

SETTLED LAW

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“Settled law” appears frequently in judicial opinions—sometimes to refer to binding precedent, sometimes to denote precedent that has acquired a more mystical permanence, and sometimes as a substantive part of legal doctrine. During judicial confirmation hearings, the term is bandied about as Senators, advocacy groups, and nominees discuss judicial philosophy and deeper ideological commitments. But its varying and often contradictory uses have given rise to a concern that settled law is simply a repository for hopelessly disparate ideas. Without definitional precision, it risks becoming nothing more than empty jargon.

We contend that settled law is actually a meaningful concept, even though it does not embody any single, unified idea. First, we argue that controlling law, which essentially corresponds to binding precedent, is a fundamentally distinct concept that is neither synonymous with nor a subset of settled law. Second, we draw on seminal jurisprudential theories to build a taxonomy of five frameworks that capture how legal actors can invoke settled law, both rhetorically and doctrinally. Third, we demonstrate how a clearer understanding of settled law can make doctrine more coherent and administrable. Situating certain doctrines within the appropriate frameworks, and not conflating controlling law and settled law, would resolve myriad doctrinal anomalies. Moreover, greater conceptual precision can improve political rhetoric during the confirmation process by promoting clearer dialogue and discouraging legal actors from talking past one another.

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INTRODUCTION

What does it mean to say that *Roe v. Wade*¹ is “settled law”? Or *Citizens United v. FEC*?² Or even *Brown v. Board of Education*?³

The idea of settled law has played a pivotal role in Supreme Court confirmation hearings for more than thirty years, and it has animated myriad legal doctrines as far back as the eighteenth century.⁴ Yet the meaning of settled law has proved stubbornly elusive. Does it refer simply to the idea that the Supreme Court has decided a particular issue, or does it connote something more enduring about particular precedents? Does it imply that a precedent is somehow “right”? Which courts (or other legal actors) have the power to settle the law? And how exactly does that happen?

¹ 410 U.S. 113 (1973).

² 558 U.S. 310 (2010).

³ 347 U.S. 483 (1954).

⁴ See, e.g., *Penhallow v. Doane’s Adm’rs*, 3 U.S. (3 Dall.) 54, 118 (1795) (Cushing, J.) (describing as “settled law and usage” the idea that “courts of Admiralty can carry into execution decrees of foreign Admiralties”).

Even though settled law had come up during earlier confirmation hearings,⁵ it first took center stage in the political arena during the Bork hearings. Under intense scrutiny about his academic writings, Judge Bork repeatedly tried to parry criticism of his controversial views by promising over and over that he would respect “settled law,” even if he disagreed with it.⁶ And notably, Judge Bork used that term to mean something quite distinct from the familiar principles of *stare decisis*.⁷ Since then, every Supreme Court nominee has faced questions about settled law, even as the term’s ambiguity has grown increasingly apparent.⁸

Discussions of settled law have become even more prominent in recent years as President Trump’s judicial nominees faced pointed questions about whether they agreed with certain precedents or, at a minimum,

⁵ See, e.g., Nomination of Justice William Hubbs Rehnquist: Hearings Before the S. Comm. on the Judiciary, 99th Cong. 356 (1986) (statement of Rehnquist, J.) (declaring that the incorporation of the right to a speedy trial through the Fourteenth Amendment “is settled law, and [his] opinions reflect it”); Nomination of Judge Antonin Scalia: Hearings Before the S. Comm. on the Judiciary, 99th Cong. 83 (1986) (statement of Sen. Specter) (asking whether *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), “is a settled issue”); *id.* at 104 (statement of Sen. Biden) (“If it’s on the books, if it is settled constitutional law for an extended period of time, and the argument to overturn that settled constitutional principle does not in fact meet the test of on its face being consistent with what the correct constitutional principle is, do you have to stick with what the settled law is?”).

⁶ See, e.g., Nomination of Robert H. Bork To Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 100th Cong. 279 (1987) (statement of Bork, J.) (repeatedly calling *Brandenburg v. Ohio*, 395 U.S. 444 (1969), “settled”); *id.* at 327 (declaring that “I certainly have no desire to go running around trying to upset settled bodies of law”); *id.* at 423 (“It seems to me that the settled law is now that the person writing the book does not have to prove that it is political or any way connected to politics. The settled law is the Government has to prove it is obscene.”); *id.* at 428 (“I am not changing my criticism of [*Brandenburg*]. I just accept it as settled law.”); *id.* at 434 (“It’s settled law. . . . I have said that I accept that body of precedent and will apply it. That’s all I’ve said.”); *id.* at 438 (declaring that “some things are absolutely settled in the law” and that “[a]ny judge understands that you don’t tear those things up”); *id.* at 587 (“I accept them as settled law. I have not said that I agree with all of those opinions now, but they are settled law and as a judge that does it for me.”); *id.* at 667 (“I have repeatedly said there are some things that are too settled to be overturned.”).

⁷ See *id.* at 989 (statement of Sen. Specter) (“[Judge Bork] flatly made a commitment to accept settled law. On the privacy cases he has not made that commitment. He has talked about various considerations of reliance and *stare decisis*, but he has made no commitment on privacy . . .”).

⁸ See *infra* notes 278–85 and accompanying text.

regarded them as settled.⁹ Sometimes nominees have refused to engage.¹⁰ On other occasions, Senators and nominees have appeared to use “settled law” in conspicuously different ways,¹¹ a phenomenon brought into stark relief during Justice Kavanaugh’s confirmation hearing. Responding to a question from Senator Feinstein, the future Justice declared that *Roe v. Wade* was “settled as a precedent of the Supreme Court, entitled to respect under principles of stare decisis.”¹² The next day, *The New York Times* published a previously confidential e-mail from 2003 in which Kavanaugh had written: “I am not sure that all legal scholars refer to *Roe* as the settled law of the land at the Supreme Court level since [the] Court can always overrule its precedent, and three current Justices on the Court would do so.”¹³ These statements provided grist for some to call him

⁹ See Laura Meckler & Robert Barnes, Trump Judicial Nominees Decline To Endorse *Brown v. Board Under Senate Questioning*, Wash. Post (May 16, 2019, 7:28 PM), https://www.washingtonpost.com/local/education/trump-judicial-nominees-decline-to-endorse-brown-v-board-under-senate-questioning/2019/05/16/d5409d58-7732-11e9-b7ae-390de-4259661_story.html [https://perma.cc/F5FK-GNPW] (describing how Sen. Blumenthal frequently asks whether nominees regard *Brown* as correct); Marcia Coyle, Revisiting Amy Coney Barrett Statements About Abortion Rights, Nat’l L.J. (Sept. 25, 2020, 3:12 PM), <https://www.law.com/nationallawjournal/2020/09/25/revisiting-amy-coney-barrett-statements-about-abortion-rights/?slreturn=20200908080816> [https://perma.cc/2EKP-YDQE] (describing how Sen. Blumenthal asked then-nominee Amy Coney Barrett if she “think[s] *Roe v. Wade* was correctly decided”).

¹⁰ See Meckler & Barnes, *supra* note 9 (describing nominees who refused to directly answer Sen. Blumenthal’s question about *Brown*); see also Ariane de Vogue, Judicial Nominees Are Changing Their Approach to the ‘Brown v. Board’ Question at Senate Hearings, CNN (Feb. 10, 2019), <https://www.cnn.com/2019/02/10/politics/brown-v-board-senate-judicial-nominees/index.html> [https://perma.cc/8BP5-7PBZ] (noting that in response to Sen. Blumenthal’s question about *Brown*, now-Judge Neomi Rao described the case as “longstanding precedent of the Supreme Court,” declared that it was “not appropriate” to comment on the “correctness of particular precedents,” but argued that “it’s hard for me to imagine a circumstance in which *Brown v. Board* would be overruled by the Supreme Court”).

¹¹ For example, in 2010, then-Senator Sessions suggested that “settled law” connoted “a more firm acknowledgment of the power of that ruling” than mere “precedent” and asked then-U.S. Solicitor General Elena Kagan whether she was using “settled law” and “precedent” interchangeably. *The Nomination of Elena Kagan To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong. 231* (2010) (statement of Sen. Sessions). She responded: “I don’t mean any difference.” *Id.* (statement of Elena Kagan, Solicitor General of the United States).

¹² C-SPAN, Supreme Court Nominee Brett Kavanaugh Confirmation Hearing, Day 2, Part 1, C-SPAN (Sept. 5, 2018), <https://www.c-span.org/video/?449705-1/supreme-court-nominee-brett-kavanaugh-confirmation-hearing-day-2-part-1> [https://perma.cc/7N8B-S2MC] (relevant exchange occurring from 48:25 to 49:10).

¹³ Charlie Savage, Leaked Kavanaugh Documents Discuss Abortion and Affirmative Action, N.Y. Times (Sept. 6, 2018), <https://www.nytimes.com/2018/09/06/us/politics/kavanaugh-leaked-documents.html> [https://perma.cc/3C4Q-7SAH].

disingenuous.¹⁴ Others argued that he was making distinct and mutually consistent claims—a prediction of whether the Court *would* revisit the abortion precedents versus an assessment of whether those precedents *should* stand undisturbed.¹⁵

Settled law is far more than an enigmatic buzzword that gets bandied about during confirmation hearings, though; it also serves an important structural role and has profound doctrinal implications. For example, lower-court judges often speak about their duty to follow the settled law of superior courts.¹⁶ Most surprisingly, an array of doctrines depend substantively on whether the law is “settled.” In the realm of constitutional torts, for instance, a plaintiff attempting to bring a Section 1983 claim usually must overcome the defendant’s qualified immunity by showing that the defendant violated a constitutional rule that was “clearly established” under “settled law.”¹⁷ So, too, settled law undergirds the circumstances when post-conviction relief is available,¹⁸ lawyers’ ethical obligations under Rule 11,¹⁹ standards of review,²⁰ and a host of other doctrines.²¹ Across these contexts, though, a firm understanding of what counts as settled law has proved chimerical.

¹⁴ See, e.g., Igor Bobic, Susan Collins Downplays Brett Kavanaugh Email About Abortion Rights and ‘Settled Law’, HuffPost (Sept. 6, 2018, 4:58 PM), https://www.huffpost.com/-entry/brett-kavanaugh-susan-collins-roe-v-wade_n_5b9165b1e4b0511db3e04121 [<https://perma.cc/4YMT-J9S5>] (quoting Sen. Blumenthal urging undecided Republicans to “read this [email] and then tell [him] Judge Kavanaugh has been candid with [them]”).

¹⁵ See, e.g., *id.* (quoting Sen. Collins saying that Kavanaugh “was merely stating a fact, which is that three [Justices] on the [C]ourt were anti-Roe,” and “[i]f that’s the case and he was not expressing his view, then [she was] not sure what the point of it [was]”).

¹⁶ See *infra* notes 26–27 and accompanying text.

¹⁷ *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018); see also *id.* at 591 (“The rule applied by [the court below] was not clearly established because it was not ‘settled law.’” (quoting *Hunter v. Bryant*, 502 U.S. 224, 228 (1991))).

¹⁸ E.g., *In re Jones*, 226 F.3d 328, 333–34 (4th Cir. 2000) (holding that whether the settled law established the legality of a conviction is part of the Fourth Circuit’s three-prong test to determine the availability of a writ of habeas corpus).

¹⁹ E.g., *Pro. Mgmt. Assocs. v. KPMG LLP*, 345 F.3d 1030, 1033 (8th Cir. 2003) (remanding and ordering the lower court to impose a Rule 11 sanction to a plaintiff’s counsel for ignoring the “well-settled law” of *res judicata* under the circumstances of the case).

²⁰ E.g., *United States v. Gary*, 954 F.3d 194, 202 (4th Cir. 2020) (quoting *United States v. Ramirez-Castillo*, 748 F.3d 205, 215 (4th Cir. 2014)) (holding that “if the settled law of the Supreme Court or this circuit establishes that an error has occurred,” the error satisfies the plain error standard of review).

²¹ See, e.g., *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1043 (9th Cir. 2009) (quoting *Hamilton Materials, Inc. v. Dow Chem. Corp.*, 494 F.3d 1203, 1206 (9th Cir. 2007)) (fraudulent joinder).

Given the definitional morass, one might conclude that “‘settled law’ is just a euphemism.”²² On this view, the term is so capacious as to become meaningless, conveying nothing useful about the weight that precedent deserves or the conditions (if any) under which a court should overrule it.

Our principal goal is to show that settled law does coherent and powerful work, even though it resists a single, overarching definition. In fact, settled law makes sense only when one appreciates that it comprises several distinct notions that do not share a common attribute. A more precise understanding of this hydra-like term has the power to clarify doctrine and improve political rhetoric. What seem like conceptual oddities in a number of doctrines actually make good theoretical sense when viewed through the lens of settled law. Moreover, settled law can play a meaningful role in confirmation hearings, but only if legal actors fully grasp its multifaceted nature. It offers a productive way to explore how politicians, judicial nominees, and the general public understand the judicial role, including how the obligations of Supreme Court Justices differ from those of lower-court judges.

We begin in Part I by differentiating between two concepts that we call *controlling law* and *settled law*. Controlling law essentially refers to the concept of binding precedent, including in its most conspicuous manifestation: an inferior court’s duty to follow the precedents of superior courts. Although one might think of controlling law as a species of settled law, we argue that the two are actually distinct ideas that address very different questions and are, at most, only tangentially related. Much of the confusion about settled law, in fact, stems from conflating these concepts. Not allowing discussions of settled law to revert into the familiar language of controlling law is thus a critical first step.

Part II demonstrates that settled law is not just an empty euphemism, even though it doesn’t embrace a single idea. In fact, settled law makes sense only when one appreciates that it comprises several notions that do not share a common attribute.

On an intuitive level, the starkest divide lies between normative and descriptive claims about settled law. For example, someone might classify *Brown* as settled law, normatively, because it achieved the right substantive result. Or, irrespective of *Brown*’s fundamental correctness,

²² Ilya Somin, Why “Settled Law” Isn’t Really Settled—and Why That’s Often a Good Thing, Reason: The Volokh Conspiracy (Sept. 9, 2018, 3:57 PM), <https://reason.com/-2018/09/09/why-settled-law-isnt-really-settled-and/> [https://perma.cc/4NSU-3N4A].

one might view it as descriptively settled because everyone recognizes that it's here to stay. Even within these broad categories, though, variation abounds. For example, calling *Brown* normatively settled could mean that the decision was consonant with the original meaning of the Fourteenth Amendment or, alternatively, that it achieved a socially desirable outcome by advancing the cause of racial justice. Calling *Brown* descriptively settled could mean that the Supreme Court has left the precedent undisturbed for more than fifty years, that a future Court is unlikely to overrule it, that principles of stare decisis have effectively entrenched it, or that it has achieved wide popular acceptance.

We bring theoretical rigor to this intuition about the descriptive-normative divide by overlaying it with seminal jurisprudential theories: formalism, realism, and legal process theory. Based on these theories, we develop a taxonomy of five concepts that “settled law” can embrace.

The first two concepts derive from legal formalism.²³ As a normative matter, a formalist insists that law is settled when it has achieved the demonstrably “right” result based on the law’s internal logic.²⁴ But from a descriptive perspective, a formalist might accept that law is settled—even if it has not reached the objectively correct result—when the concerns of stare decisis, such as reliance, predictability, and basic fairness, are paramount.²⁵

The next two concepts of settled law draw on the legal realist school.²⁶ Descriptively, a realist regards law as settled when it faces no material threat of reversal.²⁷ Normatively, a realist will insist that law is settled

²³ See, e.g., Warren Sandmann, *The Argumentative Creation of Individual Liberty*, 23 *Hastings Const. L.Q.* 637, 645 (1996) (“Legal formalism . . . is in its many guises one of the more dominant approaches to judicial decisionmaking.”).

²⁴ Thomas C. Grey, *Langdell’s Orthodoxy*, 45 *U. Pitt. L. Rev.* 1, 8 (1983).

²⁵ See Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 *Tex. L. Rev.* 1843, 1874 (2013) (citing Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 *U. Pa. J. Const. L.* 155, 186, 192–95 (2006)) (describing a “neoformalist” model of stare decisis in which even judicial “mistakes” can and should create binding precedents, if they are decided through a formalistic process of reasoning); Amy Coney Barrett, *Originalism and Stare Decisis*, 92 *Notre Dame L. Rev.* 1921 (2017) (describing Justice Scalia’s approach to the tension between the value of stare decisis and a formalistic, originalist reading of the Constitution).

²⁶ See Frederick Schauer, *Legal Realism Untamed*, 91 *Tex. L. Rev.* 749, 749 (2013) (“Legal Realism is conventionally understood, in part, to question legal doctrine’s determinacy and positive law’s causal effect on judicial decisions.”).

²⁷ As we build out below, it essentially constitutes an exercise in Holmesian Prediction Theory. See O.W. Holmes, *The Path of the Law*, 10 *Harv. L. Rev.* 457, 460–61 (1897).

only when it has achieved the “right” result, but she understands that idea very differently than a formalist does. The correct result for a legal realist corresponds to some external frame of reference, such as utility, efficiency, or social justice.²⁸

The fifth and final concept of settled law draws on legal process theory, which focuses on a legal decision’s methodological process rather than its substantive outcome.²⁹ For the legal process theorist, law is settled if and when a duly constituted court reaches a decision through an appropriate methodology, and within this framework the descriptive and normative perspectives essentially become inseparable.

A simple illustration might help reify these five theoretical concepts. Consider the question: “Is *Marbury v. Madison* settled law?” Nearly everyone would say “yes,” but Table 1 identifies more precisely the five different ideas that someone could intend to communicate when asserting that *Marbury* is settled.

²⁸ For the foundational realist works encouraging an interdisciplinary approach to law, see Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 *Colum. L. Rev.* 809 (1935); Jerome Frank, *Law & the Modern Mind* (Transaction Publishers 2009) (1930); Karl N. Llewellyn, *Law and the Social Sciences—Especially Sociology*, 62 *Harv. L. Rev.* 1286 (1949); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence* (pts. 1 & 3), 24 *Harv. L. Rev.* 591 (1911), 25 *Harv. L. Rev.* 489 (1912).

²⁹ The seminal tome of the legal process school is Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). For an overview of the related concept of procedural justice, see Lawrence B. Solum, *Procedural Justice*, 78 *S. Cal. L. Rev.* 181 (2004).

Table 1: The Taxonomy of Settled Law

Framework	<i>Marbury v. Madison</i> is settled law.
Normative Formalism	<i>Marbury</i> arrived at the objectively correct understanding of constitutional law.
Descriptive Formalism	Principles of stare decisis require continued adherence to <i>Marbury</i> .
Descriptive Realism	There is no material chance that the Supreme Court will overrule <i>Marbury</i> in the near future.
Normative Realism	<i>Marbury</i> achieved a desirable outcome in light of its intra- and extra-legal consequences.
Legal Process	<i>Marbury</i> merits continued adherence because it was issued by a duly constituted court employing an appropriate methodology.

In Part III, we show why developing a clearer understanding of settled law is far more than an academic exercise. At the intensely practical level, settled law suffuses a diverse array of doctrines, and failing to appreciate how it functions has led to pervasive confusion and mistakes. Our principal example comes from the qualified immunity context. Although courts often cast the relevant inquiry in terms of controlling law—whether binding precedent has clearly established that a particular right exists—this approach has invited a host of anomalies and errors. Instead, we argue that viewing qualified immunity through the lens of settled law makes much more sense doctrinally and normatively. Moreover, understanding qualified immunity as turning on settled law—specifically, two of the taxonomy’s five concepts—alleviates nearly all of the current conceptual problems and has the potential to refocus courts on the heart of the inquiry.

Finally, we argue that a more nuanced understanding of settled law can enhance legal dialogue, particularly the conversation about judicial nominations. Too often legal actors talk past one another because they use “settled law” to convey different ideas, and that in turn can lead to unfounded allegations of bad faith. On this level, the taxonomy is not a panacea; far from it. But greater conceptual clarity about settled law can train attention on the debates that truly matter rather than a bewitching semantic game.

I. CONTROLLING LAW AND SETTLED LAW

The notion of settled law is elusive precisely because it admits of wildly varying meanings. At the outset, we want to hive off one of those potential definitions, which is, in fact, a fundamentally different idea—one that can wreak havoc in both doctrinal and political discussions of settled law. Accordingly, in this Part, we distinguish between the important but distinct concepts of *controlling law* and *settled law*.

Someone might suggest that law is most obviously settled when a court has an absolute duty to apply a certain legal rule. For example, when a federal district court judge in California observes that the U.S. Court of Appeals for the Ninth Circuit has articulated a three-part test to govern a particular theory of personal jurisdiction, that judge might refer to the test as “settled Ninth Circuit law.”³⁰ On this understanding, settled law tracks traditional notions of binding precedent, and indeed that is exactly what many courts mean when they claim that law is settled.³¹

Defining settled law with respect to binding precedent is not necessarily wrong, but it is unhelpful and, at worst, can lead to profound and avoidable confusion. Instead, we suggest that these courts are referring to controlling law.³² Whether law is *controlling* in a given case turns on a very specific question: Does judicial hierarchy or structure require one court (or panel) to abide by another court’s (or panel’s) precedential decision? Or, more simply, is there binding precedent on point?

The general mechanics of binding precedent, and thus controlling law, are familiar and relatively straightforward, even if the deep theory of *why* courts adhere to precedent is more complicated.³³ The clearest example

³⁰ Hassen v. Nahyan, No. CV 09-01106, 2010 WL 11459204, at *4, *6 (C.D. Cal. Nov. 18, 2010).

³¹ See, e.g., Norwood v. Hamblin, No. 04-cv-813, 2010 WL 3516903, at *3–4 (W.D. Wis. Sept. 3, 2010); Lee v. Coughlin, 643 F. Supp. 546, 549 (W.D.N.Y. 1986); Carr v. Cook County, No. 85 C 05731, 1985 WL 1861, at *1 n.2 (N.D. Ill. June 25, 1985).

³² Some courts explicitly link the notions of settled law and controlling law. See, e.g., Couch v. Telescope Inc., 611 F.3d 629, 633 (9th Cir. 2010); McGillicuddy v. Clements, 746 F.2d 76, 76 n.1 (1st Cir. 1984) (citing *In re Heddendorf*, 263 F.2d 887, 888–89 (1st Cir. 1959)).

³³ See, e.g., Larry Alexander, *Constrained by Precedent*, 63 S. Cal. L. Rev. 1, 3–5 (1989); Charles L. Barzun, *Impeaching Precedent*, 80 U. Chi. L. Rev. 1625, 1626, 1631 (2013); Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 Stan. L. Rev. 817, 820–21 (1994); John Harrison, *The Power of Congress over the Rules of Precedent*, 50 Duke L.J. 503, 503–04 (2000); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723, 724 (1988); Frederick Schauer, *Precedent*, 39 Stan. L.

of binding precedent is vertical stare decisis—when superior courts create precedent that an inferior court is duty-bound to follow.³⁴ This power almost always depends on whether a superior court may revise an inferior court's decisions.³⁵ So, for example, a federal judge on the U.S. District Court for the District of Kansas must follow decisions issued by the U.S. Court of Appeals for the Tenth Circuit. But a judge in the Central District of California, part of the Ninth Circuit, has no absolute obligation to follow Tenth Circuit decisions, which it treats as merely persuasive.³⁶

Beyond the quintessential example of vertical stare decisis, precedent can exert the same binding force in other settings. For example, all U.S. courts of appeals follow a rule of absolute stare decisis. That is, one panel must adhere to an earlier panel decision within the same circuit, and only the court sitting en banc may overrule a panel decision.³⁷ Similarly, in the classic *Erie*³⁸ scenario, a federal court sitting in diversity must apply the relevant state's substantive law.³⁹ So, too, when one state is applying a sister state's law, the forum must treat the sister state's precedents as binding and apply them in good faith.⁴⁰

Rev. 571, 571–72 (1987); David L. Shapiro, *The Role of Precedent in Constitutional Adjudication: An Introspection*, 86 *Tex. L. Rev.* 929, 929–30 (2008).

³⁴ See, e.g., Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 *Stan. L. Rev.* 953, 957 (2005); Michael C. Dorf, *Dicta and Article III*, 142 *U. Pa. L. Rev.* 1997, 2025 (1994); Randy J. Kozel, *The Scope of Precedent*, 113 *Mich. L. Rev.* 179, 203 (2014).

³⁵ Caminker, *supra* note 33, at 824–25.

³⁶ See Alan M. Trammell, *Precedent and Preclusion*, 93 *Notre Dame L. Rev.* 565, 581 (2017). There are exceptions. In California, inferior state courts are bound by the decisions of *all* divisions of California Courts of Appeal, even those that lack revisory authority over the inferior courts. See *Auto Equity Sales, Inc. v. Superior Court*, 369 P.2d 937, 940 (Cal. 1962) (en banc); 9 Witkin, *California Procedure* § 497 (5th ed. 2008).

³⁷ See Harrison, *supra* note 33, at 517; Amy Coney Barrett, *Stare Decisis and Due Process*, 74 *U. Colo. L. Rev.* 1011, 1017–18, 1018 n.20 (2003); cf. *Irons v. Diamond*, 670 F.2d 265, 268 n.11 (D.C. Cir. 1981) (panel decision overruling earlier precedent with approval of full court).

³⁸ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

³⁹ *Hanna v. Plumer*, 380 U.S. 460, 465 (1965) (citing *Erie*, 304 U.S. at 78); see also Kevin M. Clermont, *Degrees of Deference: Applying vs. Adopting Another Sovereign's Law*, 103 *Cornell L. Rev.* 243, 259 (2018) (“Application of state law under *Erie* calls for pretty blind adherence by the federal actor to the state's view of the content of that law.”).

⁴⁰ See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 834–35 (1985) (Stevens, J., concurring in part and dissenting in part) (citing *Guar. Tr. Co. v. York*, 326 U.S. 99, 109 (1945)) (arguing that the forum must “attempt in good faith to apply them when necessary as they would be applied by home state courts”). In theory, the duty remains absolute. But the Supreme Court polices only the most egregious violations. See *Sun Oil Co. v. Wortman*, 486 U.S. 717, 730–31 (1988).

Describing these scenarios as ones in which courts create binding precedent—and controlling law—does not ignore important nuances. For example, the reasons why precedent is binding can vary based on context.⁴¹ Courts supposedly constrained by binding precedent can distinguish or narrow the precedent.⁴² And there is always some squishiness at the margins.⁴³

At their core, though, all of the scenarios contemplate that if binding precedent is on point, a court constrained by that precedent has a virtually unflagging obligation to obey it.⁴⁴ This is what we mean by saying that the precedent controls: a structural reason compels a court to follow and apply it. Thus, controlling law contrasts markedly with other situations in which courts choose to follow precedent, either because the earlier decision is quite persuasive⁴⁵ or because the values of *stare decisis*, such as reliance and predictability, are paramount.⁴⁶ So, even when the Supreme Court says that it does not lightly overrule its own precedents,

⁴¹ The various aspects of the *Erie* doctrine rest on a plethora of shifting constitutional and statutory rationales. See John Hart Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693, 697–98 (1974). And states' duty to apply one another's laws faithfully derives from the Constitution's Full Faith and Credit Clause. See *Sun Oil*, 486 U.S. at 730–31.

⁴² *Distinguishing* means that “the precedent, when best understood, does not actually apply” to the case at hand. Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 Colum. L. Rev. 1861, 1862 (2014). *Narrowing* involves interpreting a prior case as “more limited in scope than . . . the best available reading.” *Id.* at 1863.

⁴³ For example, in the *Erie* context, the Supreme Court has essentially said that a state's highest court reigns supreme. See, e.g., *Johnson v. Fankell*, 520 U.S. 911, 916 (1997). But in narrow, specific circumstances, a court may anticipate that a state's highest court would overrule the putatively binding precedent. See 19 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4507, at 149 (3d ed. 2016). This might look like an exercise in prediction theory, a hallmark of descriptive realism, and in some ways it is. See *infra* Subsection II.B.1. As we explain more fully throughout the Article, though, the reason why a court applies a particular rule makes an enormous difference. Thus, a directly relevant state-court precedent is almost always controlling in the *Erie* context for a structural reason—a state's sovereign authority over the content of its law. Rare departures from this rule do not obviate the overarching structural idea of controlling law.

⁴⁴ On this understanding, there will sometimes be no controlling law. Consider, for example, a diversity action in federal court. State law supplies the substantive rules of decision, but if no state precedents are directly on point, then there is no controlling law (i.e., an authoritative precedent that directly governs the case). Absent directly controlling precedent, a federal court can make a so-called *Erie* guess as to what the state law is. See, e.g., Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 Va. L. Rev. 1671, 1676–81 (1992) (describing prevalence of *Erie* guesses).

⁴⁵ For example, a judge in the District of Minnesota (in the Eighth Circuit) might find the logic of a Seventh Circuit opinion to be well-reasoned and convincing.

⁴⁶ See Barzun, *supra* note 33, at 1657–58; Caminker, *supra* note 33, at 850–51.

those precedents are not absolutely binding on the Court itself.⁴⁷ This, in turn, means that the Supreme Court is never subject to controlling law.

What, then, does all of this have to do with settled law? Everything and nothing.

Everything, because controlling law infuses (and often infects) most popular and political discussions about whether law is or should be settled. It also looms over most doctrinal applications of settled law.

Nothing, because controlling and settled law are distinct concepts and, at most, only loosely connected. *Settled law* is more ethereal than controlling law, as we explore in the next Part, and presents a much different question: Irrespective of whether law is controlling in a particular court, should the court nevertheless regard that law as determinative? Answering this question does not turn on judicial hierarchy, the structure of court systems, or the formal strength of any court's precedents. And this is the key distinction: controlling law is determinative for a *structural* reason (such as judicial hierarchy or because, say, a state's highest court is the ultimate authority on the meaning of state law), whereas settled law is determinative for a *non-structural* reason.

Settled and controlling law thus occupy different domains. Although most people tend to talk about the two ideas in the same breath—at times explicitly, at times only implicitly—neither depends on the other, and neither is a subset of the other.

Accordingly, law can be *controlling* without being *settled*. In fact, it is a fairly common scenario, and the Supreme Court has articulated how lower courts should handle one of its most confounding variants: “If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”⁴⁸ As we have defined the terms, the older precedent is controlling because it addresses the precise factual scenario at issue, and a lower court therefore must treat the

⁴⁷ See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944)) (noting that the Court has “never felt constrained to follow precedent” that is “unworkable or . . . badly reasoned”). Similarly, federal district courts never create binding precedent. *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011).

⁴⁸ *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989); see also *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (reaffirming the principle that courts of appeals should follow cases which directly control).

precedent as binding. At the same time, if subsequent Supreme Court decisions have “eroded,”⁴⁹ “called into question,”⁵⁰ or “significantly undermined”⁵¹ that precedent, it probably does not constitute settled law.⁵²

The converse of this situation is also possible—law can be *settled*, even if it is not *controlling*. Such a state of affairs is admittedly much rarer. It is also more intriguing, as we explore in Part III, because it reveals the genuine independence of these concepts as well as the surreptitious ways that conflating them can distort both doctrine and political rhetoric.⁵³

II. DISAGGREGATING SETTLED LAW

Settled law, even unalloyed by the separate concept of controlling law, embraces a dizzying panoply of ideas. Some jurists and commentators will say that law is settled once the Supreme Court has squarely decided an issue.⁵⁴ Others contend that for law to be settled, something more—an ineffable permanence—is necessary.⁵⁵ This might stem from a cold empirical prediction that a precedent is not in danger of reversal or from a conviction that the law has achieved the “right” result.⁵⁶

⁴⁹ *State Oil Co. v. Khan*, 522 U.S. 3, 21 (1997).

⁵⁰ Kozel, *supra* note 34, at 203.

⁵¹ *United States v. Hatter*, 532 U.S. 557, 567 (2001).

⁵² Only “probably” because “settled law” is not a monolith, as we discuss in Part II, so prudence cautions against broad pronouncements.

⁵³ See, e.g., *infra* notes 230–37 and accompanying text.

⁵⁴ See, e.g., *Boyle v. Zacharie*, 31 U.S. (6 Pet.) 348, 348 (1832).

⁵⁵ Indeed, many justify claims that a precedent is settled law by emphasizing the amount of time that has elapsed since its issuance. See, e.g., *Holyoke Co. v. Lyman*, 82 U.S. (15 Wall.) 500, 514 (1873); *Ho-Chunk, Inc. v. Sessions*, 894 F.3d 365, 367 (D.C. Cir. 2018); *Or. Rest. & Lodging Ass’n v. Perez*, 843 F.3d 355, 357 (9th Cir. 2016) (O’Scannlain, J., dissenting from denial of rehearing en banc); *Becker, Moore & Co. v. U.S. Fid. & Guar. Co.*, 74 F.2d 687, 688 (2d Cir. 1935). Although most recognize a precedent’s long tenure as a *feature* of it constituting settled law, few would claim that age alone transforms a prior decision into settled law. As Justice Holmes succinctly noted, “It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.” Holmes, *supra* note 27, at 469.

⁵⁶ Focusing on entrenchment brings to mind the literature on “super precedent.” Definitions of “super precedent” often have the ring of settled law from the descriptive realist perspective, albeit with an extremely high degree of confidence that a court is unlikely to disturb a particular precedent. See, e.g., Michael J. Gerhardt, *Super Precedent*, 90 *Minn. L. Rev.* 1204, 1206 (2006) (defining “super precedents” as decisions that are “so encrusted and deeply embedded in constitutional law that they have become practically immune to reconsideration and reversal”). But other definitions align more readily with the normative frameworks we outline here. See, e.g., Randy E. Barnett, *It’s a Bird, It’s a Plane, No, It’s Super Precedent: A Response to Farber and Gerhardt*, 90 *Minn. L. Rev.* 1232, 1244 (2006) (“To be sure, some

The inconsistencies become even more apparent in the political realm. Advocacy groups frequently invoke settled law, but often to espouse contradictory arguments. Sometimes those groups chastise nominees for failing to endorse a decision as settled law,⁵⁷ but at other times argue that nominees should not be able to hide behind such a vacuous notion.⁵⁸ At the hearings themselves, a Senator might seek assurances from a nominee that a particular precedent is settled, usually because the Senator suspects that the nominee otherwise could be hostile to that precedent.⁵⁹ And while nominees gamely declare precedents to be “settled law,” one can infer that they use the term in a very different way than their questioners.⁶⁰

A unifying definition of settled law has eluded scholars, practitioners, and judges,⁶¹ and we suggest that there is a straightforward reason why:

precedents could be super, in part, because they are constitutionally correct. I put *Marbury*, *Brown*, and *Griswold* into this category.”); Michael Sinclair, Precedent, Super-Precedent, 14 *Geo. Mason L. Rev.* 363, 400 (2007) (“The change in socio-legal culture necessary for *Marbury* no longer to suit our needs would be so great that we would no longer recognize it as the United States.”).

“Settled law” and “super precedent” are not synonyms, but they often seem adjacent. Much of the work that we do here to disaggregate the five different frameworks of settled law could inform the conversation about “super precedent.”

⁵⁷ NARAL Pro-Choice America criticized then-Judge Kavanaugh for “question[ing] *Roe* as ‘settled law.’” Press Release, NARAL Pro-Choice Am., New Hard-Hitting NARAL Ad Shows the Future for Nevada Women if Heller Votes To Confirm Kavanaugh, Who Will Gut *Roe v. Wade* and Criminalize Abortion (Sept. 12, 2018), <https://www.prochoiceamerica.org/2018/09/12/kavanaugh-emails-show-he-will-gut-roe-2/> [<https://perma.cc/XV6E-LKAE>]. Similarly, the Human Rights Campaign argued that “[t]he Obergefell decision is settled law” and criticized Kavanaugh because he “cannot so much as affirm that.” Press Release, Human Rights Campaign, Kavanaugh’s Refusal To Answer Questions on Obergefell Is Unacceptable, Threat to LGBTQ People (Sept. 6, 2018), <https://www.hrc.org/press/hrc-kavanaugh-refusal-to-answer-questions-on-obergefell-is-unacceptable> [<https://perma.cc/B-R47-RQJH>].

⁵⁸ The National Rifle Association criticized Elena Kagan for “refus[ing] to state her support for the Second Amendment, saying only that the matter was ‘settled law.’” Press Release, NRA-ILA, Statement on Elena Kagan’s Confirmation to the U.S. Supreme Court (Aug. 6, 2010), <https://www.nraila.org/articles/20100806/statement-on-elena-kagans-confirmation> [<https://perma.cc/8JZV-3NP3>]. The day before criticizing Kavanaugh’s failure to endorse *Obergefell* as “settled law,” the Human Rights Campaign’s President said nominees “should not be allowed to hide behind” the non-answer that “something is ‘settled law.’” Ted Johnson, Human Rights Campaign’s Chad Griffin on What Brett Kavanaugh Means for Same-Sex Marriage, *Variety* (Sept. 5, 2018, 5:42 AM), <https://variety.com/2018/politics/news/chad-griffin-human-rights-campaign-brett-kavanaugh-1202927377/> [<https://perma.cc/PT6D-UUSU>].

⁵⁹ See *infra* notes 207–08 and accompanying text.

⁶⁰ See *supra* note 11.

⁶¹ See, e.g., *Holmes v. FEC*, 823 F.3d 69, 73 (D.C. Cir. 2016) (discussing the difficulty of identifying a precise definition for “settled law”); Jeremy Paul, *The Hidden Structure of*

settled law lacks a universal meaning. The problem is not that legal actors are all referring to the same concept with alarming imprecision. Rather, settled law has become a repository for conceptually distinct and often competing ideas.⁶² In some sense, these ideas all attempt to respond to a common question—whether law is determinative for a non-structural reason—but the answers lack any common attribute.

In this Part, we endeavor to bring clarity and precision to this debate by disaggregating how people talk about settled law. We develop a taxonomy that reflects a fundamental intuition about the difference between descriptive and normative claims that law is settled. We then flesh out that intuition with several dominant jurisprudential theories: formalism, realism, and legal process theory. Thus, the taxonomy's five frameworks—(1) normative formalism, (2) descriptive formalism, (3) descriptive realism, (4) normative realism, and (5) legal process—identify the distinct ideas that the term *settled law* can convey.⁶³

Takings Law, 64 S. Cal. L. Rev. 1393, 1513 n.306 (1991) (“If . . . courts are permitted to treat the possibility of legal change as part of settled law, it becomes increasingly difficult to maintain the idea that anything is settled at all.”).

⁶² From a philosophical perspective, one might think about this problem in terms of the concept-conception distinction. Walter Bryce Gallie first elucidated the idea of “essentially contested concepts,” including such concepts as *art* and *democracy*, of which people might have competing conceptions. See W.B. Gallie, *Essentially Contested Concepts*, 56 Proc. Aristotelian Soc’y 167, 168 (1956). A concept is *essentially* contested if there is a core disagreement about the criteria for its application. Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 Law & Phil. 137, 149 (2002). For the reasons that we explore in this Part, we believe that *settled law* is not a single concept, although we don’t entirely agree with one another about which concepts (and conceptions thereof) that *settled law* embraces. Moreover, we are mindful of Waldron’s criticism that legal scholars have been less than careful—even profligate—when talking about the concept-conception distinction. See *id.* at 148–49 (“[I]n the law review literature, the use of the term has run wild, with ‘essentially contested’ meaning something like ‘very hotly contested, with no resolution in sight.’ But in Gallie’s article, ‘essentially’ is not just an intensifier.”) At the very least, though, this framing begins to elucidate why we are dealing with a more fundamental problem than linguistic imprecision.

⁶³ In developing a comprehensive taxonomy, we aspire to open a new dialogue about “settled law.” On that front, Professor Lawrence Solum has offered constructive and insightful comments about this project and, in turn, has suggested a complementary framework focused on “open” and “contested” questions of law. Lawrence Solum, *Legal Theory Lexicon: Open and Contested Questions of Law* (Oct. 4, 2020), <https://lsolum.typepad.com/legaltheory/2020/10/legal-theory-lexicon-open-and-contested-questions-of-law.html> [<https://perma.cc/G-NZ4-8Z85>].

A. The Formalist Frameworks

The first two categories in our taxonomy of settled law (normative formalism and descriptive formalism) draw on the rich jurisprudential tradition of legal formalism.⁶⁴ The scholars and judges whose arguments fit into these categories are not necessarily strict formalists themselves, but their views of settled law largely turn on whether courts have reached *correct* legal outcomes.⁶⁵ Perhaps the most difficult question for jurists who fit within this part of the taxonomy is whether a precedent that is *incorrect* nevertheless can constitute settled law.⁶⁶

Broadly stated, legal formalism is the belief that legal questions have objectively correct answers.⁶⁷ For the formalist, the law constitutes something more than mere politics,⁶⁸ and discerning the correct answer in a case is emphatically not an exercise of raw judicial will.⁶⁹ Instead, law is a complete, autonomous, and self-justifying system of logic.⁷⁰

⁶⁴ For an in-depth look at classic formalism, see Grey, *supra* note 24.

⁶⁵ Ronald Dworkin's interpretationalism, for example, differs greatly from the rigidity of classic legal formalism. See Ronald Dworkin, *Law's Empire* 226 (1986) (recognizing that "law as integrity" differs from "conventionalism"—i.e., formalism). Nevertheless, Dworkin's insistence that legal issues have discrete right answers is enough, for some, to situate him within the formalist camp. See Brian Leiter, *Positivism, Formalism, Realism*, 99 *Colum. L. Rev.* 1138, 1146 (1999) (reviewing Anthony J. Sebok, *Legal Positivism in American Jurisprudence* (1998)); Mark C. Modak-Truran, *Secularization, Legal Indeterminacy, and Habermas's Discourse Theory of Law*, 35 *Fla. St. U. L. Rev.* 73, 101 (2007).

⁶⁶ Blackstone took the extreme view that a former decision that "is manifestly absurd or unjust" is not just "bad law" but rather "not law" at all. 1 William Blackstone, *Commentaries* *70. Most contemporary jurists and scholars endorse a more permissive approach.

⁶⁷ Peter Nash Swisher, *Judicial Rationales in Insurance Law: Dusting off the Formal for the Function*, 52 *Ohio St. L.J.* 1037, 1040 (1991) ("Legal Formalism is the traditional view that correct legal decisions are determined by pre-existing legal precedent, and the courts must reach their decisions solely based upon logical deduction, applying the facts of a particular case to a set of pre-existing legal rules.").

⁶⁸ Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 *Yale L.J.* 949, 950 (1988) ("Everyone knows that legal formalism asserts the distinction of law and politics."). Indeed, for some formalists, even politically-charged constitutional questions are deemed non-legal. See Grey, *supra* note 24, at 34 ("To the legal science mentality such open-ended questions were political, not legal, and the courts abandoned any scientific role in trying to answer them."). Some contemporary jurists still maintain that politics is divorced from law. See *Obergefell v. Hodges*, 576 U.S. 644, 687 (2015) (Roberts, C.J., dissenting) ("It can be tempting for judges to confuse our own preferences with the requirements of the law.").

⁶⁹ Steven J. Heyman, *Aristotle on Political Justice*, 77 *Iowa L. Rev.* 851, 851 (1992).

⁷⁰ Swisher, *supra* note 67, at 1040; Brian Z. Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* 1 (2010); Weinrib, *supra* note 68, at 951; see also C.C. Langdell, *Selection of Cases on the Law of Contracts*, Preface to the First Edition, at viii (2d. ed. Bos., Little, Brown, & Co. 1879) (describing law as a "science" and mastery of the law as a practice of learning how to apply it with "constant facility and certainty").

On this view, legal reasoning operates in a manner structurally analogous to, say, geometry.⁷¹ Just as the core tenets of geometry are seen “not merely [as] human constructs, but rather obvious and indubitable physical truths about the structure of space, from which nonobvious truths (like the Pythagorean theorem) can be proved by sequences of indubitable deductive steps,”⁷² formalism treats the core tenets of law as equally obvious and immutable.⁷³ By carefully examining and deducing these obvious and objective legal truths, one can discern the answer to all legal questions.⁷⁴ “[F]undamental principles of the common law were discerned by induction from cases; rules of law were then derived from principles conceptually; and finally, cases were decided, also conceptually, from rules.”⁷⁵

For the legal formalist, then, law is an *internal* system—a comprehensive framework of rules and principles that serve as the exclusive reference point for discerning all legal truths.⁷⁶ In this way, formalism stands in stark contrast to those legal philosophies, such as

⁷¹ Grey, *supra* note 24, at 16.

⁷² *Id.* at 17.

⁷³ Lucille A. Jewel, *Silencing Discipline in Legal Education*, 49 U. Tol. L. Rev. 657, 660 (2018) (“Legal formalism was most certainly inspired by enlightenment principles emphasizing objectivity, reason, and competition.”); Shai Lavi, *Turning the Tables on “Law and . . .”*: A Jurisprudential Inquiry into Contemporary Legal Theory, 96 Cornell L. Rev. 811, 825–26 (2011) (“[A] good example of a legal theory that views law itself as science is legal formalism. Its underlying presupposition is that law has the structure of reason.”).

⁷⁴ Grey, *supra* note 24, at 16; see also *Gamble v. United States*, 139 S. Ct. 1960, 1983 (2019) (Thomas, J., concurring) (“[C]ommon-law judges were tasked with identifying and applying objective principles of law—discerned from natural reason, custom, and other external sources—to particular cases.”).

⁷⁵ Grey, *supra* note 24, at 19. Formalism is therefore seen as embracing something of a top-down approach. Concerns of justice, efficiency, and even social legitimacy are only relevant insofar as they are embedded within higher-order principles. The legal formalist must “identify the most abstract unifying conceptions implicit in the law’s doctrinal and institutional arrangements, and . . . enquire into the rationality that inheres in the law’s processes.” Lavi, *supra* note 73, at 825–26 (quoting Ernest J. Weinrib, *Private Law and Public Right*, 61 U. Toronto L.J. 191, 193 (2011)).

⁷⁶ Grey, *supra* note 24, at 11 (“[T]he heart of classical theory was its aspiration that the legal system be made complete through universal formality, and universally formal through conceptual order. A few basic top-level categories and principles formed a conceptually ordered system above a large number of bottom-level rules. The rules themselves were, ideally, the holdings of established precedents, which upon analysis could be seen to be derivable from the principles.”). As articulated by Harvard Law School dean Christopher Langdell, “Law, considered as a science, consists of certain principles or doctrines. To have such mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer . . .” Langdell, *supra* note 70, at viii.

realism, that expressly take account of the on-the-ground consequences of a particular legal conclusion.⁷⁷ This is true even when the (formally) correct legal answer in a case may “cause great hardship and practical injustice” or give rise to a temptation to pursue “ingenious attempts” to reach a desired outcome.⁷⁸ But giving in to that temptation would violate the requirement of conceptual order on which the formality and logical structure of the legal system depend.⁷⁹ If law is to be a science, as the formalists contend, correct legal answers must derive from higher-order principles, regardless of the positive or negative externalities that a particular legal decision might bring.

1. Normative Formalism

From a formalist perspective, determining what *should* constitute settled law is relatively straightforward. Law is settled when a court has reached the right result.⁸⁰ More specifically, normative formalism’s belief in the completeness of law means that any metric for assessing whether a decision was right or wrong must be based on law’s internal logic.⁸¹

Modern normative formalism differs substantially from its earliest antecedents. The early common law was infused with natural law

⁷⁷ Marcus J. Curtis, *Realism Revisited: Reaffirming the Centrality of the New Deal in Realist Jurisprudence*, 27 *Yale J.L. & Human.* 157, 164 (2015); Richard D. Schwartz, *Reviews*, 65 *Yale L.J.* 572, 577 (1956) (reviewing Samuel A. Stouffer, *Communism, Conformity, and Civil Liberties: A Cross-section of the Nation Speaks Its Mind* (1955)).

⁷⁸ Grey, *supra* note 24, at 15 (quoting C.C. Langdell, *Summary on the Law of Contracts* 4 (2d ed. Bos., Little, Brown, & Co. 1880)); see also J. Skelly Wright, *Law and the Logic of Experience: Reflections on Denning, Devlin, and Judicial Innovation in the British Context*, 33 *Stan. L. Rev.* 179, 184 (1980) (reviewing Rt. Hon. Lord Denning, *The Discipline of Law* (1979)) (discussing legal formalism’s rejection of developments in tort and contract law that sought to “temper ancient rigidities” or better reflect “modern realities”).

⁷⁹ Heyman, *supra* note 69, at 851 (“Legal justification involves the working out of principles that are immanent in the law, rather than looking to the instrumental realm of politics.”); see also Grey, *supra* note 24, at 15 (arguing that the need to justify the scientific nature of law explains the primacy of formalism in classical legal thought).

⁸⁰ Formalists do acknowledge the possibility that judges can get the law wrong. Stephen A. Siegel, *John Chipman Gray and the Moral Basis of Classical Legal Thought*, 86 *Iowa L. Rev.* 1513, 1522 (2001); see also James Kent, 1 *Commentaries on American Law* 444 (N.Y., O. Halstead 1826) (mentioning the thousands of cases in English and American law that have been overruled or otherwise doubted or limited). This recognition, in turn, gives rise to tension surrounding a formalist’s adherence to *stare decisis*. See *infra* Subsection II.A.2.

⁸¹ See Grey, *supra* note 24, at 6–8; Richard Posner, *Jurisprudential Responses to Legal Realism*, 73 *Cornell L. Rev.* 326, 329 (1988); Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 *U. Pa. J. Const. L.* 155, 163 (2006).

theory,⁸² and, until the late nineteenth century, courts “were thought to discover rather than to make the rules and principles that they applied.”⁸³ Immutable legal principles, discerned from both reason and divine law, offered a rule of decision in every case.⁸⁴ A judge’s role was simply to reveal those legal principles and pinpoint their appropriate application without distortion. By contrast, judges today look for rules of decision in positive law—such as the Constitution, statutes, and regulations—rather than a general common law.⁸⁵ But normative formalism is far from dead. Instead, the same motivation that drove common law judges—the search for immutable legal truths—characterizes the modern formalist approach to interpreting, construing, and applying those texts.⁸⁶

In the context of settled law, modern normative formalism is capacious. It encompasses all approaches that purport to measure the correctness of judicial opinions using an internal logic. For illustrative purposes, though, modern originalism offers a uniquely helpful example, in large part because it makes clear claims about its internal metric and how one should determine a correct result.⁸⁷ Moreover, several prominent originalists

⁸² Weinrib, *supra* note 68, at 954 n.14 (“[L]egal formalism . . . has been understood in the philosophic tradition of natural law and natural right and as it is presupposed in the ideal of coherence to which sophisticated legal systems aspire.”). Legal reasoning was not an exercise in policymaking; rather, it involved discovering truths from “the application of the dictates of natural justice, and of cultivated reason, to particular cases” and required reference to both principles of reason and divine law. Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 Va. L. Rev. 1, 44–45 (2001) (quoting 1 James Kent, *Commentaries on American Law* 439 (N.Y., O. Halstead 1826)). James Kent, for example, declared that the basis of law was a form of “natural justice” or “natural reason.” See John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 Colum. L. Rev. 547, 569 (1993) (quoting 1 Kent, *Commentaries*, *supra*, at 439).

⁸³ Nelson, *supra* note 82, at 23 (emphasis removed); see also David T. Watters, *Retroactivity Refused: North Carolina Defies Supreme Court Precedent in Swanson v. State*, 70 N.C. L. Rev. 2125, 2132 (1992) (“Early common law was based upon Blackstone’s concept of natural law, which allowed judges only to ‘declare’ a law from a pre-existing body of law.”).

⁸⁴ See 3 G. Edward White, *The Marshall Court and Cultural Change, 1815–35*, at 129 (1988).

⁸⁵ *Gamble v. United States*, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring) (“Federal courts today look to different sources of law when exercising the judicial power than did the common-law courts of England.”); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (“There is no federal general common law.”).

⁸⁶ Posner, *supra* note 81, at 329 (“What I described earlier as legal formalism in the common law sphere resembles certain approaches to interpretation, such as textualism and intentionalism, in that they assign a modest role to the judge, that of translator or logical manipulator, rather than that of a policy analyst.”).

⁸⁷ Barrett, *supra* note 25, at 1921 (“For an originalist, the meaning of the text is fixed so long as it is discoverable.”).

grapple with the problem of whether an incorrect result can ever attain the status of settled law.⁸⁸

For an originalist, properly interpreting a constitutional provision requires a judge to excavate and apply that provision's public meaning from the time of its drafting and enactment. "Originalism maintains both that constitutional text means what it did at the time it was ratified and that this original public meaning is authoritative."⁸⁹ Consistent with modern formalism, this interpretive approach eschews taking account of the external consequences of a particular interpretation.⁹⁰ This is also true of the plain-meaning textualist approach to statutory interpretation, a kissing cousin of constitutional originalism.⁹¹ Both espouse the idea that there is a correct answer to what a text means and how it should apply to a given case. Thus, a judge's role, within this modern normative formalist framework, is simply to call "balls and strikes."⁹²

As with classic formalism, both the originalist and plain-meaning textualist strive for the *objectively correct* answer to legal questions.⁹³ But this will be true of anyone who subscribes to the idea that at least certain legal questions have correct answers. So, someone committed to an intentionalist statutory interpretation methodology might consult a broad array of authorities, including not just text and structure but also a statute's legislative history, to arrive at what she regards as the single best interpretation.⁹⁴ In a similar vein, one might think of Ronald Dworkin's

⁸⁸ For example, in the next Section, we explore the opinions of Justices Clarence Thomas, Antonin Scalia, Amy Coney Barrett, Neil Gorsuch, and Samuel Alito on this issue. See *infra* Subsection II.A.2.

⁸⁹ Barrett, *supra* note 25, at 1921.

⁹⁰ Consider, for example, Chief Justice John Roberts's dissenting opinion in *Obergefell v. Hodges*, which claims to eschew consequentialist politics. See *Obergefell v. Hodges*, 576 U.S. 644, 687 (2015) (Roberts, C.J., dissenting).

⁹¹ See Thomas W. Merrill, Textualism and the Future of the *Chevron* Doctrine, 72 Wash. U. L.Q. 351, 372 (1994) ("The textualist judge treats questions of interpretation like a puzzle to which it is assumed there is one right answer."); see also Jonathan T. Molot, The Rise and Fall of Textualism, 106 Colum. L. Rev. 1, 46 (2006) ("[A]ggressive textualists purport to use textualist interpretive tools not just to resolve statutory ambiguity but to eliminate it.").

⁹² Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 56 (2005) (statement of Roberts, J.).

⁹³ Jonathan T. Molot, Ambivalence About Formalism, 93 Va. L. Rev. 1, 49 (2007).

⁹⁴ See Caleb Nelson, What Is Textualism?, 91 Va. L. Rev. 347, 353–54 (2005); see also Jonathan R. Siegel, What Statutory Drafting Errors Teach Us About Statutory Interpretation, 69 Geo. Wash. L. Rev. 309, 366 (2001) (explaining that "taking background principles as the guide" gives courts flexibility to interpret a statute using more than just its text).

interpretationalist framework of “law as integrity,”⁹⁵ which purports to offer a means of discerning the single right answer to a legal question through a balancing of “fit” and “best light.”⁹⁶ Few would consider Dworkin’s jurisprudential theory akin to staunch formalism. But his insistence that objectively correct legal answers exist situates his theory proximate to (if not squarely within) the normative formalist account of settled law.⁹⁷ And, as we show in Part III, when political actors across the ideological spectrum assert that a particular legal question is settled, they frequently place themselves within the normative formalist paradigm—claiming that a precedent achieved the right result and thus should be deemed settled.

In a perfect world, why shouldn’t someone who believes in correct answers insist that only those answers truly settle the law? Justice Thomas has been one of the most ardent defenders of this particular conception of settled law.⁹⁸ Although he has developed these arguments in the context of constitutional originalism, they apply far more broadly to any theory predicated on objectively correct answers. Courts, he contends, should “‘examin[e] without fear, and revis[e] without reluctance,’ any ‘hasty and crude decisions’ rather than leaving ‘the character of [the] law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error.’”⁹⁹

2. *Descriptive Formalism*

Despite its lofty normative aspirations, formalism faces a dilemma when it comes to *describing* existing law as settled. Is someone who

⁹⁵ Dworkin, *supra* note 65, at 225–28.

⁹⁶ Ofer Raban, Dworkin’s “Best Light” Requirement and the Proper Methodology of Legal Theory, 23 *Oxford J. Legal Stud.* 243, 245–47 (2003) (citing Dworkin, *supra* note 65, at 53, 66 and describing the canonical interpretation of Dworkin’s theory in terms of “fit” and “best light”).

⁹⁷ See Leiter, *supra* note 65, at 1146 (suggesting that Dworkin “remains within the formalist camp because he sees the law as rationally determinate”); Modak-Truran, *supra* note 65, at 101 (describing Dworkin’s interpretative theory as a “weak legal formalism”).

⁹⁸ See Clarence Thomas, *Judging*, 45 *U. Kan. L. Rev.* 1, 5 (1996) (“My vision of the process of judging is unabashedly based on the proposition that there are right and wrong answers to legal questions.”); see also, e.g., *Holder v. Hall*, 512 U.S. 874, 945 (1994) (Thomas, J., concurring in the judgment) (“I cannot subscribe to the view that in our decisions under the Voting Rights Act it is more important that we have a settled rule than that we have the right rule.”).

⁹⁹ *Gamble v. United States*, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring) (quoting 1 *Kent, Commentaries*, *supra* note 80, at 444).

believes in objectively correct answers to legal questions committed to the idea that only those correct answers truly settle a legal question? Or, to put the question the other way around, can an objectively *incorrect* decision ever constitute settled law as a purely descriptive matter?

If a court has reached what a formalist believes is the correct result, there is no tension. A formalist would contend that, in light of such a result, the law both *should be* settled and, in fact, *is* settled.¹⁰⁰

The difficulty arises when the formalist must determine whether an incorrect decision, especially one that a court has repeatedly reaffirmed, can eventually settle a legal question.¹⁰¹ At its core, the descriptive formalist account of settled law raises the basic problem of horizontal stare decisis—the binding effect that a court ascribes to its own decisions.¹⁰² As a structural matter, a court always has latitude to correct its earlier erroneous decisions.¹⁰³ But absent extraordinary circumstances, which we discuss in a moment, stare decisis calls on courts to abide by their earlier pronouncements.¹⁰⁴ This deference to previous decisions does not derive from a hierarchal mandate that inferior courts must obey the controlling decisions of superior courts.¹⁰⁵ Nor does stare decisis rest on any assurance that the first decision was correct.¹⁰⁶ Rather, it admonishes

¹⁰⁰ To borrow the words of Justice Brandeis, here the law wouldn't simply be "settled" but "settled right." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

¹⁰¹ See Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 *Const. Comment.* 257, 261 (2005) ("How and when precedent should be rejected remains one of the great unresolved controversies of jurisprudence."); Siegel, *supra* note 80, at 1522 ("How courts would treat 'incorrect' precedent—extend it, confine it, ignore it, or even overrule it—forever 'compromis[ed] the classical . . . aspiration toward universally formal conceptual order' and substantially broke the analogy between legal and natural science." (quoting Grey, *supra* note 24, at 26)); see also Kozel, *supra* note 25, at 1846 (noting that "multiple perspectives commonly emerge *within* interpretive schools as the result of varying normative premises").

¹⁰² Giving "prior judicial decisions the weight that those decisions carry independently of any formal requirement that precedent be followed" is what Professor Larry Alexander helpfully calls the "natural model" of precedent. Alexander, *supra* note 33, at 5.

¹⁰³ Albeit not with respect to the incorrect decision itself, but in terms of announcing the correct rule that will apply in the future.

¹⁰⁴ See *United States v. Mason*, 412 U.S. 391, 399–400 (1973).

¹⁰⁵ See *supra* Part I.

¹⁰⁶ See *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455 (2015) ("Respecting *stare decisis* means sticking to some wrong decisions."); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2423 (2019) ("Of course, it is good—and important—for our opinions to be right and well-reasoned. But that is not the test for overturning precedent.").

courts to respect and adhere to their own (non-controlling) precedent simply because of the precedent's existence.¹⁰⁷

But for the formalist, why would a court ever choose to entrench a demonstrably (or even arguably) erroneous precedent rather than fix it?¹⁰⁸ More specifically, why should legal actors prefer the acknowledged imperfections of precedential rules rather than a case-by-case approach that admonishes courts simply to “get it right”? After all, a rule of precedent and, relatedly, stare decisis inevitably will lead courts to reach suboptimal results in certain cases.¹⁰⁹

A rich literature has grappled with the formalist's dilemma.¹¹⁰ Scholars have offered careful and incisive answers, the most persuasive of which emphasize, as an initial matter, that precedential decision making encourages a more coherent legal system by managing the inherent fallibility and limited capacity of human beings.¹¹¹ Thus, the first step in resolving the dilemma lies in recognizing that despite the rigidity of the law's logical structure, the perfect shouldn't become the enemy of the good. A rule of precedent might lead to suboptimal results in some individual cases, but in a world of finite resources, it can achieve greater systemic accuracy as well as a more legitimate and coherent legal

¹⁰⁷ See *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (citing *Vasquez v. Hillery*, 474 U.S. 254, 265–66 (1986)).

¹⁰⁸ See Alexander, *supra* note 33, at 4 (describing the problem of precedent as “*constraint by incorrectly decided precedents*”); Schauer, *supra* note 33, at 589–91 (arguing that precedential decision making will often lead to suboptimal decisions in any given case).

¹⁰⁹ “If one has a theory of stare decisis that permits precedent decisions to have genuine decision-altering weight—that is, if precedents dictate different results than the interpreter otherwise would reach in the absence of such precedents—then stare decisis corrupts the otherwise ‘pure’ constitutional decision-making process.” Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 *Const. Comment.* 289, 290 (2005); see also Frederick Schauer, *The Jurisprudence of Reasons*, 85 *Mich. L. Rev.* 847, 864 (1987) (reviewing Ronald Dworkin, *Law's Empire* (1986)) (“[A] regime of rules, even if followed faithfully and inexorably, will generate some number of wrong answers”); Randy J. Kozel, *Precedent and Constitutional Structure*, 112 *Nw. U. L. Rev.* 789, 832 (2017) (“If a prior decision drastically interferes with individual liberty or the proper operation of the government, it seems natural that deference should yield.”).

¹¹⁰ See, e.g., Barrett, *supra* note 25, at 1922–29; Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 *U. Pa. J. Const. L.* 1, 15–16 (2016); Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 *Duke L.J.* 239, 260 (2009); Kozel, *supra* note 25, at 1865–66; Randy J. Kozel, *Original Meaning and the Precedent Fallback*, 68 *Vand. L. Rev.* 105, 108 (2015); Monaghan, *supra* note 33, at 739–48; Paulsen, *supra* note 109, at 289.

¹¹¹ See Alexander, *supra* note 33, at 49 (arguing that “adherence to rules even when the rules dictate incorrect results—as they inevitably will in some cases—may achieve more value and thus be more ‘correct’ than deciding each individual case ‘correctly’”).

system.¹¹² Stare decisis, even when it entrenches an incorrect decision, can promote judicial economy, the rule of law, fairness, predictability, reliance, and stability—all higher-order principles that formalists value.¹¹³ Most formalists recognize that vindicating these principles is also part of a court's duty to get the “right” result.¹¹⁴ But simply recognizing the abstract value of stare decisis does not solve the problem.

The second and far more difficult step in resolving the dilemma entails discerning *when* the considerations that animate stare decisis are paramount. This requires a delicate balancing act.¹¹⁵ Most formalists will recognize that, in some cases, the benefits of these higher-order principles outweigh the costs of correctly answering a specific legal question.¹¹⁶ Stare decisis never applies automatically, however, meaning that there is no consensus about its scope or strength.¹¹⁷

Here, there is deep disagreement among judges and scholars. We need not resolve that debate, even if doing so were possible; rather, we seek only to identify the factors that can lead someone to accept that the

¹¹² Indeed, if judges were to approach each case as a matter of first impression, unencumbered by precedent's tug, they would become overburdened and likely would give short shrift to each individual case. See Benjamin N. Cardozo, *The Nature of the Judicial Process* 149 (1921). Precedent, then, is a heuristic device. It might not lead to the ideal result in every individual case, but it can foster more efficient decision making and produce better system-wide results. Perhaps paradoxically, a rule of precedent, despite its known deficiencies, can lead to better results than a regime that aspires to achieve the best result on a case-by-case basis. See Alexander, *supra* note 33, at 49; Schauer, *supra* note 33, at 595–602; Solum, *supra* note 29, at 247; Trammell, *supra* note 36, at 601–06. The formalist internalizes these features as contributing to the coherence and acceptability of the legal system. See Grey, *supra* note 24, at 8–11.

¹¹³ See John Ferejohn, *Law, Legislation, and Positive Political Theory*, in *Modern Political Economy: Old Topics, New Directions* 191, 194 (Jeffrey S. Banks & Eric A. Hanushek eds., 1995) (noting that formalism values “consistency, coherence, and stability” and disfavors “external political or economic forces”); Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 *Minn. L. Rev.* 1173, 1188 (2006) (“On a deeper level, rejection of stare decisis presents a theoretical conundrum for originalism . . . originalism in practice is linked with a type of formalism that celebrates the value of clear rules.”).

¹¹⁴ For examples demonstrating how adherence to stare decisis can constitute the “right” outcome for a formalist, see Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 *Va. L. Rev.* 1437, 1473–77 (2007); Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 *Mich. L. Rev.* 1, 2 (2011).

¹¹⁵ See Schauer, *supra* note 33, at 595–602.

¹¹⁶ See, e.g., Lash, *supra* note 114, at 1473–77; Mitchell, *supra* note 114, at 2.

¹¹⁷ *Helvering v. Hallock*, 309 U.S. 106, 119 (1940) (“[S]tare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision . . .”); see also *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 982–83 (1992) (Scalia, J., dissenting) (arguing that stare decisis has no force if the earlier decision was “plainly wrong”).

principles of stare decisis take precedence over reaching a correct result, such that a wrong legal result can, descriptively, constitute settled law.

Different formalists can and do weigh these higher-order principles differently. As with the normative formalist approach to settled law, originalism is illustrative, revealing a fierce internal debate about when the principles of stare decisis prevail and, critically, whether they meaningfully settle the law.¹¹⁸

On one end of the spectrum, some originalist scholars have argued that concerns about reliance, stability, and predictability can never trump a proper interpretation of the Constitution.¹¹⁹ At least in the realm of constitutional adjudication, fidelity to the Constitution itself leaves no room to entrench wrong results, no matter the costs. Justice Thomas's recent concurring opinion in *Gamble v. United States*¹²⁰ best exemplifies this view, which prioritizes right answers above all else: "When faced with a demonstrably erroneous precedent, my rule is simple: We should not follow it."¹²¹ For Justice Thomas and other like-minded originalists, incorrect precedents can never constitute settled law, even as a descriptive matter.¹²² To them, stare decisis does not foster higher-order principles; instead "the Court's *stare decisis* doctrine [merely gives] the veneer of respectability to our continued application of demonstrably incorrect precedents."¹²³

Other originalists, however, do not recognize the absolute preeminence of right answers.¹²⁴ Justice Scalia was fond of saying, "I am an originalist;

¹¹⁸ See Barrett, *supra* note 25, at 1922–29; Barrett & Nagle, *supra* note 110, at 15–16; Colby & Smith, *supra* note 110, at 260; Kozel, *supra* note 25, at 1865–66; Kozel, *supra* note 110, at 108; Monaghan, *supra* note 33, at 724; Paulsen, *supra* note 109, at 289.

¹¹⁹ Barnett, *supra* note 56, at 1233 ("[F]earless originalists' . . . reject the doctrine of stare decisis in the following sense: if a prior decision of the Supreme Court is in conflict with the original meaning of the text of the Constitution, it is the Constitution and not precedent that binds present and future Justices."); Gary Lawson, *The Constitutional Case Against Precedent*, 17 Harv. J.L. & Pub. Pol'y 23, 24 (1994) ("[T]he practice of following precedent is not merely nonobligatory or a bad idea; it is affirmatively inconsistent with the federal Constitution."); Paulsen, *supra* note 109, at 289 ("Whatever one's theory of constitutional interpretation, a theory of *stare decisis*, poured on top and mixed in with it, *always corrupts the original theory.*").

¹²⁰ *Gamble v. United States*, 139 S. Ct. 1960 (2019).

¹²¹ *Id.* at 1984 (Thomas, J., concurring).

¹²² See Barnett, *supra* note 56, at 1233; Lawson, *supra* note 119, at 24; Paulsen, *supra* note 109, at 289.

¹²³ *Gamble*, 139 S. Ct. at 1981 (Thomas, J., concurring).

¹²⁴ On this point, see Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 412 (2012), for Justice Scalia's views on stare decisis. See also P. Thomas

I am not a nut.”¹²⁵ This was his acknowledgment of the obvious fact that judges decide cases in the real world, not the seminar room.¹²⁶ “Originalism,” he wrote, “like any other theory of interpretation put into practice in an ongoing system of law, must accommodate the doctrine of *stare decisis*; it cannot remake the world anew.”¹²⁷ Although Justice Scalia regarded his commitment to *stare decisis* as an exception to originalism,¹²⁸ Justice Barrett has defended it as compatible with an originalist framework.¹²⁹ That is, Justice Barrett insists that Justice Scalia’s approach to *stare decisis* largely accords with originalist thought because, often, *stare decisis* does not require judges to consider the validity of past decisional theories, but only to adhere to past results.¹³⁰ Notwithstanding this difference in framing, she has defended *stare decisis*, as did Justice Scalia, as “a sensible rule” that “protects the reliance interests of those who have structured their affairs in accordance with the Court’s existing cases.”¹³¹ Moreover, most of the avowedly originalist justices currently serving on the Supreme Court share the view that, as a descriptive matter, even imperfect precedent can constitute settled law.¹³²

DiStanislao III, *The Highest Court: A Dialogue Between Justice Louis Brandeis and Justice Antonin Scalia on Stare Decisis*, 51 U. Rich. L. Rev. 1149, 1171 (2017) (noting Justice Scalia’s inconsistent calls for “a weaker view of *stare decisis* in nonoriginalist constitutional interpretation in some cases, but not in others”); Antonin Scalia, *Originalism: The Lesser Evil*, 57 Cin. L. Rev. 849, 861 (1989) (“In its undiluted form, at least, [originalism] is medicine that seems too strong to swallow.”).

¹²⁵ Antonin G. Scalia, *A Look Back: 1994 William O. Douglas Lecture Series Transcript*, 51 Gonz. L. Rev. 583, 588 (2016).

¹²⁶ See Henry Paul Monaghan, *Essay, On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 Colum. L. Rev. 665, 726 (2012) (“Constitutions are not forged in seminar rooms.”).

¹²⁷ Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 138–39 (Amy Gutmann ed., 1997).

¹²⁸ See James E. Ryan, *Does It Take a Theory? Originalism, Active Liberty, and Minimalism*, 58 Stan. L. Rev. 1623, 1631 (2006) (reviewing Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (2005) and Cass R. Sunstein, *Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America* (2005)) (quoting Scalia, *supra* note 127, at 140).

¹²⁹ Barrett, *supra* note 25, at 1922–23.

¹³⁰ *Id.* at 1939 (“Adhering to a nonoriginalist decisional theory poses a different and more theoretically difficult issue for the originalist than does simply leaving the result of a decision in place.”).

¹³¹ *Id.* at 1921.

¹³² Justice Neil Gorsuch, for example, has insisted that *stare decisis* “warrants respect” and should only be abandoned when the principles it purports to advance, including stability and reliance interests, are almost entirely inapplicable given severe deficiencies in the earlier

The debate within originalist circles is only illustrative of the unique tension that all formalists must navigate in descriptively declaring a wrong decision settled law.¹³³ Anyone who believes in objectively correct answers to legal questions ultimately has to navigate this dilemma. Declaring bad precedent settled law requires recognition of and commitment to higher-order formalist principles, principles that might run counter to the formalist commitment to decisional perfection. It requires a theoretical weighing that largely plays out above the particularities of any one case. But with few exceptions, most formalists recognize instances when the law's commitment to coherence, stability, acceptability, and predictability warrant adherence to the status quo.¹³⁴ That is, the formalist can faithfully assert that, descriptively, the wrong decision is settled law.

B. The Realist Frameworks

The third and fourth frameworks of settled law derive from legal realist jurisprudence. Realism rejects formalism's key tenets, including, most importantly for our purposes, the axiom that law has a guiding internal logic. Instead, realism posits that the correctness of any particular decision depends not only on some internal metric but also a decision's *external* consequences.

Oliver Wendell Holmes, one of the progenitors of the legal realist school, saw realism as a critical response to formalism's claim that legal answers logically and necessarily derive from some higher-order system

decision. *Gamble v. United States*, 139 S. Ct. 1960, 2006 (2019) (Gorsuch, J., dissenting) (quoting *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1499 (2019)). Justice Samuel Alito's formalism strikes a similar chord. Given *stare decisis*'s role in advancing high-order legal goals—in “promot[ing] the evenhanded, predictable, and consistent development of legal principles, foster[ing] reliance on judicial decisions, and contribut[ing] to the actual and perceived integrity of the judicial process”—Justice Alito has concluded that taking whatever steps necessary to get to the right legal answer is not the end-all-be-all of judicial decision making. *Id.* at 1969 (majority opinion) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). He wrote, “Of course, it is . . . important to be right, especially on constitutional matters, where Congress cannot override our errors by ordinary legislation. But even in constitutional cases, a departure from precedent ‘demands special justification.’” *Id.* (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)).

¹³³ Notably, non-formalists do not place equivalent value on *objectively* correct answers to legal questions and, therefore, adhering to *stare decisis* is less analytically taxing. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2423 (2019) (majority opinion) (authored by Justice Kagan, who is not generally regarded as a formalist).

¹³⁴ Scalia, *supra* note 124, at 861 (“[A]lmost every originalist would adulterate [originalism] with the doctrine of *stare decisis*.”).

of fundamental principles.¹³⁵ Realists instead insist that legal systems are composed of nothing more than “ill-disguised inconsistency.”¹³⁶ So, in their view, trying to divine objectively correct answers to legal questions by mechanically applying authoritative doctrine to facts is, in Felix Cohen’s evocative phrase, “transcendental nonsense.”¹³⁷

Having abandoned the conception of law as a formal logical system, legal realists instead advocate an external perspective and consider law’s instrumental potential.¹³⁸ This approach expressly imports external metrics into the analysis and focuses on the normative tradeoffs within any potential case outcome.¹³⁹ Thus, realists often embrace an interdisciplinary approach.¹⁴⁰ For instance, prominent scholars have argued

¹³⁵ Holmes, *supra* note 27, at 460–61 (“What constitutes the law? You will find some text writers telling you . . . that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. . . . [But the] prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”); William H. Page, *Legal Realism and the Shaping of Modern Antitrust*, 44 *Emory L.J.* 1, 10 (1995) (“Holmes was one of the intellectual forbears of realism and a frequent critic of the Court’s formalism and conceptualism.”).

¹³⁶ Karl Llewellyn, *The Case Law System in America* 45 (Paul Gewirtz ed., Michael Ansaldi trans., U. Chi. Press 1989) (1933).

¹³⁷ See Cohen, *supra* note 28, at 811; see also Oliver Wendell Holmes, Jr., *The Common Law* 3 (Harv. Univ. Press 2009) (1881) (“The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.”).

¹³⁸ See Schwartz, *supra* note 77, at 577 (noting that proponents of legal realism “call for decisions made consciously in terms of social consequences”); Curtis, *supra* note 77, at 164 (“The second core feature of legal realism was a belief that questions of law should be resolved with a view to the social consequences that would flow from a particular ruling.”); Hamish Stewart, *Contingency and Coherence: The Interdependence of Realism and Formalism in Legal Theory*, 30 *Val. U. L. Rev.* 1, 3 (1995) (“Realism is the tendency to understand law from without, that is, to explain law as a vehicle for achieving purposes that are external to the law.”).

¹³⁹ See Oliver Wendell Holmes, Jr., *Law in Science and Science in Law*, in *Collected Legal Papers* 210, 238 (1921) [hereinafter *Holmes, Law in Science*] (“[T]he real justification of a rule of law, if there be one, is that it helps to bring about a social end which we desire.”); Holmes, *supra* note 27, at 474 (encouraging legal reasoning that focuses on “the ends sought to be attained and the reasons for desiring them”); Theodore W. Ruger, Pauline T. Kim, Andrew D. Martin & Kevin M. Quinn, *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 *Colum. L. Rev.* 1150, 1155 (2004).

¹⁴⁰ Pound (1912), *supra* note 28, at 510 (“Not a little of the world-wide discontent with our present legal order is due to modes of juristic thought and juridical method which result from want of ‘team-work’ between jurisprudence and the other social sciences.”); Herbert Hovenkamp, *Knowledge About Welfare: Legal Realism and the Separation of Law and Economics*, 84 *Minn. L. Rev.* 805, 854 (2000) (“Legal Realism is notable for its numerous interdisciplinary outreaches in psychology, sociology, anthropology, and political science.”).

that courts should use social sciences to evaluate “the actual social effects of legal institutions and legal doctrines”¹⁴¹ and should explicitly take human values, desires, and motivations into account when deciding cases.¹⁴² Ultimately, realism is an unapologetically consequentialist school of thought, as Holmes pithily expressed in one of his most famous aphorisms: “The life of the law has not been logic: it has been experience.”¹⁴³

Legal realism’s core claim of legal indeterminacy does not mean that law is perpetually unsettled.¹⁴⁴ From a descriptive perspective, this is easy enough to appreciate precisely because of realism’s consequentialist moorings—law is settled when a court has indicated that it will abide by an earlier decision. And even though realism rejects the idea of objectively correct legal answers, one can also make a normative realist claim about when law should be considered rightly decided and therefore settled. Unlike in the formalist context, though, this normative perspective measures a precedent through external metrics and benchmarks.

1. Descriptive Realism

The descriptive realist framework determines whether law is settled by asking a simple question: Is there a material risk that a court will overturn a prior decision? Stated more elegantly, the descriptive realist assessment of settled law is effectively an exercise in Holmesian prediction theory that “[t]he prophecies of what the courts will do in fact, and nothing more pretentious,” is the law.¹⁴⁵ On this view, law depends on neither morality nor logic but only on a practical, externally-facing assessment of how courts will decide a case.¹⁴⁶ Holmes’s “bad man” helps illustrate this

¹⁴¹ Roscoe Pound, *The Spirit of the Common Law* 212 (1921).

¹⁴² See Felix S. Cohen, *Modern Ethics and the Law*, in *The Legal Conscience: Selected Papers of Felix S. Cohen* 17, 31–32 (Lucy Kramer Cohen ed., 1960).

¹⁴³ Holmes, *supra* note 137, at 1.

¹⁴⁴ See, e.g., Sinclair, *supra* note 56, at 389 (noting that even skeptical realists would likely consider *Marbury v. Madison* “super-precedent” because it “accords with the realists’ philosophy”).

¹⁴⁵ Holmes, *supra* note 27, at 461; see also Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 *Stan. L. Rev.* 787, 826 (1989) (“Holmes’ . . . statement that ‘[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law’ . . . has come to be enshrined in the orthodox jurisprudence textbooks as ‘the prediction theory.’”).

¹⁴⁶ William P. LaPiana, *Victorian from Beacon Hill: Oliver Wendell Holmes’s Early Legal Scholarship*, 90 *Colum. L. Rev.* 809, 817 (1990); David E. Van Zandt, *The Relevance of Social Theory to Legal Theory*, 83 *Nw. U. L. Rev.* 10, 16 (1989).

point.¹⁴⁷ Imagine that a spouse wishes to secretly withdraw all money from a joint bank account and gamble with it at a casino. Is there a legal duty for the spouse to refrain from this behavior? The bad man is unconcerned with higher order principles of equity, morality, and justice;¹⁴⁸ instead, he recognizes a legal duty only as “a prophecy that if he does certain things he will be subjected to disagreeable consequences by way of imprisonment or compulsory payment.”¹⁴⁹

The same reasoning is at work when a realist considers whether the law is settled. Rather than looking to higher-order principles to determine if a court correctly resolved a particular legal issue, the realist will define settled law descriptively as a confident prophecy that, if she brings a new lawsuit challenging an earlier decision, courts will uphold that earlier precedent.¹⁵⁰ That is, the realist will deem law settled based on a practical assessment of whether a court will overrule an earlier decision.

Note that this framework is unconcerned with whether a decision has reached a right or wrong result and focuses simply on whether a court will depart from precedent. So, a realist can recognize that law is descriptively settled even if she disagrees with the entrenched decision.

A few examples help illustrate the point. At one extreme, few would have difficulty predicting that the Supreme Court will continue to uphold seminal cases like *Marbury v. Madison*¹⁵¹ or *Brown v. Board of Education*.¹⁵² *Marbury* of course enshrined judicial review as a bedrock principle within the constitutional scheme;¹⁵³ *Brown* (aspirationally)

¹⁴⁷ Holmes, *supra* note 27, at 459 (“If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.”); see also John Harrison, Richard Epstein’s Big Picture, 63 U. Chi. L. Rev. 837, 844 (1996) (reviewing Richard A. Epstein, *Simple Rules for a Complex World* (1995)) (“The bad man sees the law not as a set of rules but as a list of prices . . .”).

¹⁴⁸ Holmes, *supra* note 27, at 460–61 (“[I]f we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the . . . courts are likely to do in fact.”).

¹⁴⁹ *Id.* at 461.

¹⁵⁰ And as noted, realists will recognize that courts often adhere to precedent for instrumental reasons. See Richard A. Posner, What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does), 3 Sup. Ct. Econ. Rev. 1, 37–38 (1993); Richard A. Posner, The Jurisprudence of Skepticism, 86 Mich. L. Rev. 827, 881–82 (1988).

¹⁵¹ 5 U.S. (1 Cranch) 137 (1803).

¹⁵² 347 U.S. 483 (1954).

¹⁵³ *Marbury*, 5 U.S. (1 Cranch) at 177–78; Richard H. Fallon, Jr., *Marbury* and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension, 91 Calif. L.

declared an end to school segregation and now ranks among the most venerated Supreme Court decisions.¹⁵⁴ There is no reasonable basis for believing that the Supreme Court will uproot these decisions in the near, or even distant, future; therefore, the realist could comfortably describe these decisions as settled law.¹⁵⁵

Other cases prove more difficult. Take, for example, *Roe v. Wade*¹⁵⁶ or *Citizens United v. Federal Election Commission*.¹⁵⁷ Many today revere *Roe* and its progeny¹⁵⁸ as foundational for women's rights and, in particular, reproductive freedom.¹⁵⁹ *Roe*'s supporters insist that Justice Blackmun's majority opinion, which affirmed a woman's constitutional right to an abortion, assuredly reached the correct result.¹⁶⁰ But this is not what determines whether *Roe* (and *Casey*) are settled under the descriptive realist framework. Instead, the framework asks whether the abortion decisions are immune to any reasonable threat of formal or functional reversal by courts, and, on this score, despite the impassioned support that those decisions continue to inspire, they almost assuredly fall short. For decades, conservative politicians, thinktanks, and legal societies have argued that the Court should overrule *Roe* and *Casey*.¹⁶¹

Rev. 1, 4 (2003) ("If viewed as the case establishing judicial review, *Marbury* has a foundational, even constitutive role in constitutional jurisprudence. Take away *Marbury*, and constitutional doctrine as we know it would disappear.").

¹⁵⁴ See Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*, at vii (2004).

¹⁵⁵ Even Justice Scalia, during his confirmation hearing, acknowledged the impracticability of overruling *Marbury*: "As I say, *Marbury v. Madison* is one of the pillars of the Constitution." Nomination of Judge Antonin Scalia, To Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 99th Cong. 33 (1986) (statement of Scalia, J.).

¹⁵⁶ 410 U.S. 113 (1973).

¹⁵⁷ 558 U.S. 310 (2010).

¹⁵⁸ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846, 873 (1992) (upholding the central tenets of *Roe* while refining its analytical framework).

¹⁵⁹ Richard S. Myers, *Re-Reading Roe v. Wade*, 71 Wash. & Lee L. Rev. 1025, 1026 (2014).

¹⁶⁰ See *Roe*, 410 U.S. at 154; Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 Yale L.J. 1694, 1706 (2008) (noting that "*Roe*'s supporters believe the abortion right vindicates" certain "autonomy and equality values"); Myers, *supra* note 159, at 1026 ("*Roe* has become a symbol—it was a great victory for women's rights, it was an important part of a cultural transformation . . .").

¹⁶¹ Most members of the Federalist Society and Heritage Foundation (two prominent conservative organizations) are unpersuaded by the Court's reasoning in *Roe* and *Casey*. See, e.g., Jason Zengerle, *How the Trump Administration Is Remaking the Courts*, N.Y. Times Mag. (Aug. 22, 2018), <https://nyti.ms/2nZIAXX> [<https://perma.cc/T7EN-AK34>] ("Many of the group's members question the legal basis for *Roe v. Wade* and whether a right to privacy exists in the Constitution, as *Roe* held it does."). Conservative thinker Ed Whelan, for

Current and former Supreme Court Justices have hardly been circumspect in voicing their opposition to the decisions,¹⁶² and scholars and advocacy groups have warned that the Court is primed to vitiate those decisions.¹⁶³ Sensing opportunity, conservative states have begun passing restrictive abortion measures, which officials in those states acknowledge violate *Roe* and *Casey*, in an attempt to tee up the abortion issue anew for the Court.¹⁶⁴ In such circumstances, predicting that the current Supreme Court will continue to uphold the central tenets of *Roe* and *Casey* seems less certain than in past decades.¹⁶⁵ Accordingly, from the descriptive realist perspective, those cases are probably not settled.

The same is overwhelmingly true of *Citizens United*. In 2010, the Supreme Court held that government restrictions on corporate expenditures for political messaging violated the First Amendment.¹⁶⁶ Since then, many conservatives have lauded the decision for vindicating seminal free speech principles.¹⁶⁷ As with *Roe*, though, enthusiasm and

example, described Federalist Society head Leonard Leo as “more dedicated to the enterprise of building a Supreme Court that will overturn *Roe v. Wade*” than any other conservative. Ed Whelan, Mistaken Attack by Andy Schlafly on Leonard Leo, *Nat’l Rev.* (Dec. 9, 2016), <https://www.nationalreview.com/bench-memos/schlafly-attack-leonard-leo/> [<https://perma.cc/LE5W-SM8E>]. Responding to a presidential debate question as to whether he wants to appoint justices willing to overturn *Roe*, then-candidate Donald Trump said, “I will say this: It will go back to the states, and the states will then make a determination.” Aaron Blake, The Final Trump-Clinton Debate Transcript, Annotated, *Wash. Post* (Oct. 19, 2016, 10:29 PM), <https://www.washingtonpost.com/news/the-fix/wp/2016/10/19/the-final-trump-clinton-debate-transcript-annotated/> [<https://perma.cc/47FM-DJRN>].

¹⁶² Justice Thomas, for instance, has asserted that “the Court’s abortion jurisprudence, including *Casey* and *Roe v. Wade*, . . . has no basis in the Constitution.” *Gonzales v. Carhart*, 550 U.S. 124, 169 (2007) (Thomas, J., concurring). Justice Scalia echoed that notion while on the bench, as did Justice Rehnquist. *Stenberg v. Carhart*, 530 U.S. 914, 955 (2000) (Scalia, J., dissenting); *id.* at 952 (Rehnquist, C.J., dissenting).

¹⁶³ See, e.g., Erwin Chemerinsky, *The Conservative Assault on the Constitution* 177 (2010).

¹⁶⁴ See, e.g., Timothy Williams & Alan Blinder, Lawmakers Vote To Effectively Ban Abortion in Alabama, *N.Y. Times* (May 14, 2019), <https://nyti.ms/2VCoxRp> [<https://perma.cc/V7FU-BPZ7>]; Sabrina Tavernise & Adeel Hassan, Missouri Lawmakers Pass Bill Criminalizing Abortion at About 8 Weeks of Pregnancy, *N.Y. Times* (May 17, 2019), <https://nyti.ms/2JnFizP> [<https://perma.cc/B3DU-KRPF>]. These legislative measures are so recent that they have not yet been extensively discussed by legal commentators.

¹⁶⁵ Indeed, even those Justices who ardently support *Roe* and *Casey* recognize this potential. See Leah Litman, Supreme Court Liberals Raise Alarm Bells About *Roe v. Wade*, *N.Y. Times* (May 13, 2019), <https://nyti.ms/2WGcWND> [<https://perma.cc/Z29C-9JWX>].

¹⁶⁶ *Citizens United v. FEC*, 558 U.S. 310, 318–19 (2010).

¹⁶⁷ See, e.g., Chris Good, *Citizens United Decision: Republicans Like It, Liberals Don’t*, *Atlantic* (Jan. 21, 2010), <https://www.theatlantic.com/politics/archive/2010/01/citizens-united-decision-republicans-like-it-liberals-dont/33935/> [<https://perma.cc/8NH7-NDWH>] (quoting then-Senate Minority Leader Mitch McConnell as describing the decision

praise from supporters do not render *Citizens United* settled from a descriptive realist perspective. Opposition to the decision emerged almost immediately. President Obama called out *Citizens United* during his State of the Union address, warning that it would “open the floodgates for special interests, including foreign corporations, to spend without limit in our elections.”¹⁶⁸ Many Democrats have made appointing Supreme Court justices who are willing to overturn *Citizens United* a central component of campaign platforms,¹⁶⁹ and, perhaps most importantly, Justices have openly expressed distaste for the decision.¹⁷⁰ In light of such opposition, a prediction that the Court will continue to uphold *Citizens United* indefinitely seems overconfident.

As we explore in Part III, this framework has tremendous explanatory power—conceptually, rhetorically, and most of all doctrinally. But for two reasons, it is also the most contingent and dynamic.

First, inherent in the nature of prediction theory is that what seems like a sure bet today might not actually pay out tomorrow. With time and the evolution of both jurisprudence and social mores, a precedent that once seemed impervious to challenge can become contested. Take, for example, legal arguments regarding the constitutionality of the death penalty. For centuries, there had been barely any doubt—among Supreme

as an “important step in the direction of restoring the First Amendment rights”); Stephen Dinan, *Divided Court Strikes Down Campaign Money Restrictions*, Wash. Times (Jan. 21, 2010), <https://www.washingtontimes.com/news/2010/jan/21/divided-court-strikes-down-campaign-money-restrict/> [https://perma.cc/9Y3J-6KS4] (quoting Hans A. von Spakovsky, senior legal fellow at the Heritage Foundation, as saying: “The Supreme Court has restored a part of the First Amendment that had been unfortunately stolen by Congress and a previously wrongly-decided ruling of the court.”).

¹⁶⁸ Address Before a Joint Session of the Congress on the State of the Union, 1 Pub. Papers 75, 81 (Jan. 27, 2010).

¹⁶⁹ For example, when campaigning for Hillary Clinton, Senator Bernie Sanders declared that the 2016 election was “about overturning Citizens United, one of the worst Supreme Court decisions in the history of our country.” Michael McGough, *Democrats United in (Over)promising To Reverse Citizens United*, L.A. Times (July 26, 2016), <https://www.latimes.com/opinion/opinion-la/la-ol-citizens-sanders-20160726-snap-story.html> [https://perma.cc/94X6-388J]; see also Alexander Burns, *Seven 2020 Democrats Pledge To Focus First Bill on Fighting Corruption*, N.Y. Times (July 29, 2019), <https://nyti.ms/-2MnZUIO> [https://perma.cc/GM74-MVLY] (documenting 2020 Democratic Presidential candidates’ pledge to enact a “clean-government bill,” earning the support of the liberal grassroots advocacy group End Citizens United).

¹⁷⁰ In 2016, Justice Ginsburg said: “It would be an impossible dream. But I’d love to see Citizens United overruled.” Adam Liptak, *Ruth Bader Ginsburg, No Fan of Donald Trump, Critiques Latest Term*, N.Y. Times (July 10, 2016), <https://nyti.ms/29I7mE4> [https://perma.cc/4T4H-2CRD].

Court Justices or anyone else—that the practice was constitutional.¹⁷¹ But in recent years, doubt has crept into the discussion. Questions about the physiological effects of lethal injection, the wrongful conviction of factually innocent people, and the racially disparate application of death sentences have led scholars, practitioners, judges, and even members of the Supreme Court to speak out against the death penalty’s constitutionality.¹⁷² Perhaps there is no significant chance that the Supreme Court will declare the death penalty unconstitutional in the near future, but what was once virtually certain has become less so.

Second, the settledness of law within this framework exists along a spectrum. There will never be metaphysical certainty about what a court will do decades or centuries hence. So, unlike a binary assessment of whether an earlier decision was right or wrong, predictions about future court behavior necessarily involve murky, multivariate analyses. In this gray area, legal actors might disagree about the likelihood that a court will revisit a particular decision. For example, two conscientious and well-informed legal actors might make different predictions about how genuinely settled *Citizens United* is. One might emphasize that a solid majority of the Supreme Court is committed to upholding the precedent and will do so for the foreseeable future. Another might observe that in light of vociferous and enduring opposition to the decision among some Justices and politicians, the Court conceivably could revisit the precedent within a generation.¹⁷³ Moreover, there is no single moment or degree of certainty when unsettled law becomes settled (or vice versa). So, for instance, two people might disagree whether the constitutionality of the

¹⁷¹ *Furman v. Georgia*, 408 U.S. 238, 428 (1972) (Powell, J., dissenting); *Trop v. Dulles*, 356 U.S. 86, 99 (1958); *Gregg v. Georgia*, 428 U.S. 153, 168 (1976) (plurality opinion). Indeed, almost all “Eighth Amendment decisions contain[ed] statements—some by the Court, some by individual Justices—assuming or asserting as a matter of settled law the death penalty’s constitutionality.” Corinna Barrett Lain, *Furman* Fundamentals, 82 Wash. L. Rev. 1, 13 (2007).

¹⁷² See *Glossip v. Gross*, 576 U.S. 863, 946 (2015) (Breyer, J., dissenting) (“I believe it highly likely that the death penalty violates the Eighth Amendment.”); Kevin Barry, *The Death Penalty & the Dignity Clauses*, 102 Iowa L. Rev. 383, 387 (2017); see also Renee Knake, *Abolishing Death*, 13 Duke J. Const. L. & Pub. Pol’y 1, 2 (2018) (noting that Justices Breyer and Ginsburg questioned the death penalty’s constitutionality).

¹⁷³ Every scholar’s nightmare is a late-breaking development before an article goes to print. This sentence initially observed that “the Court is one retirement and one Democratic President away from overruling” *Citizens United*. To put matters candidly, that precedent now seems less unsettled than it was when we drafted this Article in early 2020. But all of this just underscores our point. The inherent contingency of the descriptive realist framework means that a precedent’s settledness can turn on a single judicial vacancy.

death penalty is now unsettled or just a bit less settled than it was a century ago.

A certain imprecision is inherent within this framework, and an important question always looms over it: How settled is settled? Nevertheless, it remains one of the most fruitful and explanatory conceptualizations of settled law.

2. *Normative Realism*

The normative realist framework, like normative formalism, treats an earlier decision as settled if it reached the “right” result. What counts as the right result will differ dramatically under the two frameworks, though, as realism does not rest on law’s inherent logic—at least not entirely.¹⁷⁴ Instead, the right result under a realist conceptualization is more akin to a wise policy decision—a correct outcome in light of its beneficial consequences.¹⁷⁵ Because of this external orientation—a concern with real-world consequences—some commentators mistakenly view realism as a euphemistic way to describe rank policymaking by judges. But it is more theoretically robust than that caricature. Realism will defend a particular decision as correct, such that the law is settled from a normative perspective, based on a holistic account of intra- and extra-legal justifications.¹⁷⁶ Often this means that realism will rely on external metrics to guide the analysis, whether those are economic efficiency, individual autonomy, or a host of other possibilities.¹⁷⁷ Importantly, realism is not nihilism. Whether a decision is correct depends not on a judge’s caprice, but rather on the extent to which that decision corresponds to the chosen metrics.

¹⁷⁴ See David B. Wilkins, *Legal Realism for Lawyers*, 104 *Harv. L. Rev.* 468, 474 (1990) (“Given the limitations of deductive logic and analogic reasoning and the existence of vague, internally contradictory premises and rules, the realists argued that it was almost always possible to derive multiple and often inconsistent ‘legal’ answers to particular problems.”).

¹⁷⁵ Holmes, *Law in Science*, *supra* note 139, at 238–39; John Dickinson, *Legal Rules: Their Function in the Process of Decision*, 79 *U. Pa. L. Rev.* 833, 868 (1931) (contrasting the use of logic with the use of “policy, taste, and value judgments” when resolving cases).

¹⁷⁶ See Curtis, *supra* note 77, at 169.

¹⁷⁷ See Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 *Tex. L. Rev.* 267, 298–99 (1997).

In recent decades, a number of different interdisciplinary approaches have sprouted from the realist tradition.¹⁷⁸ In this sense, normative realism is an umbrella term of sorts. Nevertheless, these metrics—often external and conspicuously consequentialist—are the benchmarks that a realist will use to assess whether a decision is correct and thus (normatively) settled.¹⁷⁹

Consider, first, the prominent law and economics school,¹⁸⁰ which offers perhaps the purest example of normative realism in action. Law and economics makes a clear claim about its governing metric—law is a means of optimizing social efficiencies.¹⁸¹ The metric is external because the correct answer to any legal problem depends, at least in part, on what happens in the world beyond the law. Legal rules are determined based on market efficiencies,¹⁸² utility,¹⁸³ or perhaps wealth maximization,¹⁸⁴ rather than pure internal legal logic. So, on this view, the outcome that yields the greatest net economic benefits is the best (and normatively settled) result.¹⁸⁵

¹⁷⁸ See Neil Duxbury, *Patterns of American Jurisprudence* 92 (1995) (“The originality of legal realism was that it set the scene for the emergence of jurisprudential sub-disciplines of the ‘law and’ variety.”).

¹⁷⁹ “The conventional view portrays the rise of Langdellian formalism as provoking an antiformalist revolt by Holmes and others, culminating in the Legal Realism of the 1930s, which instigated a return to formalism in Process jurisprudence and Law and Economics, which was followed in turn by a realist revival in contemporary Critical jurisprudence, and so on.” Thomas C. Grey, *Modern American Legal Thought*, 106 *Yale L.J.* 493, 508 (1996) (reviewing Duxbury, *supra* note 178).

¹⁸⁰ For (just a sample of) seminal pieces in the law and economics literature, see R.H. Coase, *The Problem of Social Cost*, 3 *J.L. & Econ.* 1 (1960); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 *Yale L.J.* 499 (1961) [hereinafter Calabresi, *Risk Distribution*]; Richard A. Posner, *Economic Analysis of Law* (1972); Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (1970) [hereinafter Calabresi, *The Costs of Accidents*].

¹⁸¹ See Calabresi, *The Costs of Accidents*, *supra* note 180, at 32; see also Gary Lawson, *Efficiency and Individualism*, 42 *Duke L.J.* 53, 53 (1992) (defining law and economics as “the systematic application of neoclassical price theory to legal problems”).

¹⁸² Christian Kirchner, *A “European Civil Code”: Potential, Conceptual, and Methodological Implications*, 31 *U.C. Davis L. Rev.* 671, 678 (1998) (“[L]aw and economics, in its normative Chicago version, is supposed to . . . produce value judgments on the efficiency of legal rules.”).

¹⁸³ See Ronald M. Dworkin, *Is Wealth a Value?*, 9 *J. Legal Stud.* 191, 198–99 (1980).

¹⁸⁴ See Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 *J. Legal Stud.* 103, 119 (1979).

¹⁸⁵ Samuel Issacharoff, *Can There Be a Behavioral Law and Economics?*, 51 *Vand. L. Rev.* 1729, 1731 (1998) (“At the heart of law and economics stands the idea that comparisons of utility, the cost and benefit of engaging in a particular course of conduct for a particular actor, can discipline the analysis of how legal rules should be structured.”).

Or take the critical legal studies movement.¹⁸⁶ It reflects a profoundly different ideology than the law and economics school, but it too stems from the realist tradition and, specifically, a skepticism of legal objectivity.¹⁸⁷ For the critical scholar, law is a tool for achieving a more just society, one that can embody and promote genuine equality by eliminating economic, social, political, and legal hierarchies.¹⁸⁸ Determining what constitutes settled law for the critical legal studies movement requires careful consideration of how an earlier outcome bolstered or combated entrenched power hierarches, and only decisions that foster social progress should be considered settled.¹⁸⁹

Finally, consider living constitutionalism, an illustrative contrast with its chief theoretical competitor, constitutional originalism. As we discussed earlier, originalism is a formalist interpretive theory insofar as it relies on the Constitution itself (specifically, that document's original public meaning). Living constitutionalism explicitly rejects the claim that "the Constitution is just the document that is under glass in the National Archives."¹⁹⁰ Rather, its proponents, including jurists like Justice

¹⁸⁶ See generally Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 *Harv. L. Rev.* 561 (1983) (seminal tome).

¹⁸⁷ See *id.* at 564–66; see also Jonathan Turley, *Introduction: The Hitchhiker's Guide to CLS*, Unger, and *Deep Thought*, 81 *Nw. U. L. Rev.* 593, 600 (1987) ("If CLS has a single rallying cry it is a rejection of formalism, the belief that society can resolve disputes according to a value-neutral system of rules and doctrine."); Roberto Mangabeira Unger, *Law in Modern Society* 180–81 (1976) (arguing that every legal argument must "decide, at least implicitly, which of the competing sets of belief in a given society should be given priority").

¹⁸⁸ Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 *Harv. C.R.-C.L. L. Rev.* 301, 302 (1987) ("The CLS critique of the social order demonstrates that current arrangements and distributions of power are neither necessary nor natural, and that hierarchy irrationally places some at the top while it sacrifices those at the bottom."); Thomas Ross, *Introducing Law*, 87 *Colum. L. Rev.* 859, 869 (1987) (reviewing Stephen J. Burton, *An Introduction to Law and Legal Reasoning* (1985)); see generally James Boyle, *Critical Legal Studies* (1992) (elucidating core tenets of critical theory).

¹⁸⁹ Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 *UCLA L. Rev.* 443, 452 (2001) (articulating the critical legal studies movement's aim to "demystify the power hierarchies embedded in liberal individual rights discourse by showing the indeterminacy of legal rules and the inherently political choices underlying the current legal order"). For pioneering works employing this normative aim, see Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (1989); Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 *Yale L.J.* 2117 (1996); Charles W. Mills, *The Racial Contract* (1999).

¹⁹⁰ David A. Strauss, *The Living Constitution* 34 (2010); see also Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 *Nw. U. L. Rev.* 549, 592 (2009).

Breyer¹⁹¹ and the late Justice Ginsburg,¹⁹² assert that the “small-*c* constitution” includes not just the written document, but also the amalgam of “precedents, traditions, and understandings” that have evolved in common-law-like fashion over the centuries.¹⁹³ Much of the small-*c* constitution is thus external to the document itself. Although living constitutionalism does not rely on the idea that there is a single correct answer to any constitutional question, it does claim that precedents and customs act as a meaningful constraint. So, a correct (and normatively settled) decision is one that falls within the narrow window of discretion permitted by these precedents.¹⁹⁴

From the perspective of settled law, the normative realist framework might strike someone as odd, at least initially. After all, a theory that relies on external metrics necessarily considers how the real world evolves, and the right answer to a legal question based on any of these metrics will evolve concomitantly. So, if the right answer is subject to change, perhaps in the near future, can it meaningfully be settled? In short, yes. The only reason that this argument might seem strange is if one assumes that settled law denotes an ineffable permanence. But, as we have contended throughout this Article, *settled law* is always a term of art. Although there is perhaps a trans-conceptual stickiness to formalism’s insistence on eternally correct answers, realism makes no equivalent claim. Instead, normative realism simply dictates that law should be considered settled for as long as it is considered right. A legal answer that is emphatically correct, and therefore settled, for decades or even centuries might eventually lose that status in light of sociocultural progress, as the debate about the death penalty illustrates.

Despite normative realism’s structural indeterminacy, legal actors readily tap into its essential logic. In fact, it is one of the most commonly invoked frameworks. During Justice Gorsuch’s confirmation hearings, for example, Senators Franken and Coons insisted that *Obergefell v. Hodges*,¹⁹⁵ which announced a constitutional right to same-sex marriage,

¹⁹¹ See *NLRB. v. Noel Canning*, 573 U.S. 513, 557 (2014).

¹⁹² Jonathan Faust, *Law in a Changing Society: A Conversation with RBG*, Stan. Pol. (Feb. 8, 2017), <https://stanfordpolitics.org/2017/02/08/interview-ruth-bader-ginsburg/> [<https://perma.cc/YM2S-GZ25>].

¹⁹³ Strauss, *supra* note 190, at 35.

¹⁹⁴ See *id.* at 39–40.

¹⁹⁵ 576 U.S. 644 (2015).

was “settled law.”¹⁹⁶ As is usually the case when people invoke the term, they did not explain exactly what they meant by this description, but in context, they almost assuredly were making a normative claim about *Obergefell*’s correctness using external benchmarks, including the decision’s sociocultural ramifications. While their claim would be in tension with formalist theories, it fits comfortably in the normative realist framework.

C. The Legal Process Framework

The final framework, based on the legal process school, is probably the most intuitive. It purports to be agnostic about a decision’s substantive outcome by focusing instead on procedural legitimacy, and it overwhelmingly corresponds to the pure process-based arguments that we noted at the outset, albeit with more theoretical heft. Legal actors often couch their arguments about settled law in legal process theory’s core tenets, but the framework lacks genuine explanatory power.

Legal process theory profoundly influenced the development of the law during the twentieth century. According to this school of thought, the structure, procedural design, and methodological features of a judicial system ultimately imbue it with legitimacy.¹⁹⁷ That is, rather than claiming that a particular legal decision was right because it achieved the correct substantive result, the legal process school focuses on the *methodology* used to produce the decision.¹⁹⁸ Did a court of duly appointed judges render the decision? Did the judges employ an appropriate decision-making approach when reaching their decision?

¹⁹⁶ Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch To Be an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 115th Cong. 173 (2017) (statement of Sen. Franken); *id.* at 325 (statement of Sen. Coons).

¹⁹⁷ Indeed, a core tenet of legal process thought—the principle of “institutional settlement”—suggests that “[l]aw should allocate decisionmaking to the institutions best suited to decide particular questions, and that the decisions arrived at by those institutions must then be respected by other actors in the system, even if those actors would have reached a different conclusion.” Ernest A. Young, *Institutional Settlement in a Globalizing Judicial System*, 54 *Duke L.J.* 1143, 1149–50 (2005).

¹⁹⁸ Edward L. Rubin, *Legal Reasoning, Legal Process and the Judiciary as an Institution*, 85 *Calif. L. Rev.* 265, 273 (1997) (reviewing Cass R. Sunstein, *Legal Reasoning and Political Conflict* (1996)) (identifying the legal process notion that “law can be treated as a self-contained, doctrinal system, and that procedural mechanisms can be substituted for substantive values”).

Pegging legitimacy to procedure and institutional structure preserves the rule of law's authority in a morally pluralistic society.¹⁹⁹

As a theoretical matter, legal process theory translates well into the settled law context. Without a central fixation on achieving the “right” result in a case,²⁰⁰ the legal process framework essentially merges the descriptive and normative accounts of settled law. That is, the legal process framework sees no daylight between what *is* settled law and what *should be* settled law. Instead, the law is and should be settled when a duly constituted court reaches a decision through an appropriate methodology. A decision would not be settled only if there is some institutional breakdown in constituting a court or some methodological deviation from judicial decision making through “reasoned elaboration.”²⁰¹

To see this framework in operation, return for a moment to *Roe* and *Citizens United*.²⁰² For the legal process theorist, both decisions will qualify as settled law, as a majority of Justices on a duly constituted Supreme Court resolved those cases through principled, reasoned decision making. One can surely quibble with whether the majority in either case marshalled the best possible reasons or even reached the right result. But for a legal process theorist, those objections are wide of the mark. The Court in both cases used the familiar tools of legal reasoning, rather than flipping a coin or baldly stating a policy preference that was untethered to constitutional text, precedent, and logic. For a legal process theorist, that is enough. So, because those decisions accorded with dictates of legal process, they are determinative.²⁰³

¹⁹⁹ Tom R. Tyler, *Why People Obey the Law* 73 (Princeton Univ. Press 2006) (1990) (“People may believe specific decisions are wrong, even wrongheaded, and individual judges unworthy of their offices and still continue to support the court if they respect it as an institution that is generally impartial, just and competent.” (internal citation omitted)); Daniel Markovits, *Adversary Advocacy and the Authority of Adjudication*, 75 *Fordham L. Rev.* 1367, 1384 (2006).

²⁰⁰ Mark Tushnet & Timothy Lynch, *The Project of the Harvard Forewords: A Social and Intellectual Inquiry*, 11 *Const. Comment.* 463, 479 (1994) (“[L]egal process scholars believed . . . that ultimate questions of legal legitimacy depend[ed] on a vision of process divorced from substance and thereby protected from the corrosion of realist critique.” (internal quotation marks omitted)).

²⁰¹ Anthony J. Sebok, *Misunderstanding Positivism*, 93 *Mich. L. Rev.* 2054, 2099 (1995).

²⁰² *Citizens United v. FEC*, 558 U.S. 310 (2010); *Roe v. Wade*, 410 U.S. 113 (1973).

²⁰³ *Boyle v. Zacharie*, 31 U.S. (6 Pet.) 348, 348 (1832) (“Whatever principles are established in [an earlier] opinion, are to be considered no longer open for controversy, but the settled law of the court.”).

While the legal process framework offers a simple yet sophisticated definition of settled law, it actually has very little purchase for several reasons. First, it does not answer a key question. Even if a decision like *Roe* or *Citizens United* is legitimate under the legal process framework, is a duly constituted Supreme Court ever allowed to overrule precedent? The strongest version of the legal process claim would deny the Court that power precisely because the initial decision was legitimate and thus settled.

Second, and relatedly, the framework proves too much. Under a purely procedural view of settled law—unlike arguments rooted in the policies that justify stare decisis—any procedurally legitimate decision would be final, settled, and impervious to correction.²⁰⁴ It would leave no room for overruling even the likes of *Dred Scott v. Sandford*²⁰⁵ or *Plessy v. Ferguson*.²⁰⁶

Finally, despite the legal process framework's rhetorical cachet, it suffers from an obvious problem of insincerity and is a thinly veiled stand-in for normative arguments that a listener might not be willing to accept. So, for example, Senator Hatch, a longtime opponent of abortion, did not ask then-Judge Sotomayor whether she agreed substantively with *Gonzales v. Carhart*, the decision that upheld a partial-birth abortion ban as constitutional. Instead, he wanted her to agree that it was “settled law.”²⁰⁷ Similarly, Senator Coons sought the same assurance from then-Judge Gorsuch regarding *Obergefell*.²⁰⁸ Even though the Senators framed their arguments in legal process terms, this framework was functioning as a pretext.

III. WHY SETTLED LAW MATTERS

Theoretical clarity about settled law is far more than an exercise in linguistic precision. The idea pervades political discourse about judicial nominations, and it often plays a defining role in doctrines as disparate as

²⁰⁴ See Somin, *supra* note 22.

²⁰⁵ 60 U.S. (19 How.) 393 (1857).

²⁰⁶ 163 U.S. 537 (1896).

²⁰⁷ Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, To Be an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 111th Cong. 85 (2009) (statement of Sen. Hatch).

²⁰⁸ Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch To Be an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 115th Cong. 325 (2017) (statement of Sen. Coons).

constitutional torts, standards of review, civil sanctions, and retroactivity. But despite its ubiquity, settled law often confounds more than it illuminates.

In this Part, we begin by demonstrating our taxonomy's power to clarify various doctrines, making them both more administrable and coherent. Qualified immunity offers an especially salient example. Courts have conspicuously tethered the doctrine to settled law, but they have done so in a way that seems to lead to contradictions and errors. The doctrine nicely illustrates how controlling law and settled law are distinct. Moreover, situating qualified immunity within two of the taxonomy's frameworks reveals how certain doctrinal quirks are actually integral to vindicating qualified immunity's overarching goals. We also suggest that the taxonomy has similar explanatory power with respect to other doctrines, including the "plain error" standard of review.

Finally, a clearer understanding of settled law can and should inform debates about the proper judicial role. For example, during recent Supreme Court confirmation hearings, politicians, nominees, and the general public have tended to use "settled law" to convey disparate ideas, leading to confusion and, even worse, allegations of bad faith. Clarity in terminology can prevent stakeholders from intentionally, or unintentionally, talking past one another. It can also lead to a more productive dialogue about the appropriate role of lower-court judges. Lower-court judges are of course constrained by controlling higher-court pronouncements, but settled law that has not yet become formally controlling also operates as an important constraint on the power, discretion, and legitimacy of lower courts.

A. Doctrinal Reform

1. Qualified Immunity

Of the doctrines that rely on settled law, qualified immunity does so most conspicuously. It underscores the pitfalls of conflating settled law and controlling law, and it illuminates the practical application of the taxonomy that we have developed. Moreover, it shows that identifying the reason for asking whether law is settled is a critical part of the doctrinal analysis.

The doctrinal framework of Section 1983²⁰⁹ and qualified immunity is relatively clear, at least at a high level of abstraction. Section 1983 creates a cause of action when a state official (or, more precisely, someone acting “under color of” state law) violates a person’s federal civil rights.²¹⁰ The Section 1983 plaintiff may sue an official for money damages, but most executive officials, including police officers, enjoy qualified immunity.²¹¹ As the Supreme Court has refined the doctrine over the years, it has expressly tried to strike a balance between competing values. On the one hand, Section 1983 vindicates “[t]he public interest in deterrence of unlawful conduct and in compensation of victims”;²¹² on the other, executive officials do not incur personal liability unless they violate “clearly established” rights.²¹³ So, in order to overcome a defendant’s qualified immunity, the plaintiff must show not only that an official’s action violated a federally guaranteed right but also that “the legal rules . . . were ‘clearly established’ at the time [the action] was taken.”²¹⁴

Whether a right is “clearly established” overwhelmingly turns on settled law. In fact, the Supreme Court has explicitly defined the “clearly established” standard in terms of “settled law.”²¹⁵ But what precisely does that term mean in this context?

For decades, the Supreme Court has reaffirmed that law can be settled (1) through “cases of controlling authority” in the relevant jurisdiction or (2) through “a consensus of cases of persuasive authority.”²¹⁶ It has signaled that the first option, “controlling” authority, largely tracks the way that we have defined that term—precedent that is binding in a particular jurisdiction. So, for example, the Court has looked to Tenth Circuit precedent when determining whether certain rights were “clearly

²⁰⁹ 42 U.S.C. § 1983.

²¹⁰ The modern interpretation of § 1983 traces back to *Monroe v. Pape*, 365 U.S. 167 (1961), which turned the long dormant statute into a potent weapon for enforcing civil rights by bringing state officials’ *abuse* of authority within § 1983’s ambit.

²¹¹ See *Scheuer v. Rhodes*, 416 U.S. 232, 247–48 (1974) (describing qualified immunity).

²¹² *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982).

²¹³ *Id.* at 818 (holding government officials immune if “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known”).

²¹⁴ *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (quoting *Harlow*, 457 U.S. at 818).

²¹⁵ See, e.g., *District of Columbia v. Wesby*, 138 S. Ct. 577, 591 (2018) (“The rule applied by the panel majority was not clearly established because it was not ‘settled law.’”) (quoting *Hunter v. Bryant*, 502 U.S. 224, 228 (1991)); *Hunter*, 502 U.S. at 228 (“[T]he court should ask whether the agents acted reasonably under settled law in the circumstances . . .”).

²¹⁶ *Wilson v. Layne*, 526 U.S. 603, 617 (1999); see also *Wesby*, 138 S. Ct. at 589–90.

established” in Colorado.²¹⁷ Moreover, it has observed that “district court decisions—unlike those from the courts of appeals—do not necessarily settle constitutional standards or prevent repeated claims of qualified immunity” because district courts never create binding precedent.²¹⁸

Although the Court consistently leaves open various avenues by which law can be settled (and a right “clearly established”), it usually talks the talk of controlling law, which it at times suggests is the touchstone in this area. A number of lower courts have followed suit. For example, in determining whether a right is clearly established, some have focused almost exclusively on precedents of the Supreme Court and the relevant federal court of appeals.²¹⁹ Others have taken a slightly more expansive approach, but only to consult precedent of other courts that create binding precedent within a jurisdiction. Thus, for example, the Eleventh Circuit looks exclusively to “decisions of the U.S. Supreme Court, the United States Court of Appeals for the Eleventh Circuit, and the highest court of the pertinent state.”²²⁰ And in a similar vein, a number of lower courts

²¹⁷ See *Reichle v. Howards*, 566 U.S. 658, 665–66 (2012); cf. *Wesby*, 138 S. Ct. at 591 n.8 (“We have not yet decided what precedents—other than our own—qualify as controlling authority for purposes of qualified immunity.”).

²¹⁸ *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011).

²¹⁹ See, e.g., *Pabon v. Wright*, 459 F.3d 241, 255 (2d Cir. 2006) (holding that only Supreme Court and Second Circuit precedent can clearly establish a right); *Anderson v. Recore*, 317 F.3d 194, 197 (2d Cir. 2003) (holding the same); see also *Virgili v. Gilbert*, 272 F.3d 391, 393 (6th Cir. 2001) (holding that “precedent from other circuits may ‘clearly establish’ a right only in extraordinary cases”).

²²⁰ *Marsh v. Butler County*, 268 F.3d 1014, 1032–33 n.10 (11th Cir. 2001); see also, e.g., *Vinyard v. Wilson*, 311 F.3d 1340, 1351 n.22 (11th Cir. 2002) (citing *Marsh* for the same proposition). Judge Brown of the D.C. Circuit has suggested a similar approach. See *Corrigan v. District of Columbia*, 841 F.3d 1022, 1041 (D.C. Cir. 2016) (Brown, J., dissenting).

The Fourth Circuit “look[s] ordinarily to ‘the decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the case arose.’” *Owens ex rel. Owens v. Lott*, 372 F.3d 267, 279 (4th Cir. 2004) (quoting *Edwards v. City of Goldsboro*, 178 F.3d 231, 251 (4th Cir. 1999)). Unlike the Eleventh Circuit, though, the Fourth Circuit does not view controlling law as the sole means by which rights can be clearly established. See, e.g., *Booker v. S.C. Dep’t of Corr.*, 855 F.3d 533, 543 (4th Cir. 2017) (noting that in the absence of controlling authority, rights could be established through a demonstration either that a general constitutional rule applied with “obvious clarity,” or that there was a consensus of persuasive authority).

The Supreme Court itself has taken this approach but without comment. See *Stanton v. Sims*, 571 U.S. 3, 10 (2013) (per curiam) (finding qualified immunity based significantly on the fact that “two opinions of the [California] State Court of Appeal affirmatively authorized” the officer’s conduct).

have treated district court precedent as categorically irrelevant because it is never binding.²²¹

How, then, is qualified immunity really about settled law (as we contend) when all of these tests have the ring of controlling law? Courts are conflating the two concepts, and, in one important respect, that move is entirely understandable. When a Supreme Court precedent is on point, that precedent is binding on a lower court and thus controlling. It can also be settled under many (and potentially all) of the definitions within our taxonomy. For example, a precedent that the Court is highly unlikely to reverse would be settled from the descriptive realist perspective and also controlling throughout the country. Without context, a legal actor does not necessarily know whether she should care about a Supreme Court precedent because it is *controlling* or because it is *settled*.

In another (and more insidious) respect, courts' purported focus on controlling law in the qualified immunity context is really about settled law. The Supreme Court has said that the usual route by which law becomes clearly established is through "cases of controlling authority in [the plaintiffs'] jurisdiction at the time of the incident."²²² This is not necessarily limited to federal courts that create binding precedent. The Supreme Court has consulted binding state court cases to determine whether a rule is clearly established (and thus settled) in that state.²²³ Moreover, even some of the lower federal courts that seem least inclined to look beyond their own precedents explicitly acknowledge that a state's highest court can clearly establish a right.²²⁴ Structurally this makes sense. Federal and state courts presumptively have concurrent jurisdiction to adjudicate most federal law,²²⁵ including Section 1983, and neither takes precedence over the other.²²⁶ So, for example, the U.S. Court of Appeals for the Fourth Circuit and the Supreme Court of Virginia both have the

²²¹ See, e.g., *Boyd v. Owen*, 481 F.3d 520, 527 (7th Cir. 2007) (citing *Anderson v. Romero*, 72 F.3d 518, 525 (7th Cir. 1995)); see also *Kalka v. Hawk*, 215 F.3d 90, 100 (D.C. Cir. 2000) (Tatel, J., concurring in part and concurring in the judgment) (noting that district court opinions neither "establish the law of the circuit" nor "even establish the law of the district").

²²² *Wilson v. Layne*, 526 U.S. 603, 617 (1999).

²²³ See *Stanton*, 571 U.S. at 9–10 (consulting California Court of Appeal decisions).

²²⁴ See *supra* note 220 and accompanying text.

²²⁵ *Tafflin v. Levitt*, 493 U.S. 455, 458–60 (1990).

²²⁶ See, e.g., David L. Shapiro, *State Courts and Federal Declaratory Judgments*, 74 Nw. U. L. Rev. 759, 771 (1979) (arguing that lower "federal courts are no more than coordinate with the state courts on issues of federal law").

power (and the duty²²⁷) to interpret Section 1983, and both create binding precedent throughout Virginia. Superficially, this approach might look like an application of controlling law. After all, a Virginia official should be aware of *all* binding precedent, in part because she cannot know *ex-ante* whether she will be sued in state or federal court.

The conceptual problem—illustrating that the qualified immunity inquiry doesn't really turn on controlling law—is that Fourth Circuit precedent is binding and thus controlling only on *federal* courts in Virginia (and elsewhere in the circuit), whereas Virginia Supreme Court precedent is binding only on *state* courts. So, if a Virginia official is sued under Section 1983 in federal court, that court might find that Virginia Supreme Court precedent has clearly established a right. But this conclusion has nothing to do with controlling law. Rather, the state court decision, while not binding on federal courts, has provided Virginia officials with clear notice of their obligations toward citizens. Such notice, rather than the intricacies of how binding precedent works, is the gravamen of whether qualified immunity applies.²²⁸

Some courts have tied themselves into even worse conceptual knots by misunderstanding why certain precedents do (and don't) matter. For example, the Sixth Circuit has held that “in the ordinary instance, to find a clearly established constitutional right, a district court must find binding precedent by the Supreme Court, its court of appeals *or itself*.”²²⁹ The Second Circuit similarly has suggested that district courts' power to clearly establish rights is confined to their geographic jurisdiction.²³⁰ On what theory can a district court, which of course does not create binding precedent, clearly establish a right but only within its own geographic boundaries? The court of appeals judges apparently extrapolated that the geographic sweep of precedent—both binding and persuasive—must inform the qualified immunity analysis. Years after these odd pronouncements, a similar confusion earned a vintage acerbic rebuke from Justice Scalia.²³¹

²²⁷ See *Howlett v. Rose*, 496 U.S. 356, 380–81 (1990) (holding that Florida state courts may not decline jurisdiction over § 1983 actions against state entities).

²²⁸ See, e.g., *Hope v. Pelzer*, 536 U.S. 730, 739–40 (2002) (emphasizing § 1983 defendants' “right to fair notice”).

²²⁹ *Ohio Civ. Serv. Emp. Ass'n v. Seiter*, 858 F.2d 1171, 1177 (6th Cir. 1988) (emphasis added).

²³⁰ See *Jermosen v. Smith*, 945 F.2d 547, 551 (2d Cir. 1991).

²³¹ See *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (chastising court of appeals for finding that district court dictum that “*call[ed] out Ashcroft by name!*” was sufficient to put Attorney

Thinking about qualified immunity in terms of settled law—rather than controlling law or geography—ameliorates the doctrine’s apparent contradictions and inscrutability. This is perhaps easiest to see by considering the second way that plaintiffs can show a clearly established right—through a “consensus of cases of persuasive authority.”²³² The persuasive authority route is revealing on a number of levels. In addition to elucidating the role of settled law, it demonstrates that the reason for asking whether law is settled proves critically important to the doctrinal analysis. And it offers one of the clearest examples of the rare situation in which law can be *settled* even if it isn’t *controlling*.

Begin with *why* courts and litigants care whether a right is clearly established. In many cases, a court will have concluded that an official has violated a citizen’s civil rights.²³³ Immunity nonetheless is appropriate if the official did not have fair warning that her actions would violate someone’s rights.²³⁴ Thus, the inquiry as to whether the law was settled serves a notice-giving function. If different courts have defined rights in different ways, an official might not know what her obligations are, and that is the exact scenario in which officials enjoy immunity.²³⁵ But the opposite situation is also possible—that courts have generated a “robust consensus”²³⁶ on a matter and thereby put officials on notice that certain conduct is unlawful. More concretely, the precedents, despite not being controlling law, warn officials that certain conduct is unlawful and that they will be liable for damages if they engage in it.

In this way, non-controlling precedent is relevant to the qualified immunity analysis because it can allow an official to predict the likely consequences of certain actions. Consider South Carolina prison officials who are upset that an inmate has filed a prison grievance under applicable procedures and are contemplating certain retaliatory measures. No binding Fourth Circuit precedent is directly on point. Yet the Second, Sixth, Seventh, Eighth, Ninth, Eleventh, and D.C. Circuits all have held

General on notice and clearly establish a right) (citations omitted) (emphasis, of course, Justice Scalia’s).

²³² Wilson v. Layne, 526 U.S. 603, 617 (1999).

²³³ See Pearson v. Callahan, 555 U.S. 223, 236–43 (2009) (giving courts discretion to decide immunity question before deciding whether a right existed).

²³⁴ See, e.g., Tolan v. Cotton, 572 U.S. 650, 656 (2014); Hope v. Pelzer, 536 U.S. 730, 739–40 (2002).

²³⁵ See, e.g., Maciariello v. Sumner, 973 F.2d 295, 298 (4th Cir. 1992) (holding that “[o]fficials are not liable for bad guesses in gray areas”).

²³⁶ *al-Kidd*, 563 U.S. at 742 (citation and quotation marks omitted).

that such retaliation would violate an inmate's rights under the First Amendment's Petition Clause.²³⁷ And there is no precedent going the other way.²³⁸ What do those prison officials expect will happen if they retaliate against the inmate and then are sued in a court in the Fourth Circuit? The "robust consensus of persuasive authority"²³⁹ surely gives them more than an inkling.

The analysis calls for classic Holmesian prediction (or "bad man") theory. Functionally, qualified immunity's concern for giving officials "fair warning" corresponds to the descriptive realist framework, which regards law as settled when someone can predict to a high degree of certainty what the law will be in a future case.

From a predictive viewpoint, the existence (or absence) of controlling law is a red herring. True, stable Supreme Court precedent will be the most consequential data point, but not because it is controlling; instead, it has the highest predictive value and thereby offers the clearest warning. An official is also likely to consult precedents of the courts in which she acts and is most likely to be sued. So, in the earlier example, a Virginia official will look to precedents of federal and state courts in Virginia when trying to predict the outcome of a lawsuit, even though federal precedent interpreting Section 1983 is not controlling in state court or vice versa. Note also that geography is not determinative. While local precedent might help an official predict what will happen in those courts in future cases, precedent from much farther afield can also clarify and settle the law—again, in terms of prediction theory—which an official may disregard only at her peril.

Treating settled law—specifically, from the descriptive realist perspective—as the touchstone of qualified immunity has tremendous explanatory and conceptual power. It demonstrates why certain precedents, especially from the Supreme Court, are highly relevant. At the same time, it explains why the analysis does not perfectly track notions of binding precedent and thus why courts shouldn't fetishize controlling law, which might function, at best, as a rule of thumb to discern whether law is settled. Relatedly, the descriptive realist framework crystallizes why the settled or unsettled nature of law matters.

²³⁷ See *Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 544 (4th Cir. 2017).

²³⁸ See *id.* at 545 (observing that "the Third, Fifth, and Tenth Circuits have recognized an inmate's right to be free from retaliation for filing a grievance under the First Amendment (albeit without referencing a particular clause)").

²³⁹ *Id.* at 544 (internal quotation marks omitted).

And it trains courts' attention on the right questions as they navigate murky doctrinal waters. Among the most difficult questions is exactly how settled the law must be, and, on this score, courts vary significantly. At the strictest end of the spectrum, some courts have suggested that there is not a "consensus of persuasive authority" unless most courts of appeals have weighed in on a particular issue²⁴⁰ or if the consensus is not truly unanimous.²⁴¹ At the other end, the Eighth Circuit candidly has "taken a broad view of what constitutes 'clearly established law,'"²⁴² sometimes finding consensus on scant authority.²⁴³ Most courts fall somewhere in between.²⁴⁴ Notwithstanding differences among courts, these questions about fair notice and the law's settledness are—and should be—the heart of the analysis.

The taxonomy of settled law that we have developed does not necessarily tell courts how to allocate the costs of mistakes between victims and officials or how much warning is required before an official must pay for such mistakes. But settled law does offer some lessons. It clarifies precedent's notice-giving function and thereby suggests that courts should use those precedents in a more global way in order to ascertain whether the state of the law is genuinely settled. Absolute certainty is not the standard. But neither should a court cherry pick a few examples to reach its preferred conclusion. This suggests an "all in" approach. Accordingly, courts should not categorically reject the value of district court decisions. Such precedents are relevant not because they are binding (they never are) or because of the issuing court's geographic jurisdiction. Rather, in sufficient numbers they can paint a clearer picture

²⁴⁰ See, e.g., *Panagoulakos v. Yazzie*, 741 F.3d 1126, 1131 (10th Cir. 2013) (finding no consensus because "[t]he majority of courts have never imposed such a duty"); see also *Morrow v. Meachum*, 917 F.3d 870, 879–80 (5th Cir. 2019) (six circuits insufficient to establish consensus).

²⁴¹ See, e.g., *Denius v. Dunlap*, 209 F.3d 944, 957–58 (7th Cir. 2000).

²⁴² *Boswell v. Sherburne County*, 849 F.2d 1117, 1121 (8th Cir. 1988).

²⁴³ See, e.g., *Hayes v. Long*, 72 F.3d 70, 74 (8th Cir. 1995) (relying on one district court opinion and two out-of-circuit precedents); see also *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1095–96 (9th Cir. 2013) (relying on one Tenth Circuit and two district court opinions).

²⁴⁴ See, e.g., *Figgs v. Dawson*, 829 F.3d 895, 906 (7th Cir. 2016) (citing two Ninth Circuit and one Third Circuit case in finding law clearly established); *Williams v. Bitner*, 455 F.3d 186, 192–93 (3d Cir. 2006) (finding law clearly established by the only three reported court of appeals decisions on point); *Daugherty v. Campbell*, 935 F.2d 780, 784–87 (6th Cir. 1991) (finding law clearly established by precedent from First, Fifth, and Eighth Circuits as well as Sixth Circuit dicta).

of what the law is and will be.²⁴⁵ They can, in other words, help establish a genuine consensus that, in turn, enables officials to confidently predict court behavior.

Finally, we note one manifestation of qualified immunity that does not cohere as readily with the descriptive realist framework of settled law but that the taxonomy still explains. On occasion, the Supreme Court and lower courts note that law can be clearly established, and thus settled, even without any precedent. That might seem paradoxical, given courts' insistence on fair warning, but some conduct is so "outrageous"²⁴⁶ or bespeaks such "obvious cruelty"²⁴⁷ that it is blatantly unconstitutional. Judge Posner hypothesized a situation in which welfare officials sell children into slavery and suggested that "it does not follow that if such a case arose, the officials would be immune from damages liability because no previous case had found liability in those circumstances."²⁴⁸ Or, to put the matter more succinctly, "[t]he easiest cases don't even arise."²⁴⁹

One might argue that these cases actually do fit into the descriptive realist framework. Anyone could easily predict how a court would rule in Judge Posner's hypothetical child slavery case. But this category of cases—settled without precedent, one might say—belongs more naturally in one of the normative frameworks. To some questions there is a right answer, and (almost) everyone knows what it is.

Several courts have relied on this theory to find that officials were not entitled to qualified immunity when they engaged in exceptionally egregious conduct.²⁵⁰ Moreover, the Fourth Circuit has eloquently explained why such cases, even in the absence of precedent, still cohere with what we have described as the normative formalist framework of

²⁴⁵ A global approach also means that a losing party at the district court level cannot, by declining to appeal, prevent that decision from becoming part of the broader qualified immunity analysis. This seems eminently sensible, insofar as qualified immunity aims to vindicate fair notice rather than structural concerns, like judicial hierarchy.

²⁴⁶ *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377–78 (2009).

²⁴⁷ *Hope v. Pelzer*, 536 U.S. 730, 745 (2002).

²⁴⁸ *K.H. v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990).

²⁴⁹ *Id.*

²⁵⁰ See, e.g., *Guertin v. Michigan*, 912 F.3d 907, 933 (6th Cir. 2019) (holding that officials involved in Flint Water Crisis who took "affirmative steps to systematically contaminate a community through its public water supply" were complicit in "government invasion of the highest magnitude"); *Schneyder v. Smith*, 653 F.3d 313, 330 (3d Cir. 2011) (describing prosecutor as attempting to incarcerate a material witness indefinitely without a court's reauthorization); *McDonald v. Haskins*, 966 F.2d 292, 295 (7th Cir. 1992) (describing officer's "holding a gun to the head of a 9-year-old and threatening to pull the trigger," despite the fact that the child posed no threat to anyone).

settled law: “The absence of ‘a prior case directly on all fours’ here speaks not to the unsettledness of the law, but to the brashness of the conduct.”²⁵¹

2. Plain Error

Appellate courts often invoke settled law when they apply the “plain error” standard of review, which governs “when a party seeks an appellate remedy for error that was not properly preserved in the trial court.”²⁵² In defining what counts not just as an error, but one that is plain—meaning “obvious” or “clear”²⁵³—the Supreme Court²⁵⁴ and each circuit²⁵⁵ have explicitly relied on the concept of settled law.

As with qualified immunity, courts dealing with plain error frequently link the notions of controlling and settled law. For example, many courts hold that an error is plain “when the settled law of the Supreme Court or this circuit establishes that an error has occurred.”²⁵⁶

Although this language is redolent of controlling law, we contend that plain error analysis, particularly in the criminal law setting, is (again) fundamentally a question of settled law. Courts’ framing of the legal issue as well as the underlying logic of plain error analysis strongly suggest as much.

First, several courts of appeals have expressly left open the possibility that they could find plain error even “in the absence of controlling

²⁵¹ *Bellotte v. Edwards*, 629 F.3d 415, 424 (4th Cir. 2011) (quoting *Pinder v. Johnson*, 54 F.3d 1169, 1173 (4th Cir. 1995) (en banc)).

²⁵² See Harry T. Edwards & Linda A. Elliott, *Federal Courts Standards of Review* 91 (2007); see also Fed. R. Crim. P. 52(b).

²⁵³ See *United States v. Olano*, 507 U.S. 725, 734 (1993).

²⁵⁴ See *Johnson v. United States*, 520 U.S. 461, 468 (1997) (defining plain error to mean that “the law at the time of trial was settled and clearly contrary to the law at the time of appeal”).

²⁵⁵ See *United States v. Ríos-Hernández*, 645 F.3d 456, 463 n.4 (1st Cir. 2011); *United States v. Gamez*, 577 F.3d 394, 400 (2d Cir. 2009); *United States v. Fraser*, 42 F. App’x 532, 534 (3d Cir. 2002); *United States v. Carthorne*, 726 F.3d 503, 516 (4th Cir. 2013); *United States v. Medina-Mendoza*, 743 F. App’x 542, 542 (5th Cir. 2018); *United States v. Yancy*, 725 F.3d 596, 600 (6th Cir. 2013); *United States v. Carraway*, 612 F.3d 642, 647 (7th Cir. 2010); *United States v. Pirani*, 406 F.3d 543, 550 (8th Cir. 2005) (quoting *Johnson*, 520 U.S. at 466–67); *United States v. Wilde*, 674 F. App’x 671, 673 (9th Cir. 2017); *United States v. Whitney*, 229 F.3d 1296, 1309 (10th Cir. 2000); *United States v. Maragh*, 189 F.3d 1315, 1316 (11th Cir. 1999); *United States v. Askew*, 88 F.3d 1065, 1068 (D.C. Cir. 1996).

²⁵⁶ *United States v. Neal*, 101 F.3d 993, 998 (4th Cir. 1996) (internal quotations omitted); see also, e.g., *United States v. Whab*, 355 F.3d 155, 158 (2d Cir. 2004); *United States v. Lejarde-Rada*, 319 F.3d 1288, 1291 (11th Cir. 2003).

authority” from the Supreme Court or their own circuits.²⁵⁷ Echoing language from the qualified immunity caselaw, these courts recognize that a legal rule can become clear or obvious through a consensus of persuasive authority.²⁵⁸ And, in fact, appellate courts occasionally find that, despite the lack of binding precedent, an error was obvious based on overwhelming persuasive authority.²⁵⁹

Second, the purpose of plain error review suggests that the analytical touchstone really is settled law. Here again, a key part of the analysis is figuring out *why* courts care if the law is settled. The Supreme Court has strongly indicated that the plain error inquiry does not actually serve to protect a criminal defendant, at least not in the first instance.²⁶⁰ From a defendant’s perspective, the error committed by a lower court is exactly the same, regardless of whether the defendant preserved the issue, yet the standard of review shifts based on the defendant’s litigation behavior. Why not allow all alleged errors to be reviewed under the same standard (if accuracy is the goal) or deem all unpreserved challenges forfeited (if the system wants to encourage timely objections)? In other words, why does it matter whether the error contravened settled law?

Answering these questions, the Supreme Court has held that appellate courts “should correct a plain forfeited error affecting substantial rights if the error ‘seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.’”²⁶¹ On this view, the judicial system can live with most errors, particularly if the defendant does not raise an objection. Usually, the loss is the defendant’s alone. But some errors are grievously intolerable because they have the potential to shake public confidence in the judicial system’s basic fairness and integrity. Plain error review arguably targets this precise situation by mitigating an abjectly “wrong”

²⁵⁷ *Carthorne*, 726 F.3d at 516 n.14 (citing *Neal*, 101 F.3d at 998).

²⁵⁸ See *United States v. Smith*, 815 F.3d 671, 675 (10th Cir. 2016); see also, e.g., *United States v. Valdivia*, 680 F.3d 33, 42 (1st Cir. 2012).

²⁵⁹ See, e.g., *United States v. Hope*, 545 F.3d 293, 296 (5th Cir. 2008) (finding plain error based on “confluence” of persuasive authority from five circuits); *United States v. Gore*, 154 F.3d 34, 47 (2d Cir. 1998) (relying on “the uniform holdings of our sister circuits” to find plain error).

²⁶⁰ See *United States v. Young*, 470 U.S. 1, 15 (1985) (noting that plain error review primarily seeks to protect “judicial proceedings”).

²⁶¹ *United States v. Olano*, 507 U.S. 725, 736 (1993) (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)); cf. Jeffrey L. Lowry, Note, Plain Error Rule—Clarifying Plain Error Analysis Under Rule 52(b) of the Federal Rules of Criminal Procedure, 84 J. Crim. L. & Criminology 1065, 1078–82 (1994) (arguing that *Olano* misconstrued the purpose of the plain error rule, which historically has focused on defects in the adversarial system).

decision's institutional effects. Correcting the error aims primarily to restore public confidence in the judiciary and only collaterally to benefit defendants.²⁶² And on that score, the nuances of controlling law are not really what identify the types of errors that jeopardize public confidence in the judicial system.

Within this framing, the Supreme Court has suggested that plain error review governs situations in which an obvious answer exists to a question, yet the trial court failed to reach that result. Accordingly, settled law in this context seems to refer to the taxonomy's two normative frameworks. These versions of settled law, rather than controlling law, correspond far more readily with the underlying purpose of plain error review: ferreting out errors that implicate institutional integrity. Controlling law is, at best, a rule of thumb that can assist the motivating inquiry; at worst, it is a distraction or perhaps even a mistake.

3. *And Many Others*

The qualified immunity and plain error contexts are merely the tip of the iceberg. Settled law plays a central role in a multitude of wide-ranging doctrines. Courts consider it when assessing the propriety of sanctions under Federal Rule of Civil Procedure 11,²⁶³ the reasonability of a sentence,²⁶⁴ the appropriateness of certifying a question for appeal,²⁶⁵ the existence of a Fourth Amendment violation,²⁶⁶ the extent to which law can be modified,²⁶⁷ fraudulent joinder,²⁶⁸ ineffective assistance of

²⁶² See, e.g., Troy D. Shelton, Note, Plain Error but No Plain Future: North Carolina's Plain Error Review After *State v. Lawrence*, 91 N.C. L. Rev. 2218, 2240 (2013) (noting situations in which plain error might harm the judicial system even if the error had no impact on the outcome of a defendant's case).

²⁶³ *Pro. Mgmt. Assocs. v. KPMG LLP*, 345 F.3d 1030, 1033 (8th Cir. 2003); *Ahmed v. Gateway Grp. One*, No. 12 Civ. 0524, 2012 WL 2061601, at *5 (E.D.N.Y. June 7, 2012).

²⁶⁴ *United States v. Brown*, 495 F. App'x 300, 303 (4th Cir. 2012).

²⁶⁵ *Holmes v. FEC*, 823 F.3d 69, 74 (D.C. Cir. 2016).

²⁶⁶ *Lincoln v. Scott*, 887 F.3d 190, 198 (5th Cir. 2018).

²⁶⁷ *United States v. Villanueva*, 174 F. App'x 216, 219 (5th Cir. 2006); *Traczyk v. Conn. Co.*, 190 A.2d 922, 924 (Conn. Super. Ct. 1963).

²⁶⁸ *Simpkins v. S. Wine & Spirits of Am., Inc.*, No. C-10-02353, 2010 WL 3155844, at *4 (N.D. Cal. Aug. 9, 2010).

counsel,²⁶⁹ retroactivity,²⁷⁰ and the viability of habeas claims.²⁷¹ Across these diverse contexts, our settled law taxonomy enables jurists, scholars, and practitioners to hone their reasoning and arguments, encouraging precision and clarity in what are often analytically muddy waters.

As we have emphasized throughout this Article, settled law does not necessarily mean the same thing across different contexts. The key lies in figuring out why courts care about whether law is settled in any given area, and the answer to that question in turn points to the appropriate analytical framework within the taxonomy.

B. Discursive Reform

Very little legal jargon makes its way into the popular imagination, yet “settled law” ranks among the few exceptions that have influenced modern discourse about the role of courts in society.²⁷² Lawyers, politicians, journalists, and everyday citizens consistently invoke the phrase for rhetorical and persuasive effect.²⁷³ It has graced the headlines of the *New York Times*²⁷⁴ and *Washington Post*²⁷⁵ and has been the focus

²⁶⁹ *Zapata v. United States*, 193 F. App’x 40, 43 (2d Cir. 2006); *Hamberg v. United States*, 675 F.3d 1170, 1173 (8th Cir. 2012).

²⁷⁰ *Redhouse v. Comm’r*, 728 F.2d 1249, 1251 (9th Cir. 1984); *Cookeville Reg’l Med. Ctr. v. Leavitt*, 531 F.3d 844, 849 (D.C. Cir. 2008).

²⁷¹ *Napoli v. United States*, 32 F.3d 31, 36–37 (2d Cir. 1994), on reh’g, 45 F.3d 680 (2d Cir. 1995).

²⁷² Perhaps the most notable exception is the *Miranda* warning, which almost anyone who has ever seen a police procedural can repeat verbatim.

²⁷³ Tim Hains, President Obama: Obamacare Is Settled and “Here To Stay” RealClearPolitics (Oct. 1 2013), https://www.realclearpolitics.com/video/2013/10/01/president_obama_obamacare_is_settled_and_here_to_stay.html [https://perma.cc/2AFC-NJ52]; Jim Brunner, Mayor Pete Buttigieg Brings His Presidential Campaign to Seattle, *Seattle Times* (Feb. 25, 2020, 1:18 PM), <https://www.seattletimes.com/seattle-news/politics/mayor-pete-buttigieg-brings-his-presidential-campaign-to-seattle> [https://perma.cc/4GEH-FV7J].

²⁷⁴ E.g., Sheryl Gay Stolberg, Roe Is ‘Settled Law,’ Kavanaugh Tells Collins. Democrats Aren’t Moved., *N.Y. Times* (Aug. 21, 2018), <https://www.nytimes.com/2018/08/21/us/politics/kavanaugh-collins-abortion.html> [https://perma.cc/86GS-RR6H].

²⁷⁵ E.g., Robert Barnes & Michael Kranish, Kavanaugh Advised Against Calling Roe v. Wade ‘Settled Law’ While a White House Lawyer, *Wash. Post* (Sept. 6, 2018, 11:51 AM), https://www.washingtonpost.com/politics/courts_law/kavanaugh-advised-against-calling-roe-v-wade-settled-law-while-a-white-house-lawyer/2018/09/06/f30216dc-b1df-11e8-a20b-5f4f84429666_story.html?utm_term=.15a2895528c3 [https://perma.cc/R66P-TRSE].

of popular think-pieces.²⁷⁶ Indeed, studies show that just about everyone has some intuitive working definition of settled law.²⁷⁷

But public discourse, like doctrine, has suffered from definitional imprecision, as people often use this single term to convey conceptually disparate ideas. Two people discussing “settled law” become ships passing in the night if, for example, one person is making a normative argument when the other is operating within one of the descriptive frameworks. The imprecision doesn’t just foment semantic frustration but also can lead to allegations of disingenuousness or bad faith. Nowhere is the bite of this discursive dilemma more prominent than in judicial confirmation hearings.

During their hearings before the Senate Judiciary Committee, Chief Justice Roberts²⁷⁸ and Justices Thomas,²⁷⁹ Breyer,²⁸⁰ Alito,²⁸¹ Sotomayor,²⁸² Kagan,²⁸³ Gorsuch,²⁸⁴ Kavanaugh,²⁸⁵ and Barrett²⁸⁶ all

²⁷⁶ E.g., Garrett Epps, *Kavanaugh’s Unsettling Use of ‘Settled Law’*, Atlantic (Sept. 3, 2018), <https://www.theatlantic.com/ideas/archive/2018/09/kavanaughs-unsettling-use-of-settled-law/569212/> [<https://perma.cc/8VS7-A5JQ>]; Nancy Northup, ‘Settled Law’ Is Not Enough To Protect *Roe v. Wade*, Hill (Sept. 4, 2018, 12:30 PM), <https://thehill.com/opinion/judiciary/404934-settled-law-is-not-enough-to-protect-roe-v-wade> [<https://perma.cc/VYU3-9P4D>].

²⁷⁷ Matthew Sheffield, *Poll: 56 Percent Say Supreme Court Should Consider *Roe v. Wade* Settled Law*, Hill (June 7, 2019), <https://thehill.com/hilltv/what-americas-thinking/447471-poll-56-percent-of-americans-say-supreme-court-should-consider> [<https://perma.cc/575J-BMKX>].

²⁷⁸ Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 145 (2005).

²⁷⁹ Nomination of Judge Clarence Thomas To Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 102d Cong. 184 (1991).

²⁸⁰ Nomination of Stephen G. Breyer To Be an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 103d Cong. 137 (1994).

²⁸¹ Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 352 (2006).

²⁸² Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong. 8 (2009).

²⁸³ The Nomination of Elena Kagan To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong. 65 (2010).

²⁸⁴ Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 115th Cong. 78 (2017).

²⁸⁵ C-SPAN, *supra* note 12; see also Epps, *supra* note 276; Northrup, *supra* note 276.

²⁸⁶ C-SPAN, *Barrett Confirmation Hearing, Day 2, Part 2, C-SPAN* (Oct. 13, 2020), <https://www.c-span.org/video/?476316-4/barrett-confirmation-hearing-day-2-part-2> [<https://perma.cc/C7SZ-CYRK>] (relevant exchange occurring from 1:30:05 to 1:30:50).

discussed or responded to questions about settled law. Senators asked the nominees about the status of key precedents, often pressing them to concede that past Supreme Court rulings to which the nominee might be hostile nonetheless constitute settled law.²⁸⁷ For example, Justice Alito answered one question by saying that the “status of independent agencies, I think, is now settled in the case law. . . . [They do not] violate the separation of powers.”²⁸⁸ Similarly, Justice Breyer asserted that the “constitutionality of the death penalty . . . is, in my opinion, settled law.”²⁸⁹

An erstwhile nominee’s statements before the Senate Judiciary Committee often seem in tension with his or her eventual decisions on the Court. In an apparent contradiction to his confirmation hearing statement, for instance, Justice Alito recently announced that “[i]f a majority of this Court were willing to reconsider the approach we have taken [to agencies] for the past 84 years, I would support that effort.”²⁹⁰ Similarly, Justice Breyer recently declared it “highly likely that the death penalty violates the Eighth Amendment.”²⁹¹ Commentators have noted other apparent contradictions by the Justices.²⁹²

²⁸⁷ For example, Senator Chris Coons asked then-Judge Neil Gorsuch during his Supreme Court Confirmation hearing, “[I]s *Casey* and this particular piece of the *Casey* holding indisputably settled law?” Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 115th Cong. 324 (2017) (statement of Sen. Coons). Similarly, Senator Klobuchar sought assurances from then-Judge Barrett that *Smiley v. Holm*, 285 U.S. 355 (1932), which concerned apportionment and elections, was “settled law.” C-SPAN, *supra* note 286.

²⁸⁸ Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 352 (2006) (statement of Alito, J.).

²⁸⁹ Nomination of Stephen G. Breyer To Be an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 103d Cong. 137 (1994) (statement of Breyer, J.).

²⁹⁰ *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Alito, J., concurring in the judgment).

²⁹¹ *Glossip v. Gross*, 576 U.S. 863, 946 (2015) (Breyer, J., dissenting).

²⁹² Senator Amy Klobuchar, for instance, recently criticized Justice Neil Gorsuch’s dissenting opinion in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), as having violated the fidelity that then-Judge Gorsuch pledged to precedent during his confirmation hearing. See C-SPAN, Supreme Court Nominee Brett Kavanaugh Confirmation Hearing, Day 3, Part 3, C-SPAN (Sept. 6, 2018), <https://www.c-span.org/video/?449706-2/supreme-court-nominee-brett-kavanaugh-confirmation-hearing-day-3-part-3> [<https://perma.cc/J898-CQHS>] (relevant exchange occurring from 48:40 to 49:05). Justice Kavanaugh also faced criticism for a perceived inconsistency between his confirmation hearing testimony and his previous legal analysis at the Office of Legal Counsel. See *supra* notes 12–15 and accompanying text

But are these contradictions at all? Our taxonomy of settled law suggests not (at least, potentially). Rather than blatant disingenuousness or bad faith, tension between confirmation hearing statements and Supreme Court votes is often the result of definitional imprecision. Instead of endorsing the constitutionality of independent agencies or the death penalty as a normative matter, Justices Alito and Breyer (respectively) more likely declared those holdings settled law because they did not foresee any danger that the Court would disturb them in the near future. That is, Justices Alito and Breyer simply responded to questioning about the settled status of a precedent by using the descriptive realist conceptual framework.²⁹³

Nominees across the political spectrum have adopted this tactic—responding to difficult normative questions about settled law by pivoting to a descriptive conceptual framework. For example, Chief Justice Roberts declared during his confirmation hearing that *Casey* is “a precedent of the Court, entitled to respect under principles of *stare decisis* . . . it is settled.”²⁹⁴ Although some might question whether this answer truthfully reflects Chief Justice Robert’s views on whether *Casey* is settled as a *normative* matter, there is no reason yet to suspect it is untruthful under the descriptive formalist settled law framework. So, too, Justice Sotomayor’s statement that *Gonzalez v. Carhart*’s partial-birth abortion ban is “settled law subject to the deference [the] doctrine of *stare decisis* would counsel.”²⁹⁵ And Justice Kagan’s statement that “*Citizens United* is settled law going forward. There is no question that it’s precedent, that it’s entitled to all the weight that precedent usually gets.”²⁹⁶ And Justice Gorsuch’s insistence that “*Casey* is settled law in the sense that it is a decision of the U.S. Supreme Court . . . entitled to the

(describing Kavanaugh’s seemingly contradictory statements about the Supreme Court’s abortion jurisprudence).

²⁹³ See *supra* Subsection II.B.1.

²⁹⁴ Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 145 (2005) (statement of Roberts, J.).

²⁹⁵ Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong. 85 (2009) (statement of Sotomayor, J.).

²⁹⁶ The Nomination of Elena Kagan To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong. 92 (2010) (statement of Elena Kagan, Solicitor General of the United States.).

weight of precedent, which is quite considerable.”²⁹⁷ Given the imprecision of settled law, nominees can shift deftly into a descriptive framework and offer answers that are truthful, so far as they go.

Of course, the reality is that Senators are often uninterested in descriptive statements. Politicians and the public want to know what a nominee believes is the *right* result to a particular legal question, not merely what the nominee predicts will happen to a precedent (and even less so whether an earlier precedent was procedurally legitimate, as it almost assuredly was).

The taxonomy offers a way to sharpen the conversation surrounding Supreme Court nominations. Through more precise vocabulary, nominees, Senators, interest groups, and the public at large can engage in a more fruitful and edifying conversation, rather than becoming mired in conceptual ambiguity or, worse, doublespeak. Instead of allowing for obfuscation by simply asking whether a nominee considers *Roe* or *Citizens United* settled law, questioners should use the clearer language of each conceptual framework. Did *Roe* arrive at the correct understanding of constitutional law? Should the Supreme Court continue to follow *Citizens United* in light of its intra- and extra-legal consequences? Do principles of stare decisis require continued adherence to *Casey*?

Admittedly, Senators sometimes try to be more precise by asking whether a nominee considers a decision to be correct. Extracting a genuine response to such questions might prove difficult, but the taxonomy can still be useful. Nominees who describe a precedent as being entitled to stare decisis should be asked to provide a more precise answer. What exactly is their theory of stare decisis? Under what circumstances does it counsel adhering to a decision that might be objectively incorrect? Not only would greater conceptual clarity foster a more productive dialogue, it also would mitigate allegations of bad faith that stem from ambiguous language.

Finally, a clearer understanding of settled law suggests ways to improve the conversation surrounding nominees to the lower federal courts. Unlike Supreme Court Justices, who are never absolutely bound by any precedent, lower-court judges often must apply controlling law—that is, binding precedent from a higher court. Although Senators try to

²⁹⁷ Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 115th Cong. 324 (2017) (statement of Gorsuch, J.).

uss out lower-court nominees' views on a range of decisions, nominees increasingly decline to answer such questions, perhaps most famously in recent years when they have refused to discuss even the correctness of *Brown v. Board of Education*.²⁹⁸ Instead, these nominees essentially pledge fealty to the idea of controlling precedent, which they promise to apply faithfully, and imply that other questions are irrelevant for lower-court judges.²⁹⁹ We have shown that this view is dangerously incomplete, and Senators are right to ask more probing questions.

True, one of a lower-court judge's most conspicuous roles is to apply binding precedent correctly. Although controlling law governs that role, we have demonstrated that settled law is a distinct concept and, importantly, one that has ramifications beyond the Supreme Court's decision to uphold or overrule one of its own precedents. In the doctrinal area, for example, lower-court judges often must decide whether a civil rights plaintiff may recover damages or whether the defendant is entitled to qualified immunity because the law was unsettled. A lower-court judge's normative view of the law—whether a legal question was correctly decided—can be quite relevant to that inquiry.³⁰⁰ Moreover, a judge's willingness to find a question descriptively settled through persuasive authority also requires a degree of judgment that goes beyond mechanically applying binding precedent. In short, controlling law does not mark the outer boundary of a lower-court judge's job, and a promise of fidelity to controlling law should not end the conversation. Settled law still matters.

CONCLUSION

In response to an attorney's claim that a legal dispute was a trivial semantic disagreement, Justice Felix Frankfurter eloquently replied: "All our work, our whole life is a matter of semantics, because words are the tools with which we work, the materials out of which laws are made, out

²⁹⁸ E.g., Meckler & Barnes, *supra* note 9 (noting that "more than two dozen nominees have declined to answer" whether *Brown* was "properly decided").

²⁹⁹ For example, Judge Wendy Vitter said that *Brown* "is Supreme Court precedent. It is binding . . . and of course I would uphold it." Mahita Gajanan, *Trump Judicial Nominee Won't Say If She Supports Brown v. Board of Education*, *Time* (Apr. 12, 2018), <https://time.com/5237672/wendy-vitter-brown-v-board-segregation/> [<https://perma.cc/L8A4-HY2F>].

³⁰⁰ See *supra* notes 246–51 and accompanying text (describing role of the normative formalist framework in the qualified immunity analysis).

of which the Constitution was written. Everything depends on our understanding of them.”³⁰¹

No doubt, this project is a semantic exercise. Although settled law has proved doggedly enigmatic, it captures something essential about the way that lawyers and informed citizens think about the judiciary’s role. Away from the bright lights of confirmation hearings, settled law exerts a quieter but equally profound influence on an array of doctrines. It helps determine whether citizens may hold government officials accountable for violating civil rights and serves as a backstop on questions about the judicial system’s fundamental integrity. So, Justice Frankfurter was right. At least across this range of politics and doctrine, everything indeed depends on semantics.

³⁰¹ William T. Coleman Jr., *Counsel for the Situation: Shaping the Law To Realize America’s Promise* 78 (2010) (quoting Justice Frankfurter).