for the emergence of political

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183 Theories that give weight to historical practice in constitutional law also recognize this. *See*, *e.g.*, Bradley & Morrison, *supra* note 13, at 415; Baude, *supra* note 13, at 16–18.

184 This possibility is similarly recognized in the literature on the role of historical practice in constitutional law. *See*, *e.g.*, Bradley & Morrison, *supra* note 13, at 435; GERHARDT, *supra* note 15, at 113.

185 I adapt this term from Barry Friedman, *Things Forgotten in the Debate Over Judicial Independence*, 14 GA. ST. L. REV. 737, 760 (1998).

norms and thus likely not precedential as such.[186] Yet some voting procedures produce much less ambiguous conclusions about a vote's meaning; referenda, which detail a much more precise question for an up/down vote, are the most obvious example.[187]

We have also seen that opportunistic political behavior can obfuscate the ability to conclude from that behavior that what explains it is a political norm, and hence that the event will be taken as precedential.[188] But while self-interested behavior is pervasive in politics, political institutions and decision makers occasionally behave in what seem like non-opportunistic ways—for example, by incurring personal or institutional costs or exemplifying bipartisanship.[189] And when this occurs, the events or decisions' informational value increases. Consider, for instance, how the following precedents that political observers have identified are or were partially reliant on strong political precedents of this kind:

(1) The nineteenth century precedent that prohibited U.S. presidents from leaving the country while in office: some presidents took this restriction so seriously that when meeting their Mexican counterparts, they had to do so halfway across a bridge over the Rio Grande (a serious hassle at the time).[190]

(2) The precedent against more than two presidential terms (well before FDR's successful election to third and fourth terms in office): in 1896, the Democratic Party decided to deny the nomination to President Grover Cleveland—who was concluding two terms in office—even though at the time he was likely the party's best nominee.[191]

(3) The precedent that the German chair of the Budget Committee in the Bundestag should be filled by the largest party in the opposition: in 2013, a

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186 *See supra* Section IV.C.2.

187 For more reading on the latest attempts to fashion "best practices" of how to conduct referendums, and the importance of clarity of the questions being put up to a vote, see EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), CODE OF GOOD PRACTICE ON REFERENDUMS, (Oct. 25, 2018), https://perma.cc/PC3H-E73F (highlighting that "[t]he clarity of the question is a crucial aspect of the voters' freedom to form an opinion.").

188 *See, e.g.*, Pildes, *supra* note 170 and accompanying text (explaining the problem of observational equivalence whereby a behavior can be explained by multiple causes).

189 The qualification "seems like" is necessary because sometimes limiting one's discretion against apparent self-interest may be conducive to the relevant agent across other dimensions of their activity or in the medium run. *See generally*, *e.g.*, Eric Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865 (2007) (suggesting mechanisms by which a well-motivated executive can signal to voters their good intentions by limiting their own discretion for the public good, such as by making bipartisan appointments and choosing policies counter to the preferences of their own party).

190 *See* H.W. HORWILL, THE USAGES OF THE AMERICAN CONSTITUTION 201–03 (1925).

191 *See* Jon Elster, *Political Norms*, 63 IYYUN: J PHIL Q. 47, 58 (2014). *But see* Jaconelli, *supra* note 173, at 157 n.27 (recounting how the electorate chose to "acquiesce" when FDR broke the two-term precedent).

representative of the Left Party, at the time the only opposition party, was given the position despite being "on the fringe of German politics" and "the unease [that] was expressed at the time."[192]

Finally, we have also seen that actors can deliberately make political events or decisions ambiguous when they accompany political events or decisions with negating or self-negating statements.[193] But here too there are limits. First, there is a cap on what words can do on their own. Decision makers in politics can employ negating and self-negating statements as much as they want, but at some point, if they behave contrary to their statements, these statements will stop being credible and will lose their precedent-denying force.[194] Consider the practice around peacetime espionage in international law. States have repeatedly denied that there is an exception in international law for espionage and other intelligence activities and continue to do so today.[195] They resort, in the terms I have used here, to "negating statements."[196] Nonetheless, there is no doubt that states do in fact engage in espionage during peacetime and have consistently done so.[197] As a result, claims that there is no exception for espionage in international law seem to have lost their credibility.[198]

Moreover, and more interestingly perhaps, in politics, sometimes the mirror image of negating and self-negating can also occur—when we encounter what could be described as *self-confirming statements*, in which those involved in the event confirm the precedential status of events. For example, when the norm against

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192 *See* Taylor, *supra* note 177, at 315.

193 *See* Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 1000 (2008); Elster, *supra* note 48, at 47–48. *See also supra* text accompanying notes 179–86.

194 *See*, *e.g.*, Posner & Vermeule, *supra* note 193, at 1000 ("Branches cannot avoid creating precedents just by using magic words. Other actors will adjust their behavior based on their best estimates of how the branch behaves.").

195 *Summary Record 1845th Meeting*, [1984] 1 Y.B. Int'l L. Comm'n 185–86, U.N. Doc. A/ CN.4/SR.1845 (stating that, in relation to peacetime espionage, "everyone engaged in that exercise, but everyone denied it").

196 Alexandra H. Perina, *Black Holes and Open Secrets: The Impact of Covert Action on International Law*, 53 COLUM. J. TRANSNAT'L. L. 507, 542 (2015) (stating that "[h]istorically, governments were loath even to acknowledge that they engaged in covert activity, especially in peacetime")

197 *See generally,* Iñaki Navarrete & Russell Buchan, *Out of the Legal Wilderness: Peacetime Espionage, International Law, and the Existence of Customary Exceptions*, 51 CORNELL INT'L L.J. 897 (2019).

198 *See*, *e.g.*, Ashley Deeks, *An International Legal Framework for Surveillance*, 55 VA. J. INT'L L. 291, 305 (2015):

> [T]he widespread and long-standing practice of spying—committed by many states in different regions of the world during time periods that both precede and post-date the UN Charter—undercuts arguments that these customary principles either were intended to prohibit espionage at the time they developed or should be deemed to do so today.

But see Navarrete & Buchan, *supra* note 197, at 901 (disputing the claim that customary international law recognizes peacetime espionage).

looting arts after wars was emerging in international relations, one of its most vocal opponents stated that he had a change of heart, writing that "perhaps the monuments of arts should never have entered the domain of conquest."[199] That statement might have had a self-confirming effect, contributing to the crystallization of the norm.

In sum, while the burden cast on political precedents is substantial, it may not be completely impossible to fulfill it. Some events or decisions are more likely to face the burden than others.

2. Standardizing politics (and its precedents)

In Subsection C, I argued that it is unlikely that politics will feature the exact same "craft" norms that exist in law that prevent judges and lawyers from inquiring into the judges' motives and beliefs or into the "what comes next" question. This in turn highlighted the challenge of establishing political precedents and why they are unlikely to arise in "one go." But what if political decision makers did have some standardization of the way they should identify political precedents? After all, as I mentioned before, politics has been professionalized to a certain extent.[200] And as I further mentioned, lawyers have a significant influence on politics, from inside and outside political institutions.[201] Thus, it would not be surprising to see some attempt to standardize what goes into the task of identifying political precedents. And to the extent that this would occur, its effect will be to ease the way in which political precedents are identified.

To make this less abstract, let me highlight two concrete examples of exactly such attempts to standardize politics and the task of identifying political precedents. The first example is found in customary international law. Indeed, one of the crucial tasks practitioners in this field face is identifying political precedents of a particular kind—ones that indicate the existence or emergence of a norm of customary international law. In principle, to know which events in international politics constitute customary international norms, practitioners need to inquire into the same issues that other political decision makers need to inquire into when determining whether an event is a precedent and indicates political norms' emergence or existence, which is the motives and beliefs of those involved and "What comes next?" In fact, in customary international law, the threshold may be even higher than it is in other political contexts because for a customary norm to emerge, the level of internalization of the relevant state practice is usually understood to be especially high. Specifically, the practice should reflect *opinio juris*,

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199 *See* Wayne Sandholtz, *Dynamics of International Norm Change: Rules Against Wartime Plunder*, 14 EUR. J. INT'L. L. 101, 114 (2008).

200 *See supra* note 77 and accompanying text.

201 *See* CLAYTON, *supra* note 112; Robinson, *supra* note 113; Sorkin, *supra* note 114. *See also supra* text accompanying notes 112–16.

which is to say it needs to be accepted by states *as if it were binding law*. Nonetheless, within the international community there are ongoing efforts to "standardize" this inquiry by, for instance, identifying what sources are especially indicative of the intentions and beliefs of states about the emergence of customary norms.[202]

The second example is found in discussions in American constitutional law about the role of historical practice in "constructing,"[203] providing "gloss,"[204] or "liquidating"[205] the Constitution's text. Here too the claim made by scholars who believe that past practice can inform constitutional interpretation is often about the precedential effect of past events in constitutional politics, which, to many,[206] requires looking more seriously into the beliefs and motives of the political institutions and asking "What comes next?" And here, too, what those engaged in this enterprise attempt to do is to give guidance and "standardize" the task of identifying which acts are valid political precedents that may inform constitutional interpretation.[207]

Both examples supply some motivation for the idea that politics and its precedents can be standardized and thus the process of identifying or generating political precedents can be eased. Yet these examples also point to the limits of that possibility. First, both examples are obviously drawn from contexts where the interaction between law and politics is significant because of the involvement of lawyers and courts. It is an open question whether we would see similar attempts to standardize politics without similar overlap.[208] Second, though it is clear there is an attempt at standardization in both these examples, the attempts are clearly incomplete. Many disputes remain inside each of these fields, and no consensus seems to include insight into what exactly the proper standardization is.[209]

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202 *See, e.g.,* Report of the International Law Commission, 142–51 U.N. Doc. A/73/10 (2018).

203 *See*, *e.g.*, WHITTINGTON, *supra* note 13.

204 *See*, *e.g.*, Bradley & Morrison, *supra* note 13.

205 *See* Baude, *supra* note 13.

206 This qualification is necessary because on some accounts of the constitutional pedigree of historical practice, it can provide "gloss" also for mere "Burkean" reasons, which do not require any level of internalization of the practice. *See, e.g.,* Bradley & Morrison, *supra* note 13, at 455–56.

207 *See*, *e.g.*, Alison L. LaCroix, *Historical Gloss: A Primer*, 126 HARV. L. REV. F. 75, 77–79 (2013) (highlighting this standardizing task of the literature and critiquing it).

208 *See also infra* Section V.A. I note that even Professor Gerhardt's discussion of "non-judicial precedents" seems to assume the possibility of some form of legal regulation. *See generally* GERHARDT, *supra* note 15.

209 Indeed, in customary international law, the recommendations by the International Law Commission, cited *supra* note 202, are still in draft form. In constitutional law, the judicial doctrine is far from coherent, and scholars dispute the circumstances of when exactly the past should be considered as providing meaningful guidance for constitutional interpretation. *See*, *e.g.*, Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 VA. L. REV. 1 (2020) (comparing a "historical gloss" method of constitutional interpretation to "liquidation").

The promise of standardization therefore exists but is likely modest at best.

3. Quick political precedents

I arrive finally at the most substantial qualification: in some cases, political precedents will be generated or become identified as such *quickly* and even *immediately*, very much like how we think of judicial precedents.

a) *Low political stakes*

An important assumption implicitly built into the discussion in the preceding Subsection, and that led to the conclusion that political precedents are likely retrospective or cumulative rather than arising in "one go," was that the matters at hand were consequential and involved high stakes for the relevant decision makers. It was clear, for instance, who exactly would lose and who would win if the precedent would be taken as such. Alternatively, it was clear that some political institutions benefit more than others from the existence of a particular cooperative arrangement (for instance, consider the benefits non-superpower states draw from the arrangement of cooperating on war-related matters through the Security Council compared to those the U.S. draws from such cooperation).[210]

But not all political events carry similarly consequential lessons. Or, perhaps more accurately, the mere chance that some rule of conduct suggested by a political event will prove consequential in the future does not mean that it was considered consequential at the time it *originally occurred*. To the contrary, decision makers in politics might not have foreseen how some past events would prove to be binding and consequential for them down the road. It might not even matter if the decision makers saw the potential costs of being bound by an event or if adhering to the rule of conduct suggested by the precedent is far from their own point of view (as they would have preferred a different kind of precedent). Sometimes, the future for political decision makers will seem too far off and uncertain to prompt decision makers to question the precedential weight of past events or decisions.[211] And sometimes decision makers may prefer a "settlement" precisely because the stakes of getting something right might be, at that exact moment, low.[212]

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210 *See* Voeten, *supra* note 130. *See also supra* text accompanying note 165.

211 In technical terms, this is often referred to as low "discount rates." *See* ROBERT E. GOODIN, POLITICAL THEORY AND PUBLIC POLICY 162–83 (1982).

212 *See*, *e.g.*, Rosalind Dixon & Tom Ginsburg, *Deciding Not to Decide: Deferral in Constitutional Design*, 9 INT'L. J. CONST. L. 636, 643–46 (2011) (explaining that, for some decisions in constitution drafting, it is more important that actors be coordinated through a decision than that that decision be exactly right); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 906–11 (1996) (arguing that conventionalism—the idea that it is more important for some things to be settled than right—is a part of the common law tradition that explains constitutional interpretation today).

The original perception of the stakes of the rules of conduct suggested by political events is important. When the stakes are viewed initially as low, political precedents will be generated quite quickly after the event has transpired, as if at first blush.

I have described the issue informally, but we can connect it to the two sources of past precedential constraint in politics. Events that indicate rules of conduct that are not consequential in this sense can signal the existence or emergence of what the literature refers to as "coordination norms," which are norms that are adhered to because no one has a strong enough interest to defect from them, and everyone prefers to work in tandem.[213] They are often merely "focal points,"[214] much like whether we drive on the right or left.

In addition, when an event points to a low-stakes political arrangement, it will be quickly identified as a political precedent by the second-order norm of political stare decisis. In such circumstances, political decision makers will not need to question the precedential nature of the event because the stakes will seem not sufficiently high to justify that effort. And the cooperative advantages they gain from adhering to the norm of political stare decisis or the institutional, professional, or public pressures to adhere to that norm will easily dominate.

b) *High(er) political stakes*

But can political precedents emerge or be identified relatively quickly even if the stakes of politics are *higher*?

Of course, decision makers in politics may have attributes that make them particularly amenable to conform to past political decisions or lessons learnt by past events, even if this would substantially work against their interests. We have seen before that political institutions and decision makers may be risk-averse or lack imagination.[215] They may have an increased, even *exaggerated*, tendency to conform.[216] But what of political decision makers (or institutions) who are savvier—who are, in other words, less in the model of H.L.A. Hart's "puzzled

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213 *See* Vermeule, *supra* note 48, at 1186 (describing "thin" obligations as those an actor follows because, given others' behavior, breaching it harms the actor more than it would benefit them). *See generally* DAVID K. LEWIS, CONVENTION: A PHILOSOPHICAL STUDY (1969). Of course, there is a difference between pure coordination and other forms of coordination games. *See generally* McAdams, *supra* note 56 (capturing this difference by emphasizing that precedents can be generated or become identified, even if the solution is not ideal from the point of view of one of the parties).

214 THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 54–67 (1960) (describing how behavioral coordination benefits from focal points or known expectations about how others will behave or be expected to behave).

215 *See* Vertzberger, *supra* note 65 and accompanying text.

216 To motivate this claim, it is worth noting that social science literature has identified that certain groups of people tend to develop a sense of "false consensus" more easily than others, meaning that they overestimate their similarity to others within their group. *See generally*, Chadly Stern, Tessa V. West & Peter G. Schmitt, *The Liberal Illusion of Uniqueness*, 25 PSYCH. SCI. 137 (2014).

person"[217] and more in that of Oliver Wendell Holmes's "bad man"?[218] Can such decision makers also abide by political events and immediately take them as precedential, even if that would mean behaving in ways that they believe would be wrong or operate against their interests?[219]

I believe that there are three main possibilities where this can indeed occur. The first is when a high-stakes decision or event will be taken as a constraining political precedent by an influential figure—or "opinion leader"—and others simply follow that precedent because of powerful *cascade effects*.[220]

A second possibility is when a precedential event either (1) instantly creates a political norm of the first-order or (2) generates widespread but false beliefs about the immediate emergence of a political norm subsequent to the event. Both scenarios can arise under conditions of *pluralistic ignorance*, in which people are uncertain of others' preferences or beliefs and thus end up falsifying or making invisible their own preferences and beliefs.[221] In the first scenario, political decision makers, *prior* to the precedential event, believed that a certain political path was more desirable, but disguised or obfuscated those beliefs because they suspected that others saw things differently, even though they did not. The event that supports the decision makers' true beliefs then "unleashes"[222] and crystalizes the political norm.[223] In the second scenario, the power of pluralistic ignorance kicks in *after* the event has transpired, when decision makers believe that others have understood the event to be precedential and indicative of the emergence of a political norm, whereas other decision makers believe, falsely, the same.

While possible, these scenarios are probably rather rare (particularly the latter one, which seems plausible mostly in authoritarian regimes).[224] A final possibility

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217 H.L.A. HART, THE CONCEPT OF LAW 40 (3rd ed. 2012).

218 Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

219 I note that enhanced conformity can sometimes be strategic and hence within the realm of what the text describes as "savviness." *See generally*, *e.g.*, Sydney Finkelstein & Donald C. Hambrick, *Top-Management Team Tenure and Organizational Outcomes: The Moderating Role of Managerial Discretion*, 35 ADMIN. SCI. Q. 484 (1990) (discussing "strategic conformity" in a managerial setting).

220 *Cf.* Eric L. Talley, *Precedential Cascades*, 73 S. CAL. L. REV. 87 (1999) (describing a cascade effect as when strategic actors rationally prefer to emulate the behavior of others, presuming that their own information is unreliable and positing that this phenomenon is unlikely in the evolution of law because of institutional practices in the judiciary that prevent bad cascades).

221 McAdams, *supra* note 59 at 356–58 (explaining "pluralistic ignorance").

222 Cass R. Sunstein, *Unleashed*, 85 SOC. RES. 73 (2018) (arguing that people often falsify their preferences based on their perception of others' preferences but that the erosion of social norms "unleashes" people in that they can reveal their prior preferences and create new norms).

223 *See also* Elster, *supra* note 48, at 36.

224 In particular, situations of pluralistic ignorance in politics seem much more prevalent in authoritarian regimes, given that the control over the means of communication and information dissemination is in the hands of the rulers. *See*, *e.g.*, Huq & Ginsburg, *supra* note 34, at 130–35 (describing how authoritarian governments control and distort information).

of immediate precedential constraint in high stakes political matters that seems much more common in politics relates to the *other* source from which constraint from the past can stem: the *second-order norm of political stare decisis*.

In the discussion so far, the two sources of constraint by the past have worked in tandem. The norm of political stare decisis seemed to create constraints and identify political precedents when these precedents were also indicative of political norms of the first-order. In many ways, however, the whole point of a second-order norm of political stare decisis is to achieve constraint *even beyond* these cases—when some things are best left decided, even if they may be wrong, because of the values of political cooperation or the possible (real or anticipated) reactions of the institutions of politics, political peers, or the public. The question of whether constraint can quickly arise even if the political stakes are not low appears then directly reliant on the force of the norm of political stare decisis itself.

As a general matter, we have good reasons to suspect that the norm of political stare decisis is quite weak. For one, as we have previously seen,[225] the norm creates lower rhetorical or discursive burdens than does the parallel norm of judicial stare decisis. For another, as I will discuss below, the norm of political stare decisis is more easily overridden than its judicial counterpart.[226]

Despite this, I believe we can make some generalizations, though inevitably crude ones, about when the norm of political stare decisis is more likely to produce constraint (or less likely to do so). The key is to identify when the forces that support and first give life to that norm will be particularly powerful (or weak).

(1) The Value of Cooperation.

Start with cooperative logic underlying the norm of political stare decisis. Though adhering to the norm of political stare decisis can signal willingness to engage in cooperative political exchange, the value of political cooperation is likely to change with context and institutions. The current state of political polarization that exists around the world obviously weakens the value of political cooperation and, thus, likely decreases the level of constraint by the past and the ability of the norm of political stare decisis to generate quick political precedents. In addition, when one political party to the cooperative endeavor finds it can systematically get what it desires even without cooperating—because, for instance, it is the stronger party in the political relationship—its willingness to abide by "things decided" even if it believes them to be wrong will similarly weaken.[227]

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225 *See* Fallon, Jr., *supra* note 38; Pozen & Samaha, *supra* note 39. *See also* text accompanying notes 38–39.

226 *See infra* Section V.A.

227 *See*, *e.g.*, Jens David Ohlin, *Nash Equilibrium and International Law*, 23 EUR. J. INT'L. L. 915, 936 (2012) (discussing how the unequal bargaining power of actors affects the costs and benefits of

(2) Degree of Institutional "Loyalty."

Recall too that the norm of political stare decisis relies in part on the expectation of what some have called institutional "loyalty."[228] It is clear, though, that some institutions in politics are more demanding in their expectation of loyalty from members than others. This partly depends on specific organizational structures and how well the relevant political organization socializes (or "imprints")[229] its members into those structures, including through processes of employee selection and retention.[230] But it also partly depends on the institution's goals and on the members' professional backgrounds.[231] For instance, legislatures are probably less demanding of institutional loyalty than are, say, administrative agencies, which are largely staffed with career officials. And legislatures with higher turnover rates and less permanent staff will likely be less loyalty-demanding than will legislatures with lower turnover rates and more permanent staff.[232] Similarly, an administrative agency or supranational organization that has more "in-house" lawyers and strong and influential legal departments will likely demand more political stare decisis than will agencies and organizations that are less legalized in this way.[233]

(3) Decisional Context.

We have also seen that the norm of political stare decisis depends on professional, peer, or public expectations from officials to adhere to the past. There is reason to think, however, that these expectations will be stronger in some decisional contexts and weaker in others. Consider, for instance, how the demands from public officials to act professionally and abide by the past may be stronger when the political matters are procedural or organizational rather than

non-compliance). *But see* Verdier & Voeten, *supra* note 74, at 408 (suggesting that powerful states have a strong incentive to comply with the past because the precedential nature of noncompliance is especially high).

228 *See* Fontana & Huq, supra note 75.

229 Arthur L. Stinchcombe, *Social Structure and Organizations*, *in* HANDBOOK OF ORGANIZATIONS 142 (James G. March ed., 1965).

230 The various components of what institutional "loyalty" consists of are surveyed in Fontana & Huq, *supra* note 75, at 38–64.

231 *See*, *e.g.*, Jon D. Michaels, *An Enduring, Evolving, Separation of Powers*, 115 COLUM. L. REV. 515, 530–51 (2015) (describing the different professionals and officials who serve in administrative agencies).

232 For the role of legislative staffers, see Fontana & Huq, *supra* note 75, at 76–83.

233 Indeed, the significant role of lawyers in departments like OLC is very much what accounts for its relatively robust practice of abiding by past decisions. *See generally* Morrison, *supra* note 13. For the claim that the existence of lawyers in international organizations increases the likelihood that a practice of constraint by precedent will emerge, see Harlan G. Cohen, *Lawyers and Precedent*, 46 VAND. J. TRANSNAT'L. L. 1025 (2013).

substantive.[234] Consider also how if issues are labeled "constitutional" rather than as related to matters of "regular" politics, public expectations for restraint could increase further.[235] In a similar vein, although the public might expect a measure of fairness in dealings among public officials, that expectation may be weak when the public develops more concrete opinions about the policy matters at hand.[236] When this occurs, the public may care less about adhering to the past and would prefer to get things right.

(4) "Tipping Points."

Finally, decisions about whether to abide by the norm of political stare decisis are likely not made in isolation. Past record matters. Suppose a certain public official or political institution has a record of not being constrained by past events. It is very likely that there will be some tolerance for recalcitrant behavior, which will not shatter the norm of political stare decisis itself. It is also likely, however, that the norm of political stare decisis will have a "tipping point"[237] beyond which recalcitrance will not be tolerated, either because when the decision-maker crosses that point, her cooperativeness ceases to be credible, or because the sanction-based forces that support the norm of political stare decisis begin to appear.

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For all these reasons, the conclusion at the end of Subsection C about the challenges in establishing political precedents in "one go" should indeed be qualified. In some cases, political precedents will be generated (or become identified) only retrospectively or in a cumulative fashion. In other cases, political precedents will be generated (or identified) rather quickly, and the constraint they bring with them will also be more readily apparent—just as in judicial stare decisis. Tables 1 & 3 further below will summarize the key takeaways from this Section.

V. OVERRULING POLITICAL PRECEDENTS

Suppose that a political precedent has been established in domestic and international politics in accordance with one of the possible routes discussed in Section IV. Obviously, the story does not end there. Precedents, after all, can be

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234 An analogy is the well-known distinction between structure and rights in constitutional law and the claim that, in many circumstances, issues of structure are more self-entrenching than issues of rights. *See*, *e.g.*, Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 692–97 (2011).

235 *See*, *e.g.*, Stephen M. Griffin, *The Nominee Is… Article V*, *in* CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 51 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998) (highlighting the effects that labeling something as "constitutional" carries with the public).

236 *See* Vermeule, *supra* note 81, at 426.

237 *See* THOMAS C. SCHELLING, MICROMOTIVES AND MACROBEHAVIOR 83–110 (1978) (developing a "tipping point" model).

ignored or overruled, even if they did previously constrain political decision makers. But how?

The analogy to judicial stare decisis, described in Section III, suggests that the overruling of political precedents might not be so different from the overruling of judicial precedents. Much like we saw in Section IV in relation to the question of establishing political precedents, however, this analogy is partial and can also prove misleading in the stage of the potential overruling of these precedents. This Section shows why. Subsection A argues that political precedents are *more fragile* than judicial precedents and can be overruled much more easily. By contrast, Subsection B argues that in some cases, the reverse is true and political precedents may prove even *more resilient* than judicial precedents. It will be incredibly hard to overrule them.

A. The Increased Fragility of Political Precedents

1. Expiration without express overruling: the Nike principle and overruling as *fait accompli*

Political precedents seem fragile, especially when compared with judicial precedents. One reason for this is obvious: politics is informal and we do not expect public officials to reason about precedents and justify their departures from previous decisions in the same way as we expect judges and lawyers to do so. As previously mentioned,[238] even if the past does constrain public officials, in politics, the expectation to reason about precedents may be very weak, even nonexistent. And decision makers will simply be able to ignore previous precedents without explaining why. Borrowing from Mark Tushnet, we may call this the Nike Principle, whereby overruling of past political precedents can be achieved if decision-makers "Just Do It."[239]

There is, however, another, less obvious, explanation for this fragility of political precedents. In principle, even if the political world is more informal than law, we may imagine a situation in which earlier political precedents must be "informally overruled" before decision makers are permitted to dispense with those earlier precedents. In effect, the precedent would be required to be politically "tested"—that is, before officials could decide to overrule the precedent, they would need to first examine the political reality of whether the precedent applies and has force. This is, in essence, what we have in law. A central legal craft norm is that judicial rulings are considered valid unless they are "tested"

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238 *See* Fallon, Jr., *supra* note 38; Pozen & Samaha, *supra* note 39. *See also* text accompanying notes 38–39.

239 *See generally* Mark Tushnet, *Amending an Unwritten Constitution: Comparative Perspectives* (unpublished manuscript, on file with the author).

in the authoritative court.[240] Thus, judges continue to refer to a judicial precedent, so long as it has not been squarely challenged, notwithstanding how much time has passed since the day it was rendered. And court spectators cannot confidently presume that a judicial precedent that has not been applied or reaffirmed in subsequent cases has expired and left the "precedential pool." In other words, there is always a chance that a court would say, "[R]eliance upon a square, unabandoned holding of the [highest court] is always justifiable reliance."[241]

But much like we saw in Section IV regarding the legal craft norms that instruct judges and lawyers to treat judicial precedents as constraining in "one go" and to refrain from exploring the real motivation behind the precedent or a pivotal judge's vote,[242] it is unlikely that a similar craft norm that requires informal "testing" would develop in politics. And, again, like we saw in Section IV, this lack of a similar craft norm in politics is consequential for how political stare decisis operates and creates an important difference with the operation of judicial stare decisis.

Suppose some time had passed from the political precedent-triggering event. Suppose further that during this time, the officials that were supposed to adhere to the precedent did not resort to it nor rely on it. At some point, the lack of affirmations will raise the kinds of questions that, as we saw in Section IV, are crucial for the generation of political precedents in the first place—questions about "What comes next?" and about the true beliefs of political participants. Observers know that political preferences and beliefs are not static. And as time passes, decision makers will reasonably begin to question whether the conditions that made a political precedent constraining in the past still endure—that is, whether the precedent indicates that the political norm persists or remains as robust as it once was.[243] What if, for example, the relevant decision makers no longer believe in the precedent and the norm it supports or in its desirability as they had in the past? And what if their support for that precedent and the norm it reflects has weakened, and they are no longer willing to follow the precedent or enforce it with the same enthusiasm or at the same institutional or personal cost? What if the relevant political norm is completely forgotten?

If political decision makers conclude that any of the above is true and given that there is no requirement to "test" the precedent before its abandonment, they

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240 *See* Daniel R. Rice & Jack Boeglin, *Confining Cases to their Facts*, 105 VA. L. REV. 865, 893–94 (2019).

241 Quill Corp. v. North Dakota, 504 U.S. 298, 320–21 (1992) (Scalia J., dissenting). On the rejection of the idea of "anticipatory overruling" in Canadian jurisprudence, see Debra Perks, *Precedent Unbound? Contemporary Approaches to Precedent in Canada*, 32 MANITOBA L.J. 135, 144–46 (2007).

242 *See infra* Section IV.C.1.

243 *Cf.* Joseph Jaconelli, *Do Constitutional Conventions Bind?*, 64 CAMB. L.J. 149, 168 (2005).

might simply decide to ignore the precedent.[244] The relevant precedent at this point no longer convincingly indicates the existence of a political norm. And its constraining force will be severely weakened, even to the point of expiration. Anyone who would protest will face a *fait accompli*.

Note that in addition to the craft norm that requires "testing," judicial institutions generally have features that help secure the resilience of judicial precedents that are not explicitly tested or reaffirmed. And political institutions may lack these features. First, judiciaries operate through formal means, and their precedents are almost always memorialized.[245] By contrast, political institutions' precedents are mostly informal in nature and are not memorialized in the same systematized manner. Thus, these precedents are at a real risk of being forgotten if not reaffirmed.[246] Second, turnover in judiciaries is usually less frequent than in political institutions (especially in judicial systems that provide judges life tenure).[247] This means that observers of judicial precedents are usually confronted less often with the possibility of changed beliefs and expectations about the validity of past precedents as a consequence of new entrants onto the scene compared with observers of political precedents. Finally, judicial institutions, unlike many political institutions, are usually somewhat removed from the political fray and enjoy some independence from immediate political dynamics.[248] Consequently, even if there are indications that the beliefs and preferences of

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244 *See, e.g.,* Eric A. Posner & Alan O. Sykes, *Efficient Breach of International Law: Optimal Remedies, 'Legalized Noncompliance,' and Related Issues*, 110 MICH. L. REV. 243, 287–88 (2011) (discussing an example of unilateral efficient breach in international law as a mode of change).

245 For complications, see, for example, Patrick J. Schiltz, *The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 FORDHAM L. REV. 23 (2005) (discussing the phenomenon of unpublished rulings); Julius Schumann, *Precedents—A Question of Memory*, *in* PRECEDENTS AS RULES AND PRACTICE: NEW APPROACHES AND METHODOLOGIES IN STUDIES OF LEGAL PRECEDENTS 157 (Amalie Frese & Julius Schumann eds., 2021) (discussing differences between courts in Central Europe in how they store precedents).

246 *Cf.* Vermeule, *supra* note 81, at 434–35 (raising the possibility of political forgetfulness).

247 For surveys and analysis of judicial terms of service, from a comparative perspective, see John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 TEX. L. REV. 1671 (2004). *See also* Tom Ginsburg, *Term Limits and Turnover on the U.S. Supreme Court: A Comparative View*, Testimony for the Presidential Commission on the Supreme Court, July 20, 2021, https://perma.cc/PN9S-DY3N. For discussion of turnover in politics, see, for example, Fontana & Huq, *supra* note 75, at 45–51.

248 For a description of the development of independent judicial institutions, to relative degrees, in a range of politics, see TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (2003); Gretchen Helmke & Frances Rosenbluth, *Regimes and the Rule of Law: Judicial Independence in Comparative Perspective*, 12 ANN. REV. POL. SCI. 345 (2009). For a discussion of the recent trend of increased politicization of judiciaries, see Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 ANN. REV. POLIT. SCI. 93 (2008). And for a discussion of how in recent years judicial independence is especially being threatened, see Kriszta Kovacs, *The Fragility of an Independent Judiciary: Lessons from Hungary and Poland—and the European Union*, 51 COMMUNIST AND POST-COMMUNIST STUDIES 189 (2018).

judges and lawyers are gradually changing, the effects of the change may not reach courts, at least without some significant lag.[249]

2. Greater possibilities of overruling (I): lower thresholds and the role of "power, not reason"

Political precedents are more fragile than judicial ones in another key respect: in law, the bar for overruling prior judicial precedents is described as a relatively high one—"special justifications"[250] or "compelling reasons" [251] may be required. Moreover, a judge who seeks to disregard a previous judicial precedent is limited to offering only valid "legal" reasons in justifying that choice.[252]

But political decision makers will not be constrained in the same way. For one, the threshold for disregarding political precedents will generally be lower in politics.[253] As mentioned,[254] though we may want public officials to be constrained by past decisions, our level of tolerance of getting things wrong in politics may be lower than it is in law. In politics, we often want what is right for today, not what was right for yesterday. Yet, even if the standard for overruling were identical in politics and law, this would not be enough. In politics, decision makers are obviously not limited to offering only "legal" justifications for overruling; they can offer political reasons too. Those political reasons, which can involve pure self-interest or distributional considerations (and even pork-barrel politics), greatly expand the opportunities for overruling.

Indeed, a powerful charge that could be leveled against a judge for disregarding a precedent merely for "[p]ower, not reason"[255] is much less effective in politics. It might be completely beside the point.

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249 For an example of how the structural features of courts create this sort of lag between the political and judicial spheres, see Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001).

250 This is the U.S. standard, at least as most of the Justices at the Supreme Court seem to accept. For a useful discussion of the law and complications, see Randy J. Kozel, *Special Justifications*, 33 CONST. COMMENT. 471 (2018). On the difference between constitutional and statutory precedents, however, see William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361 (1988).

251 This is the standard that seems to be accepted in Canada. For discussion, see LAWRENCE DAVID, STARE DECISIS, THE CHARTER, AND THE RULE OF LAW IN THE SUPREME COURT OF CANADA 47–98 (2020). For discussions of the Australian High Court's mixed approach to overruling precedents, see Matthew Harding & Ian Malkin, *Overruling in the High Court of Australia in Common Law Cases*, 34 MELBOURNE L. REV. 17 (2010).

252 *See* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 41 (1991) (arguing that in constitutional law, "[n]ot just any argument will do, and a political argument *per se* will never do . . . and the standards of legal argument—neutrality, generality, consistency—are not the standards of the political operative").

253 *See*, *e.g.*, Morrison, *supra* note 13, at 1455 (arguing that the Office of Legal Counsel in the Department of Justice may depart from their precedents more frequently and easily than courts).

254 *See* Patterson v. McClean Credit Union, 491 U.S. 164, 172 (1989) (citing THE FEDERALIST NO. 78, at 490 (Alexander Hamilton) (H. Lodge ed., 1888)); *supra* note 24 and accompanying text.

255 Payne v. Tennessee, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting).

3. Greater possibilities of overruling (II): the increased risk of "anti-canonity" of political precedents

A related issue, worth emphasizing separately, concerns the different role blaming plays in law and in politics. In judicial decision-making, blame is a valid cause for discarding judicial precedents only in extremely limited cases. One reason for the difference is that it is usually difficult to blame judiciaries and their precedents directly for political or policy failures. Judicial institutions are thought to be passive institutions, which supposedly have "no influence over either the sword or the purse"[256] and do not normally intervene with policymaking on a regular and systemic basis.

Another reason, however, is that, by accepted legal "craft" norms, the "anti-canon" of judicial precedents is an exclusive club, so to speak.[257] To enter it, a judicial precedent ought to be nearly "wrong the day it was decided."[258] In other words, it needs to be associated with a reality that has been so significantly repudiated (or the judges ought to have been so severely morally corrupt)[259] that relying on it would be almost unthinkable.[260] Consequently, and perhaps too because of the increased tendency in law to generalize,[261] judicial precedents can still stand their ground even if the decisions are deeply unfavorable or were rendered by judges whom history views negatively. The (in)famous *Korematsu* case, which allowed for the internment of Japanese Americans during World War II, serves as one potential example from the U.S.[262]

Politics is different. In contrast to judiciaries, political institutions generally do hold the sword and the purse, and they do engage with relevant policies in a direct and systematic way. Blaming political actors and institutions for policy failures therefore makes much more sense. Moreover, contrary to law, politics is a field that also permits constant personal and institutional blaming. In fact, blaming may not only be allowed in politics but may be the primary way elections

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256 The Federalist No. 78, 523 (Alexander Hamilton).

257 *See*, *e.g.*, Greene, *supra* note 18, at 466–68.

258 *See* Jack M. Balkin, *Wrong the Day It Was Decided: Lochner and Constitutional Historicism*, 85 B.U. L. REV. 677 (2005).

259 *See generally* Barzun, *supra* note 147 (discussing the dynamics of how precedents in law might be "impeached"); Darrell A.H. Miller, *Tainted Precedent*, 74 ARK. L. REV. 291 (2021) (similar).

260 For an attempt to expand this craft norm and formalize it, see Daniel B. Rice, *Repugnant Precedents and the Court of History* (2021) (unpublished manuscript) (on file with Chicago Journal of International Law).

261 *See generally* Frederick Schauer, *The Generality of Law*, 107 W. VA. L. REV. 217 (2004).

262 Korematsu v. United States, 323 U.S. 214 (1944), *abrogated by* Trump v. Hawaii, 138 S. Ct. 2392 (2018). *But see also* Jamal Greene, *Is Korematsu Good Law?*, 128 YALE L.J.F. 629 (2019) (suggesting that the Court's declaration in *Trump* that it was overruling *Korematsu* was empty).

are won and policy lessons are learned.[263] For these reasons, the world of politics seems much less conducive to the stability and longevity of the precedents generated in it. Even much less severe policy failures can cause a political precedent to be considered "anti-canonical." And political precedents can become anti-canonical for merely strategic reasons as well—that is, even if the blame directed against these precedents is insincere and justified by the strategic benefits achieved by blaming the proponents of these precedents.

It is worth noting that the risk of political precedents becoming "anti-canonical" may be especially high in situations of personnel turnover in politics. In systems that adhere to stare decisis,[264] overruling judicial precedents "upon a ground no firmer than a change in [a court's] membership" could potentially do "lasting injury" to the institution of the judiciary.[265] Not so in politics. The arrival of new public officials to the scene may work in reverse, and we might reasonably expect some expiration of past precedents. Consider a newly appointed decision maker to a political institution. They might want to differentiate from their predecessors by charting a new path, including by retiring old ways and precedents. Or they may have been explicitly selected or elected to the post on a "reform" ticket and therefore seek to cast aside old precedents that they believe are responsible for prior institutional failures. In these latter cases, even if the decision makers believe—or discover after their appointment—that their predecessors were correct in establishing certain precedents and following them, the circumstances of the departure of their predecessors from office might make these precedents unavailable to the decision maker.

4. Qualifications

Although political precedents seem much more fragile than judicial ones for all the reasons mentioned above, some important qualifications seem to apply and should be emphasized.

To begin, many of the rationales discussed in Section IV as contributing to the ease of the generation or identification of political precedents also contribute to their resilience at the stage of potential overruling. In particular, low-stakes

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263 *See generally* CHRISTOPHER HOOD, THE BLAME GAME: SPIN, BUREAUCRACY, AND SELF-PRESERVATION IN GOVERNMENT (2011).

264 *See supra* notes 1, 40–41 and accompanying text.

265 Mitchell v. W.T. Grant Co., 416 U.S. 600, 636 (1974) (Stewart, J., dissenting). *See also* Rehan Abeyrante & Iddo Porat, *Introduction: Towering Judges—A Conceptual and Comparative Analysis*, *in* TOWERING JUDGES—A COMPARATIVE STUDY OF CONSTITUTIONAL JUDGES 1, 12 (Rehan Abeyrante & Iddo Porat eds., 2021) (mentioning, in relation to the German legal system, a strong tradition "that shies away from personalization of judgment and from the glorification of individual judges").

political precedents seem to be at especially low risk of being overruled; no one may simply bother or want to do so.[266]

But, even for high-stakes political precedents, attempts at overruling are far from guaranteed. Perhaps decision makers may be too risk-averse, or the political organization is characterized by a "risk culture" that would prevent attempts at overruling.[267] Perhaps, too, appropriate opportunities for decision makers or institutions to overrule such precedents are simply unavailable. It is also possible that despite the lack of reaffirmations of a certain political precedent or "testing," there might still be enough evidence to suggest that the political norm the precedent supports remains robust or internalized in a sufficiently thick way that decision makers are reluctant to upset it. And even if there is no affirmative evidence, pluralistic ignorance might achieve the same result.[268]

Political precedents involving high-stakes situations may prove resilient for other reasons, too. Consider the possibility of standardizing politics and its precedents, discussed above.[269] It is not unthinkable that some attempts to standardize politics could limit the ability of decision makers to rely on otherwise politically available routes to "overrule" political precedents. Finally, the strength of the norm of political stare decisis also matters. As we saw, this norm is especially robust when decision makers put a high premium on political cooperation, when domestic and international political institutions exhibit a high degree of institutional "loyalty," in moments at which public and peer expectations to adhere to the past are likely high, and when an institution is close to the "tipping point."[270] Much like these features of the political environment encourage political decision makers to identify events as precedential and consequently constrain themselves, they will also likely cause decision makers to be reluctant to overrule political precedents too easily even if these are high-stakes ones.

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266 Importantly, note that these low-stakes political precedents could either be (1) precedents that were low-stakes at the point at which they first occurred and remained so through time, or (2) political precedents that were initially high-stakes but over time transformed to be low-stakes (for example, because time had passed, public officials had come and gone, and the precedent had been followed so regularly that it had become an event that in essence signals the existence of a "coordination norm").

267 *See* Bozeman & Kingsley, *supra* note 68 and accompanying text.

268 Indeed, social science research has found that there is often a "conservative lag" in how norms ultimately decay, and it is plausible that a similar dynamic may appear also in politics. *See* Dale T. Miller & Deborah A. Prentice, *Collective Errors and Errors about the Collective*, 20 PERSONALITY & SOC. PSYCH. BULL. 541, 543–44 (1994).

269 *See supra* Section IV.D.2.

270 *See* SCHELLING, *supra* note 237 and accompanying text.

B. The Increased Resilience of Political Precedents

In the previous Subsection, I argued that precedents in politics are more fragile than precedents in law (subject to some qualifications). Here I emphasize that the *reverse* can also be true.

In law, whenever a relevant number of judges on a court (usually a majority, but, as we saw, not necessarily so)[271] have sufficiently serious and justifiable legal reasons, a judicial precedent can be overruled. As U.S. Supreme Court Justice William Brennan famously counseled his clerks, "with five votes, you [can] accomplish anything."[272] But in politics, the equivalent to having transient majorities may not be enough. Sometimes political precedents are so thickly internalized that overruling them would prove tremendously difficult even the decision maker appears to have real power to do so.

There are two primary ways political precedents can become sticky such that they are resistant to being overruled. The first is when the political precedent reaches a level of "cognitive hegemony"[273] where those who abide by it simply cannot conceive of doing anything different. In such cases, attempts to overrule the political precedent would most likely prove futile, even if the one who is trying to do so is entirely correct that the precedent is nothing more than a "dogma[ ] of the quiet past" that is no longer suitable for "the stormy present."[274]

For example, the agreement signed in September 1938 between Germany, Italy, France, and the United Kingdom that allowed Adolf Hitler to annex large parts of Czechoslovakia is often referred to as the "Munich analogy"[275] or "precedent."[276] That precedent suggests that capitulation to aggressive dictatorial regimes is futile and should never be pursued—just as the appeasement of Hitler in Munich proved futile and even counterproductive in stopping Hitler's invasion to Poland and the beginning of World War II.[277] Many foreign relations scholars believe that the Munich precedent has grown into a full-blown "syndrome," in which decision makers have become so trapped in that historical analogy that they are unable to consider circumstances in which appeasement would have been

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271 *See supra* note 87 and accompanying text.

272 SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 196 (2010).

273 *See* Vermeule, *supra* note 48, at 1190–91.

274 *See* Abraham Lincoln, *Annual Message to Congress* (Dec. 1, 1862), *in* 5 COLLECTED WORKS OF ABRAHAM LINCOLN 537 (Roy P. Basler ed., 1953).

275 *See* JEFFREY RECORD, THE SPECTER OF MUNICH: RECONSIDERING THE LESSONS OF APPEASING HITLER 1–13 (2007).

276 Patrick Hagopian, *Histories and "Lessons" of the Vietnam War*, *in* PARTISAN HISTORIES: THE PAST IN CONTEMPORARY GLOBAL POLITICS 167, 181 (Max Paul Friedman & Padraic Kenney eds., 2005).

277 *Id.*

quite obviously beneficial. Indeed, a well-known book described foreign policy officials, in adhering to the Munich precedent, as "prisoners of the past."[278]

Cognitively hegemonic political precedents of this kind are clearly important. But they do not exhaust the category of interest. Another situation in which political precedents can prove incredibly sticky, much more than we think of precedents in law, is when their thick internalization stems from politics, not cognition. In other words, when political precedents become *politically hegemonic*.

This can happen most clearly when the political precedent becomes so closely affiliated with what literature sometimes calls a political "regime"[279] or a "constitutional order,"[280] that it cannot easily be disposed of, at least so long as that regime or order remains resilient. To illustrate this, consider, the following well-known story.[281] Before assuming office and during his election campaign, candidate Barack Obama campaigned vigorously against many of President George W. Bush's aggressive practices concerning the War on Terror and promised to get rid of them. However, once in office, Obama ended up retaining many of the practices he had dismissed as a candidate.[282] What accounts for this? Partly, the beliefs and preferences of President Obama and those in his administration may have changed once they entered the White House and learned more about the risks of terror.[283] But another plausible explanation seems to be that the Bush administration past practices on the War on Terror became politically hegemonic. These practices were essentially incorporated into a political regime or a constitutional order in the U.S. that is now fully devoted to what some

278 GÖRAN RYSTAD, PRISONERS OF THE PAST? THE MUNICH SYNDROME AND MAKERS OF AMERICAN FOREIGN POLICY IN THE COLD WAR ERA (1982).

279 For studies that theorize the existence of separate "regimes" in U.S. politics, see STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON 34 (1993); Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, 36 INT'L ORGS. 185, 186 (1982).

280 For the concept of a "constitutional order," see generally Mark Tushnet, *The Supreme Court, 1998 Term—Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29 (1999).

281 *See*, *e.g.*, CHARLIE SAVAGE, POWER WARS: THE RELENTLESS RISE OF PRESIDENTIAL AUTHORITY AND SECRECY 21–22 (2017).

282 In fact, in the eyes of some, President Obama was more aggressive than his predecessor in the tools he authorized in the War on Terror. *See*, *e.g.*, Jack Goldsmith, *The Contributions of the Obama Administration to the Practice and Theory of International Law*, 57 HARV. INT'L L.J. 455 (2016); Jack Goldsmith & Matthew Waxman, *The Legal Legacy of Light-Footprint Warfare*, 39 WASH. Q. 7 (2016); Curtis A. Bradley & Jack L. Goldsmith, *Obama's AUMF Legacy*, 110 AM. J. INT'L L. 628 (2016).

283 And, in particular, when they were exposed to information that was unavailable to them beforehand. *See*, *e.g.*, SAVAGE, *supra* note 281, at 144.

have called the "National Security State"[284] or to the entrenchment an "infinity war."[285]

To be sure, the resilience of political precedents that become politically hegemonic is not guaranteed. And, indeed, President Obama was able to dismiss or overrule some of his predecessor's precedents regarding the War on Terror.[286] Nonetheless, at least when the political regime or constitutional order remains resilient, and so long as the political precedents in question are central to its agenda—and "compensating adjustments" cannot be devised[287]—the overruling of precedent may ultimately prove temporary. The relevant political precedents might be reinstalled in the short to medium term.[288]

VI. THE PUBLIC AND POLITICAL PRECEDENTS

Sections IV & V illustrated that political stare decisis is a complex phenomenon. Political precedents can be established either quickly or with time (Section IV), and they can prove either extremely fragile or extremely resilient (Section V). In this Section, I introduce a final complication regarding political precedents that has to do with the role of the public at large.

In both law and politics, the public is obviously an important audience that judicial and political institutions surely consider.[289] However, the frequency with which institutions in law and politics must address the public as an audience, or the weight that they should give the public, likely differs between the two spheres. In law, even when the public is alert to judicial activity and judges care about the views of the public, the legal profession serves as a crucial "intermediary" between the public and the precedents courts produce. This is especially true when judicial precedents appear somewhat technical in nature and in systems where the public's

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284 *See, e.g.*, Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1, 5–7 (2008).

285 *See, e.g.*, Samuel Moyn & Stephen Wertheim, *The Infinity War*, WASH. POST (Dec. 13, 2019), https://perma.cc/KV3H-R4PY.

286 For a favorable account, see Trevor Morrison, *Obama v. Bush on Counterterrorism Policy*, LAWFARE (Nov. 11, 2012), https://perma.cc/7CA2-8ASD.

287 *See generally* Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733 (2005). And, indeed, the less favorable account of President Obama's changes to his predecessors' legacy is exactly that they were marginal changes or could be compensated for. *See* Jack Goldsmith, *More on Bush-Obama Continuity*, LAWFARE (Nov. 11, 2012), https://perma.cc/68CE-SWJ.

288 For the dynamic of norms (or precedents) that make a comeback, *see* Tamir, *supra* note 48, at 901–04.

289 For discussion of judicial awareness of public perception *see*, *e.g.*, Tom Ginsburg & Nuno Garoupa, *Judicial Audiences and Reputation: Perspectives from Comparative Law*, 47 COLUM. J. TRANSNAT'L L. 451, 457–63 (2009).

perception is that a relatively strong separation exists between law and politics.[290] Judicial precedents, therefore, are not normally vulnerable to any differences that might exist between the legal profession and the nonlegal world. By contrast, political precedents likely do not enjoy the same level of "acoustic separation"[291] and intermediation that exists in law. Even though politics has been professionalized to a certain degree, as we saw,[292] politicians are probably much weaker intermediaries than "the professional experts who make up the lawyer class."[293] Consequently, what the public believes, knows, or understands about politics will have a powerful influence on political stare decisis's operation.

A. Effectively Unknown Political Precedents

Here is the first implication of this sort of divergence between politics and law: If law is less penetrable to the public, then for judicial precedents to achieve their constraining force, it is enough for these precedents to be known within the legal profession. But in politics, that may not suffice. Some precedents known within the world of politics will be *ineffective* if they are unknown outside of it and "do not arouse general interest."[294]

Consider the following illustration of this pivotal role of the public in generating precedential constraint in politics: in the U.K., Canada, and Australia, the Queen (or her representatives) holds the power to refuse "royal assent," which can prevent legislation from gaining force.[295] However, a widespread belief across Westminster systems is that because the power to refuse royal assent has not been exercised since 1708, it has become obsolete.[296] There is, in effect, a powerful political precedent against the power to refuse assent.[297]

In an important study, Australian scholar Anne Twomey has however brought to light findings that seem to complicate this powerful precedent. What Twomey found was that well beyond 1708, the monarchy and its representatives occasionally threatened to deny legislative assent,[298] threats that were often taken quite seriously. Nonetheless, Twomey also emphasizes that there were *no overt acts*

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290 *See generally* THEUNIS ROUX, THE POLITICO-LEGAL DYNAMICS OF JUDICIAL REVIEW: A COMPARATIVE ANALYSIS (2018) (exploring societal perceptions about the separation of law and politics in different systems).

291 *See generally* Dan-Cohen, *supra* note 19.

292 *See supra* note 77–80 and accompanying text.

293 BENJAMIN J. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 34 (1921).

294 HORWILL, *supra* note 190, at 207.

295 *See, e.g.*, Nick Barber, *Can Royal Assent Be Refused on the Advice of the Prime Minister?*, U.K. CONST. L. BLOG (Sept. 25, 2013), https://perma.cc/CR4C-QW3N.

296 *Id.*

297 *Id. See also* Vermeule, *supra* note 81, at 424.

298 *See generally* Anne Twomey, *The Refusal or Deferral of Royal Assent*, 2006 PUB. L. 580 (2006).

of refusal to provide assent to legislation by the monarchy and its representatives.[299] The instances Twomey discovered remained at most an "internal" governmental issue, not known by the public at large.

During the fierce political discussions in the U.K. about "Brexit," some tried to rely on Twomey's study to claim that the Queen would be justified in refusing royal assent because the precedent against doing so is in fact more qualified as Twomey's findings suggest.[300] Ultimately, this did not transpire as the Queen did provide assent for the legislation in question. And, while we cannot be sure, one reason for this might be exactly that the precedents Twomey's study identified were irrelevant in the most important sense: the public who enforces that precedent against refusing of assent was simply unaware of them. All the public knows is that since 1708, the monarchy has never refused assent. And that may be all that matters for the effectivity of the precedent.

B. Cognitive and Political Intake of Political Precedents

One solution to the problem of effectively unknown precedents seems simple: make these precedents known to the public, both as a general matter but especially in *real time*. And in some cases, this may solve the issue. For instance, Professor Nicholas Parrillo's recent study of administrative agencies' guidance documents in the U.S. discovered that agencies often make exceptions to what these guidance documents determine.[301] Parrillo also found, however, that these exceptions are mostly unknown to outside stakeholders.[302] Accordingly, Parrillo's suggestion is to make the exceptions known so they could essentially become effective precedents and constrain officials within those agencies.[303]

But in politics, making the unknown known might not be enough. The stakeholders of the policy made by the agencies Parrillo studied may be sophisticated, just as we assume lawyers who observe courts and judicial precedents are sophisticated. But the public at large, whose view the precedent's efficacy hinges on, might not be similarly sophisticated. Informational gaps between the internal political world and the more diffuse public would likely exist. And some issues that appear important for political insiders about the

299 *Id.* at 589.

300 *See* Robert Craig, *Could the Government Advise the Queen to Refuse Royal Assent to a Backbench Bill?*, U.K. CONST. L. BLOG (Jan. 22, 2019), https://perma.cc/EA25-UH4U.

301 *See* Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REGUL. 165 (2019).

302 *See id.* at 251–52.

303 *Id.*

precedent-creating event might not be sufficiently salient or vivid to outsiders.[304] In such circumstances, political precedents might fail to be generated in the way political elites would want them to be not because they are unknown to the public. Rather, they will fail, *despite* being known, because the public will not be as receptive to the information political elites assume.

As an example, consider this: we previously saw the political precedent according to which the chair of the Budget Committee in the Bundestag should come from the opposition party.[305] In the past, some advocated for a more narrow reading of that precedent, arguing that it should not preclude the appointed chair from being a legislator from a coalition party *so long as* their views on budgetary policies are substantively different from those of the Finance Minister.[306] This view certainly has logic. At the same time, there are also reasons to wonder whether this distinction would actually work to the extent that the public is the one "enforcing" the relevant precedent. From the public's perspective, all that might matter is whether the Finance Minister comes from the opposition party or not; the nuances of internal coalitional dynamics might not be salient enough to resonate with the public. Proceeding in practice according to the proposed narrow reading of the precedent might be interpreted by the public as an overruling of the precedent, not its narrowing down (as those who have suggested it intended it to be understood).

The types of gaps that I have just emphasized are informational and cognitive in nature. But sometimes there could be important *political* gaps too. More specifically, on occasion we may find that there is a discrepancy between the way professionalized politics is understood by relevant political "professionals," on one hand, and the public perception of what political professionalism should entail, on the other hand.

Obviously, a complete divergence between the two spheres is impossible, as political actors are ultimately drawn from the public. Nonetheless, some gaps are likely to exist between the spheres at some points in time, partly because in the short term, politics is always imperfectly responsive to the public.[307] Where such political gaps exist, they will likely have an important impact on political stare decisis. In particular, for political precedents to constrain, they need to speak to the publicly perceived standards of appropriate political behavior rather than to the standards that political elites believe apply to them. In other words, the

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304 *See, e.g.*, RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 45 (1980) (describing vivid information as information that is "(a) emotionally interesting, (b) concrete and imagery-provoking, and (c) proximate in a sensory, temporal, or spatial way").

305 *See supra* note 192 and accompanying text.

306 *See* Taylor, *supra* note 177, at 315.

307 William D. Nordhaus, *The Political Business Cycle*, 42 REV. ECON. STUD. 169, 173 (1975).

precedents need to consider the "logic of appropriateness"[308] that is alive in the mind of a more diffuse public.

In many cases, this gap has implications for the degree of aggressiveness of political behavior that will be required for it to be taken as precedential. For instance, for a political precedent to be established in polities where the public is highly cynical of politicians, political actors will need to become more brutish than they otherwise would be in order to convince the public that a precedent has been established.[309] By contrast, when politicians are more cynical and brutish than the public, they might need to tone down their more aggressive political tendencies if they hope to register their behavior as a successful political precedent.[310]

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Having discussed at length in Sections IV–VI how judicial and political stare decisis diverge, Tables 1–3 below provide a summary of the key takeaways that emerge from the inquiry:

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308 *See* James G. March & Johan P. Olsen, *The Logic of Appropriateness*, *in* THE OXFORD HANDBOOK OF POLITICAL SCIENCE 478, 478 (Robert E. Goodin ed., 2009) (defining the "logic of appropriateness" as the logic that explains when rules are followed because they are seen as "natural, rightful, expected, and legitimate").

309 *See, e.g.*, Zlatko Šram, *The Effects of Political Cynicism and National Siege Mentality on the Internalization of an Anti-European Sentiment*, 3 INT'L J. MGMT. & SOC. SCI. 203 (2015).

310 A case in point might be the precedent against "court packing" in the U.S. discussed supra note 42 and accompanying text. During the 1930s, court packing might have fallen within the realm of political appropriateness, but the public did not view it as such, arguably causing its ultimate failure. *Cf.* Adrian Vermeule, *Political Constraints on Supreme Court Reform*, 90 MINN. L. REV. 1154, 1162 (2006).

TABLE 1: ESTABLISHING PRECEDENTS

Judicial Stare Decisis	**Political Stare Decisis**
Precedents are established by winners or losers	Precedents are established by winners or losers & cooperation signals
Winning is good for precedents; losing is bad for precedents	Winning or losing might have *perverse* results for precedents (overzealous winners & sore losers)
Precedents are established in "one go"	Precedents are established—if at all—in *retrospect* or *cumulatively* (unless, e.g., decision makers are less savvy, the political stakes are low, or the *norm* of political stare decisis is robust in the context at hand)

TABLE 2: OVERRULING PRECEDENTS

	Judicial Stare Decisis	**Political Stare Decisis**
Precedential Resilience	• Requirement to justify overruling • Requirement of "testing" before overruling (no *fait accompli*) • High threshold for overruling (e.g., "special justifications" or "compelling reasons") • "Reason, not power," as basis for overruling • Very limited group of anti-canons	• Transient majorities cannot easily overrule (cognitive and political hegemony)
Precedential Fragility	• Transient majorities can easily overrule: "with five votes you can do anything"	• No requirement to justify overruling: the Nike principle—"Just Do It" • Precedents can be overruled without being "tested" (*fait accompli* overruling) • Lower threshold for overruling • "Power, not reason" can serve as the basis for overruling • Large group of anti-canons

TABLE 3: REASONING AND AUDIENCES

Judicial Stare Decisis	**Political Stare Decisis**
Limited to common law reasoning	Public officials will ask, in addition to common law-like reasoning and either explicitly or implicitly: (1) what comes next? (2) what were people truly thinking or believing during the precedential event and what motivated them to behave as they did?
The mediated public: primary audience is legal professionals	The less-mediated public: a relevant and sometimes primary audience is the public itself (which may lead to effectively unknown precedents and gaps in the cognitive and political intake of precedents)

VII. PRESCRIPTIONS

So far, my discussion of political stare decisis has been limited to explanatory and analytic lenses. But the analysis does lend itself to some prescriptive insights as well.

A. Precedenting: How to Make or Break Political Precedents

From a social standpoint, in any given political system or institution, there could be either *too much* or *too little* political stare decisis. As mentioned in the Introduction, many believe that much of what is wrong with domestic and international politics today is that too much of the past is being eroded.[311] By contrast, others think that even today much of the past proves unjustly sticky in both global and domestic politics.[312] They would want to see *less* political stare decisis today.

The issue is normatively vexing, and I doubt whether any general account could resolve the debate. Nonetheless, understanding the operation of political stare decisis seems to offer some helpful prescriptions for those involved in this debate. In particular, understanding political stare decisis points to the way public officials can behave in order to create successful political precedents that will genuinely constrain public officials, whether these are completely new precedents or rather precedents meant to strengthen or weaken existing ones.

We can call this sort of activity, in short, "precedenting." And based on the discussion in Sections IV–VI, we can moreover identify its core elements.

1. The craft

First, precedenting aims for political events and decisions that can satisfy the informational burden that is needed to create constraint by the past in politics, particularly in high-stakes matters. As we saw in Sections II and IV, these are events and decisions that can deliver information indicating the existence or potential emergence of political norms. Accordingly, when the political precedent constrains based on its cooperative logic, precedenting means aiming for *galvanizing events that strongly signal the existence of such political cooperation*. By contrast, when the risk of political sanctions gives the political precedent its constraining force, precedenting means aiming for *decisive political victories* (rather than mere

311 *See supra* notes 16–17 and accompanying text.

312 *See*, *e.g.*, Jedediah Britton-Purdy, *Normcore*, DISSENT (Summer 2018), https://perma.cc/66EL-EDZF. *See also* Cristina M. Rodriguez, *The Supreme Court 2020 Term—Foreword: Regime Change*, 135 HARV. L. REV. 1 (2021).

"brushbacks"),[313] including by picking the timing at which the necessary political or social penalties will most likely be doled out.[314]

Second, those who engage in precedenting should seek to avoid the kind of ambiguities that decrease the informational power of political events or decisions and their likelihood of becoming efficacious political precedents. This means that those who engage in precedenting should *avoid negating and self-negating statements*. And they should also act in ways that *do not appear to be motivated by purely legal considerations or purely opportunistic ones*, but that signal the sincere belief in the precedential force of the event.

Third, given the retrospective or cumulative nature of many political precedents, and given their potential to be easily overruled at a later stage, precedenting requires thinking of the task not as a "single shot" enterprise, as we often think of precedents in law. To the contrary: precedenting is a continuous and steady task. Thus, precedenting requires the *regular reaffirmation of the initial precedent*.[315] That way, precedenting can cumulatively support the emergence of the political norm that ultimately makes political precedents constraining. Alternatively, if the political norm that the precedent supports already emerged, the steady reaffirmation signals the continued belief in it and prevents it from being forgotten or weakened which, as we saw, may be a real risk in politics in contrast to law.[316]

Fourth, because of the increased risk of anti-canonicity of political precedents, precedenting also requires that those who engage in it to scrupulously protect their overall legacy (or the legacy of the institution they are affiliated with). This means that precedenting should lead decision makers to consider whether they may need *to resign from their posts* if, for instance, their continued presence jeopardizes the resilience of the relevant political precedents (or, conversely, *extend their tenure* if there is concern over the wreckage to these precedents that might be caused by their replacements).[317] In addition, given the importance of positive legacy for the survival of precedents, decision makers should moreover consider engaging in *valorization of these precedents*, even in ways that might seem substantively unjustified.[318]

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313 I borrow this term from Tushnet, *Hardball*, *supra* note 48, at 544–45.

314 Discussions of strategic timing are not foreign in the context of courts. *See* Delaney, *supra* note 168 (distinguishing between *ex ante*, *in medio*, and *ex post* judicial interventions).

315 This recommendation appears also in Vermeule, *supra* note 81, at 439, but Professor Vermeule's discussion does not add the other requisite conditions this Section identifies.

316 *See supra* note 246 and accompanying text.

317 *Cf.* JENNET KIRKPATRICK, THE VIRTUES OF EXIT: ON RESISTANCE AND QUITTING POLITICS (2017) (discussing the concept of quitting and exit in politics).

318 *See* Thomas B. Lawrence & Roy Suddaby, *Institutions and Institutional Work*, *in* SAGE HANDBOOK OF ORGANIZATION STUDIES 215, 230 (Stewart R. Clegg et al. eds., 2d ed. 2006); Tamir, *supra* note 48 at 943–44.

Finally, when the relevant audiences for the political precedents are likely to be diffuse publics, precedenting entails being acutely aware of the pivotal role of the public. This means that those who engage in precedenting should make sure that the relevant political precedents are *known to the public* instead of merely engaging in "smoke-filled-room" politicking.[319] It also requires making sure that the relevant precedents *do not assume the background of political professionalism* and *speak to the "logic of appropriateness" that captures the broader public's mind about politics*.

2. Negative and reactive precedenting

Thus far, I have described the craft of precedenting primarily from the point of view of those who wish to create new political precedents or strengthen existing ones. But the same applies, *mutatis mutandis*, to precedenting in the other direction—when the goal is to weaken and ultimately replace existing political precedents. The only difference is that when precedenting is taken with this specific goal in mind—call it negative precedenting— it requires demonstrating the inefficacy of the existing political precedent (for example, by aiming for decisive "wins" that demonstrate there are *no penalties for the breach of the previous* precedent or *exposing the self-interestedness of those who adhere to it*).[320]

Furthermore, once we recognize what the task of precedenting generally entails, we can understand better how one should react to it when the other side is engaging in it. For instance, to decrease the likelihood of negative precedenting, those who wish to defend existing political precedents can try to undermine the political events their opponents wish to use by resorting to *negating statements* or by using whatever political clout they have to extract *self-negating statements*. In situations where those engaging in negative precedenting look as though they may be successful in a particular political environment but not in "the court of public opinion," those who resist the precedent change can try to shift the setting itself by *"going public"*[321] with the developments in the hope that informational gaps, salience, or the logic of appropriateness among the public will complicate the adverse precedent's intake. Finally, to decrease the effectiveness of negative precedenting, resisters can try to *discredit, "trash-talk," or even "demonize"*[322] the legacy of the person who had attempted to set the adverse precedent (or the institution with which that precedent is affiliated) and strategically blame them for policy failures—in the hope that it will enjoy a short life inside the relevant political

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319 *See* Jonathan Rauch, *Political Realism: How Hacks, Machines, Big Money, and Back-Room Deals Can Strengthen American Democracy*, *in* IS CONGRESS BROKEN? THE VIRTUES AND DEFECTS OF PARTISANSHIP AND GRIDLOCK 201 (William F. Connelly et al. eds., 2017).

320 I note that this analysis suggests that precedenting to strengthen current political precedents may also require strategic breaching of political precedents at a time at which they are likely to be enforced and arouse political sanctions.

321 SAMUEL KERNELL, GOING PUBLIC: NEW STRATEGIES OF PRESIDENTIAL LEADERSHIP (1986).

322 *See* Tamir, *supra* note 48.

precedential pool. And resisters can also engage in what some call *"memory entrepreneuring*,"[323] which in this context means to deliberately deemphasize the existence of the undesirable precedent—so it will be forgotten or get lost in a "wilderness of dispersed incidents."[324]

3. Is precedenting possible?

As should be obvious, the task of precedenting is quite difficult. At the most basic level, it asks decision makers to manipulate two elements: politics and beliefs. Such manipulation is undoubtedly hard, though. Decision makers cannot fully control how political events occur, and they cannot wish people into believing in something.

It is unsurprising, then, that some are skeptical that something like precedenting is possible. Jon Elster, for example, voices doubts that it is possible to create political precedents in a deliberate fashion to get "one's foot in the door."[325] And Adrian Vermeule notes that political norms (and, implicitly, the political precedents that support them) "cannot be tailored to any arbitrarily desired degree of nuance and suspended or activated at will."[326]

Although this skepticism is understandable, the world of politics does appear to leave some space for human agency and engagement in precedenting.[327] This can happen in surprising, unanticipated ways but also in more systemic ones.

First, decision makers often do control the words that come out of their mouths or appear in official records, which is precisely why they are drawn to employ negating or self-negating statements.

Second, decision makers also often control informational flows into politics, and through this, they can at least influence beliefs, even if they cannot guarantee that those beliefs will end up where decision makers want them to be.[328]

Finally, when decision makers are in a secure position of power, their political flexibility expands. They can more easily set the stage of politics, pick the timing for their engagement, and make bolder moves that attempt to create

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323 *See*, *e.g.*, ROBYN AUTRY, DESEGREGATING THE PAST: THE PUBLIC LIFE OF MEMORY IN THE UNITED STATES AND SOUTH AFRICA 27 (2017).

324 Jaconelli, *supra* note 173, at 166. The account Professor Tara Leigh Grove provides of the development of the political precedent or norm against violating judicial orders traces such successful attempt at "memory entrepreneuring." *See* Grove, *supra* note 42 at 531–32.

325 Elster, *supra* note 48, at 33.

326 Adrian Vermeule, *The Invisible Hand in Legal and Political Theory*, 96 VA. L. REV. 1417, 1436 (2010).

327 A similar point is also made by Professor Michael Gerhardt. *See* Gerhardt, *supra* note 15, at 722. *See also* Larry Crump, *Toward A Theory of Negotiation Precedent*, 32 NEGOT. J. 85, 87 (2016) (speaking of precedent generation, in the context of international negotiation, as a "strategic tool").

328 As James March puts it, "[i]nformation is not innocent." *See* Thomas H. Davenport et al., *Information Politics*, 34 SLOAN MGMT. REV. 53, 53 (1992) (citing JAMES G. MARCH, DECISIONS AND ORGANIZATIONS (1988)).

political precedents or strengthen previously existing ones. And sufficiently powerful political actors might also allow themselves to act in less opportunistic ways than they would otherwise—which, as we saw,[329] may be crucial for the generation of political precedents.

4. More and less successful precedentors

Even if one remains skeptical about the prospects of *deliberate* precedenting, the analysis offers other benefits. By understanding the operation of political stare decisis, we can see who is likely to benefit more from political precedents in a given system or context. We can also more reliably speculate on the circumstances in domestic and international politics in which we are likely to observe more or fewer political precedents.

For one thing, and perhaps obvious at this point, it is likely that existing political precedents in a particular environment or system will benefit stronger political actors or institutions rather than weaker ones.[330] The reason for this is not only that stronger political actors can set the stage of politics, but also that the behavior of strong political actors serves as a stronger informational signal about whether events in politics indicate the emergence or confirm the previous existence of political norms.[331] It is enough, in other words, to be strong, and political precedents may follow.

The categories of strong or weak can be too crude, though. Sometimes political institutions that operate in a certain environment (or even officials within a specific institution) are strong or weak across various dimensions. And these differences can be important for seeing who is likely to be a better precedentor.

Two dimensions stand out in particular. First, given that, as we saw,[332] political precedents require both decisiveness and continuous work, political precedents will likely benefit political institutions in political environments that are more hierarchical or centralized than those that are less so. Second, for similar reasons, political precedents are likely to work in favor of those who have greater control over how the past is memorialized in politics, including those in charge of

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329 *See supra* Section IV.D.1.

330 Robert Axelrod puts this in terms of "dominance," see Robert Axelrod, *An Evolutionary Approach to Norms*, 80 AM. POL. SCI. REV. 1095, 1103–04 (1986), while Mancur Olson speaks of a "privileged group," see MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 49–50 (1965).

331 But, again, I stress the argument made by Professors Voeten and Verdier, *supra* note 74, at 408, that strong political actors may actually find themselves more constrained than others precisely because they sometimes wish to avoid establishing new precedents. This is a kind of reverse "curse of bigness."

332 *See supra* notes 315–12 and accompanying text.

writing down potentially precedential events or decisions and their retrieval.[333] As an example, consider how skeptics of OLC's ability to constrain presidents point to its practice of memorializing only "affirmative precedents"[334]—that is, precedents that support expansions of executive power. Or, perhaps from a different political perspective, consider recent criticisms that were sounded in the U.K. during Brexit that civil servants were "doctoring" the minutes of cabinet meetings in order to delay the Brexit process.[335]

Institutions and political systems will likely also differ in their ability to generate political precedents. For instance, given that the establishment of political precedents is undermined when the beliefs in the generation of precedents are ambiguous—because of the previously discussed problem of observational equivalence[336]—the ability of institutions and political systems to generate political precedents will be vulnerable to the relevant legal or political culture that exists within them. In particular, the more the culture in a specific jurisdiction or context is legalistic and characterized by what legal philosopher David Dyzenhaus calls the "compulsion of legality,"[337] the harder it will be to establish political precedents in it, because law rather than something deeper will explain the behavior. Similarly, the more a system's political and constitutional culture permits self-interest and opportunism—such as when a country is more committed to pluralist politics and what comparative constitutional scholars describe as "culture of authority" rather than "culture of justification"[338]—this, too, may result in a difficulty in establishing political precedents within that system. More events or decisions that could have potentially been considered precedential will be interpreted as pure opportunism and thus will not generate political precedents.

We have seen as well that it may be difficult to establish political precedents when the *norm* of political stare decisis is weak[339] or when the public's less-mediated role in politics becomes significant (given informational gaps and the potential for different logics of appropriateness).[340] This suggests that the more

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333 *See also* GERHARDT, *supra* note 15, at 119–20 (discussing how the method of preservation and documentation of debates in Congress may affect the content of the precedents generated there).

334 Rebecca Ingber, *The Obama War Powers Legacy and the Internal Forces that Entrench Executive Power*, 110 AM. J. INT'L L. 680, 692 (2016).

335 *See* Michelle Clement, *Writing History: Why Are Civil Servants Being Accused of 'Doctoring' Cabinet Minutes?*, CIVIL SERV. WORLD (April 30, 2019), https://perma.cc/4ZG7-XRHA.

336 *See supra* notes 170–78 and accompanying text.

337 David Dyzenhaus, *The Compulsion of Legality*, *in* EMERGENCIES AND THE LIMITS OF LEGALITY 33 (Victor V. Ramraj ed., 2008) (defining the compulsion of legality as the strong need of public officials to justify their actions in reference to legal arguments).

338 On this distinction, see, for example, Jamal Greene, *The Supreme Court, 2017 Term—Foreword: Rights As Trumps?*, 132 HARV. L. REV. 28, 64–65 (2018).

339 *See supra* Section IV.D.3.

340 *See supra* Section VI.

elitist a particular system is—in the sense of relying more systematically on a robust political class and institutions rather than the force of public opinion or on "personalized"[341] politics—the more likely it is for political precedents to be established. Indeed, some believe[342] that this is precisely why the U.S. and the U.K. are so different, in the sense that the latter, with its tradition of parliamentary government rather than separation of powers and a more robust bureaucratic class, is much more capable of relying on informal political precedents and norms than the U.S.[343]

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The following tables summarize the key takeaways from the discussion in this Section so far:

TABLE 4: PRECEDENTING

Goal	**Means**
Aim for decisiveness	Create "galvanizing events" or strive for decisive wins or losses (no "brushbacks")
Avoid ambiguities	For example, "negating "or "self-negating statements," outright opportunism, or pure legalism
Embrace a continual frame	Reaffirm precedents periodically and especially in situations of personnel turnover
Protect your (or your institution's) legacy	Focus on resignation (if your reputation taints) and the valorization of desirable past precedents
Remember the public when it matters	Make the precedents known in real time, beyond "smoked-filled" rooms, and do not assume the background of political professionalism

341 *See*, *e.g.*, Ian McAllister, *The Personalization of Politics*, *in* OXFORD HANDBOOK OF POLITICAL BEHAVIOR 571 (2007).

342 *See*, *e.g.*, Erin F. Delaney, *Stability in Flexibility: A British Lens on Constitutional Success*, *in* ASSESSING CONSTITUTIONAL PERFORMANCE 393 (Tom Ginsburg & Aziz Huq eds., 2016).

343 This claim may originate with James Bryce. *See* JAMES BRYCE, THE AMERICAN COMMONWEALTH VOL. I 923 (1888). Note, though, that this does not speak to the dimension of *resilience* of political precedents, and it is possible that political precedents that are less reliant on the public are more fragile and could easily be changed or revoked. On this possibility, *see* HORWILL, *supra* note 190, at 201–02.

TABLE 5: NEGATIVE/REACTIVE PRECEDENTING

Goal	**Means**
Aim for *negative* decisiveness	Illustrate the disutility of an *undesired* precedent or the utility of a *contrasting desired* precedent
Engage in obfuscation strategies	Plant "negating statements" or extract "self-negating" ones; highlight opportunism and legalism as key explanations for the undesired precedent
Disrupt your opponents' continuous work	Engage in "memory entrepreneuring" (for example, make the undesired political precedent forgotten, change its meaning, or make instances of reaffirmation appear disconnected)
Spoil your opponents' overall legacy	Participate in "trash-talking," demonizing, and unfair blaming of the opponent
Change the setting	"Go public"

TABLE 6: MORE/LESS SUCCESSFUL PRECEDENTORS

More Successful	**Less Successful**
Strong political power	Weaker political power
Hierarchical organizational structure	More diffuse organizational structure
Control over organizational memory (including the who and the what)	Lack of control over organizational memory (including the who and the what)
Weak "compulsion of legality"	Strong "compulsion of legality"
"Culture of justification"	"Culture of authority"
Elitism	Personalization and "government by public opinion"

B. Strengthening Political Stare Decisis (Generally)

The task of precedenting, as I have presented it so far, is directed to the level of *specific* political precedents. But sometimes in politics, what we care about may be broader: instead of caring about specific precedents, we may want political institutions to *generally* be able to exhibit constraint of the past more frequently.

This is not far-fetched. After all, the values that we associate with *judicial* stare decisis, including stability, epistemic humility, and integrity,[344] are not exclusive to that domain. There may be contexts in politics where these values seem exceedingly appealing as well.[345] In addition, and perhaps especially given the recent experience with the rise of "tradition-threatening" regimes around the world,[346] we may also be interested in thinking *preemptively* about how to design institutions in politics in a way that would make them more immune from changes that decrease the constraining effects of the past.

What paths are open for institutional designers who are interested in achieving either of these goals? That is, in making political stare decisis *generally* more robust?

Given the discussion here, one option institutional designers should clearly consider relates to the *norm* of political stare decisis, which, as we saw, is precisely what can cause public officials to adhere more regularly to the past, even in high-stakes cases. Consequently, institutional designers who want to enhance the weight of the past in decision-making precedents should turn their attention to the forces that make this norm robust[347] and consider how to structure political institutions to strengthen it.[348] For example, institutional designers should focus on strategies for increasing political institutions' sense of "loyalty" (including by changing employee retention and evaluations practices), for increasing institutional parity (including by giving veto-gate powers[349] to institutions that are usually weak), for enhancing the sense of professionalism in politics, and for highlighting the relevant "tipping point."[350]

But institutional designers might consider *other* strategies as well, perhaps more creative ones that can also strengthen the norm of political stare decisis. First, there have been recent suggestions in academic literature to increase the involvement of historians in domestic policy processes, partly given how such

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344 *See supra* notes 4–6 and accompanying text.

345 *Cf.* THE NEED FOR HUMILITY IN POLITICS: LESSONS FROM REGULATORY POLICY (Stefanie Haeffele & Anne Hobson eds., 2019). Of course, the claim that respect to the past and traditions is desirable in political decision-making generally, among other things because it represents the epistemic "bank and capital of nations, and of ages," is deeply associated today with Edmund Burke. *See* EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 183 (W. Alison Phillips & Catherine Beatrice Phillips eds., 1912) (1790).

346 *See supra* note 16–17 and accompanying text.

347 *See supra* Section IV.D.3.

348 Note that thinking about this issue in this a systemic way seems free of the challenges that apply, as discussed before in Section VII.A.2, to precedenting at the level of *specific* precedents.

349 *See generally* William N. Eskridge Jr., *Vetogates and American Public Law*, 31 J. L. ECON. & ORG. 756 (2015).

350 This too may involve changes in hiring practices in organizations, to ensure a specific balance of thresholds. *See generally* Mark Granovetter, *Threshold Models of Collective Behavior*, 83 AM. J. SOCIO. 1420 (1978).

involvement will increase the weight of the past in political decision-making.[351] There is no reason why such proposals could not be implemented broadly, in many domestic systems as well as at the international level.[352]

Second, institutional designers may also consider examining the way the past is memorialized and retrieved in political institutions, including what is and is not memorialized and who controls the process of memorialization itself.[353] Indeed, there is much to the claim that today there is too little attention to issues of official memorialization in domestic and international politics.

Finally, institutional designers might also consider creating avenues that will increase the public's ability to monitor officials' willingness to respect the past. A possible path to doing so is to institutionalize the use of the "public registries" of past political precedents that have recently been established by various nongovernmental outlets.[354]

VIII. REVISITING JUDICIAL STARE DECISIS

A. Judicial Precedents as Political Precedents

I conclude the Article with a jurisprudential turn, and a twist: up to this point I argued that political stare decisis cannot be fully equated with how we conventionally understand judicial stare decisis. As I explained in Sections IV–VI and summarized in Tables 1–3 above, several legal craft norms that apply to judicial stare decisis make the comparison seem partial, if not misleading, including that judicial precedents are established in "one go," that the sincere beliefs of judges are (largely) irrelevant to determine whether a past decision is precedential, that there is no final overruling of a precedent before an authoritative overruling is in fact received, that even transient majorities can overrule precedents, and that judges can overrule prior precedents using only "reason, not power."

In a world where judges and lawyers take these legal craft norms "seriously,"[355] the divergence between political and judicial stare decisis would indeed be a powerful one. But is this really our world? Was it ever?

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351 *See generally* ALIX R. GREEN, HISTORY, POLICY, AND PUBLIC PURPOSE: HISTORIANS AND HISTORICAL THINKING IN GOVERNMENT (2016). *See also* CATHERINE HADDON ET AL., WHAT IS THE VALUE OF HISTORY IN POLICYMAKING? 22–23 (2015), https://perma.cc/8BVM-7TMZ.

352 Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53 (2014); Shirin Sinnar, *Institutionalizing Rights in the National Security Executive*, 50 HARV. C.R.-C.L. L. REV. 289, 347 (2015).

353 *See generally* Barbara Levitt & James G. March, *Organizational Learning*, 14 ANN. REV. SOCIO. 319, 326–29 (1988) (discussing the concept of "organizational memory").

354 For an example of a public registry, see Katerina Wright, *Norms Watch: Tracking Team Trump's Breaches of Democratic Traditions*, JUST SEC. (Jan. 13, 2017), https://perma.cc/LSM6-A2HS.

355 *Cf.* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

At least since the advent of legal realism, we have serious reasons to doubt it. As is well known, one of the realists' most important legacies is that the standards or rules that judges and lawyers apply to legal precedents are so flexible that judges can use them to reach whatever results they want (at least when they have enough time to navigate the complex system of legal rules).[356] To the extent that the realist claim is true, the entire basis for distinguishing between judicial precedents and political precedents seems to disappear. Many of the legal craft norms that supposedly create the divergence between judicial and political precedents are revealed to be more nominal than real.

Indeed, if judges can reach any result they want relying on traditional legal materials and legal craft norms, then it is highly doubtful that legal precedents genuinely constrain the law in "one go." This might make sense when the stakes of the relevant precedent are low. But when the stakes are high, not so much. Instead, judicial spectators will have sufficient reason to take a precedent as constraining only when there is an indication that it has been internalized in a more meaningful sense than what conventional legal craft norms (or legal materials) suggest. Moreover, the path to learn about that internalization is precisely the *same* one as we have seen political decision makers use to learn about the internalization of events in politics that might be taken as precedential: first, by inquiring into the actual beliefs and motivations of judges and what truly explains their views in the precedential decision, including beyond formal legal materials and craft norms of the legal profession. And second, by asking the Carl von Clausewitz/*Matrix* question, "What comes next?" Or, to use Justice Oliver Wendell Holmes's memorable phrase, by engaging in "prophecies of what the courts will do in fact."[357] More specifically, court spectators will ask themselves whether judges who are likely to disagree with the previous precedent will be able to effectively undermine it in the future via any of the available methods of law that permit doing so,[358] such as distinguishing the case, overruling it, or narrowing it down.[359] And they will moreover adopt a *dynamic* perspective—looking not only at the present pool of cases, but to possible future pools as well.

Obviously, this means that lawyers and judges will *constantly breach* the legal craft norms that structure judicial stare decisis and that supposedly restrict (1) inquiring into actual beliefs and motives of the voting judges and (2) asking "What

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356 The literature on this topic is legion. For a useful survey, see generally Schauer, *supra* note 41.

357 Oliver Wendell Holmes Jr., *The Path of Law*, 10 HARV. L. REV. 457, 460–61 (1897).

358 "Effective" here can be either in the sense of (1) having the votes to undermine the previous precedent or (2) issuing influential dissents or concurrences that have similar effect. *See* Thomas B. Bennett, Barry Friedman, Andrew D. Martin & Susan Navarro Smelcer, *Divide & Concur: Separate Opinions & Legal Change*, 103 CORNELL L. REV. 817, 846 (2018).

359 *See also* Jan G. Deutsch, *Precedent and Adjudication*, 83 YALE L.J. 1553, 1584 (1974).

comes next?"—even if on the discursive[360] or argumentative[361] level they will keep insisting that they do observe the legal craft norms. And this also means that at least in those high-stakes cases that stimulate disputes on and off the bench, judicial precedents, like political precedents, also face a significant informational burden before they become fully constraining. And that burden, as in politics, will also likely be satisfied only in *retrospect* or *cumulatively*, i.e., when it will be clear that the precedents indicate the existence or emergence of a political norm that judges—like any other political official—will not want to upset.

Once we recognize that, on this post-realist understanding of judicial precedents, what primarily matters for the generation of precedential constraint is the level of internalization of a judicial precedent and whether it reflects an emerging or existing first-order *political norm*, then all the other legal craft norms that served to distinguish between legal and judicial precedents similarly start appearing more nominal than real. For example, the legal craft norm that requires formal overruling (or "testing") before a precedent expires is at best a fragile one, because judicial precedents that are not reaffirmed, have been abandoned, or have been forgotten strongly indicate a weak level of internalization. They may, therefore, lose their constraining force even absent formal overruling. And when they will later be "tested," the overruling would be a *fait accompli*. Furthermore, even if a transient majority of a judicial panel can in principle do away with precedents, that legal craft norm is similarly fragile. So long as that precedent remains attached to a robust political norm, it is likely that judges will refrain from interrupting it.

What all this means, then, is that at least on a post-realist view of law, judicial precedents are exactly like political precedents. What distinguishes the two is not the way in which they become constraining—they both constrain as a result of the force of first-order political norms. Rather, it is that in law, the net of legal craft norms creates a much more significant argumentative or discursive burdens that will not similarly exist in politics.

To be sure, this post-realist understanding of judicial stare decisis is not entirely new. Sophisticated judicial observers have absorbed this understanding of judicial precedents. Rather than look exclusively and even primarily to legal craft and the formal materials of legal reasoning, they, like decision makers in politics, constantly ask the types of prophetic questions really required to more reliably anticipate where to expect precedential constraint in law. In fact, precisely because these issues are so significant, legal *rhetoric* has adapted as well. For instance, many jurisdictions now recognize that not all judicial precedents are the same. Some precedents become significantly entrenched and are hence "superprecedents"[362]

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360 Levinson, *supra* note 234, at 709.

361 Schauer, *supra* note 3, at 587.

362 *See, e.g.*, Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204 (2006).

and even "super-duper precedents"[363] whereas others may become "weak"[364] or "bad"[365] precedents if not reaffirmed.[366] In certain contexts, even legal *doctrine* itself has incorporated some of the prophetic and psychological considerations—for instance, when doctrine acknowledged that overruling of precedents becomes more easily justified when it represents a "doctrinal anachronism" or a "remnant of abandoned doctrine"[367] or in the context of the doctrine of "one last chance."[368]

Given this, some might not find it very surprising that judicial precedents are nothing but a particular kind of political precedent. Others might think it obvious. I want to suggest, though, that even those who accept the post-realist view of judicial precedents will have significantly gained from the previous discussion in this Article. First, following this discussion, we can now see that the mechanism that explains both superprecedents and weak (or bad) precedents is primarily the connection between precedents and the existence of, respectively, robust or fragile political norms.[369]

Second, we can now also see that on a post-realist perspective, superprecedents may be the *only* type of precedents that we can talk about as being truly constraining. Everything else is, in principle, up for grabs, "a ticket good for one day and train only,"[370] or a mere tool of persuasion, not constraint.[371] And superprecedents are themselves up for grabs, like "sticky" or hegemonic political precedents,[372] either temporarily (if "compensating adjustments" could not be devised) or once the political norms with which they are associated begin eroding.

Finally, accepting that judicial precedents are but one species of political precedents illuminates a path for those interested in advancing their causes through the courts, to ensure that their precedential wins are indeed successful.

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363 Jeffrey Rosen, *So, Do You Believe in 'Superprecedents'?*, N.Y. TIMES (October 30, 2005), https://perma.cc/NM7E-WSKZ.

364 *See*, *e.g.*, Jason Mazzone, *Subprecedents*, 33 CONST. COMMENT. 389, 390 (2018).

365 *See*, *e.g.*, Adrian Vermeule, *Morrison v. Olson is Bad Law*, LAWFARE (Jun. 9, 2017), https://perma.cc/JUC9-4V7V.

366 For an extensive discussion of the phenomenon of divergent strengths and weaknesses of precedents under the Canadian practice of stare decisis, see DAVID, *supra* note 251, at 55–78, 98–111.

367 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992).

368 Richard M. Re, *Second Thoughts on "One Last Chance"?*, 66 UCLA L. REV. 634 (2019).

369 To be sure, we may have good reasons to ask what precisely the political norm is that makes the precedent a "superprecedent." But that does not take away from the usefulness, as a causal and analytic matter, of the conclusion that it is the force of political norms that makes superprecedents what they are. In my view, this constitutes a suitable response to the criticism that is leveled against the term "superprecedents" itself. *See* Jack Balkin, *Don't Talk to Me About Superprecedents*, BALKINIZATION (Oct. 30, 2005), https://perma.cc/CAB9-AFKW.

370 Richard M. Re, *On "A Ticket Good for One Day Only,"* 16 GREEN BAG 2D 155 (2013).

371 *See supra* Section II.A.

372 *See supra* Section V.B.

That path, we can now see, is exactly the same as the one open to political actors. This is what I have called in Section VII the task of precedenting. And it includes all the elements described in Tables 4–5 above, such as the prescription that establishing precedents is a continuous, steady work (rather than a "one-off" enterprise) and that it might be wise to engage in excessively valorizing desirable judicial precedents to make sure that they stick (or, conversely, "trash-talking" undesirable precedents to increase their effective anti-canonicity).

B. Precedenting for Judicial Stare Decisis

My claim in Subsection A requires some qualification, however. For one, we have seen in several places in this Article that judicial institutions differ from political ones, given for instance their general passivity and slower "jurisprudential cycles"[373] or their slower rates of personnel turnover.[374] These all may have important effects on the ability of judicial precedents to constrain even on a fully post-realist understanding of law.

Additionally, the discussion so far ignored that even in politics, constraint by precedent can be achieved not only via political norms of the first order, but also due to a second-order norm of political stare decisis. As we have seen, law certainly has a similar norm—the norm of judicial stare decisis.[375] Moreover, the force of the norm of judicial stare decisis might be generally stronger than that of its political parallel, for reasons discussed throughout, including law's robust rhetorical burdens and the stronger sense of professionalism of those who "make up the lawyer class."[376]

In recent years, however, many believe that despite its potential to serve as an effective constraint, the norm of judicial stare decisis has significantly weakened in various apex courts around the world. For instance, in relation to the U.S. Supreme Court, some have concluded that the norm of stare decisis has become entirely "impotent."[377] In Israel, similar general weakening of stare decisis at the Supreme Court has also been reported with some commentators wondering if

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373 *See supra* notes 167–68 and accompanying text.

374 *See supra* note 247 and accompanying text.

375 *See supra* Section II.C.2.

376 Cardozo, *supra* note 293, at 34.

377 Frederick Schauer, *Stare Decisis—Rhetoric and Reality in the Supreme Court*, 2018 SUP. CT. REV. 121, 143. *See also* Michael Gentithes, *Janus-Faced Judging: How the Supreme Court Is Radically Weakening Stare Decisis*, 62 WM. & MARY L. REV. 83 (2020). And, of course, the Supreme Court now seems poised to overrule one of its major so-called "superprecedents." *See* Adam Liptak, *Critical Moment for Roe, and the Supreme Court's Legitimacy*, N.Y. TIMES (Dec., 2021), https://perma.cc/N5BU-AKZA. *But see* William Baude, *Precedent and Discretion*, 2020 SUP. CT. REV. 313, 317 ("Adherence to precedent is still the rule, not the exception, in nearly every case before the Court.").

some of the Justices are genuinely and consistently willing to adhere to it.[378] In Canada, worries about the resilience of stare decisis have also been raised after the Supreme Court, in a recent 2018 case concerning the law on religious accommodation, did not feel bound to apply its stare decisis framework and virtually ignored it.[379] And in India, commentators recently suggested that the "larger bench rule," according to which a previous Supreme Court precedent can only be overruled by a bench larger than the one that delivered the precedential decision, has also been importantly weakened.[380]

Those who are displeased by this situation have been sometimes drawn to offer solutions that rely on traditional legal craft tools—for instance, by suggesting which reasons are impermissible for overruling past precedents,[381] by trying to give greater structure to the way judges determine what the "holding" is of a particular case and what should be considered "dicta,"[382] or by insisting on a "theory" for judicial stare decisis.[383] Yet, for someone prone to accept the post-realist understanding of law, these solutions seem largely beside the point. The realist insight—which highlights the inevitable indeterminacy of legal materials and craft norms—applies with similar force to all these solutions as well.[384]

This does not mean that other solutions, more aligned with the so-called "realist program," cannot be devised. One such solution obviously lies in the *design* of judicial institutions—for example, by changing the way judges are selected or their terms in office.[385] But another, more novel solution worth flagging here is about *behavior*: Earlier we saw there might be some room for actors to influence the content and resilience of the precedents that occur in politics if those actors engage in what I called precedenting.[386] I also suggested that this is how actors

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378 For recent scholarly discussion indicating this sense of significant weakening of stare decisis at the Israeli Supreme Court, see Eyal Zamir, *Contractual Interpretation: Theory, Law, Facts, and Values (In Response to CA 7649/18 Bivey Kvishim Dirt & Development Inc. v. the Israeli Railroad Inc.)*, 51 MISHPATIM 81, 120 (2021) (Hebrew).

379 *See* Barry W. Bussey, *Law Matters but Politics Matter More: The Supreme Court of Canada and* Trinity Western University, 7 OX. J. LAW. & REL. 559, 565 (2019).

380 *See* Shrutanjaya Bhardwaj & Ayush Baheti, *Precedent, Stare Decisis, and the Larger Bench Rule: Judicial Indiscipline at the Indian Supreme Court*, 2021 INDIAN L. REV. 1 (2021).

381 *See generally* KOZEL, *supra* note 6 (proposing a "second-best" approach to judicial stare decisis).

382 *See*, *e.g.*, Michael B. Abramowicz & Maxwell L. Stearns, *Defining Dicta*, 57 STAN. L. REV. 953 (2005).

383 *See* Baude, *supra* note 377.

384 In other words, the only effect that these solutions will have is complicating the "art" of overruling. *See* Jerold H. Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 SUP. CT. REV. 211.

385 For discussion of such reform proposals in the context of the U.S. Supreme Court, see, for example, Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148 (2019); Suzanna Sherry, *Our Kardashian Court (and How to Fix It)*, 106 IOWA L. REV. 181 (2020).

386 *See supra* Section VII.A.

primarily focused on judicial precedents should view their own enterprise.[387] But at this point, it is worth nothing that the craft of precedenting may be valuable not only at the first-order level but *at the second-order level as well*, as a tool to strengthen the norm of judicial stare decisis itself.

The basic idea is to deliberately create what we can think of as "precedents within precedents" or "double-layer precedents." On one level, these precedents will simply reaffirm the previous first-order judicial precedent. On another level, though, the aim would also be for that reaffirmation to take a particular form, one that strongly signals that the primary reason for the reaffirmation is judges' belief in the norm of political stare decisis rather than their substantive agreement with the precedent (as we saw before,[388] a key component of precedenting is avoiding the appearance of opportunism).

It is easy to imagine how the judges in various apex courts around the world could in principle coordinate amongst themselves to engage in this form of deliberate precedenting for the sake of strengthening the norm of judicial stare decisis. Most clearly, this would entail assigning the writing of a decision confirming, and *even extending*, a previous precedent to a judge or justice that vehemently disagreed with it in the past. It would also entail choosing cases that provide for such opportunities in the first place.[389] Recall as well that the aim here is not and should not be maximal adherence to the norm of judicial stare decisis such that judges would be required to completely suffocate substantive disagreements. Rather, the requirement should only be to reaffirm the norm of judicial stare decisis *enough*, so that non-adherence to the norm would not lead to crossing the "tipping point,"[390] beyond which that norm of stare decisis will simply cease to be credible.

An entirely different matter, however, is whether the possibility of engaging in this practice of "precedents within precedents" will be realized in the political climate that exists today in many countries around the world. Indeed, the same reasons that have arguably made the norm of judicial stare decisis weaken in the first place in at least some of those systems—including the increased politicization of the courts[391] and the high degree of political polarization in various societies

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387 *See supra* Section VIII.A.

388 *See supra* Section VII.A.

389 The ability of different courts to do so would depend, of course, on their specific features, including how their deliberations are conducted and how much freedom they have in selecting cases. For one relevant comparative study, see MITCHEL DE S.-O.-L'E. LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF TRANSPARENCY AND LEGITIMACY (2009).

390 *See* SCHELLING, *supra* note 237 and accompanying text.

391 *See generally* Hirschl, supra note 248.

more broadly[392]—raise doubts as to whether the coordination needed to achieve this among judges could realistically be expected. Ultimately, it might very well be that, at least without more significant changes in constitutional politics and culture, the likelihood of a resilient norm of judicial stare decisis in those systems where it has weakened, is systematically slim.

IX. CONCLUSION

I began this Article by asking whether political stare decisis is at all possible. By the end, I hope to have shown that it *is* possible but that its operation is quite complex. Among other things, it depends on the political stakes of the issue and on the resilience of political norms, of either the first or the second order. And it can either be very fragile or very strong. The task of trying to "tinker" with political stare decisis—what I have called precedenting—is similarly possible but complicated.

I also hope to have demonstrated in this Article that, as far as achieving past constraint is concerned, political stare decisis might in fact be *all there is*. Indeed, at least if one embraces a post-realist understanding of law and legal institutions, even judicial stare decisis is revealed to be nothing more than one species of political stare decisis. The functional, explanatory, and prescriptive lessons from the Article are therefore not only relevant in the domain of politics. They are also relevant to law. More specifically, the Article suggests that those who seek to affect the content of judicial precedents, or strengthen judicial stare decisis itself, across the vast array of judiciaries that follow this practice (explicitly or implicitly), should at least in part embrace the same lens as those who wish to affect the content of domestic and international political precedents, or strengthen political stare decisis, ought to embrace as well.

As in other contexts, here too we get a fuller sense of the law by beginning with politics first.

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392 *See supra* notes 33–36 and accompanying text. *See also generally* David Landau & Roaslind Dixon, *Abusive Judicial Review: Courts Against Democracy*, 53 U.C. DAVIS L. REV. 1313 (2020) (discussing how courts around the world have acted to undermine political opposition and the incentives of politicians to use courts in this way).