

STATE COURT STRUCTURE AND PRECEDENT

CHANNING J. CURTIS

ABSTRACT

Vertical stare decisis is often thought of as a relatively simple doctrine—lower courts are bound by higher courts of the same jurisdiction. And while that may be so in the federal model, it is not, nor should it necessarily be, the case in the states. If stare decisis is truly context dependent and the structure of the court system within which the doctrine is applied actually has an impact on precedential value, structure and appellate procedure are contexts that must be considered. Thus, a failure to take into account each individual state judicial structure and appellate procedure in evaluating the precedential value of state court decisions leaves looming questions, such as whether a lower court might be allowed to anticipatorily overrule a prior decision of that state's supreme court.

*By now, the United States Supreme Court has returned many issues of great importance to the states. Thus, a serious need is developing in state court jurisprudence, particularly regarding the rules of vertical stare decisis. For an example of the relevancy of this issue, one need only look to the Mississippi state court case which followed *Dobbs v. Jackson Women's Health Organization*. There, the chancellor cited the state's court structure as she disregarded, or anticipatorily overruled, a prior Mississippi Supreme Court decision which found that the Mississippi Constitution protected a right to abortion. As seen in the Mississippi *Dobbs* case, the implications of the relationship between vertical stare decisis and state court structure are undoubtedly important and affect the decision-making process surrounding rights that are hotly debated.*

Therefore, this Article, for the first time, proposes that the relationship between vertical stare decisis and the appellate structure of state courts around the country should be considered by courts when determining the strength of vertical stare decisis, especially when courts are faced with difficult precedential questions regarding seemingly moth-eaten precedent. A fifty-state survey of the issue shows that forty-eight states' courts have promulgated rules commanding lower courts to follow higher court precedent, while a handful have codified or constitutionalized the issue. But one state, Kansas, has adopted a rule which makes it possible for their interme-

diating appellate court to anticipatorily overrule the Kansas Supreme Court, while one other state has seemingly never put forward a rule on the subject.

Despite the Article's survey of vertical stare decisis rules, some state courts have taken court structure into account when deciding the strength of a vertical precedent. Two examples highlighted in this Article, including Mississippi and California, cite court structure for both a weaker and stronger application of vertical stare decisis. The California Supreme Court seems to root their Rodriguez de Quijas-like rule in the fact that they exercise discretionary review over lower courts, but Mississippi courts have pointed to the mandatory review of the Mississippi Supreme Court as a basis for disregarding prior decisions of higher courts that rest on shaky foundations. Thus, court structure is a consideration that can both strengthen or weaken the application of stare decisis, and it should be taken into account by every state judiciary in light of their unique structure.

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CHANNING J. CURTIS*

I. INTRODUCTION

Stare decisis, as some scholars note, is a doctrine that derives its significance from the structure of the judiciary within which it is applied.¹ As others describe, the doctrine's strength is "context dependent,"² and much attention should be paid to the universe within which a judicial decision is made in order to determine what precedential weight it carries.³ In particular, vertical stare decisis is often thought of as a relatively simple principle—lower courts are bound by higher courts of the same jurisdiction.⁴ And while that principle is universally accepted in the federal judiciary,⁵ it is not, nor should it necessarily be, assumed in the states.⁶ If the strength of stare decisis is truly context dependent and the structure of the court system within which the doctrine is applied actually has an impact on precedential value, then a failure to take into account each individual state judicial structure and appellate procedure in evaluating the precedential value of state court decisions leaves looming questions. For instance, questions like whether a lower court might be allowed to anticipatorily overrule, or disregard, a prior decision of that state's supreme court—a possibility that has been routinely rejected in the federal courts⁷—is left open in the states. And the ability of state courts to do just that might depend on the structure or appellate process of the state's judiciary, namely whether a state supreme court has mandatory or discretionary review of appeals.

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1. Jeffrey C. Dobbins, *Structure and Precedent*, 108 MICH. L. REV. 1453, 1459 (2010).

2. Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1712 (2013).

3. See Dobbins, *supra* note 1.

4. See *id.* at 1455. But see Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEORGETOWN L. REV. 921, 927 (2016) ("Though often portrayed as simple or absolute, vertical stare decisis is actually complex and nuanced.").

5. See Dobbins, *supra* note 1, at 1453.

6. For an example of a state deviation from the traditional model of vertical precedent, see Part III.B.

7. See, e.g., *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

By now, the United States Supreme Court has returned many issues of great importance to state governments,⁸ meaning state courts are now playing a vital role in deciding cases on hotly debated topics.⁹ Thus, a serious need is developing in state court jurisprudence,¹⁰ particularly regarding the rules of vertical stare decisis. For an example of the relevancy and importance of the issue, one need only look to the little-publicized Mississippi state court case which followed *Dobbs v. Jackson Women's Health Organization*. Shortly after the Supreme Court's decision, the Jackson Women's Health Organization ("the Clinic") filed for an injunction in state court to keep Mississippi's new abortion law from taking effect.¹¹ The basis for the injunction was 1998 Mississippi Supreme Court decision, *Pro-Choice Mississippi v. Fordice*,¹² in which the court found a state constitutional protection of the right to an abortion.¹³ The chancellor disregarded this prior decision by denying the injunction and cited the state's court structure as she anticipatorily overruled, or ignored, a binding higher court decision.¹⁴

As seen here, the implications of the relationship between vertical stare decisis and state court structure are undoubtedly important and affect the decision-making process surrounding rights that are hotly debated. Therefore, this Article, for the first time,¹⁵ proposes that the relationship between vertical precedent and the mandatory or discretionary nature of review, or structure, of state courts is an important consideration for determining the strength of vertical precedent. In doing so, Part II.A will provide a back-

8. See, e.g., *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

9. Michael Wines, *As Stakes Rise, State Supreme Courts Become Crucial Election Battlegrounds*, N.Y. TIMES (Nov. 2, 2022), <https://www.nytimes.com/2022/11/02/us/state-supreme-court-races-campaigns.html>.

10. See generally Jeffrey S. Sutton, *Why Teach—And Why Study—State Constitutional Law*, 34 OK. CITY U. L. REV. 165 (2009).

11. *Jackson Women's Health Org. v. Dobbs*, No. G2022-739013, 2022 WL 2354520 (Miss. Ch. June 27, 2022) (Trial Pleading).

12. *Pro-Choice Mississippi v. Fordice*, 716 So. 2d 645 (Miss. 1998).

13. *Id.* at 666 ("While we do not find the Mississippi Constitution to provide an explicit right to an abortion, abortion is protected within the penumbras of the right to privacy.").

14. *Jackson Women's Health Org. v. Dobbs*, No. G2022-739013, 2022 WL 2354520 (Miss. Ch. June 27, 2022) (Trial Pleading). Although the Plaintiff in this case eventually dismissed their appeal to the Mississippi Supreme Court voluntarily, see Wicker Perlis, *Jackson Women's Health Organization Legal Saga Comes to an End With Case Dismissed*, CLARION LEDGER (Aug. 3, 2022), <https://www.clarionledger.com/story/news/2022/08/03/case-dismissed-final-abortion-clinic-lawsuit-mississippi/10230660002/>, this is not the end of the fight regarding *Fordice* in Mississippi. See Michael Goldberg, *Mississippi Abortion Ban Might Not Be Valid Yet*, CLARION LEDGER (Nov. 15, 2022), <https://www.clarionledger.com/story/news/2022/11/15/mississippi-abortion-ban-might-not-be-valid-yet-lawsuit-says-roe-v-wade/69649215007/>.

15. Professor Jeffrey C. Dobbins called for this discussion to be had in his article, *Structure and Precedent*, which focused only on federal court structures that affected the precedential value of decisions. See Dobbins, *supra* note 1, at 1458 n.16. But to the Author's knowledge no paper exists which addresses the relationship between vertical stare decisis and the appellate structure of state courts.

ground on principles and theories of stare decisis, before discussing the Supreme Court's positions on vertical stare decisis as applied through their case law in Part II.B. Part II.C will then highlight four common court structures found among the states, focusing on the characteristics of intermediate appellate courts. These various structures will be important for later discussion of their implication when considering vertical stare decisis. Part III will then survey the states in search of variances in their treatment of vertical precedent or reasoning that indicates a concern for state structure when deciding issues concerning vertical precedent. Ultimately, in Part III.C, this Article discusses some of the specific implications that court structure has on the application of vertical stare decisis.

Kansas, Mississippi, and California all provide unique examples. Mississippi and California provide contrasting examples of courts citing the mandatory or discretionary review of their supreme court as a basis for both a strong and weak application of vertical stare decisis. And Kansas has created a wholly unique rule, allowing their intermediate court of appeals to disregard supreme court precedent if they are convinced that their supreme court is likely to abandon a prior decision. Finally, Part IV will discuss how mandatory or discretionary review of appellate courts might affect vertical stare decisis, thereby indicating a further area in which structure, or perhaps appellate procedure, influences the doctrine.

II. BACKGROUND

Before discussing the importance of structure in considering state application of vertical stare decisis, it is important to first gain a grasp on what stare decisis is in the traditional sense. Therefore, Part II.A discusses theories of stare decisis as a source of law. Part II.B will then discuss the application of vertical stare decisis in the United States Supreme Court as an important base level understanding of traditional vertical stare decisis principles.

A. *Theories of Stare Decisis and Its Source of Law*

Stare decisis derives its modern meaning from the longer Latin phrase *stare decisis et non quieta movere*, meaning “to stand by things decided and not disturb settled points.”¹⁶ Scholars debate the true purpose of the doctrine, but three distinct purposes have been readily determined, “including

16. BRYAN GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 5 (Thomson Reuters 2016) (“The legal doctrine commanding deference to precedent derives its shorthand Latin name, *stare decisis*, from the maxim *stare decisis et non quieta movere*—‘to stand by things decided and not disturb settled points.’”).

judicial restraint, the rule of law, and the legitimacy of judicial review.”¹⁷ The doctrine’s purpose is to give stability to our system of law,¹⁸ including common law, statutes, and constitutional law. As one state supreme court has put it, “The rule of stare decisis is grounded upon the theory that when a legal principle is accepted and established rights may accrue under it, security and certainty require that the principle be recognized and followed thereafter.”¹⁹ Perhaps this stability is the most important consideration under the principles of stare decisis.

And in a court system with multiple levels and courts, that stability is found in two forms of stare decisis.²⁰ First, stare decisis serves to bind courts to previous decisions of their own, often referred to as “horizontal precedent.”²¹ Horizontal precedent is debated in great detail among scholars of the Supreme Court,²² but little has been said about horizontal precedent in the states.²³ The second form of stare decisis binds lower courts to follow the decisions of higher courts in their respective jurisdiction, often referred to as “vertical precedent,”²⁴ or “hierarchical precedent.”²⁵ In courts throughout the United States, vertical precedent is often viewed as an inflexible doctrine—one that courts take very seriously.²⁶ But it is not a legally binding doctrine in most jurisdictions.²⁷ There are some states that have codified or constitutionalized the issue,²⁸ but by-and-large, the principle is not one which is codified.²⁹

17. Barrett, *supra* note 2, at 1712 (citing Thomas W. Merrill, *The Conservative Case for Precedent*, 31 HARV. J. L. & PUB. POL’Y 977, 981 (2008); 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, 159 (2006); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 752 (1988)).

18. See Michael Sinclair, *Precedent, Super-Precedent*, 14 GEO. MASON L. REV. 363, 366-67 (2007).

19. *Wenco v. EOG Res., Inc.*, 822 N.W.2d 701, 706 (N.D. 2012) (internal quotations omitted).

20. Barrett, *supra* note 2, at 1712.

21. *Id.* (“[H]orizontal stare decisis, a court’s obligation to follow its own precedent.”); GARNER ET AL., *supra* note 16, at 35-43.

22. See generally, e.g., Barrett, *supra* note 2.

23. While the focus of this Article is on vertical stare decisis, the Author intends to further explore horizontal stare decisis as it is applied in the states in the future.

24. Barrett, *supra* note 2, at 1712.

25. See Dobbins, *supra* note 1, at 1461 (citing Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994)).

26. Barrett, *supra* note 2, at 1712 (“Vertical stare decisis is an inflexible rule that admits of no exception.”).

27. *Id.* at 1713 (“It is a judge-made doctrine that federal courts have given varied force in varied contexts.”).

28. See, e.g., ALA. CODE § 12-3-16 (“The decisions of the Supreme Court shall govern the holdings and decisions of the courts of appeals, and the decisions and proceedings of such courts of appeals shall be subject to the general superintendence and control of the Supreme Court as provided by Constitutional Amendment No. 328.”); GA. CONST. art. VI, § 5, para. IV (“The decisions of the Supreme Court shall bind all other courts as precedents.”); *Id.* at para. III (“The decisions of the Court of Appeals inso-

Thus, the question becomes, what kind of source of law is stare decisis? While stare decisis “is [often] a judge-made doctrine,”³⁰ it is not always just a matter of common law. As mentioned above, sometimes, the doctrine is codified and even constitutionalized, making the source of law statutory or constitutional in nature. This distinction matters because it determines the source of law from which we derive the doctrine of stare decisis, and thereby interpret prior judicial decisions.

If stare decisis is part of the common law of a particular state, it is subject to one of two common law theories: the judicial legislation theory or the discovery theory.³¹ These theories determine whether state courts may ever take into account state court structure when determining what weight vertical stare decisis carries. Under the judicial legislation theory, “common law is judge-made law,” where “judges legislate on a case-by-case basis.”³² Thus, judges consider whichever factors they wish in creating such law, and they may consider what their court structure looks like in pronouncing rules of law because the court itself creates the rules of law.

But if under the common law, we view stare decisis under the discovery theory of common law, then state courts likely cannot consider structure. This is because “[t]he core idea of the discover theory is that the common law preexists the judicial decisions that identify common law norms.”³³ “Judges don’t ‘make’ the common law; they ‘discover’ it.”³⁴ So whether a court has a particular structure or not does not change what the common law which may be discovered actually is. Under this view, courts might exercise a weak application of stare decisis regarding its prior decisions, or even higher court decisions, because a court views its obligation to get the law correct, without regard to precedent.

far as not in conflict with those of the Supreme Court shall bind all courts except the Supreme Court as precedents.”); KY. S. CT. R. 1.030(8)(a) (“The Court of Appeals is bound by and shall follow applicable precedents established in the opinions of the Supreme Court and its predecessor court.”); MO. CONST. art. V, § 2 (“[The Missouri Supreme Court’s] decisions shall be controlling in all other courts.”); MO. CONST. art. V, § 4 (establishing a principle of vertical precedent throughout the Missouri court system).

29. See Barrett, *supra* note 2, at 1713 (“[Stare decisis] is a judge-made doctrine that federal courts have given varied force in varied contexts.”).

30. *Id.*

31. Lawrence B. Solum, *Legal Theory Lexicon: Common Law*, LEGAL THEORY BLOG (January 31, 2021, 09:14 AM), <https://lsolum.typepad.com/legaltheory/2021/01/legal-theory-lexicon-common-law.html>.

32. *Id.* (“Unlike, a legislature, judges are not authorized to write statutes. Instead, judges legislate on a case-by-case basis, making incremental changes in the rules within the limits of the doctrine of stare decisis or precedent.”).

33. *Id.*

34. *Id.* (“On this view, there must be some source of the preexisting common law that is independent of the judicial decisions that discover it.”).

However, by passing a statute or ratifying an amendment that binds state lower courts to higher court decisions, those lower courts would no longer be applying stare decisis. Instead, they would be applying, and bound by, state law, which would then be subject to theories of statutory interpretation, like textualism, intentionalism, or purposivism,³⁵ or theories of constitutional interpretation, like originalism or non-originalism. But, by the Author's count, there are only about four states that codify or constitutionalize the principle.³⁶ All other states adhere to the general principle of stare decisis that scholars and courts often discuss, which finds its source in the common law.

Scholars typically discuss vertical stare decisis in a variety of contexts either arguing for a stronger or weaker view of the doctrine³⁷ or explaining ambiguous areas within the doctrine.³⁸ But the strength of stare decisis is largely "context dependent,"³⁹ and some scholars discuss vertical stare decisis as a doctrine that is dependent upon the judicial structure in which it is applied.⁴⁰ While these scholars often make points regarding the application of stare decisis, their comments often concern only the federal structure, leaving discussions of the relationship between state applications of stare decisis and the structure of state courts for another day.⁴¹ While this Article seeks to survey that relationship as it pertains to state courts, it is important to understand the traditional vertical stare decisis as applied by the United States Supreme Court as it may often serve as persuasive authority for state courts to establish their own vertical stare decisis.⁴²

35. Lawrence B. Solum, *Legal Theory Lexicon: Theories of Statutory Interpretation and Construction*, LEGAL THEORY BLOG (July 24, 2022, 09:45 AM), <https://lsolum.typepad.com/legaltheory/2022/07/legal-theory-lexicon-theories-of-statutory-interpretation-and-construction.html>.

36. See *supra* note 28. The author intends to flesh out these states' statutory and constitutional schemes which remove stare decisis from a common law source in work to be completed in the future.

37. See, e.g., Caminker, *supra* note 25.

38. See Andrew R. Jones, *Toward A Stronger Economic Future For North Carolina: Precedent and the Opinions of the North Carolina Business Court*, 6 ELON L. REV. 189, 205 (2014).

39. Barrett, *supra* note 2, at 1712.

40. See Dobbins, *supra* note 1, at 1459.

41. See *id.* at 1458 n.16.

42. It is also important to understand the various theories of holdings, of which there are three leading theories: the ration decidendi theory, the predictive theory, and the salient legal factual characteristics theory. Lawrence B. Solum, *Legal Theory Lexicon: Holdings*, LEGAL THEORY BLOG (March 14, 2021, 09:00 AM), <https://lsolum.typepad.com/legaltheory/2021/03/legal-theory-lexicon-holdings.html>. These three theories each allow for a different breadth of holding. The narrower the holding allowed by any theory would not require such strict rules of stare decisis for lower courts could always avoid a narrow higher court decision because higher court decisions would often be inapplicable to new cases which would be factually distinguishable. For instance, under the salient legal factual characteristics theory, there will rarely be two cases that have the same salient legal factual characteristics, and thus, a strict rule of precedent does not mean much. But where higher courts issue decisions with broad holdings, like they would under the ration decidendi or predictive theories of holdings,

B. Vertical Stare Decisis in the United States Supreme Court

This principle of vertical stare decisis has been adopted without hesitation in the federal courts,⁴³ and those decisions are important for understanding how this principle is applied in the states. Thus, this section discusses the decisions that make up the rule of vertical stare decisis under United States Supreme Court precedent. As this Article discusses these decisions, it is important to keep in mind the structure of the federal courts within which this doctrine of vertical stare decisis operates.⁴⁴ In the Federal Judiciary, litigants may appeal most final decisions or orders from a district court to a court of appeals as of right.⁴⁵ But appeals from the courts of appeals to the United States Supreme Court are at the discretion of the Supreme Court by way of the certiorari mechanism.⁴⁶ There are, of course, complex scenarios that provide for different routes through the appellate structure,⁴⁷ but generally, this is the traditional structure.

i. Board of Education v. Barnette

In 1943, the Supreme Court decided *West Virginia State Board of Education v. Barnette*,⁴⁸ an appeal which originated in the United States District Court for the Southern District of West Virginia.⁴⁹ In that case, the court dealt with First Amendment issues regarding a school's mandate to salute the flag and the binding nature of a prior Supreme Court case,⁵⁰ *Minersville School District v. Gobitis*.⁵¹ The district court noted that only seven justices whom decided *Gobitis* were still on the Supreme Court and that four of those seven had since publicly expressed doubts regarding the *Gobitis* holding.⁵² It was on this basis that the district court did not feel bound by the

vertical stare decisis might be much more important. For a broader discussion of these theories of holdings, see Channing J. Curtis, *Clarifying Plurality Precedent: Historical Applications and Theories of Holdings*, 59 GONZAGA L. REV. ____ (forthcoming 2023), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4383792.

43. Although there are some scholars who do not necessarily subscribe to this bright line ban on lower courts interpreting Supreme Court decisions outside the bounds of prior opinions themselves. See Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L. REV. 921, 927-929 (2016) (discussing lower courts' ability to "narrow" Supreme Court decisions).

44. See generally, Dobbins, *supra* note 1.

45. See FED. R. APP. P. 3(a)(1).

46. See *infra* note 85.

47. See 28 U.S.C. § 1251; 1253; 1257.

48. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

49. *Id.* at 625.

50. *Id.* at 625-26.

51. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).

52. *Barnette v. W. Va. State Bd. of Education*, 47 F.Supp. 251, 252-53 (S.D. W. Va. 1943).

Gobitis decision and anticipatorily overruled United States Supreme Court precedent.⁵³

On appeal, the United States Supreme Court affirmed the district court's holding, which was contrary to its prior decision in *Gobitis* without any chastisement of the district court.⁵⁴ Thus began a nearly seventy-five-year-long discussion by the Supreme Court on the issue of anticipatory overrulings by lower courts. Over time, the Supreme Court has narrowed its allowance of lower courts to question their decisions.

ii. *Rodriguez de Quijas v. Shearson*

In 1989, over forty years after the Supreme Court affirmed a district court's anticipatory overruling of a prior Supreme Court decision without chastisement, the Supreme Court changed its tune.⁵⁵ No longer did the Court commend lower courts who anticipatorily overruled their decisions, but instead, the Court chastised the U.S. Court of Appeals for the Fifth Circuit for its action in *Rodriguez de Quijas*, stating: "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."⁵⁶

Now, *Rodriguez de Quijas* is the bedrock principle upon which scholars and courts around the country rely for the proposition that lower courts should not be allowed to anticipate the actions of a higher court or disregard binding precedent in light of that anticipation, no matter how old or shaky that precedent may be.⁵⁷ But *Rodriguez de Quijas* was not the last time the United States Supreme Court mandated adherence to vertical precedent.⁵⁸

53. *Id.* ("Ordinarily, we would feel constrained to follow an unreversed decision of the Supreme Court of the United States, whether we agreed with it or not.... The developments with respect to the *Gobitis* case, however, are such that we do not feel that it is incumbent upon us to accept it as binding authority.").

54. *W. Va. State Bd. of Education*, 319 U.S. at 642.

55. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. at 484 (1989).

56. *Id.* See also *id.* at 486 (Stevens, J., dissenting) (describing the court of appeals decision as "an indefensible brand of judicial activism").

57. See *Nat'l Coalition for Men v. Selective Serv. Sys.*, 969 F.3d 546, 550 (5th Cir. 2020); see also, *Payne v. Taslimi*, 998 F.3d 648, 654 (4th Cir. 2021) ("So even if we were to correctly conclude that a Supreme Court precedent contains many infirmities and rests on wobbly, moth-eaten foundations, it remains the Supreme Court's prerogative alone to overrule one of its precedents.") (internal quotations and citations omitted).

58. See, e.g., *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) ("The Court of Appeals was correct in applying that principle despite disagreement over *Albrecht*, for it is this Court's prerogative alone to overrule one of its precedents.").

iii. Agostini v. Felton

In 1997, the Supreme Court again addressed vertical precedent in *Agostini v. Felton*.⁵⁹ There, defendants and petitioners sought relief from an injunction based upon recent Supreme Court decisions which undermined *Aguilar v. Felton*,⁶⁰ the case upon which the injunction rested.⁶¹ But because the Supreme Court had not yet overruled *Aguilar*, the district court found that it was bound to deny the relief sought,⁶² and the U.S. Court of Appeals for the Second Circuit affirmed for the same reasons.⁶³ On appeal to the Supreme Court, petitioners asked the Court to overrule *Aguilar* based upon its recent decisions.⁶⁴ The Court agreed and, in doing so, commended the district court and court of appeals,⁶⁵ reaffirming the principle that lower courts are bound to follow Supreme Court precedent until the Court overrules its prior decision.⁶⁶ And while *Rodriguez de Quijas* and *Agostini* are the guiding decisions on vertical precedent for inferior federal courts, the Supreme Court has also mandated adherence to its prior decisions from state courts on questions of federal law.⁶⁷

iv. Roper v. Simmons & Bosse v. Oklahoma

In 2005, the United States Supreme Court affirmed the holding of the Missouri Supreme Court in *Roper v. Simmons*,⁶⁸ which undermined the Supreme Court's prior holding in *Stanford v. Kentucky*⁶⁹ without any chas-

59. *Agostini v. Felton*, 521 U.S. 203 (1997).

60. *Aguilar v. Felton*, 473 U.S. 402 (1985).

61. *Agostini*, 521 U.S. at 208-09.

62. *Id.* at 214 ("The District Court recognized that petitioners, 'at bottom,' sought 'a procedurally sound vehicle to get the propriety of the injunction back before the Supreme Court,' and concluded that 'the Board had properly proceeded under Rule 60(b) to seek relief from the injunction.' Despite its observations that 'the landscape of Establishment Clause decisions has changed,' and that 'there may be good reason to conclude that *Aguilar*'s demise is imminent,' the District Court denied the Rule 60(b) motion on the merits because *Aguilar*'s demise had 'not yet occurred.' The Court of Appeals for the Second Circuit 'affirmed substantially for the reasons stated in' the District Court's opinion.") (cleaned up).

63. *Id.*

64. *Id.* at 208-09 ("Petitioners maintain that *Aguilar* cannot be squared with our intervening Establishment Clause jurisprudence and ask that we explicitly recognize what our more recent cases already dictate: *Aguilar* is no longer good law.")

65. *Id.* at 238 ("The trial court acted within its discretion in entertaining the motion with supporting allegations, but it was also correct to recognize that the motion had to be denied unless and until this Court reinterpreted the binding precedent.")

66. *Id.* at 237-38 (citing *Rodriguez de Quijas*, 490 U.S. at 484).

67. *Bosse v. Oklahoma*, 137 S. Ct. 1 (2016).

68. *Roper v. Simmons*, 543 U.S. 551 (2005).

69. *Stanford v. Kentucky*, 492 U.S. 361 (1989).

tisement for doing so.⁷⁰ But eleven years later, in 2016, the Supreme Court decided *Bosse v. Oklahoma*, an appeal from the Oklahoma Criminal Court of Appeals regarding the application of Eighth Amendment precedents.⁷¹ There, the Criminal Court of Appeals held that a more recent Supreme Court decision “*implicitly* overruled” a portion of a prior Supreme Court decision,⁷² but the United States Supreme Court disagreed and reaffirmed its superiority with regards to federal law, chastising the Criminal Court of Appeals for anticipating the demise of a prior Supreme Court decision.⁷³

C. Common Court Structures

While the United States Supreme Court has solidified its doctrine of vertical stare decisis in the federal courts, which have become a model for some state judiciaries, many state courts are structured in varying ways. And because stare decisis is context dependent,⁷⁴ these structures are an important consideration in determining the precedential value of state court decisions in each jurisdiction.

While many might think that court structures do not differ greatly among the states or that the United States Constitution mandates a certain court structure, they would be mistaken. The United States Constitution mandates that states maintain a republican form of government,⁷⁵ but that mandate does not entail a mirror image of the federal government.⁷⁶ Indeed, states are free to structure their governments however they wish, so long as they are republican in nature.⁷⁷ For instance, one state, Nebraska, has a unicameral legislature.⁷⁸ And the same is true with respect to judiciaries; states are free to structure their judiciaries as they see fit.⁷⁹ This subsection discusses the varying court structures which may be found in the states in order to lay

70. Justice Scalia took issue with the Court’s actions, stating “the Court affirms the Missouri Supreme Court without even admonishing that court for its flagrant disregard of our precedent in *Stanford*.” *Roper*, 543 U.S. at 628-29 (Scalia, J., dissenting).

71. *Bosse*, 137 S. Ct. at 2.

72. *Id.*

73. *Id.* (“the court was wrong to go further and conclude that Payne implicitly overruled Booth in its entirety. Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing viability.”) (internal quotations and citations omitted).

74. See Barrett, *supra* note 2.

75. U.S. CONST. Art. IV, § 4 (“The United States shall guarantee to every state in this Union a Republican Form of Government....”).

76. See *infra* note 78.

77. *Supra* note 61.

78. NEB. CONST. Art. III, § 1 (“The legislative authority of the state shall be vested in a Legislature consisting of one chamber.”).

79. See for example, MONT. CONST. Art. VII, § 2 (creating a judiciary in which the supreme court directly reviews the state’s trial courts, with no intermediate appellate court).

a foundation for examination of the relationship between these structures and the states' applications of vertical precedent.⁸⁰

i. Traditional Structure

The most common structure for state courts is, of course, the current structure of the federal courts: a trial court, appeal as of right to an intermediate court, and discretionary review at the Supreme Court.⁸¹ In this structure, litigants are afforded an appeal as of right to the intermediate appellate court from any final decision or order in the trial court.⁸² Thus, the intermediate appellate court must review the decision of the trial court.⁸³ But should a litigant wish to appeal the decision of the intermediate appellate court, they may only do so within the discretion of the court of last resort.⁸⁴ In other words, the supreme court may pick and choose which cases it might hear on appeal.⁸⁵ Examples of this court structure might be found in the Federal Judiciary,⁸⁶ as well as Indiana,⁸⁷ Louisiana,⁸⁸ and Kansas.⁸⁹

An important note for the remainder of this Article is that should a litigant wish to have an appellate court review their case, they are entitled to review of a trial court's decision, but they are not entitled to review of a decision by the court of appeals. The difference is appeal as of right, or as this Article may refer to as mandatory review, and discretionary review.

ii. States Without an Intermediate Court

States have such freedom to structure their courts that some states have foregone the use of intermediate appellate courts altogether, meaning that trial court rulings are reviewed directly by the state's supreme court.⁹⁰ In Montana, a state which has this appellate structure,⁹¹ it seems that the su-

80. While the Author does not complete an exhaustive and comprehensive survey of state courts, their structures, and varying scenarios which provide for mandatory or discretionary review, such information may be found here: https://www.courtstatistics.org/state_court_structure_charts. This information, while helpful to courts in determining their own structure and the strength of stare decisis, is not necessary for the Article, which simply argues that courts should consider that information.

81. See 28 U.S.C. Ch. 1-5.

82. 28 U.S.C. § 1291.

83. See FED. R. APP. P. 3(a)(1) (discussing appeals as of right).

84. 28 U.S.C. § 1254.

85. S. Ct. R. 10 ("Review on a writ of certiorari is not a matter of right, but of judicial discretion.").

86. See 28 U.S.C. Ch. 1-5.

87. IND. CONST. Art. VII § 4; IND. R. APP. P. 4 & 5.

88. See LA. CONST. Art. 5 § 10.

89. See KAN. R. APP. P. 2.01; 2.02; 8.03.

90. See, e.g., MONT. CONST. Art. VII, § 4.

91. *Id.*

preme court exercises discretionary review over appeals from a trial court.⁹² And this model is found in nine states, including Montana, Maine, New Hampshire, Vermont, Rhode Island, North Dakota, South Dakota, Wyoming, and Delaware.⁹³

iii. Intermediate Courts of Deflection

Court systems which utilize intermediate courts of deflection or assignment provide for a particularly unusual structure.⁹⁴ In this appellate structure, a trial court's ruling is appealed as of right directly to the state supreme court, and the supreme court decides whether it will retain the appeal and decide the case itself.⁹⁵ Or the supreme court may assign, or deflect, that case to the state court of appeals. It is worth noting that in either scenario, litigants may have their case reviewed by *some* appellate court. Assuming that the supreme court initially deflects a case to the court of appeals, an appeal from the court of appeals to the supreme court is typically within the discretion of the supreme court, not an appeal as of right.⁹⁶

iv. Dual Appellate Court Structure

Some courts have a dual appellate court structure. This is a structure where the state's court system is bifurcated into a civil and criminal appellate system. A prime example is the judiciary of Texas.⁹⁷ There, the Supreme Court of Texas is the court of last resort on all civil matters,⁹⁸ while the Texas Court of Criminal Appeals hears the last word on all criminal matters.⁹⁹ The Oklahoma court system is another example which follows this appellate structure.¹⁰⁰

92. Compare MONT. CODE ANN. § 25-12-101 ("A judgment or order in a civil action...may be reviewed as prescribed by the Rules of Appellate Procedure and not otherwise.") with MONT. CONST. Art. VII, § 2(3) (the supreme court has the power to create the Rules of Appellate Procedure).

93. See Survey of Judicial Salaries, National Center for State Courts, July 1, 2022, Available at: https://www.ncsc.org/_data/assets/pdf_file/0040/79798/JSS-July-2022.pdf.

94. Iowa and Mississippi are two examples of states with this court structure. See MISS. CODE ANN. § 9-4-3; IOWA CODE ANN. §§ 602.4102; 602.5103.

95. See MISS. R. APP. P. 16(a).

96. See MISS. CODE ANN. 9-4-3(2); MISS. R. APP. P. 17(a).

97. TEX. CONST. Art. 5, § 1.

98. TEX. CONST. Art. 5, § 3.

99. TEX. CONST. Art. 5, § 5.

100. OKLA. CONST. Art. 7, § 4 ("The appellate jurisdiction of the Supreme Court shall be coextensive with the State and shall extend to all cases at law and in equity; except that the Court of Criminal Appeals shall have exclusive appellate jurisdiction in criminal cases until otherwise provided by statute and in the event there is any conflict as to jurisdiction....").

III. VERTICAL PRECEDENT IN THE STATES

The purpose of this Article being to show that the relationship between state court structure and vertical stare decisis might allow states to apply vertical stare decisis in a non-traditional manner, this section seeks to survey the states on both points, highlighting cases or state structures which are noteworthy. It is clear that states may, and often do, have structures which vary from the Federal Judiciary. And while state courts virtually always recognize their inferior role in deciding issues of federal law, there is a bit of variation in the application of stare decisis within their own courts. At least some of the time, this variation is due to court structure allowing it.

A. *State Courts Are Bound by U.S. Supreme Court Precedent.*

It is clear that all of the states that have addressed the issue agree—they are bound by United States Supreme Court decisions on questions of federal law under the Supreme Court’s decision in *Rodriguez de Quijas*.¹⁰¹ But

101. In fact, courts in twenty-eight states have cited *Rodriguez de Quijas* or *Agostini* for the proposition that they are bound by decisions of the United States Supreme Court on issues of federal law. See *Gen. Motors Corp. v. Kilgore*, 853 So. 2d 171, 177 n.4 (Ala. 2002); *State v. North Pacific Fishing, Inc.*, 485 P.3d 1040, 1048 (Alaska 2021) (leaving question of whether decision had been abandoned to the Supreme Court); *Tyler v. State*, 133 P.3d 686 (Alaska Ct. App. 2006); *State v. Ring*, 65 P.3d 915, 938 (Ariz. 2003) (in banc); *State v. Hayes*, No. CR07241859, 2010 WL 2106550, at *4 (Conn. Super. Ct. April 19, 2010); *Zebroski v. State*, 179 A.3d 855, 861 n.26 (Del. 2018); *State v. Jones*, 2004 WL 2190097, at *4 (Del. Super. Ct. Aug. 31, 2004) (“The United States Supreme Court is the final arbiter of the federal Constitution. A Supreme Court constitutional pronouncement is the law of the land; all executive, legislative, and judicial actors, state or federal, must obey it. Moreover, the Supreme Court would be neither the highest court in the land nor the final arbiter of the Constitution, leaving the scope and dignity of our constitutional rights subject to conflicting interpretation, and thus perilously uncertain. The doctrine of stare decisis embodies these principles.”); *Hunter v. State*, 8 So. 3d 1052, 1073 (Fla. 2008); *Mills v. Moore*, 786 So. 2d 532, 537 (Fla. 2001); *Bailey v. State*, 311 So. 3d 303, 315-16 (Fla. Dist. Ct. App. 2020); *Cooper Tire & Rubber Co. v. McCall*, 863 S.E.2d 81, 90 (Ga. 2021) (upholding Georgia law although the reasoning of recent Supreme Court decisions cast doubt on the statute’s constitutionality); *Maxim Cabaret, Inc. v. City of Sandy Springs*, 816 S.E.2d 31, 36 n.4 (Ga. 2018); *Indiana Dept. of State Revenue v. Felix*, 571 N.E.2d 287, 289 (Ind. 1991); *Bomgaars v. State*, 967 N.W.2d 41, 48 n.4 (Iowa 2021) (“This court is not at liberty to anticipatorily overrule Supreme Court precedent any more than lower courts in Iowa are at liberty to anticipatorily overrule this court’s precedent.”); *State v. Wright*, 961 N.W.2d 396, 445 (Iowa 2021) (Christensen, C.J., dissenting) (arguing that the Iowa Supreme Court “should not attempt to read the tea leaves” of future United States Supreme Court decisions); *Wright v. General Elc. Co.*, 242 S.W.3d 674, 679 (Ky. Ct. App. 2007); *Bagley v. Raymond Sch. Dept.*, 728 A.2d 127, 147 n.36 (Me. 1999); *Bunch v. Robinson*, 712 A.2d 585, 593 (Md. Ct. Spec. App. 1998) (overruled on other grounds); *1A Auto, Inc. v. Director of Office of Campaign and Political Finance*, 105 N.E.3d 1175, 1184 (Mass. 2018); *Com. v. Runyan*, 922 N.E.2d 794, 798 (Mass. 2010) (overruled on other grounds); *People v. Jemison*, 952 N.W.2d 394, 399 (Mich. 2020) (deferring to U.S. Supreme Court to overrule its own decision); *State v. Bernard*, 859 N.W.2d 762, 772 n.11 (Minn. 2015); *Garcia-Mendoza v. 2003 Chevy Tahoe*, VIN No. 1 GNEC13V23R143453, Plate No. 235JBM, 852 N.W.2d 659, 667 (Minn. 2014); *State v. Brist*, 812 N.W.2d 51, 56-57 (Minn. 2012); *State v. Mizenko*, 127 P.3d 458, 468 (Mont. 2006); *State ex rel. Hatch v. Murray*, 526 P.2d 1369, 1371 (Mont. 1974); *Shober v. Jack*, 3 Mont. 351, 453 (1879) (“This court, however, is bound by the [Supreme Court’s] decision, and although with great reluctance, must follow it.”); *State v. Gales*, 658 N.W.2d 604, 629

this idea is widely accepted to the point that it warrants little discussion here. However, it is of note that some scholars do dispute that states fully embrace this point, or at least disregard Supreme Court decisions more often than appropriate.¹⁰² Regardless, this Article focuses on the application of vertical stare decisis to precedents which originate and are applied within state court systems.

B. State Application of Vertical Stare Decisis

In analyzing the strength of vertical stare decisis within state courts, the Author has conducted a fifty-state survey, finding a forty-eight-to-one-to-one split between states' rules on vertical stare decisis. Forty-eight state supreme courts or courts of appeals have promulgated or recognized a rule that trial courts and courts of appeals are bound by their state supreme court's prior decisions.¹⁰³

(Neb. 2003); *State v. Addison*, 87 A.3d 1, 41 (N.H. 2013); *State v. Rodriguez*, 116 P.3d 92, 98 (N.M. 2005); *Chavez v. Bridgestone Americas Tire Operations, LLC*, 503 P.3d 332, 343 (N.M. 2021); *State v. Graham*, 172 N.E.3d 841, 883 (Ohio 2020); *State v. Newkirk*, 509 P.3d 757, 759 (Or. Ct. App. 2022); *State v. Wayfair Inc.*, 901 N.W.2d 754, 761 (S.D. 2017); *B.C. v. Steak N Shake Operations, Inc.*, No. 05-14-00649-CV, 2020 WL 4435305, at *6 n.8 (Tex. App. Aug. 3, 2020); *State in Interest of N.R.*, 967 P.2d 951, 955 (Utah 1998); *State v. Bacon*, 702 A.2d 116, 122 n.7 (Vt. 1997); *Clark v. Virginia Department of State Police*, 793 S.E.2d 1, 7 (Va. 2016); *State v. Koeller*, No. 62162-9-I, 2011 WL 167522, at *3 n.27 (Wash. Ct. App. Jan. 18, 2011); *State v. Scott*, 928 N.W.2d 629, 638 (Wis. Ct. App. 2019).

102. See generally, Frederic M. Bloom, *State Courts Unbound*, 93 CORNELL L. REV. 501 (2008).

103. *Farmers Inc. Exch. v. Raine*, 905 So. 2d 832, 835 (Ala. Civ. App. 2004) ("Although the supreme court might choose to revisit this issue, this court is bound by precedent...."); *American Lumber & Export Co. v. Love*, 100 So. 623, 625 (Ala. Ct. App. 1924) ("Whether intentional or not, the trial court appears to have ignored or disregarded the decision of this court, and its mandate in this connection, and this the court is without authority to do. The decisions of the appellate courts of this state are binding upon all the lower courts, and must govern in the proceedings of such courts."); *State v. Seigle*, 394 P.3d 627, 633 (Alaska Ct. App. 2017) (quoting ALASKA STAT. § 22.07.020(g)) ("[the statute] codifies the principle of vertical stare decisis, under which lower courts are required to follow the precedent of higher courts."); see *id.* at n.24 (gathering cases from other jurisdictions); *State v. Newnom*, 95 P.3d 950, 951 (Ariz. Ct. App. 2004) ("We have no authority to overrule or disregard decisions of our supreme court."); *McKay v. Industrial Commission*, 438 P.2d 757, 759 (Ariz. 1968) (in banc) ("Whether prior decisions of the highest court in a state are to be disaffirmed is a question for the court which makes the decisions. Any other rule would lead to chaos in our judicial system.") (citing *Justice Court v. Keswick*, 433 P.2d 984 (Ariz. 1967) (in banc)); *DeSoto Gathering Co. LLC v. Hill*, 531 S.W.3d 396, 403 (Ark. 2017) ("[I]t is well settled that the Arkansas Court of Appeals must follow the precedent set by the Arkansas Supreme Court. The court of appeals must follow the precedent set by the supreme court and are powerless to overrule its decisions.") (internal quotations and citations omitted); *Auto Equity Sales, Inc. v. Superior Court*, 369 P.2d 937, 939-940 (Cal. 1962) (in bank); *People v. Novotny*, 320 P.3d 1194, 1203 (Colo. 2014) (citing *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)); *Ligouri v. Quintans*, No. 318583, 1996 WL 383401, at *2 (Conn. Super. Ct. June 13, 1996) ("[t]he opinions of the Supreme Court of Connecticut are binding upon the Superior Court," and where a rule "is clear and explicit," it must be followed by lower courts "[u]ntil it is reversed, changed or modified by the Supreme Court.") (quoting *Montes v. Hartford Hospital*, 26 Conn. Super. Ct. 441, 442-43 (1966)); *Firefighters' Pension System of City of Kansas City, Missouri Trust v. Presidio, Inc.*, 251 A.3d 212, 265 (Del. Ch. Jan. 29, 2021) ("There is no question that, if the Supreme Court has clearly spoken on a question of law necessary to deciding a case before it, this court must follow its answer.");

Gilliam v. Stewart, 291 So. 2d 593, 594 (Fla. 1974) (abrogated on other grounds) (“[t]he constitutional system of courts in this State contemplates that only the Supreme Court may overrule its own decisions. This does not necessarily infer that the decisions of [the Supreme Court of Florida] are always correct but it does provide a system for the uniform operation of the laws of this State throughout its borders.”); State v. Stanford, 864 S.E.2d 448, 450 (Ga. 2021) (discussing “the general rule that lower courts must follow this Court’s precedent until we overrule it.”); George v. Hercules Real Estate Services, Inc., 795 S.E.2d 81, 91 n.3 (Ga. Ct. App. 2016) (Peterson, J., specially concurring) (“This principle is mandatory and does not involve an discretion on our part.”); Richmond & D.R. Co. v. Allison, 16 S.E. 116, 117 (1892) (“The appellate court, as the expositor of the law, must obey the law; it is bound by the law as other courts are bound by it; it must follow precedent as other courts follow it.”); Robinson v. Ariyoshi, 65 Haw. 641, 653 (1982) (“Under the rule of *stare decisis*, where a principle has been passed upon by the court of last resort, it is the duty of all inferior tribunals to adhere to the decision, without regard to their views as to its propriety, until the decision has been reversed or overruled by the court of last resort or altered by legislative enactment.”); State v. Martinez, No. 35438, 2010 WL 9586548, at *2 (Idaho Ct. App. May 18, 2010) (“[W]e must follow binding precedent from the Idaho Supreme Court...”); (declining to address litigant’s argument that the court of appeals should overrule a prior supreme court decision); State v. Hayes, 824 P.2d 163, 166 (Idaho Ct. App. 1992); Hoffer v. City of Boise, No. 36731, 2010 WL 9585780, at *2 (Idaho Ct. App. March 24, 2010) (declining to address arguments to overturn supreme court precedent); Schramer v. Tiger Athletic Ass’n of Aurora, 815 N.E.2d 994, 996 (Ill. App. Ct. 2004) (“Under the Illinois rule of *stare decisis*, a circuit court must follow the precedent of the appellate court of its district, if such precedent exists; if no such precedent exists, the circuit court must follow the precedent of other districts.”); Mekerichian v. Mercedes-Benz U.S.A., L.L.C., 807 N.E.2d 1165, 1171 (Ill. App. Ct. 2004) (“[a]fter our supreme has declared the law with respect to an issue, this court must follow that law, as only the supreme court has authority to overrule or modify its own decisions.”); Agricultural Transp. Ass’n v. Carpentier, 116 N.E.2d 863, 867 (Ill. 1953) (“Where the Supreme Court has declared the law on any point, it alone can overrule and modify its previous opinion, and the lower judicial tribunals are bound by such decision and it is the duty of such lower tribunals to follow such decision in similar cases.”); Horn v. Hickerson, 824 N.E.2d 690, 694-695 (Ind. Ct. App. 2005) (“[i]t is not this court’s role to reconsider or declare invalid decisions of our supreme court.”); In re Estate of Rickert, 912 N.E.2d 831, 838-39 (Ind. Ct. App. 2009) (Barnes, J. dissenting) (“As an intermediate appellate court, we must follow precedent set by our supreme court, even if we do not agree with it.”) (citing Horn v. Hendrickson, 824 N.E.2d 690, 694-95 (Ind. Ct. App. 2005)) (opinion vacated); State v. Zarate, No. 15-0451, 2016 WL 3269569, at *4 (Iowa Ct. App. June 15, 2016); State v. Eichler, 83 N.W.2d 576, 578 (Iowa 1957) (“it is the prerogative of this court to determine the law, and we think that generally the trial courts are under a duty to follow it as expressed by the courts of last resort, as they understand it, even though they may disagree. If our previous holdings are to be overruled, we should ordinarily prefer to do it ourselves.”); Davis v. Central Bridge, No. 2020-CA-0364-WC, 2022 WL 2541861, at *2 (Ky. Ct. App. July 8, 2022); State v. Norman, 287 So. 3d 778, 786 (La. Ct. App. 2019) (“As an intermediate appellate court, this Court is obliged to follow the precedent established by the Louisiana Supreme Court.”); Louisiana Electorate of Gays and Lesbians, Inc. v. State, 812 So. 2d 626, 629 (La. 2002) (“Despite the clarity of our holding to this effect, the district court chose to depart from *Smith* and reached a contrary result on the law. This action involves, at least, a failure by the lower court to recognize its obligation to follow the law of this State as pronounced by this court.”); Myrick v. James, 444 A.2d 987, 997-998 (Me. 1982) (superseded by statute on other grounds) (“That policy, enshrined as the doctrine of *stare decisis*, forms the underpinning of an orderly, stable system of common law jurisprudence. Under that doctrine, a deliberate or solemn decision of a court, after argument on a question of law fairly arising in the case, the disposition of which is necessary to the determination of the case, is an authority or binding precedent in the same court and in other courts of equal or lower rank, in subsequent cases where the very point is again in controversy.”); Chamberlain v. State, 2018 WL 6433000, at *4 (Md. Ct. Spec. App. Dec. 6, 2018) (“Although we are aware of no similar declaration by the Court of Appeals, we do not doubt that our State’s highest Court would prefer us to adhere to the same restraining principle, which is consistent with our role as an intermediate appellate court.”); Com. v. Sommer, 929 N.E.2d 973, 974 (Mass. App. Ct. 2010) (“This court, however, has no authority to revise decisions of the Supreme Judicial Court. Instead, this court is obliged to follow those decisions until they are modified or overruled either by the Supreme Judicial Court itself or by a higher authori-

ty.”); *Com. v. Vasquez*, 923 N.E.2d 524, 530 (Mass. 2010) (“it is also true that this court is the highest appellate authority in the Commonwealth, and our decisions on all questions of law are conclusive on all Massachusetts trial courts and the Appeals Court.”); *In re AGD*, 933 N.W.2d 751, 755 (Mich. Ct. App. 2019) (“An elemental tenet of our jurisprudence, *stare decisis*, provides that a decision of the majority of justices of the Supreme Court is binding upon lower courts. The obvious reason for this is the fundamental principle that only the Supreme Court has the authority to overrule one of its prior decisions. Until it does so, all lower courts and tribunals are bound by that prior decision and must follow it even if they believe that it was wrongly decided or has become obsolete.”) (cleaned up); *In re Estate of Kilburn*, No. 353525, 2021 WL 2026174, at *6 n.4 (Mich. Ct. App. May 20, 2021); *Brainerd Daily Dispatch v. Dehen*, 693 N.W.2d 435, 439-40 (Minn. Ct. App. 2005) (“...we are bound to follow Minnesota Supreme Court precedent.”); *State v. Saros*, No. A12-1429, 2013 WL 3368415, at *4 n.1 (Minn. Ct. App. July 8, 2013); *Kisoondath v. U.S. Fire Ins. Co.*, 620 N.W.2d 909, 914 (Minn. Ct. App. 2001) (“Nevertheless, a trial court is bound to follow established case law in rendering decisions....”); *State v. Chauvin*, 955 N.W.2d 684, 695 (Minn. Ct. App. 2021) (“Although parties, attorneys, district court judges, and the public may disagree with this court’s precedential decisions, district courts are bound to follow them. If it were otherwise, there would be uncertainty in the law and the integrity of our judicial system would be undermined. We therefore hold that a precedential opinion of this court is binding authority for this court and district courts immediately upon its filing.”); *Brown v. State*, 336 So. 3d 134, 146 (Miss. Ct. App. 2020) (“However, we will continue to follow the Supreme Court’s directly on-point decisions in *Robinson* and *Kelly* until the Supreme Court itself has overruled those decisions.”); *Young v. State*, 245 So. 3d 510, 517-18 (Miss. Ct. App. 2017) (Wilson, P.J., concurring) (“Thus, while *Bester*’s reasoning signals that the Supreme Court may or is likely to overrule *Stewart* in the future, that is no basis for this Court to declare that *Stewart* has already been overruled. ‘This Court, sitting as an intermediate appellate court, is bound by established precedent as set out by the Mississippi Supreme Court and we do not have the authority to overrule the decisions of that Court.’ *Bevis v. Linkous Constr. Co.*, 856 So.2d 535, 541 (¶ 18) (Miss. Ct. App. 2003). As the United States Supreme Court has instructed the federal courts of appeals, ‘If a precedent of the Supreme 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 the Supreme Court the prerogative of overruling its own decisions.’ An intermediate appellate court may not, ‘on its own authority, ... take[] the step of renouncing’ precedent of a higher court.”); *State ex rel. Hopkins v. Daues*, 6 S.W.2d 893, 896 (Mo. 1928) (en banc) (“All inferior courts are bound to follow the latest controlling decision of this court.”); *Damon v. City of Kansas City*, 419 S.W.3d 162, 174-75 (Mo. Ct. App. 2013); *Martinez v. International Paper Co.*, 937 N.W.2d 875, 882 (Neb. Ct. App. 2020) (“[U]nder the doctrine of *stare decisis*, lower courts must follow the precedent of higher appellate courts.”); *State v. Nichols*, 600 N.W.2d 484, 486-87 (Neb. Ct. App. 1999); *Employment Sec. Div. v. Ramirez*, No. 65544, 2015 WL 1877532, at *2 n.1 (Nev. Ct. App. April 13, 2015); *Premier One Holdings, Inc. v. Green Tree Servicing, LLC*, No. 77481-COA, 2020 WL 5513361, at *1 n.1 (Nev. Ct. App. Sept. 11, 2020); *Spottedbear v. State*, No. 79572-COA, 2021 WL 673401, at *1 (Nev. Ct. App. Feb. 19, 2021); *Marshall v. Burke*, 34 A.3d 705, 708 (N.H. 2011) (“Our opinion in *Burke* did not cite or reference *Gowen* in any way, and while, like the trial court, we acknowledge the reality that a case may be overruled *sub silencio*, such a conclusion should not be reached except on inescapable grounds, as to do otherwise is inconsistent with settled principles of *stare decisis*.”) (internal citations omitted); *State v. Rembert*, 383 A.2d 747, 749 (N.J. Super. Ct. App. Div. 1978) (“The decision of an intermediate appellate court is the law of the State until reversed or overruled by the court of last resort.”) (citing *Byrnes v. Hudson Cty. Blvd. Comm’rs*, 3 A.2d 456 (N.J. E. & A. 1939)); *State v. Spano*, 319 A.2d 230, 231 (N.J. Superior Ct. App. Div. 1973) (“We, of course, may not ignore or change, but must follow, the decision of our court of last resort.”); *State ex rel. Martinez v. City of Las Vegas*, 89 P.3d 47, 54 (N.M. 2004) (“the Court of Appeals remains bound by Supreme Court precedent.”) As with the principle of *stare decisis* generally, the *Alexander* rule remains a necessity in order to protect the fundamental interests of fairness, certainty, uniformity, and judicial economy, and the rule is implicit in our power of superintending control and our power to issue writs of certiorari.”) (quoting *State v. Wilson*, 867 P.2d 1175, 1178 (N.M. 1994)) (finding that while the Court of Appeals may question uniform jury instructions not considered by the New Mexico Supreme Court, they are bound to follow the prior decisions of the New Mexico Supreme Court); Article 70 of CPLR for a Writ of Habeas Corpus, *The Nonhuman Rights Project, Inc. ex rel. Hercules and Leo v. Stanley*, 16 N.Y.S.3d

Some states, like Iowa, compare their vertical precedent rule to the rules pronounced by the United States Supreme Court in cases like *Rodriguez de Quijas*, stating, “[t]his court is not at liberty to anticipatorily overrule Supreme Court precedent any more than lower courts in Iowa are at liberty to anticipatorily overrule this court’s precedent.”¹⁰⁴ And while the application of vertical stare decisis is often strict, higher courts often welcome lower courts to state their disagreement with prior decisions while faithfully applying the same decisions until they are overruled.¹⁰⁵ This notion is similar

898, 916 (Sup. Ct. N.Y. 2015) (“[s]tate trial courts must follow a higher court’s existing precedent ‘even though they may disagree.’... Ultimately, ‘a higher court commands superiority over a lower not because it is wiser or better but because it is institutionally higher.’”) (gathering cases); *Diday v. Beaufort Cnty. Bd. of Education*, 149 S.E.2d 345, 346-47 (N.C. 1966) (Lake, J., concurring) (“The decision of a majority of this Court, applying the provisions of the Constitution of North Carolina, as we understand them, to a matter before us, is the final adjudication of the rights of the parties in that particular lawsuit and is a precedent which the judges of the other courts of this State must follow in deciding subsequent cases of like nature, until it is overruled by us or by our successors or by the people, themselves, through the amending process.”); *Martinez v. Wake Cnty. Bd. of Education*, 813 S.E.2d 658, 667 (N.C. Ct. App. 2018) (“it is clear that where a prior ruling of this Court is in conflict with binding Supreme Court precedent, we must follow the decision of the Supreme Court rather than that of our own Court.”); *Cannon v. Miller*, 327 S.E.2d 888 (N.C. 1985) (“It appearing that the panel of Judges of the Court of Appeals to which this case was assigned has acted under a misapprehension of its authority to overrule decisions of the Supreme Court of North Carolina and its responsibility to follow those decisions, until otherwise ordered by the Supreme Court.”); *Chase v. State*, 966 N.W.2d 557, 561 (N.D. 2021) (“[i]f a precedent has direct application, a district court is bound to follow it, whether or not the district court has doubts about whether the appellate court may be inclined to correct it.”); *State v. Fips*, 157 N.E.3d 680, 681 (Ohio 2020) (“We also take this opportunity to remind the lower courts in this state that they are required to follow our precedent.”); *Bruns v. Green*, 168 N.E.3d 396, 405 (Ohio 2020) (Kennedy, J., concurring); *Crown Services, Inc. v. Miami Valley Paper Tube Co.*, 166 N.E.3d 1115, 1127 (Ohio 2020) (Kennedy, J., dissenting) (“Even when our precedent appears to be in conflict with other decision of this court..., a court of appeals must ‘follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.’ The court of appeals’ failure to follow our caselaw, standing alone, is reversible error.”); *State v. Ingels*, 107 N.E.3d 762, 766-67 (Ohio Ct. App. 2018); *State v. Blevins*, 825 P.2d 270, 271 (Okla. Crim. App. 1992) (citing OKLA CONST. art. 7, § 4; 20 O.S.1981, § 40; *Jean v. State*, 49 Okla.Cr. 409, 295 P. 233 (1931)); *Stevens v. City of Cannon Beach*, 835 P.2d 940, 942 (Or. Ct. App. 1992); *State v. Barrett*, 460 P.3d 93, 97 n.8 (Or. Ct. App. 2020) (en banc); *Walnut Street Associates, Inc. v. Brokerage Concepts, Inc.*, 20 A.3d 468, 480 (Pa. 2011); *McCann v. McCann*, 396 A.2d 942, 944 (R.I. 1979) (“Under no circumstances may a trial justice ignore our previous rulings.”); *Stoneledge at Lake Keowee Owners’ Ass’n, Inc. v. Clear View Const., LLC*, 776 S.E.2d 426, 434 n.4 (S.C. Ct. App. 2015) (Lockemy, J., concurring in part); *Huan v. Guaranty Sec. Ins. Co.*, 453 S.W.2d 84, 94 (Tenn. Ct. App. 1969); *Evans v. Steelman*, No. 01-A-01-9511-JV-00508, 1996 WL 557844, at *8 (Tenn. Ct. App. Oct. 2, 1996) (Koch, J., dissenting); *Petco Animal Supplies, Inc. v. Schuster*, 144 S.W.3d 554, 565 (Tex. App. 2004); *Mitchell v. Labor Comm’n, Milliken & co.*, 348 P.3d 356, 360 (Utah Ct. App. 2015); see *State v. Downing*, 245 A.3d 758, 767 (Vt. 2020); *Startin v. Commonwealth*, 690 S.E.2d 310, 316 (Va. Ct. App. 2010); *Dalton M, LLC v. North Cascade Trustee Services, Inc.*, 504 P.3d 834, 855 (Wash. Ct. App. 2022); see *Jackson v. Belcher*, 753 S.E.2d 11, 17 (W.Va. 2013); *State v. Alvarado*, 393 N.W.2d 799 (Wisc. Ct. App. 1986); see *Mayhew v. State*, 438 P.3d 617, 623 (Wyo. 2019).

104. *Bomgaars v. State*, 967 N.W.2d 41, 48 n.4 (Iowa 2021).

105. See, e.g., *Gilliam v. Stewart*, 291 So. 2d 593, 594 (Fla. 1974) (abrogated on other grounds); *Agostini v. Felton*, 521 U.S. 203 (1997). See also, *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (concurring in the majority opinion written by himself arguing that while he applies *Chevron* as he was bound to do, the Supreme Court should consider overruling

to the United States Supreme Court's decision in *Agostini v. Felton*, where the Court commended the district court for its application of precedent despite noting that the prior decision rested on shaky foundations.¹⁰⁶ The Florida Supreme Court has invited their lower courts to do just that, stating,

We recognize that in this fast changing world the general welfare requires from time to time reconsideration of old concepts. When the district courts decide that ancient precedent should be overruled, we welcome their views and such should be unhesitatingly rendered but, in cases such as this, it is the duty of the district courts under the plain constitutional language to adhere to the former precedents and then certify the decision to us. This will assure uniformity.¹⁰⁷

And other courts do not hesitate to chastise lower courts for their rogue decision-making. The Nebraska Court of Appeals has chastised its trial courts for disregarding precedent, stating

A hierarchical system of courts allows for as much certainty and predictability as possible in our legal system because lawyers, litigants, and judges all understand that trial courts must follow the precedents of the appellate courts.... We write neither to assert nor claim superior intellect or wisdom than Judge Murphy, but to emphasize that the office and commission of the Court of Appeals is higher than that which he holds. Thus, while Judge Murphy is entitled to his personal opinion about this court and its members, he is not, under his oath of office, entitled to ignore this court's precedential decisions. Neb. Ct. R. of Prac. 2E(5), which was adopted by the Nebraska Supreme Court on April 30, 1997, requires the judge to follow our permanently published opinions until they are modified or overruled by the Supreme Court.... We write to ensure that citizens, litigants, and lawyers in Judge Murphy's district will have a system of vertical stare decisis upon which they can depend.... Rule 2E(5) adopts vertical stare decisis for this court's precedential opinions to bring efficiency and order to the Nebraska judicial system.¹⁰⁸

Oddly, one state, South Dakota, seems to have not fully addressed this issue. But where it has touched on adjacent topics, the Supreme Court of South Dakota has said, "[e]very court should be free to acknowledge its errors and should hasten to correct the same...."¹⁰⁹ While this is more aligned with horizontal precedent, it is of note that the supreme court has vested every court in their state with that power while not addressing verti-

Chevron); Jonathon R. Seigel, Essay, *The Constitutional Case for Chevron*, 71 VANDERBILT L. REV. 937, 950-51 (2018) (discussing then-Judge Gorsuch's self-concurrence).

106. See *Agostini*, 521 U.S. at 237.

107. *Gilliam*, 291 So. 2d at 594 (abrogated on other grounds).

108. *State v. Nichols*, 600 N.W.2d 484, 486-87 (Neb. Ct. App. 1999).

109. *Sentell v. Farm Mutual Insurance Company of Lincoln County*, 956 N.W.2d 826, 835 (S.D. 2021).

cal precedent. South Dakota's court structure could be the reasoning for both the supreme court's silence on vertical stare decisis as well as their trust of lower courts.¹¹⁰

But one state, Kansas, explicitly deviates from the typical stare decisis rule that a lower court must, without hesitation, follow supreme court precedent.¹¹¹ It is curious that Kansas allows their court of appeals the discretion to anticipatorily overrule the Kansas Supreme Court. Further variation from the typical application of vertical stare decisis is found when looking to other states. Some lower courts disregard their supreme court's vertical precedent rules without much admonition, while other state supreme courts keep a watchful eye over lower courts seeking to disregard precedent. But one thing seems to be common among these oddities—a concern for structure and procedure in deviating from the traditional application of vertical stare decisis.

i. The Kansas Court of Appeals' Power to Overrule Vertical Precedent

In Kansas, the Kansas Court of Appeals serves as an intermediate appellate court,¹¹² and their decisions are reviewable only by the Kansas Supreme Court.¹¹³ While most intermediate appellate courts find that they are bound by a higher court's decision,¹¹⁴ even if it seems like "moth eaten" precedent,¹¹⁵ Kansas allows its Court of Appeals to anticipatorily overrule or disregard Kansas Supreme Court decisions so long as the Court of Appeals is convinced that the Kansas Supreme Court is departing from its own precedent. In other words, the Kansas Court of Appeals has the power to disregard Kansas Supreme Court precedent where the Kansas Supreme Court is deciding cases in a manner which is chipping away at a prior decision.

As early as 1981, the Kansas Court of Appeals has taken the position that while it is "duty-bound to follow the law as established by the Supreme Court of [their] state," they are not necessarily required to do so when there is, in the opinion of the Court of Appeals, "some indication that [the Kansas Supreme Court] is departing from its previously expressed position."¹¹⁶ Again in 1995, the Kansas Court of Appeals stated, that "[t]his court is not at liberty to disregard controlling precedent but must follow Kansas Su-

110. The South Dakota court structure is one without an intermediate appellate court. *See* Part II.B.ii.

111. *See, e.g.,* *State v. Miller*, 629 P.2d 748, 750 (Kan. Ct. App. 1981).

112. KAN. STAT. ANN. § 20-3001.

113. *Id.* ("shall be subject to the general administrative authority of the supreme court.").

114. *See supra* note 103.

115. *National Coalition for Men v. Selective Service System*, 969 F.3d 546, 549 (5th Cir. 2020).

116. *State v. Miller*, 629 P.2d 748, 750 (Kan. Ct. App. 1981).

preme Court holdings *unless we are convinced* that court is departing from its own precedent.”¹¹⁷ And over a decade later, the Court of Appeals doubled down, stating that “[a]s an intermediate appellate court, we must follow the decisions of the Kansas Supreme Court *unless there is some indication* that it is departing from a past holding.”¹¹⁸ It was not until 2016 that the Supreme Court of Kansas finally recognized this rule.¹¹⁹

This rule, which gives a certain amount of discretion to the intermediate court of appeals to overrule the state supreme court, is in direct contrast from the rules of vertical stare decisis in the federal courts. Indeed, as the Fifth Circuit has put it, “despite [a particular case’s] increasingly wobbly, moth-eaten foundations” lower courts must, despite any disagreement, obey those decisions and leave them for higher courts to overrule on their own.¹²⁰ But the Kansas Court of Appeals has the liberty to hold prior Kansas Supreme Court holdings as abandoned and anticipatorily overrule them. This discretion which the Kansas Court of Appeals possesses is seemingly unmatched throughout the United States.¹²¹

Thus, the question arises: why are Kansas’s vertical stare decisis rules different? Kansas has not codified or constitutionalized a rule of vertical stare decisis, so their rule is promulgated in the common law.

But under the judicial legislation theory, the Kansas Court of Appeals’ ability to overrule the Kansas Supreme Court would make no sense. Under that theory of common law, the Kansas Supreme Court would pronounce rules of law on a case-by-case basis.¹²² In other words, the Justices of the Kansas Supreme Court would be creating the law, and it would not make logical sense to allow the Kansas Court of Appeals to subvert laws created by the court entrusted with this sort of judicial legislation, or rule pronouncement, function.

The most likely possibility is that Kansas courts operate under a common law theory similar to the discovery theory, meaning that the Kansas Court of Appeals is obligated to apply the common law as it exists, not necessarily as the Kansas Supreme Court says it exists.¹²³ Indeed, under the discovery theory, it is entirely possible for the Kansas Supreme Court to be mis-

117. *State v. Gunter*, No. 71,399, 1995 WL 18253140, at *1 (Kan. Ct. App. Aug. 11, 1995) (emphasis added).

118. *State v. Hodges*, No. 96,811, 96,812, 2007 WL 4158165, at *1 (Kan. Ct. App. Nov. 21, 2007) (emphasis added).

119. *State v. Spencer Gifts, LLC*, 374 P.3d 680, 685 (Kan. 2016) (“Court of Appeals must follow Kansas Supreme Court precedent unless there is indication the Supreme Court is departing from a prior position.”).

120. *National Coalition for Men*, 969 F.3d at 549.

121. *See supra* note 103.

122. *See supra* note 32.

123. *See supra* note 33-34.

taken about the law, and the Kansas Court of Appeals is not required to follow a mistaken view of the supreme court when the Court of Appeals has itself discovered what the law truly is.¹²⁴ Instead, the Court of Appeals might have a duty to follow the law as it is discovered.¹²⁵

ii. Some State Courts Ignore Vertical Stare Decisis Altogether

While Kansas is somewhat of a maverick in its application of vertical stare decisis, it is worth noting that while Kansas expressly permits this sort of behavior in their lower courts, there are state lower courts that, from time to time, do not follow the traditional rules of vertical stare decisis or the rules laid out by their state supreme court.¹²⁶ Despite the general principle put forward by the United States Supreme Court's pronouncements that lower courts are to follow the prior decisions of the Supreme Court unless and until the Supreme Court overrules those decisions itself,¹²⁷ this issue is very much still relevant, as seen by recent decisions in the states.¹²⁸ A prime example is the Hinds County, Mississippi chancery court *Dobbs* case, which highlights the issue that anticipatory overruling presents.¹²⁹

Shortly after the United States Supreme Court handed down its decision in *Dobbs v. Jackson Women's Health Organization*, the Jackson Women's Health Organization ("the clinic") filed suit in the Hinds County Chancery Court,¹³⁰ a trial court which serves as a court of equity in Mississippi,¹³¹ seeking an injunction that would prevent Mississippi's new abortion statute from taking effect.¹³² The clinic based its claim for an injunction on a little-discussed, 1998 Mississippi Supreme Court case, *Pro-Choice Mississippi v. Fordice*.¹³³

124. Cf. Stephen E. Sachs, *Finding Law*, 107 CAL. L. REV. 527, 581 (2019) ("Unwritten law can be found, as well as made....").

125. While it would be interesting and important to uncover Kansas's true reasons for their particular application of vertical stare decisis, that task is for another day!

126. At one point, the Indiana Court of Appeals was not wholly bound by Indiana Supreme Court precedent. See *Wagner v. Carskadon*, 28 Ind. App. 573, 573, 61 N.E. 976, 976 (Div. 2 1901) ("This court is bound by the law as there declared, and our decision must conform to it, unless we are of the opinion that the law was wrongly declared, in which event our way is made plain by the statute.").

127. *Rodriguez de Quijas*, 490 U.S. at 484.

128. See, e.g., *State v. Chauvin*, 955 N.W.2d 684, 695 (Minn. Ct. App. 2021).

129. *Jackson Women's Health Org. v. Dobbs*, Cause No. 25CH1:22-cv-00739 (Miss. Ch. 2022) (Opinion and Order Denying Plaintiff's Motion for Preliminary Injunctive Relief).

130. *Jackson Women's Health Org. v. Dobbs*, No. G2022-739019, 2022 WL 2354520 (Miss. Ch. June 27, 2022).

131. MISS. CONST. Art. 6, § 159.

132. *Jackson Women's Health Org. v. Dobbs*, No. G2022-739019, 2022 WL 2354520 (Miss. Ch. June 27, 2022).

133. *Jackson Women's Health Org. v. Dobbs*, No. G2022-739019, 2022 WL 2354520 (Miss. Ch. June 27, 2022) ("Although the U.S. Supreme Court's June 24 decision in *Dobbs v. Jackson Women's Health Organization* overruled that Court's decision in *Roe v. Wade*, Mississippians still have a separate

In *Pro-Choice Mississippi v. Fordice*, the Mississippi Supreme Court handed down a fractured opinion.¹³⁴ Nevertheless, five votes were cast for a portion of the opinion that found a right to choose whether or not to obtain an abortion within the right to privacy that is protected in the Mississippi Constitution.¹³⁵ In the Mississippi-version of *Dobbs*, the State argued that the language of the *Fordice* opinion was too closely attached to the Supreme Court's holdings in *Roe* and *Casey*, such that the prior decision of the Mississippi Supreme Court was dependent on those decisions.¹³⁶ But the language of the *Fordice* opinion never says that the holding was dependent on *Roe* and *Casey*.¹³⁷ Nevertheless, under Mississippi Supreme Court precedent, lower courts are to follow prior decisions of the supreme court unless and until the supreme court overturns those decisions.¹³⁸

Faced with this conflicted reading of *Fordice* and the recent overruling of *Roe* and *Casey*, the chancellor made an undoubtedly difficult decision. But they did not follow the default rule of most states, including their own, that they should apply the prior decision of the state supreme court.¹³⁹ Instead, the chancellor disregarded or anticipatorily overruled the *Fordice* decision,

and independent right to privacy under the Mississippi Constitution that the Mississippi Supreme Court held encompasses a right to abortion. The Court reaffirmed in *Pro-Choice Mississippi v. Fordice* that “[n]o right is held more sacred ... than the right of every individual to the possession and control of his own person,” and “no aspect[] of life is more personal and private than those having to do with one’s [own] reproductive system,” and ruled that “the state constitutional right to privacy includes an implied right to choose whether or not to have an abortion.” 716 So. 2d 645, 653-54 (Miss. 1998) (internal quotations omitted). This holding by the Mississippi Supreme Court in 1998 is still standing and is binding precedent that prevents the State of Mississippi from outlawing abortion regardless of the status of the current federal law.”).

134. *Pro-Choice Mississippi v. Fordice*, 716 So. 2d 645 (Miss. 1998).

135. *Id.* (Prather, C.J., Sullivan, Pittman, P.J.J., Banks, and McRae, JJ. concurring in Parts I and III). Part I states, “[j]ust as the United States Supreme Court has recognized that the federal constitutional right to privacy protects a woman’s right to terminate her pregnancy, we find that the state constitutional right to privacy includes an implied right to choose whether or not to have an abortion.” *Id.* at 654.

136. *Jackson Women’s Health Org. v. Dobbs*, No. 2022-M-681-SCT, Petition for Interlocutory Appeal, at *5 (Miss. July 7, 2022) (“The State argued that it can compel Mississippians to endure these grave violations of their rights because the U.S. Supreme Court’s decision overruling *Roe* automatically extinguished the independent right to abortion under the Mississippi Constitution this Court recognized in *Fordice*.”).

137. *See Fordice*, 716 So. 2d 645.

138. *Young v. State*, 245 So. 3d 510, 517-18 (Miss. Ct. App. 2017) (Wilson, P.J., concurring) (“Thus, while *Bester*’s reasoning signals that the Supreme Court may or is likely to overrule *Stewart* in the future, that is no basis for this Court to declare that *Stewart* has already been overruled. ‘This Court, sitting as an intermediate appellate court, is bound by established precedent as set out by the Mississippi Supreme Court and we do not have the authority to overrule the decisions of that Court.’ *Bevis v. Linkous Constr. Co.*, 856 So.2d 535, 541 (Miss. Ct. App. 2003). As the United States Supreme Court has instructed the federal courts of appeals, ‘If a precedent of the Supreme 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 the Supreme Court the prerogative of overruling its own decisions.’ An intermediate appellate court may not, ‘on its own authority, ... take[] the step of renouncing’ precedent of a higher court.”).

139. *See supra* note 103.

citing the Mississippi Supreme Court's forthcoming and mandatory review.¹⁴⁰ While this is in direct conflict with the Mississippi Supreme Court's rules of stare decisis, the chancellor's discussion of the supreme court's mandatory review on appeal is interesting. Essentially, the chancellor applied a weaker vertical stare decisis on the basis that the court structure within which they were operating allowed them to do so without much harm to the judicial process. Despite the Mississippi *Dobbs* chancellor's clear disregard of both the prior supreme court decision and the rule that they are absolutely bound by such prior decisions, their decision provides an important example that suggests a weak application of vertical stare decisis may not be as unwise as attorneys might first think. Instead, it is possible that state courts should look to their court structure to determine the strength of vertical stare decisis's application within that structure.

C. *State Court Structure's Impact on Vertical Stare Decisis*

In the discussion of precedent, an oft overlooked point of context is the appellate structure—or the extent of mandatory or discretionary review—within which a court operates.¹⁴¹ Indeed, if the doctrine of stare decisis is truly “context dependent” as then-professor, now-Justice Amy Coney Barrett has written,¹⁴² these structures are an important consideration in determining the strength of vertical precedent.¹⁴³ As one scholar puts it,

As it turns out, the structure of the court system within which judicial decisions are made—the structure of the appellate universe—is critical to defining the rules of precedent that function within it. Through a better understanding of the relationship between structure and precedent, we are better positioned to answer questions about the role of precedent within our legal system as a whole, to understand why we have certain assumptions and intuitions about precedent, and to ensure a more careful and rational discussion of precedential rules in the future.¹⁴⁴

But this same method of thinking about precedential rules in light of the structure, or context, within which the court is making decisions, is appropriate and necessary for state courts.¹⁴⁵

140. Jackson Women's Health Org. v. Dobbs, Cause No. 25CH1:22-cv-00739, at *5 (Miss. Ch. 2022) (Opinion and Order Denying Plaintiff's Motion for Preliminary Injunctive Relief).

141. See generally, Dobbins, *supra* note 1.

142. Barrett, *supra* note 2.

143. See Dobbins, *supra* note 1.

144. Dobbins, *supra* note 1, at 1459. Dobbins discusses the relationship between appellate structure and vertical precedent at the federal level, but he leaves open an important question as to the issue at the state level. *Id.* at 1458 n.16 (“Additional investigation into the relationship between precedent and structure at the state level would be useful, but it is beyond the scope of this Article.”).

145. See *id.* at 1458 n.16.

i. Intermediate Courts of Appeals

The existence and specialization of an intermediate court of appeals is one of the most important structural components which might affect the application of vertical stare decisis. As has been shown above, some state court systems have intermediate courts of appeals, and some do not. In those states that do have intermediate courts of appeals, some have specialized courts of appeals. All of these state court system characteristics ought to be taken into account when determining the strength at which vertical stare decisis is applied.

The strongest application of vertical stare decisis might be had in state judiciaries without an intermediate court of appeals. If state trial courts are left to decide cases with only one court which exercises appellate review, that supreme court would be hard-pressed to review every state trial court ruling. Thus, in all practicality, errors of law would be allowed to persist at a higher rate. But when lower courts are more firmly bound to higher court decisions under a strict application of vertical stare decisis, the errors produced by trial courts would most likely be fewer in number.

But by state judiciaries at least having an intermediate court of appeals, it is possible for them to allow some room for flexibility in vertical stare decisis. In those judiciaries, trial court decisions would be more readily reviewable by both an intermediate court of appeals or regional intermediate courts of appeals, and a supreme court, minimizing the amount of error that slips under the radar. The presence of an intermediate court of appeals has an impact on vertical stare decisis largely based upon that court's effect on the appellate review process as well, such as the right to appellate review. In the next subpart, the effects of mandatory and discretionary review by both intermediate courts of appeals and supreme courts are discussed.

Lastly, there are stronger arguments for a weaker application of vertical stare decisis in more specialized intermediate courts of appeals that are more specialized. For instance, the Texas Court of Criminal Appeals may have a stronger argument to deviate from any binding ruling of the Texas Supreme Court on criminal matters. Because the Texas Court of Criminal Appeals deals in criminal law more frequently, they have an expertise in the field which might allow them more authority than a general intermediate appellate court.

ii. Mandatory and Discretionary Appellate Review

One structural or procedural rule which affects the strength of vertical stare decisis is whether an appellate court exercises mandatory or discretionary review of lower court decisions. If a state supreme court exercises

appellate review directly over trial court proceedings as of right, meaning that so long as one litigant wishes the supreme court to review the decision, the supreme court is bound to do so, it may not be an absurd notion to allow state trial courts to decide cases as they believe their supreme court would. While allowing lower courts to do so would likely drive up the cost of litigation for the parties, assuming that appeals would become more frequent, the cost to precedent does not seem to be overly great. Instead, direct, mandatory review of trial courts is likely enough to ensure that trial courts stay within bounds, not frivolously making anticipatory decisions.

This might also be possible in judicial systems where all trial court decisions are appealable as of right to an intermediate appellate court. In this system, which mirrors the appellate process of the federal judiciary,¹⁴⁶ intermediate courts would serve as the check on trial courts that anticipate a supreme court ruling on precedential issues of great difficulty or ambiguity. In this type of judicial system, the intermediate appellate court might serve as the state supreme court does in the preceding paragraph. Although in this system, trial court decisions would likely be reversed by the intermediate appellate court, which is more strongly bound by supreme court precedent, and if the trial court correctly anticipated the supreme court's decision, the intermediate court would be reversed and the trial court affirmed.

But often in these systems, the state supreme court does not exercise mandatory review over cases appealed from the intermediate court.¹⁴⁷ Where appellate review is discretionary on the part of the reviewing court, it would seem that the danger of anticipatory decision-making by a lower court would increase. The same can be said where there are institutional limitations on the review of lower court decisions, such as statutes prohibiting review of certain actions. The limited review over lower court decisions increases the probability of anticipatory actions going unrecognized by a higher court and thus endangering the principle of vertical precedent in a more severe context.

Indeed, some courts have already recognized this issue.¹⁴⁸ For example, the California Supreme Court noted in *Auto Equity Sales, Inc.* that it was particularly concerned about lower court anticipatory rulings because of the limited review that the supreme court may exercise over such a ruling.¹⁴⁹ There, the California Supreme Court stated,

The appellate department of the superior court, while recognizing that the *Kroiss* case was directly in point, refused to follow the rule of that case on

146. See *supra* note 81.

147. See, e.g., R. KAN. SUP. CT. 8.03(g)(2).

148. See *Auto Equity Sales, Inc. v. Superior Court*, 369 P.2d 937, 939-40 (Cal. 1962) (in bank).

149. *Id.*

the ground that that case had been decided incorrectly.... Under these facts, whether or not the *Kroiss* case was decided correctly, the appellate department of the superior court exceeded its 'jurisdiction,' as that term is used in connection with the writ of certiorari, in refusing to follow a rule established by a court of superior jurisdiction.... This rule requiring a court exercising inferior jurisdiction to follow the decisions of a court exercising a higher jurisdiction has particular application to the appellate departments of the superior court. Until very recently, the decisions of those courts were not subject to appellate review except by the use of original writs in exceptional cases. Even under the recent constitutional amendment, which is not here applicable, *the right of review is strictly limited*. It would create chaos in our legal system if these courts were not bound by higher court decisions.¹⁵⁰

Sitting en banc, the California Supreme Court made it clear that vertical stare decisis is a bedrock principle in their state. But the quote above shows that a major concern the court expressed was the limited right of review that the litigants had. Because the litigants could not appeal the intermediate appellate court's ruling as of right, there is a danger that the supreme court may never review the question and injustice may be allowed to spread.¹⁵¹

Similar reasoning, although on the opposite end of the spectrum, was employed by the chancellor in the Mississippi state-court version of *Dobbs*.¹⁵² There, the chancellor was faced with a decision of great importance where the precedent was at least partially ambiguous as to whether the right to abortion recognized in *Fordice* was dependent on the Supreme Court's decisions in *Roe* and *Casey*. Thus, knowing that their decision would be reviewed by the Mississippi Supreme Court regardless of outcome, the chancellor simply ruled as she thought the Mississippi Supreme Court would ultimately decide the case.¹⁵³

The Mississippi *Dobbs* case and *Auto Equity Sales, Inc.* are distinct in that one case is a lower court using structure to abandon vertical stare decisis and the other is a supreme court using structure to bolster vertical stare decisis. But one thing is clear: structure can be a determining factor in the strength of vertical stare decisis. Thus, courts ought to look to their own structures to determine whether they could deviate from the traditional model of vertical stare decisis. Although it would be inadvisable in most

150. *Id.* (emphasis added).

151. *See id.*

152. Jackson Women's Health Org. v. Dobbs, Cause No. 25CH1:22-cv-00739, at *5 (Miss. Ch 2022) (Opinion and Order Denying Plaintiff's Motion for Preliminary Injunctive Relief).

153. Jackson Women's Health Org. v. Dobbs, Cause No. 25CH1:22-cv-00739, at *5 (Miss. Ch 2022) (Opinion and Order Denying Plaintiff's Motion for Preliminary Injunctive Relief).

scenarios, it is not necessarily, nor should it be, out of the realm of possibility.

CONCLUSION

It is not the purpose of this Article to advocate for state deviation from traditional notions of vertical stare decisis. But instead, this Article serves as a check on the notion that vertical stare decisis is a rigid doctrine to be applied in the same fashion at all times in all courts. There may be instances where state courts are faced with difficult questions in the grey—or where it seems extremely likely that a binding, prior decision actually does rest on moth-eaten foundations. In such cases, this Article suggests that it may, and often is, appropriate for state lower courts to consider the greater universe, or court structure, within which they operate.

If stare decisis is indeed “context dependent,” its application requires accounting for all contexts surrounding the manner in which courts make decisions. And one of the most important contexts in considering precedential value of a court decision is the procedure which a case follows on appeal. Because state judiciaries vary in their appellate procedure, or appellate process, the context within which the weight of stare decisis is determined varies from state to state, allowing variances in the application of vertical stare decisis. Whether such variances from the traditional vertical stare decisis model are advisable is a question that each state must answer for themselves, but a state’s adoption of a different sense of vertical stare decisis is not an absurd notion.