

DOBBS AND THE NEW DOCTRINE OF *STARE DECISIS*

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ABSTRACT

Alongside the historic and troubling annulment of the half-century-old Substantive Due Process right to abortion, *Dobbs* produced another significant outcome. To get its substantive constitutional law result, the Court's majority also had to reconceive—and significantly weaken—the doctrine of *stare decisis*. This was necessary because, following *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the constitutional right to abortion largely depended on respect for precedent as the basis for its survival. To overturn *Roe*, the *Dobbs* majority had to blast through the established practice of precedent and articulate a new doctrine of *stare decisis*. It seems that precedent was meant to be the last (jurisprudential) casualty of America's long-running abortion war. This Article outlines the new doctrine of *stare decisis* that emerged from the majority's tectonic ruling in *Dobbs*.

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INTRODUCTION

It is fashionable (now, literally) to be skeptical about the doctrine of *stare decisis*.¹ It is a lot of bluster but never really a controlling force on the decision-making of the Supreme Court Justices. It is for dissenters. It is a loser's lament. It is a roiling, inconsistent, and incoherent mess, better observed in theory than in practice. It is, perhaps, an ambition, but it is not a proper doctrine. *Stare decisis* is for suckers.²

Is it? Then why the need for so many—*so many*—law review articles and monographs on the subject?³ Do we protest too much? And it's not just the academy that can't seem to quit the idea of precedent, even as so many seem so convinced that it's meaningless. Maybe the empirics tell us that *stare decisis* plays almost no role in determining outcomes at One First Street N.E. in Washington, D.C.⁴ But the Justices haven't gotten the memo. They keep going on and on about it, in their opinions: majority, concurring, dissenting—it doesn't matter. They treat it in their extrajudicial writings.⁵ In fact, as I explain elsewhere, the Court has just passed through an intensive and consuming debate on the purpose and practice of precedent.⁶ It was

¹ See *Merchandise*, CROOKED STORE, <https://store.crooked.com/collections/strict-scrutiny/products/stare-decisis-t-shirt> [<https://perma.cc/9RU3-LAC8>] (last visited Feb. 19, 2025).

² *Id.*; see also *CFPB v. All Am. Check Cashing, Inc.*, 952 F.3d 591, 603 (5th Cir. 2020) (Smith, J., dissenting) (“[S]tare decisis is for suckers.”).

³ See, e.g., Joseph A. Greenway, Jr., *Reflections on Stare Decisis*, 83 MD. L. REV. 1 (2023); Glen Staszewski, *A Deliberative Democratic Theory of Precedent*, 94 U. COLO. L. REV. 1 (2023); Nicholas Iacono, *Stare (In)decisis: The Elusive Role of Precedent in Originalist Theory & Practice*, 20 GEO. J.L. & PUB. POL'Y 389 (2022); Randy J. Kozel, *Stare Decisis as Authority and Aspiration*, 96 NOTRE DAME L. REV. 1971 (2021); Sam C. Ehrlich & Ryan M. Rodenberg, *Tracking the Evolution of Stare Decisis*, 60 U. LOUISVILLE L. REV. 57 (2021); Morgan Johnson, *Conservative Stare Decisis on the Roberts Court: A Jurisprudence of Doubt*, 55 U.C. DAVIS L. REV. 1953 (2022); Jessie D.H. Snyder, *Stare Decisis Is for Pirates*, 73 OKLA. L. REV. 245 (2021); James Tilghman, *Restoring Stare Decisis in the Wake of Janus v. AFSCME*, Council 31, 64 N.Y.L. SCH. L. REV. 135 (2019–2020); Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411 (2010); Michael S. Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, 86 N.C. L. REV. 1165 (2008).

⁴ See Frederick Schauer, *Has Precedent Ever Really Mattered in the Supreme Court?*, 24 GA. ST. U. L. REV. 381, 392 (2007) (“[T]he existing research provides very strong support for the view that, at least in the Supreme Court, there exists no strong norm of stare decisis.”).

⁵ See, e.g., Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921 (2017); Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711 (2013); Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011 (2003); NEIL M. GORSUCH, *A REPUBLIC, IF YOU CAN KEEP IT* 216–17 (2019).

⁶ Russell A. Miller, *The Purpose and Practice of Precedent: What the Decade Long*

a labor involving contributions from every member of the current Court, waged across hundreds of pages of opinions that were lodged in scores of cases. Of course, much of that sound and fury was (implicitly) fueled by the abortion controversy.⁷ *Roe* was always the justification for the Court's debate over precedent, even as the Justices refused to say as much. So, when the time came to end that long-running *Kampf* in *Dobbs v. Jackson Women's Health Organization*, the doctrine of *stare decisis* found itself at center stage and in the sharp glare of the spotlight. Half of Justice Alito's 100-page opinion for the majority in *Dobbs* is concerned with the purpose and practice of precedent.

This Article aims to explain what the *Dobbs* decision wrought with respect to the doctrine of *stare decisis*. I argue that, alongside the historic and troubling annulment of the half-century-old Substantive Due Process right to an abortion, *Dobbs* produced another significant outcome.⁸ To get its substantive constitutional law result, the Court also had to reconceive—and significantly weaken—the doctrine of *stare decisis*.⁹ This was necessary because, following *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the constitutional right to abortion largely depended on respect for precedent as the basis for its survival.¹⁰ To overturn *Roe*, the *Dobbs* majority had to blast through the established practice of *stare decisis*. It seems that precedent was meant to be the last (jurisprudential) casualty of America's long-running abortion war.¹¹

Debate Over Stare Decisis Teaches Us About the New Roberts Court, 51 HASTINGS CONST. L.Q. 231 (2024).

⁷ See, e.g., Lee Ann Banaszak & Heather L. Ondercin, *Explaining the Dynamics Between the Women's Movement and the Conservative Movement in the United States*, 95 SOC. FORCES 381 (2016); Robert N. Karrer, *The Pro-Life Movement and Its First Years Under Roe*, 122 AM. CATH. STUD. 47 (2011); Glen A. Halva-Neubauer & Sara L. Zeigler, *Promoting Fetal Personhood: The Rhetorical and Legislative Strategies of the Pro-Life Movement after Planned Parenthood v. Casey*, 22 FEMINIST FORMATIONS 101 (2010); Reva B. Seigel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641 (2008).

⁸ *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

⁹ See *id.* at 359, 387 (Breyer, J., dissenting) ("By overruling *Roe*, *Casey*, and more than 20 cases reaffirming or applying the constitutional right to abortion, the majority abandons *stare decisis*, a principle central to the rule of law."); Michael Gentithes, *Concrete Reliance on Stare Decisis in a Post-Dobbs World*, 14 CONLAWNOW 1, 3, 10 (2022) (proposing *Dobbs* has "fundamentally altered *stare decisis* principles" by further entrenching a "weak strand" of *stare decisis*—overruling decisions that are poorly reasoned).

¹⁰ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–68 (1992) (retaining the essential holding because of *stare decisis*); Drew C. Ensign, *The Impact of Liberty on Stare Decisis: The Rehnquist Court from Casey to Lawrence*, 81 N.Y.U. L. REV. 1137, 1145 (2006) ("The joint opinion stressed the importance of *stare decisis* for the Court's legitimacy and reaffirmed *Roe* despite apparent concerns that it was wrongly decided.").

¹¹ See, e.g., Melissa Murray, *The Symbiosis of Abortion and Precedent*, 134 HARV. L. REV. 308 (2020); Mary Ziegler, *Unsettled Law: Social Movement Conflict, Stare Decisis, and Roe v. Wade*, 54 CONN. L. REV. 457 (2022); Scott W. Gaylord, *Roe as Potemkin Village*:

The skeptics, busy discounting the *stare decisis* leitmotif in the Court's recent jurisprudence (including right up through *Dobbs* and beyond) will have missed this fundamental rewriting of the fundamental doctrine of *stare decisis*.¹² The Court has been saying a lot about *stare decisis*. Now, what the majority told us in *Dobbs* is that precedent will have much weaker force as it gives way to a formalist pursuit of the law's objective meaning.¹³ Maybe this confirms the skeptics' view of *stare decisis*. But they will have missed the profound jurisprudence that got us there.

This Article begins with a summary of the established practice of *stare decisis*, which found canonical expression in the Rehnquist-era cases *Payne v. Tennessee* and *Casey*.¹⁴ Those cases recognized the benefits justifying the doctrine and they framed several factors to be considered when determining, on rare occasions, that precedent might be set aside. Significantly, those factors did not center on the objective correctness of the challenged precedent. *Dobbs* changed all of this.

This Article then discusses the different approaches to *stare decisis* that emerged in the *Dobbs* case. First, the controlling majority, in an opinion written by Justice Alito, announced a new *stare decisis* doctrine. This involved two efforts. The Court discredited *Casey* as a "leading precedent on precedent."¹⁵ Having kicked *Casey* to the curb, the *Dobbs* majority then reframed the factors traditionally involved in a *stare decisis* analysis. In particular, the majority newly elevated concern for the "wrongness" of the controlling precedent to a decisive role in its novel assessment of the viability of precedent. The majority called for a fierce formalistic focus on the controlling constitutional norm, which would be exhumed through the process of "liquidating" the law's concrete and objective meaning. Presumably, that effort relies on little else but the constitutional text as understood through a historical lens.¹⁶

Fallacies, Facades, and Stare Decisis, 83 U. PITT. L. REV. 229 (2021); Thomas J. Molony, *Taking Another Look at the Call on the Field: Roe, Chief Justice Roberts, and Stare Decisis*, 43 HARV. J.L. & PUB. POL'Y 733 (2020); Bridget Winkler, *What about the Rule of Law? Deviation from the Principles of Stare Decisis in Abortion Jurisprudence, and an Analysis of June Medical Services L.L.C. v. Russo Oral Arguments*, 68 UCLA L. REV. DISC. 14 (2020); Frank Scaturro, *Abortion and the Supreme Court: Roe, Casey, the Myth of Stare Decisis, and the Court as a Political Institution*, 3 HOLY CROSS J.L. PUB. POL'Y 133 (1998).

¹² See, e.g., *SEC v. Jarkesy*, 603 U.S. 109 (2024); *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024); *Erlinger v. United States*, 602 U.S. 821 (2024); *Allen v. Milligan*, 599 U.S. 1 (2023).

¹³ Lawrence B. Solum, Solum Chair Lecture at the University of Virginia School of Law: Formalism Is Back (Nov. 5, 2021) (transcript available at University of Virginia School of Law).

¹⁴ *Payne v. Tennessee*, 501 U.S. 808 (1991); *Casey*, 505 U.S. 833.

¹⁵ See *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 359, 367 (2022) (Breyer, J., dissenting) ("*Casey* itself applied those [*stare decisis*] principles, in one of this Court's most important precedents about precedent.").

¹⁶ See *id.* at 235 (majority opinion) ("Constitutional analysis must begin with 'the language of the instrument,' which offers a 'fixed standard' for ascertaining what our founding document means.").

The majority also significantly diminished concern for reliance on a controlling precedent as a factor in determining whether to sustain a previous ruling.¹⁷ These and other moves undermined the traditional justifications for the doctrine of *stare decisis*, especially the understanding that respect for precedent reinforces the public's trust in the integrity of the courts.¹⁸

For their part, the progressive Justices dissented in *Dobbs* in an opinion authored by Justice Breyer.¹⁹ Breyer insisted that the established practice of *stare decisis* required the Court to formalistically follow the fixed abortion jurisprudence.²⁰ The dissenters protested that controlling precedent should be strictly observed unless a rare “special justification”—accounting for the established *stare decisis* factors from *Casey*, which are essentially unrelated to any conclusion about the “wrongness” of the controlling case—permits the Court to overrule its previous decision.²¹ Breyer argued that there was no special justification for overruling *Roe* and *Casey*.²²

Finally, Chief Justice Roberts wrote an opinion only partially concurring with the majority.²³ He would have preserved the *Roe* and *Casey* precedents.²⁴ But he would have adapted the standard they articulated to permit him to nevertheless join the majority in upholding Mississippi's draconian abortion regime.²⁵ This compromise position feigns formalistic fealty to precedent while nevertheless pursuing changes to the controlling rule. Roberts's pragmatic posture towards *stare decisis* has been characterized as “stealth overruling” or “erosion of *stare decisis*.”²⁶ Still, Roberts's stance seems closest to the instrumentalist approach to precedent that was applied by the decisive plurality in *Casey* and which has often characterized the Court's *stare decisis* practice.²⁷ Roberts strikes the least formalistic position offered

¹⁷ See *id.* at 281, 287–88.

¹⁸ *Id.* at 291.

¹⁹ See *id.* at 359 (Breyer, J., dissenting).

²⁰ *Id.* at 390.

²¹ *Id.* at 280 (majority opinion); *id.* at 388 (Breyer, J., dissenting).

²² *Id.* at 390 (Breyer, J., dissenting).

²³ See *id.* at 347 (Roberts, C.J., concurring).

²⁴ *Id.* at 348–49.

²⁵ *Id.* at 348.

²⁶ See Barry Friedman, *The Wages of Stealth Overruling* (with Particular Attention to *Miranda v. Arizona*), 99 GEO. L.J. 1 (2010); Richard L. Hasen, *Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How Supreme Court Justices Move the Law*, 61 EMORY L.J. 779 (2012); William D. Araiza, *Playing Well with Others—But Still Winning: Chief Justice Roberts, Precedent, and the Possibilities of a Multi-Member Court*, 46 GA. L. REV. 1059 (2012); Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861 (2014); cf. Amy E. Sloan, *The Dog That Didn't Bark: Stealth Procedures and the Erosion of Stare Decisis in the Federal Courts of Appeals*, 78 FORDHAM L. REV. 713 (2009).

²⁷ See R. Randall Kelso & Charles D. Kelso, *How the Supreme Court Is Dealing with Precedents in Constitutional Cases*, 62 BROOK. L. REV. 973, 980 (1996); Charles D. Kelso & R. Randall Kelso, *Sandra Day O'Connor: A Justice Who Has Made a Difference in Constitutional Law*, 32 MCGEORGE L. REV. 915 (2001); Bernard Schwartz, *Supreme Court*

in *Dobbs*. In a classically realist maneuver, the Chief Justice would have “made” new law out of *Roe* and *Casey* in order to advance a jurisprudential compromise and foster the acceptance and credibility of the Court.

Dobbs involved the termination of the Substantive Due Process right to abortion and the emergence of a new and more plastic doctrine of *stare decisis*. This Article tells the story of the latter significant development.

I. THE ESTABLISHED PRACTICE OF *STARE DECISIS*

There is a long and rich history of deliberation, in commentary and cases, over the purpose and practice of precedent in American law.²⁸ That history involves an evolving doctrine with roots in founding-era concerns over judicial power,²⁹ but later featuring rising and falling degrees of respect for the doctrine of *stare decisis*.³⁰ Some epochs have emphasized the force of precedent, and the benefits it promotes, above ambitions about the possible realization of an objectively correct understanding of the law. Other epochs have diminished the doctrine, which should not be seen to stand in the way of pursuing and implementing the objectively correct interpretation of a norm.³¹ One commentator attributed these vacillations to the general degree of confidence in the determinacy of law prevailing in the legal culture of any particular era.³² Caleb Nelson insisted on a link between concerns for law’s indeterminacy and demands for respect for precedent, concluding that “Antebellum Americans

Superstars: The Ten Greatest Justices, 31 TULSA L. REV. 93 (1995); Brian Z. Tamanaha, *How an Instrumental View of Law Corrodes the Rule of Law*, 56 DEPAUL L. REV. 469 (2007).

²⁸ See Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647 (1999); Mortimer N. S. Sellers, *The Doctrine of Precedent in the United States of America*, 54 AM. J. COMPAR. L. 67 (2006); Michael Gentithes, *Janus-Faced Judging: How the Supreme Court Is Radically Weakening Stare Decisis*, 62 WM. & MARY L. REV. 83, 93–98 (2020); Randy J. Kozel, *Stare Decisis as Authority and Aspiration*, 96 NOTRE DAME L. REV. 1971 (2021); see also Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281 (1990); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1 (1983); William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735 (1949); Barrett, *supra* note 5.

²⁹ See Randy J. Kozel, *Precedent and Constitutional Structure*, 112 NW. U. L. REV. 789 (2018).

³⁰ Compare Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71, 73 (1928) (“[T]here is a drift both marked and unfortunate away from the ancient doctrine of *stare decisis*.”), with Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM. J. LEGAL HIST. 28, 41–44 (1959) (cataloging the shift in state courts to adopting precedent as the basis for legal decision-making).

³¹ See Lee, *supra* note 28 (providing a historical analysis of precedential force across the nation’s history).

³² Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 42 (2001).

embraced *stare decisis* to restrain the discretion that legal indeterminacy would otherwise give judges.”³³ Nelson’s study does not track this dynamic through the Court’s history following the Civil War, through the Gilded Age, through the revolutionary period of the New Deal era, and into the Warren and Burger Courts. But the ascendance of legal realism in the early part of the twentieth century suggests deepening disillusionment with claims about the formal determinacy of law.³⁴ According to Nelson, that development should have been accompanied by a growing commitment to *stare decisis*.³⁵ Instead, the middle third of the twentieth century was a low ebb for precedent as the Court reworked settled rules to reshape American law, and with it, politics, the economy, and society. As Justice Alito noted in the *Dobbs* opinion, these reversals of precedent represent some of the most influential—and characteristically “American”—jurisprudence in American constitutional history.³⁶ This, after all, was the era that brought the tectonic reversals of *Lochner*, *Plessy*, and other major precedents.³⁷ There was a steady stream of reversals across these years. The notion of law’s indeterminacy, which is so central to the dominant realist paradigm, did not seem to foster fondness for the doctrine of *stare decisis*. Still, Nelson helpfully exposes the key role the doctrine of *stare decisis* is bound to play—if only as a bellwether—in the persistent struggle in American jurisprudence between formalism and confidence for law’s determinacy, on the one hand, and pragmatism and the conviction that law is essentially indeterminate, on the other hand.³⁸ If law is fundamentally determinate, then it demands its objective implementation without regard for the interpretation the law has been given by past majorities of the Court.

In a further frustration of Nelson’s thesis, the resurgent interest in formalist approaches to constitutional law promoted by conservative judges and scholars in the late twentieth century was not accompanied by a parallel weakening of the doctrine of *stare decisis*. The confidence in law’s determinacy that informed the impassioned commitment to textualism and originalism empowered an occasional conservative majority on the Rehnquist Court to confront what those Justices regarded as past activist rulings so unmoored from the Constitution’s objective meaning that they did not merit the continued respect seemingly demanded by the doctrine of *stare decisis*.³⁹ Yet, in the face of this threatened tumult, and despite a deepening sense of law’s determinacy, the doctrine of *stare decisis* hardened. After all, this was the

³³ *Id.* at 8.

³⁴ NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 10–11 (1997).

³⁵ Nelson, *supra* note 32, at 4–5.

³⁶ See *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 264–66, 265 n.48 (2022).

³⁷ See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (reversing *Plessy*); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (reversing *Adkins*); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (reversing *Minersville*).

³⁸ See generally DUXBURY, *supra* note 34.

³⁹ Drew C. Ensign, *The Impact of Liberty on Stare Decisis: The Rehnquist Court from Casey to Lawrence*, 81 N.Y.U. L. REV. 1137, 1138–39 (2006).

context that produced the leading precedents on precedent. *Payne v. Tennessee* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* framed the doctrine of *stare decisis* that served as the established approach for more than a generation. The Rehnquist Court overruled fewer cases than its predecessor, the Burger Court, reversed (even as prominent reversals continued to cast shade on the doctrine of *stare decisis*).⁴⁰ This was the established practice of precedent that the Court confronted in its recent debate and that the majority ultimately toppled in *Dobbs*. A key feature of the established doctrine, at least as it relates to the new doctrine announced by *Dobbs*, was the disciplined disinterest the old standard showed for asserted flaws in a controlling case.

The Rehnquist Court's established *stare decisis* doctrine came into focus in the 1991 decision *Payne v. Tennessee*.⁴¹ In *Payne*, the Court overruled its newly minted decisions in *Booth* and *Gathers*, cases that placed strict limits on the presentation of victim-impact evidence to a capital case sentencing jury.⁴² After just a few years under that framework—and after a new Republican-appointed Justice replaced one of the Court's stalwart liberals—Chief Justice Rehnquist authored *Payne*'s majority opinion, paying special attention to the doctrine of *stare decisis*. That doctrine might have required that *Booth* and *Gathers* dictate the outcome of the appeal in *Payne*'s favor. Instead, Rehnquist's narrow majority abandoned those precedents. Yet, counterintuitively, the opinion enthusiastically endorsed the doctrine of *stare decisis*.⁴³ Rehnquist quoted Justice Brandeis's dissent in *Burnet v. Coronado Oil*, which insisted that following precedent is usually the wise policy “because in most matters it is more important that the applicable rule of law be settled than that it be settled right.”⁴⁴ Rehnquist also provided a clear statement of the benefits justifying the

⁴⁰ In 19 years, the Rehnquist Court overruled 44 precedents, at a rate of 2.3 reversals each year. See *Table of Supreme Court Decisions Overruled by Subsequent Decisions*, CONST. ANNOTATED, <https://constitution.congress.gov/resources/decisions-overruled/> [<https://perma.cc/3NQY-2VYM>] (last visited Feb. 19, 2025). Over 17 years, the Burger Court overruled 53 cases, at a rate of 3.1 reversals each year. *Id.*

⁴¹ See 501 U.S. 808 (1991).

⁴² *Id.* at 818–19, 825.

⁴³ *Id.* at 827 (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)), overruled by *Helvering v. Bankline Oil Co.*, 303 U.S. 362 (1938), and *Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938)).

⁴⁴ *Burnet*, 285 U.S. at 406 (Brandeis, J. dissenting). Brandeis's dissent is the source of other foundational—and oft quoted—insights into the purpose and practice of precedent, including: (1) the understanding that *stare decisis* is not a “universal, inexorable command”; (2) the rule providing that precedent should be more flexibly applied in the constitutional law context where “correction through legislative action is practically impossible”; and (3) the idea that erroneous precedent should be overruled. *Id.* at 405–08. I suppose that it bodes poorly for the doctrine of *stare decisis* that one of the most decisive opinions framing the purpose and practice of precedent is a dissent that has no force or control. Brandeis's dissent, endorsing a more flexible approach to *stare decisis*, also might be the most significant indictment of the link Nelson identifies between legal indeterminacy and robust enforcement

authority of precedent: jurisprudential stability resulting from even-handed decision-making and predictability; the promotion of fairness and justice, concerns that are implicated by the public's reliance on settled precedent; and support for the actual and perceived integrity of the judiciary resulting from the application of established legal principles as opposed to the pursuit of political agendas or personal inclinations.⁴⁵

But what the *Payne* majority gave with one hand, it took away with the other. Rehnquist revived and underscored the old truism that precedent is not an "inexorable command," especially with respect to procedural issues, evidentiary issues, and in the constitutional law context.⁴⁶ And he suggested that the standard for deciding when it is appropriate to overrule precedent involves questions about the controlling rule's "workability" and poor reasoning.⁴⁷ These concerns were drawn from the old voting rights case, *Smith v. Allwright*, in which an 8–1 majority of the Court explained:

[W]e are not unmindful of the desirability of continuity of decision in constitutional questions. However, when convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions. This has long been accepted practice, and this practice has continued to this day. This is particularly true when the decision believed erroneous is the application of a constitutional principle.⁴⁸

Smith, for its part, supported this dynamic understanding of *stare decisis* with a footnote in which the Court listed a dozen examples of overturned precedents.⁴⁹

of precedent. Brandeis makes the classical realist argument that law should progressively develop through "the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function." *Id.* at 407–08. There can hardly be a stronger assertion of instrumentalist notion that law is fundamentally indeterminate.

⁴⁵ *Payne*, 501 U.S. at 827.

⁴⁶ *Id.* at 828.

⁴⁷ *Id.* at 827.

⁴⁸ 321 U.S. 649, 665 (1944).

⁴⁹ *See id.* at 665 n.10. It is interesting to note the curious practice of merely listing a large number of reversals in a footnote as part of the reasoning in *stare decisis* cases. It's true here in the *Smith* case. Rehnquist does it in *Payne*. *See Payne*, 501 U.S. at 827–30 n.1. Alito and Kavanaugh do something similar in *Dobbs*. The *Dobbs* majority, for example, attached an appendix listing scores of these cases. *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 417–23 (2022). Unfortunately, there is no attempt to contextualize the real number of reversals by exposing the fact that this involves a minuscule number of cases relative to the total number of decisions reached by the Court. What percentage of the Court's work involves this disregard for *stare decisis*? Determining the weight to be given to these long lists of

Even if the Court did not closely analyze the basis for those reversals and especially the role that “error” played in the decision to overrule the controlling precedent, *Payne* picks up and projects into the Rehnquist Court’s jurisprudence the old understanding that the doctrine of *stare decisis* should not prevent the Court from “correcting” erroneous decisions. Still, when explaining why *Booth* and *Gathers* now merited reversal, Rehnquist raised concerns that were not at all keyed to the cases’ supposed error. He explained instead that they had been decided by narrow margins, that they prompted spirited dissents, that they had come under scrutiny in subsequent cases, and that they had defied consistent application.⁵⁰ That’s a damnable depiction of those cases, to be sure. But none of those complaints necessarily involve a conclusion that *Booth* and *Gathers* were wrongly decided. A case could be soundly correct and still attract strong dissents or subsequent critique.

In *Payne*, Rehnquist also added concern for reliance to the mix of factors to be considered when deciding whether to overrule precedent. He explained that the doctrine of *stare decisis* had been most rigorously applied by the Court in cases involving property or contract issues, “where reliance interests are involved.”⁵¹ These considerations, Rehnquist noted, had informed a practice of *stare decisis* that permitted as many as thirty-three reversals (in whole or in part) at the Court in the preceding two decades.⁵² In light of the Court’s assessment of these factors, Rehnquist and the majority concluded that *Booth* and *Gathers* should be overruled.⁵³

The Court’s newest member in the *Payne* decision, Justice David Souter, had been confirmed as Justice Brennan’s successor at the start of the Court’s October 1990 term.⁵⁴ His concurring opinion in *Payne* gave Rehnquist a secure 6–3 majority.⁵⁵ But Souter wrote separately to clarify that he joined the decision to overrule *Booth* and *Gathers* for reasons independent of those cases’ supposed error. Under-scoring a qualification that would become central to the established practice of *stare decisis* (and which would feature prominently in the recent *stare decisis* debate at the Court),⁵⁶ Souter explained that more was needed to overrule precedent than the mere conclusion by a contemporary majority that a controlling case had been wrongly decided.⁵⁷ He insisted that, in order to reverse a precedent, a court must

reversals also requires some effort at identifying the number of cases in which the Court unquestioningly upholds or reinforces precedent. Since even the Court’s most vocal skeptics (excluding possibly Justice Thomas) accept that reversals of precedent should be rare, it has to be assumed that the Court’s practice would overwhelmingly favor respect for precedent.

⁵⁰ *Payne*, 501 U.S. at 828–30.

⁵¹ *Id.* at 828.

⁵² *Id.*

⁵³ *Id.* at 828–30.

⁵⁴ See David H. Souter, 1990–2009, SUP. CT. HIST. SOC’Y, <https://supremecourthistory.org/associate-justices/david-h-souter-1990-2009/> [<https://perma.cc/RA3A-JDVF>] (last visited Feb. 19, 2025).

⁵⁵ *Payne*, 501 U.S. at 835 (Souter, J., concurring).

⁵⁶ Miller, *supra* note 6, at 233, 243.

⁵⁷ *Payne*, 501 U.S. at 842 (Souter, J., concurring).

point to a “special justification.”⁵⁸ Souter cited *Arizona v. Rumsey* for this elevated standard, arguing that precedent’s persuasive power could be overcome only with a special justification such as the conclusion that the controlling case had established an unworkable standard, had produced arbitrary consequences, or had resulted in uncertain application.⁵⁹ Again, each of these failings might exist independent of whether a precedent was wrongly decided. By drawing attention to them as the factors for determining the viability of precedent, Souter joined the Rehnquist majority in emphasizing elements that are (at least conceptually) independent of and altogether unrelated to the current majority’s conclusion that the precedent in question was objectively wrong.

Souter’s concurring opinion in *Payne* matters because his insistence on a “special justification” as the basis for overruling precedent aligned with the views of some of the dissenters in that case. Justice Marshall wrote one of the dissenting opinions to complain about the *Payne* majority’s “debilitated” and “impoverished” conception of *stare decisis*.⁶⁰ Marshall explained that, although the doctrine of *stare decisis* is not an inexorable command, overruling precedent nevertheless “ought to be a matter of great moment and consequence.”⁶¹ In part, that is because the doctrine of *stare decisis* is fundamental to the rule of law.⁶² Conscious that he was also arguing against the long list of overrulings presented by Rehnquist in the majority opinion, Marshall qualified the Court’s history of reversals by asserting that “this Court has never departed from precedent without ‘special justification.’”⁶³ And then Marshall catalogued examples of those heightened factors, such as: changes in the law; changes in facts; changes in experience; the conclusion that the controlling rule has become a detriment to coherence and consistency in the law; and the conclusion that the rule has defied consistent application.⁶⁴ This list of concerns, similar to Rehnquist’s and Souter’s, involved shortcomings that are not tantamount to a conclusion that the controlling case was wrongly decided.

The abortion controversy necessitated the Rehnquist Court’s further refinement of the doctrine of *stare decisis*. Intense and persistent opposition to *Roe v. Wade* made that case a definitive test for *stare decisis*.⁶⁵ The legal and political fever over abortion seemed to reach its simmering peak in 1992 with the Court’s decision in

⁵⁸ *Id.*

⁵⁹ *See id.* at 849 (Souter, J., concurring) (citing *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)); *see also id.* at 842–43 (explaining that there is “special justification” to overrule *Booth* because it established an unworkable standard and would produce arbitrary results).

⁶⁰ *Payne*, 501 U.S. at 852–53 (Marshall, J., dissenting).

⁶¹ *Id.* at 848.

⁶² *Id.* at 848–49.

⁶³ *Id.* at 849.

⁶⁴ *Id.*

⁶⁵ 410 U.S. 113 (1973); *see, e.g.,* Murray, *supra* note 11; Clarke D. Forsythe & Rachel N. Morrison, *Stare Decisis, Workability, and Roe v. Wade: An Introduction*, 18 AVE MARIA L. REV. 48 (2020). *See generally* N.E.H. HULL & PETER CHARLES HOFFER, *ROE V. WADE: THE ABORTION RIGHTS CONTROVERSY IN AMERICAN HISTORY* (2d ed. 2010).

Planned Parenthood of Southeastern Pennsylvania v. Casey.⁶⁶ Nothing less than the continued force of *Roe* was at stake. For that reason, *stare decisis* was a pivotal facet of the case. A decisive three-Justice plurality in *Casey*, writing on behalf of a five-Justice majority with respect to the issue of *stare decisis*, reluctantly endorsed *Roe*.⁶⁷ The plurality Justices insisted that “the reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*.”⁶⁸ *Stare decisis* promotes legal certainty, the plurality explained, and they linked that benefit to a broader commitment to the rule of law.⁶⁹ The plurality urged: “Liberty finds no refuge in a jurisprudence of doubt.”⁷⁰ To avoid those jurisprudential doubts, the plurality concluded that overruling precedent should remain a “rare” act that might be undertaken only consistent with prudential and pragmatic considerations that show respect for the rule of law.⁷¹ In *Casey*, they found no basis for a reversal of *Roe*’s abortion right.

In reaching that conclusion, the *Casey* plurality identified and thoroughly engaged with five “pragmatic considerations” about *stare decisis*, including:

- whether the rule defied practical workability;
- whether the rule had engendered the kind of reliance that would produce special hardship should it be reversed;
- whether the law’s growth and development make the rule a doctrinal anachronism;
- whether the relevant facts have changed so much that the rule has been robbed of its justification; and
- whether reversing the rule would seriously weaken the Court’s tenuous legitimacy.⁷²

In light of the debate in *Payne* over the need for a “special justification” to overrule precedent—beyond the mere conclusion that the rule had been wrongly decided—it is significant that the *Casey* plurality made no mention of that standard.⁷³ That may be due to the plurality’s general indifference to contemporary

⁶⁶ 505 U.S. 833 (1992).

⁶⁷ *Id.*

⁶⁸ *Id.* at 853; *id.* at 845–46 (“After considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, and the rule of *stare decisis*, we are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.”).

⁶⁹ *Id.*

⁷⁰ *Id.* at 844.

⁷¹ *Id.* at 854.

⁷² *Id.* at 854–55, 865–66.

⁷³ It was Justice Souter, in his *Payne* concurring opinion, who had demanded a “special justification” beyond mere error in order to overturn precedent. *Payne v. Tennessee*, 501 U.S. 808, 842 (1991) (Souter, J., concurring). Yet, Souter was a member of the *Casey* plurality opinion that neglects the standard.

conclusions about the defects in past precedent for a *stare decisis* analysis. Importantly, at least in conceptual terms, the *stare decisis* factors the plurality addressed can be relevant, and might recommend a reversal of precedent, even if the controlling rule had been *correctly decided*. An otherwise doctrinally sound rule might nevertheless prove difficult to implement.⁷⁴ Or, for a large number of reasons, a well justified and effectively framed rule might never foster concrete, or even broad social, reliance.⁷⁵ Disruptive, exogenous changes to the jurisprudence or the facts upon which a precedent relied have nothing at all to do with the endogenous correctness and integrity of a previously announced rule. It is possible that the times—potentially involving the evolution of norms and facts—simply overtake even the best work done by the Court in the past.⁷⁶ The plurality underscored that these factors are independent of the perception that “a prior decision was wrong”⁷⁷ and explained that a reversal of *Roe* after considering these factors might “address error” or might permit the recalibration of the Court’s abortion jurisprudence wholly independent of whether the *Roe* Court had gotten the substantive constitutional law issue wrong.⁷⁸

The *Casey* plurality’s negligible interest in past error as part of its *stare decisis* analysis highlights the overriding significance the *Dobbs* Court eventually placed on that concern. Two other factors from the *Casey* plurality’s analysis would also be featured prominently in *Dobbs*’s reframing of the doctrine of *stare decisis*.

First, the *Casey* plurality placed considerable weight on the reliance it believed the *Roe* abortion right had engendered. The plurality conceded that “the classic case for weighing reliance heavily in favor of following the earlier rule occurs in the commercial context.”⁷⁹ And they could agree that there was likely no, or only *de minimis* reliance on *Roe* in relation to any specific unplanned pregnancy (which, by its unexpected nature, would be inherently decoupled from reliance).⁸⁰ But the plurality Justices broadly construed the reliance factor, finding that it involved more than just a role in conditioning “specific instances of sexual activity.”⁸¹ An overly narrow understanding of reliance, the plurality explained, ignores “two decades of economic and social developments, [revealing that] people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail.”⁸²

⁷⁴ See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557 (1985) (overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976)) (“Attempts by other courts since then to draw guidance from this model have proved it both impracticable and doctrinally barren.”).

⁷⁵ See *United States v. Ross*, 456 U.S. 798, 824–25 (1982) (overruling *Robbins v. California*, 453 U.S. 420 (1981)).

⁷⁶ See *Puerto Rico v. Branstad*, 483 U.S. 219, 230 (1987) (overruling *Kentucky v. Dennison*, 65 U.S. 66 (1861)).

⁷⁷ *Casey*, 505 U.S. at 866.

⁷⁸ *Id.* at 869.

⁷⁹ *Id.* at 856 (citing *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

The *Casey* plurality was impressed by the fact that women in particular had come to rely on *Roe* to empower themselves “to participate equally in the economic and social life of the Nation” because the abortion right facilitated “their ability to control their reproductive lives.”⁸³ In this assessment, the *Casey* plurality considered a form of reliance that transcended the kind of exact measurement possible in concrete commercial settings.⁸⁴ The plurality instead embraced an understanding of reliance—as a factor in determining whether to overrule precedent—that accounted for the common-sense and self-evident significance a rule has for society generally and the way it shapes people’s “thinking and living.”⁸⁵ On these terms, the plurality reasoned, *Roe* may not have involved the kind of isolated and practical reliance that operates in a property or contractual transaction. But it had prompted widespread ethical, psychological, social, economic, and political reliance that would be significantly disrupted if the case were to be overturned and access to abortion could be denied.⁸⁶

Second, the *Casey* plurality sought to account for the impact overruling *Roe* might have on the popular perception of the Court’s integrity. This *stare decisis* factor was relatively straightforward. The *Casey* plurality insisted that the Court’s authority lies in its credibility and the power it possesses to persuade the country to conform to its rulings. That modest basis for the Court’s effectiveness, the plurality explained, requires the Court “to speak and act in ways that allow people to accept its decisions . . . as grounded truly in principle.”⁸⁷ But the plurality worried that, by too-readily reversing precedent, the Court might “overtax the country’s belief in the Court’s good faith.”⁸⁸ If the credible limit for the frequency of reversals were to be exceeded, the plurality urged, then the “disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term.”⁸⁹ The plurality worried that “[t]he legitimacy of the Court would fade with the frequency of its vacillation.”⁹⁰ The plurality insisted that these concerns had particular resonance in the intensely discordant context of the abortion controversy.

The Rehnquist Court addressed other issues when grappling with the force owed to precedent, such as the numerical strength of the majority that decided a case that would serve as precedent, the age of the controlling case, and the “merit” of the prior decision.⁹¹ Rules established by a thin majority of the Justices, for example, might be

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 865–66.

⁸⁸ *Id.* at 866.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ William S. Consovoy, *The Rehnquist Court and the End of Constitutional Stare Decisis: Casey, Dickerson and the Consequences of Pragmatic Adjudication*, 2002 UTAH L. REV. 53, 78–81.

less secure.⁹² So were more recently announced rules, in part because older precedent was thought to acquire weight as successive generations relied on it.⁹³ Justice Scalia, in particular, emphasized a precedent's longevity as a dimension of reliance:

Indeed, I had thought that the respect accorded prior decisions increases, rather than decreases, with their antiquity, as the society adjusts itself to their existence, and the surrounding law becomes premised upon their validity. The freshness of error not only deprives it of the respect to which long-established practice is entitled, but also counsels that the opportunity of correction be seized at once, before state and federal laws and practices have been adjusted to embody it.⁹⁴

But Scalia's engagement with the doctrine of *stare decisis* in the quote above is more remarkable because he seems preoccupied with the merit or "correctness" of the established rule as a factor in deciding whether to overturn precedent. Even as the established *stare decisis* doctrine de-emphasized the relevance to be attributed to a precedent's supposed error—including treatments of the doctrine by Rehnquist, Souter, Marshall, and the *Casey* plurality—Scalia was able to prop up that concern until it could resurface as the flashpoint in the Court's recent debate over the purpose and practice of precedent. Eventually, the *Dobbs* majority would make it the determinative element in its new *stare decisis* doctrine.⁹⁵

The practice the Rehnquist Court left behind involved several key elements that constituted, for the last generation, the established doctrine of *stare decisis*.⁹⁶ For more than two decades, and until the recent debate over the purpose and practice of precedent, there had been few voices urging a radical reimagining of this framework.⁹⁷ A more broadly conceived understanding of reliance was a prominent

⁹² *Id.* at 78–79 (referencing *Payne v. Tennessee*); Amy L. Padden, *Overruling Decisions in the Supreme Court: The Role of a Decision's Vote, Age, and Subject Matter in the Application of Stare Decisis After Payne v. Tennessee*, 82 GEO. L.J. 1689, 1708–09 (1994) (looking at opinions generally).

⁹³ See Consovoy, *supra* note 91, at 79.

⁹⁴ *South Carolina v. Gathers*, 490 U.S. 805, 824 (1989) (Scalia, J., dissenting), *overruled by Payne v. Tennessee*, 501 U.S. 808 (1991).

⁹⁵ Perceived error is not a novel concern in the Court's *stare decisis* practice. Consovoy noted that it has long attracted attention from the Court. See Consovoy, *supra* note 91, at 80.

⁹⁶ *Id.* at 56.

⁹⁷ See, e.g., *id.* at 104, 106 ("The Court should abandon stare decisis in constitutional cases. . . . Pragmatism has no place in the Supreme Court and its application in the realm of stare decisis is unwarranted and unacceptable."); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 291 (2005) ("*Stare decisis* is *unconstitutional*, precisely to the extent that it yields deviations from the correct interpretation of the Constitution!"); Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1, 2 (2007); see also Adam Liptak, *Precedent, Meet Clarence Thomas. You May Not Get Along.*, N.Y. TIMES (Mar. 4, 2019), <https://www.ny>

consideration. But so were concerns about the established rule's workability, about intervening developments in the law, about changes to the relevant facts, and about the risk that the reversal of precedent might erode the Court's credibility. These "special justifications" were decisive in the all-important plurality opinion in *Casey*.⁹⁸ Significantly, this established practice of precedent was relatively unconcerned with the controlling rule's supposed defects or deficiencies. The doctrine of *stare decisis* didn't require a finding, by a contemporary court, that the precedential rule had been wrongly decided. Instead, a justification independent of that question—a special justification—was the controlling concern when it came to the controlling force of precedent. The *Dobbs* decision radically reconceived this established practice.

II. *DOBBS* AND THE NEW DOCTRINE OF *STARE DECISIS*

A. *Dobbs* and *Stare Decisis*

The new conservative majority on the Court has been determined to advance its constitutional agenda, not hesitating to overrule well-settled precedent when necessary.⁹⁹ The Court has overturned nearly twice as many controlling cases in the last ten years than it did in the preceding decade.¹⁰⁰ As I have written elsewhere, that effort necessarily involved an intensive debate over the sense and sensibility of *stare decisis*.¹⁰¹ Even if the abortion controversy was barely featured in that debate, it was always clear that the Court's renewed interest in the doctrine of *stare decisis* was aimed at facilitating conservatives' long-standing desire to overturn *Roe* and *Casey*.¹⁰²

times.com/2019/03/04/us/politics/clarence-thomas-supreme-court-precedent.html [https://perma.cc/8FFY-YCDZ] (describing Justice Clarence Thomas's approach to *stare decisis*).

⁹⁸ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 864–66 (1992).

⁹⁹ See Kelsey Reichmann, *Is Overturning Precedent the New Precedent at the High Court?*, COURTHOUSE NEWS SERVS. (July 8, 2022), https://www.courthousenews.com/is-overturning-precedent-the-new-precedent-at-the-high-court/ [https://perma.cc/A8J5-NM3D]; Debbie Kaminer, *The Supreme Court's Surprising Overturn of a 47-Year-Old Precedent on Religious Accommodation*, THE HILL: CONG. BLOG (July 5, 2023, 2:00 PM), https://thehill.com/opinion/congress-blog/4081797-the-supreme-courts-surprising-overturn-of-a-47-year-old-precedent-on-religious-accommodation/ [https://perma.cc/FCW3-ZAX8]; Ben Olinsky & Grace Oyenubi, *The Supreme Court's Extreme Majority Risks Turning Back the Clock on Decades of Progress and Undermining Our Democracy*, CAP 20 (June 13, 2022), https://www.americanprogress.org/article/the-supreme-courts-extreme-majority-risks-turning-back-the-clock-on-decades-of-progress/ [https://perma.cc/V4BU-X3E4].

¹⁰⁰ See *Table of Supreme Court Decisions Overruled by Subsequent Decisions*, *supra* note 40.

¹⁰¹ Miller, *supra* note 6, at 232–33.

¹⁰² See Murray, *supra* note 11 (“[I]t is a strategy in which distinguishing and limiting precedent is part of an incremental approach that, over time, destabilizes and discredits precedent, laying the foundation for later overruling.”); Mary Ziegler, *Taming Unworkability Doctrine: Rethinking Stare Decisis*, 50 ARIZ. ST. L.J. 1215, 1217 (2018) (“As abortion opponents successfully crafted multiple, sometimes conflicting definitions of unworkability,

The *Dobbs* case finally provided the Court with the opportunity to reframe the doctrine of *stare decisis*, a move that would be necessary because the majority also intended to use *Dobbs* to at last overrule the abortion cases. After a preliminary draft of the Court's judgment leaked in early May 2022,¹⁰³ the Court formally announced its decision in the case on June 24, 2022.¹⁰⁴ The conservative six-Justice majority agreed to allow Mississippi's draconian limitations on abortion access to stand.¹⁰⁵ But only five members of the Court joined Justice Alito's majority opinion concluding that this result was possible because *Roe* and *Casey* should be reversed.¹⁰⁶ This is the opinion in *Dobbs* that rescinded the fifty-year-old constitutional right to terminate a pregnancy, the constitutional right that *Roe* and *Casey* had announced and reaffirmed.¹⁰⁷

Because the cancellation of those precedents was the judgment's tectonic achievement, *Dobbs* was a case about two legal frameworks. On the one hand, the Justices grappled with the material constitutional law involved: the integrity and viability of the Court's recognition of a woman's Substantive Due Process right to choose an abortion.¹⁰⁸ On the other hand, having found that the "Constitution, properly understood" does not confer a right to obtain an abortion,¹⁰⁹ the Court turned to the secondary legal question: whether the doctrine of *stare decisis* nevertheless obliged the Court to continue to respect and enforce the abortion right secured by *Roe* and *Casey*.¹¹⁰ The majority concluded that the doctrine of *stare decisis* "does not compel unending adherence to *Roe*["]."¹¹¹

Three approaches to *stare decisis* surfaced in the *Dobbs* decision.

The *Dobbs* majority invoked cases from the Court's recent debate over precedent as the basis for its new characterization of the doctrine.¹¹² In particular, Justice Alito's majority opinion in *Dobbs* drew on his framing of the doctrine in his majority

the Court's approach to *stare decisis* has grown increasingly muddled, both inside and outside the abortion context.").

¹⁰³ Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 3, 2022, 2:14 PM), <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473> [<https://perma.cc/JJP4-FUFS>].

¹⁰⁴ See *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

¹⁰⁵ See *id.* at 215–16.

¹⁰⁶ See *id.*

¹⁰⁷ See *id.* at 229 (noting that "[t]he right to abortion does not fall within" the category of unenumerated rights "'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty'" (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997))); see also *id.* at 416 (Breyer, J., dissenting) ("[A] new and bare majority of this Court . . . eliminates a 50-year-old constitutional right that safeguards women's freedom and equal station.").

¹⁰⁸ See *id.* at 239–40 (majority opinion).

¹⁰⁹ See *id.* at 231.

¹¹⁰ See *id.* at 263–67 (turning to the *stare decisis* analysis).

¹¹¹ See *id.* at 231.

¹¹² See Miller, *supra* note 6, at 240.

opinion in *Janus v. American Federation of State, County & Municipal Employees, Council 31* and on Justice Kavanaugh's treatment of the doctrine in his concurring opinion in *Ramos v. Louisiana*.¹¹³ The majority's new approach to *stare decisis* did not explicitly adopt Justice Thomas's radical calls for the abolition of the doctrine, which he had asserted in a concurring opinion in *Gamble v. United States*.¹¹⁴ Still, the influence of Thomas's extreme views can be seen in the new understanding of precedent announced by the majority. Significantly, Alito elevated these recent cases above the classics of *stare decisis* doctrine, such as *Payne* and, more profoundly, the plurality opinion in *Casey*. These cases were the basis for the established practice of precedent that had prevailed at the Court for the last decades. The latter case simultaneously served as the precedential thread keeping the right to abortion aloft. In its determination to dispose of *Roe* and *Casey*, the *Dobbs* majority articulated a radically new understanding of the doctrine of *stare decisis* that abandons the established practice of precedent. The new approach emphasized contemporary conclusions about the erroneousness of the controlling case. It retooled several of the traditional *stare decisis* factors, including a significant narrowing of the concern for reliance on a controlling case. Finally, it summarily dismissed any concern about the impact overruling precedent might have on the integrity and popular acceptance of the Court.

For his part, Chief Justice Roberts joined the conclusion that Mississippi's law should survive constitutional scrutiny.¹¹⁵ But he continued in *Dobbs* with his pursuit of a controlled, institutionalist approach to the Court's new, conservative constitutional agenda. Roberts would have formalistically allowed *Roe* and *Casey* to stand as precedent while nevertheless applying a new, permissive constitutional law standard under those cases that would, in practical terms, operate as a reversal by erosion.¹¹⁶

Finally, similar to the approach they had taken in recent cases in which they often sought to fend off conservative reversals of precedent,¹¹⁷ in their dissent in *Dobbs*, the progressive Justices (arrayed behind Justice Breyer) argued for robust respect for precedent.¹¹⁸ Their position insisted that respect for *stare decisis* serves as a foundation for the rule of law and they insisted that precedent should be overruled only if a "special justification" exists. As expressed in the cases that forged the

¹¹³ See 585 U.S. 878, 916–17 (2018); *Ramos v. Louisiana*, 590 U.S. 83, 115–24 (2020) (Kavanaugh, J., concurring).

¹¹⁴ See 587 U.S. 678, 711 (Thomas, J., concurring) (arguing that "the *stare decisis* standard does not comport with [the Court's] judicial duty").

¹¹⁵ See *Dobbs*, 597 U.S. at 348 (Roberts, C.J., concurring in judgment).

¹¹⁶ See Araiza, *supra* note 26.

¹¹⁷ See, e.g., *Edwards v. Vannoy*, 593 U.S. 255, 295 (2021) (Kagan, J., dissenting); *Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. 230, 249 (2019) (Breyer, J., dissenting); *Knick v. Twp. of Scott*, 588 U.S. 180, 207 (2019) (Kagan, J., dissenting); *Janus*, 585 U.S. at 931 (Kagan, J., dissenting); *South Dakota v. Wayfair*, 585 U.S. 162, 191 (2018) (Roberts, C.J., dissenting).

¹¹⁸ See *Dobbs*, 597 U.S. at 416 (Breyer, J., dissenting).

established practice of *stare decisis*, this standard involved something more—and different—than the conclusion (reached by a contemporary majority of the Court) that the controlling case had been wrongly decided.

B. Alito and the Majority Opinion—A New Stare Decisis Standard

In an opinion authored by Justice Alito, five Justices declared: “We hold that *Roe* and *Casey* must be overruled.”¹¹⁹ This was the moment towards which generations of conservative constitutional politics and strategy had been straining. The Court’s recent struggle over the meaning and application of *stare decisis*, beginning with *Janus*, seemed to have been the essential final jurisprudential preparation needed for this constitutional excision.¹²⁰ *Stare decisis* was so central to the conservative majority’s achievement in *Dobbs* that fully one-half of Justice Alito’s opinion—more than forty pages of the judgment—was devoted to a re-examination of the purpose and practice of precedent. This was unavoidable. *Stare decisis* had been the decisive doctrine in the controlling plurality opinion in *Casey*, and *Casey* was the dam holding back the pent-up ambition to see the abortion right trimmed from the constitutional fabric.¹²¹ The plurality Justices begrudgingly conceded the central holding of *Roe*, but exclusively because they felt bound to that outcome by the doctrine of *stare decisis*.¹²² For a generation—and despite numerous highly detailed judgments about the scope, meaning, and application of the *Casey* undue burden test—the reality was that the constitutional right to abortion dangled by little more than a precedential thread.¹²³ To cut that thread, however, Alito had to reframe and re-imagine the doctrine of *stare decisis*. For that work he could usefully refer to arguments developed over the last years in the contemporary debate over *stare decisis*, most prominently his majority opinion in *Janus* and Justice Kavanaugh’s concurring opinion in *Ramos*.¹²⁴

¹¹⁹ See *id.* at 231 (majority opinion).

¹²⁰ Miller, *supra* note 6.

¹²¹ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (noting that “the rule of *stare decisis*” led the plurality to retain and reaffirm *Roe*’s “essential holding”).

¹²² *Id.* at 853 (“[T]he reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*.”).

¹²³ See generally *Stenberg v. Carhart*, 530 U.S. 914 (2000); *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320 (2006); *Gonzales v. Carhart*, 550 U.S. 124 (2007); *Whole Woman’s Health v. Hellerstedt*, 579 U.S. 582 (2016); *June Med. Servs., LLC v. Russo*, 591 U.S. 299 (2020).

¹²⁴ See *Janus v. Am. Fed’n State, Cnty. & Mun. Emp., Council 31*, 585 U.S. 878, 917 (2018) (reformulating the *stare decisis* analysis to begin with the subjective examination of the prior decision’s “quality of . . . reasoning”); *Ramos v. Louisiana*, 590 U.S. 83, 121 (2020) (Kavanaugh, J., concurring) (attaching the “grievously or egregiously wrong” label to the examination of “the quality of the precedent’s reasoning”).

Alito's opinion began with a lengthy analysis that led him and the other Justices in the majority to conclude that *Roe* and *Casey* were wrongly decided on the merits. Alito argued that the cases relied on constitutionally irrelevant and plainly incorrect reasoning.¹²⁵ I leave to others the necessary and profound critique those conclusions demand.¹²⁶ Having reached that outcome with respect to the substantive constitutional law issue, however, Alito then insisted that "[s]tare decisis . . . does not compel unending adherence to *Roe*'s abuse of judicial authority."¹²⁷

1. Diminishing the Benefits of *Stare Decisis*

As had often been the case throughout the contemporary debate, Justice Alito began his *stare decisis* analysis in *Dobbs* with an acknowledgment of the "important role" the doctrine plays in American law.¹²⁸ He nodded towards the justifications that have informed the purpose and practice of precedent, including: accommodating society's reliance on announced case law;¹²⁹ promoting stability and predictability in the administration of the law by lowering incentives to challenge settled precedent;¹³⁰ promoting even-handed judicial decision-making;¹³¹ and reinforcing the integrity of the judiciary, which should be seen as ruling on the basis of objective, juristic reasoning, and not the proclivities of judges.¹³² To this more-or-less standard list of the benefits of precedent, Alito added the claim that the doctrine of *stare decisis* also improved the quality of judicial decision-making by infusing it with the accumulated learning and wisdom of "past generations," which is richer "than what can be found in any single judge or panel of judges."¹³³ It is not an exact restatement of the doctrine's core justifications, which had been advocated over the years and had been clearly reaffirmed in *Payne*.¹³⁴ *Payne*, for example, reduced precedent's

¹²⁵ See *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 226 (2022).

¹²⁶ See, e.g., Evan D. Bernick, *Vindicating Cassandra: A Comment on Dobbs v. Jackson Women's Health Organization*, 2021–2022 CATO SUP. CT. REV. 227 (2022); Antony Hilton, *Alito Versus Roe v. Wade: Dobbs as a Means of Circumvention, Avoidance, Attenuation and Betrayal of the Constitution*, 31 AM. U. J. GENDER SOC. POL'Y & L. 1 (2023); Richard H. Fallon, Jr., *Selective Originalism and Judicial Role Morality*, 102 TEX. L. REV. 221 (2023).

¹²⁷ See *Dobbs*, 597 U.S. at 231.

¹²⁸ See *id.* at 263.

¹²⁹ *Id.* (noting that *stare decisis* "protects the interests of those who have taken action in reliance on a past decision").

¹³⁰ *Id.* (quoting *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455 (2015)).

¹³¹ *Id.* at 264 (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).

¹³² *Id.*

¹³³ See *id.* (quoting GORSUCH, *supra* note 5, at 217). Alito quoted his colleague Justice Neil Gorsuch's book for this point. This echoes claims raised by Chief Justice Roberts. See also *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 142, 144, 551 (2005).

¹³⁴ See *Payne*, 501 U.S. at 827–28 (first citing *Vasquez v. Hillery*, 474 U.S. 254, 265–66

essential benefits to three interests: even-handed decision-making due to predictability; concern for reliance interests based on settled precedent; and support for the actual and perceived integrity of the judicial process by signaling the constrained nature of the judiciary's power.¹³⁵ The differences in detail between *Payne*'s and Alito's justifications for respecting precedent are not as important as Alito's seeming lack of conviction regarding these benefits. Besides the already-announced decision to overrule *Roe* and *Casey*, an early indication of the majority's disregard for precedent can be seen in the truncated treatment this part of the *stare decisis* analysis received. The "valuable ends" served by *stare decisis* merit a single paragraph.¹³⁶ Another forty pages were devoted to the deconstruction of the doctrine—its attendant benefits be damned.

Instead of a deep consideration of the benefits provided by respect for precedent, Alito rushed to elevate the doctrine's shadow logic. Sure, *stare decisis* demands respect for decisions already taken,¹³⁷ but no Justice in the contemporary debate had argued that *stare decisis* involves an absolute, unbending commitment to precedent. Alito rolled out the well-worn claim that *stare decisis* is "not an inexorable command."¹³⁸ In contrast to his summary treatment of precedent's merits, this part of his analysis involved four pages of reasoning.¹³⁹ This established, rhetorically and structurally, that the permissibility of the abandonment of precedent was the baseline for his assessment of *stare decisis* rather than insisting upon a presumption favoring respect for precedent (which Justice Kavanaugh had suggested in his *Ramos* concurrence).¹⁴⁰ The *Dobbs* majority prioritized skepticism towards the doctrine, seemingly embracing the fashionably cynical claim that "*stare decisis* is for suckers."¹⁴¹ Tapping into an undisputed truism, which had been frequently invoked and never disputed during the contemporary *stare decisis* debate, Alito underscored that precedent is at its weakest with respect to constitutional law.¹⁴² But just how weak? In prioritizing (constitutional) precedent's ephemerality, Alito also provided a lengthy accounting of the Court's rich record of reversals. He explained: "Some of our most important constitutional decisions have overruled prior precedents."¹⁴³ He

(1986); and then citing *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405–06 (1932) (Brandeis, J., dissenting), *overruled by* *Helvering v. Bankline Oil Co.*, 303 U.S. 362 (1938), *and Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938)).

¹³⁵ See *Payne*, 501 U.S. at 827 (citing *Vasquez*, 474 U.S. at 265–66).

¹³⁶ See *Dobbs*, 597 U.S. at 263–64.

¹³⁷ See *Stare Decisis*, BLACK'S LAW DICTIONARY 1696 (11th ed. 2019).

¹³⁸ See *Dobbs*, 597 U.S. at 264 (quoting *Pearson v. Callahan*, 555 U.S. 223, 233 (2009)).

¹³⁹ *Id.* at 262–65.

¹⁴⁰ See *Ramos v. Louisiana*, 590 U.S. 83, 118 (2020) (Kavanaugh, J., concurring in part) (noting that in "applying the doctrine of *stare decisis*, this Court ordinarily adheres to precedent").

¹⁴¹ See *Merchandise*, *supra* note 1.

¹⁴² See *Dobbs*, 597 U.S. at 264 (citing *Agostini v. Felton*, 521 U.S. 203, 235 (1997)).

¹⁴³ See *id.*

provided a casebook's index of fundamental decisions in a page-long footnote but singled out three progressive icons as representative of the frequency and gravity of the Court's disregard for precedent.¹⁴⁴ He seemed to want to taunt the dissenters by reminding them of reversals that are celebrated by progressives. Alito pointed to *Brown v. Board of Education*,¹⁴⁵ *West Coast Hotel Co. v. Parrish*,¹⁴⁶ and *West Virginia Board of Education v. Barnette*.¹⁴⁷ In light of these examples, Alito suggested that an overly formalistic respect for precedent is both hypocritical and un-American. "Without these [overrulings]," he mused, "American constitutional law as we know it would be unrecognizable, and this would be a different country."¹⁴⁸ As true as that claim surely is, it selectively highlights the impact of overturning precedent. It is no less true that constitutional law—and America—have been profoundly shaped by precedents that are preserved and enjoy enduring respect.

2. The New *Stare Decisis* Analysis

But, since no one was advocating blind servility to precedent, the real question confronting the *Dobbs* majority was what standard should apply in determining when to disregard controlling case law. That "serious matter,"¹⁴⁹ Alito reasoned, is to be guided by the framework charted in his *Janus* opinion and in Justice Kavanaugh's concurring opinion in *Ramos*. Those opinions from the recent *stare decisis* debate suggested six factors to Alito, all of which "weigh strongly in favor of overruling *Roe* and *Casey*."¹⁵⁰ It is significant that Alito turned to these recent cases as authorities on the purpose and practice of precedent. By eschewing the Court's more established and better-recognized statements of the "traditional practice" of *stare decisis*, such as *Payne* and the plurality opinion in *Casey*, Alito drew a line under those precedents on precedent.¹⁵¹ The recent debate that I mapped elsewhere truly was going to serve as the fountainhead for a reimagined doctrine of *stare decisis*.¹⁵² The factors Alito identified included: (i) the erroneousness of the controlling case law; (ii) the quality of the reasoning that informed the controlling case law; (iii) the workability of the rule announced by the controlling case law; (iv) the disruptive effect controlling case law was having on other areas of the law; (v) the absence of concrete reliance on the controlling case law; and (vi) concern for how overruling precedent might affect the Court's perceived integrity.¹⁵³

¹⁴⁴ See *id.* at 265 n.4.

¹⁴⁵ 347 U.S. 483 (1954).

¹⁴⁶ 300 U.S. 379 (1937).

¹⁴⁷ 319 U.S. 624 (1943).

¹⁴⁸ See *Dobbs*, 597 U.S. at 265–66.

¹⁴⁹ *Id.* at 267.

¹⁵⁰ See *id.* at 267–68.

¹⁵¹ See *id.* at 364 (Breyer, J., dissenting) ("*Casey* is a precedent about precedent.").

¹⁵² Miller, *supra* note 6.

¹⁵³ See *Dobbs*, 597 U.S. at 268, 290–91.

On its own, this list of *stare decisis* factors is novel. I have acknowledged that the Court's cases touch on a number of possible *stare decisis* factors and that the concerns covered are variably defined and deployed. The Court's contemporary debate over precedent did not add clarity or coherence to that ambiguous history. Still, *Payne* and *Casey* had long provided something like the "traditional *stare decisis* factors."¹⁵⁴ The factors identified by Alito depart from that tradition.

Most importantly, the "traditional factors" gave no consideration to the perceived error or poor quality of the reasoning in the controlling case law. Whether those concerns should have any role in a *stare decisis* analysis had been one of the central points of dispute in the contemporary debate. On the one hand, Justices Thomas, Kavanaugh, and Gorsuch had insisted that this concern should be paramount (if not decisive).¹⁵⁵ On the other hand, Justice Kagan passionately insisted that more than mere contemporary contempt for, or disenchantment with, a prior Court's judgment should be necessary to overrule precedent.¹⁵⁶ Kagan sought to preclude this possibility by consistently demanding that a "special justification," beyond and independent of the perceived "wrong[ness]" of the controlling rule, is required to overturn precedent.¹⁵⁷ This should be something more than the present-day conclusion that "precedent was wrongly decided."¹⁵⁸ This aligned with the general disinterest the established *stare decisis* practice showed for a precedent's perceived erroneousness. Framed in two distinct ways, Alito nevertheless made error the paramount concern in the new *stare decisis* analysis.¹⁵⁹ The first and second factors in his novel *Dobbs* analysis involve a version of the question: was the controlling case wrongly decided? Alito also reframed the reliance factor, demanding "concrete reliance"¹⁶⁰ and departing from the *Casey* plurality's broader understanding of that factor, which it described as the "cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application."¹⁶¹ The narrowing of the reliance factor had also been a point of discussion in the Court's recent *stare decisis* debate. Finally, I have included Alito's reference to the Court's integrity as the last factor in the majority's new *stare decisis* analysis. In fact, Alito addressed this concern as a concluding rebuttal argument and not as one of the *stare decisis* factors.¹⁶² This

¹⁵⁴ In his dissent, Justice Breyer articulates three "traditional *stare decisis* factors": "(1) a change in legal doctrine that undermined or made obsolete the earlier decision; (2) a factual change that had the same effect; or (3) an absence of reliance because the earlier decision was less than a decade old." *See id.* at 389 (Breyer, J., dissenting).

¹⁵⁵ *See Miller, supra* note 6, at 253, 256–57.

¹⁵⁶ *Id.* at 242–44 (citing *Janus v. Am. Fed'n State, Cnty. & Mun. Emp., Council 31*, 585 U.S. 878, 929 (2018) (Kagan, J., dissenting)).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *See Dobbs*, 597 U.S. at 269–70 (reviewing the "quality of the reasoning").

¹⁶⁰ *See id.* at 288.

¹⁶¹ *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992).

¹⁶² *See Dobbs*, 597 U.S. at 290–92.

separate treatment might have been justified by the fact that the issue did not feature amongst the list of “traditional factors.” The *Casey* plurality, for example, did not consider it alongside reliance, workability, or changes to law and facts. Still, judicial integrity has been invoked as one of the core justifications for the doctrine of *stare decisis*, including by Chief Justice Rehnquist in *Payne* and by the plurality opinion in *Casey*.¹⁶³ The *Casey* plurality was concerned about the impact its decision regarding *Roe* might have on America’s fragile political consensus over the abortion issue, and relatedly, on the Court’s status in American politics.¹⁶⁴ Alito dismissed these concerns, insisting instead that the Court should not let society’s reaction to overruling *Roe* and *Casey* “influence our decision.”¹⁶⁵

These three points represent *Dobbs*’s revolutionary reframing of *stare decisis* doctrine.

a. Error and Quality of Reasoning—No Special Justification

i. Egregious Error

To begin, Alito’s novel *stare decisis* analysis invites contemporary majorities to assess and disregard precedents that are determined, by the current majority of the Court, to have been wrongly decided. This had never been central to the consideration of a precedent’s continuing viability and force.¹⁶⁶ That’s because its logic so thoroughly contradicts the very purpose of the doctrine of *stare decisis*: promoting the clarity and predictability of the law despite changes in the judicial personnel and personalities at the Court. If liberally applied, this factor would essentially decimate the doctrine of *stare decisis*, reducing it to a mere form as each new majority at the Court declared the error of their predecessors’ ways. No case law would be secure against the whims of future courts. Aware of this absurdity, Alito sought to limit this factor by making use of Justice Kavanaugh’s construction of it in his *Ramos* concurrence. There, Kavanaugh called for the reversal of “egregiously wrong” precedent, as opposed to case law that is flawed in modest or pedestrian ways.¹⁶⁷

Yet, the limits established by the qualifying adjective “egregious” fully depend on how it is measured. Neither Alito (in *Dobbs*) nor Kavanaugh (in *Ramos*) offer an abstract clarification or concrete measure for the term. Alito merely noted that some erroneous interpretations of the Constitution are “more damaging than others.”¹⁶⁸ Borrowing from Kavanaugh’s concurrence in *Ramos*, Alito resorted to an analogy to

¹⁶³ See *Casey*, 505 U.S. at 845–46; *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (citing *Vasquez v. Hillery*, 474 U.S. 254, 265–66 (1986)).

¹⁶⁴ See *Casey*, 505 U.S. at 864–69.

¹⁶⁵ See *Dobbs*, 597 U.S. at 292.

¹⁶⁶ See *id.* at 412 (Kagan, J., dissenting).

¹⁶⁷ See *Ramos v. Louisiana*, 590 U.S. 83, 121–22 (2020) (Kavanaugh, J., concurring in part).

¹⁶⁸ See *Dobbs*, 597 U.S. at 268.

define egregiousness. “The infamous decision in *Plessy v. Ferguson*,” he reasoned, “was one such decision.”¹⁶⁹ Alito explained that *Plessy* should serve as anti-canon because it betrayed the American commitment to equality before the law.¹⁷⁰ But how is *Plessy*’s misapprehension of equality to be understood as a way of framing of egregiousness? Two problematic possibilities emerge. First, Alito may have been suggesting that precedent is egregiously wrong if it contradicts extant, concrete constitutional doctrine. *Plessy* was egregiously wrong because it brazenly flouted the applicable understanding of constitutional equality. But this approach to egregiousness creates a strange catch-22. After all, it is precedent that defines the scope and meaning of constitutional law. How can a case be regarded as egregiously flawed, relative to existing constitutional doctrine, if it serves as the case that established that existing doctrine? *Plessy*, after all, was fully aligned with the concrete constitutional standard for equality that *Plessy* announced and defined. No. This cannot be the measure of egregiousness that Alito intended. Second, Alito may have meant that egregiousness is linked to affronts to grand or foundational constitutional values as opposed to “mere” or “mundane” constitutional doctrine?¹⁷¹ That is exactly how *Plessy* was portrayed (if not in such succinct terms) when the Court reversed it in *Brown*. And it is certainly the view of *Plessy* that has deepened with time. By invoking *Plessy* as the relevant analogy for egregiousness, Alito himself canonizes this view. *Plessy* was egregiously wrong (and can serve as a standard for egregiousness in future assessments of precedent) because it offended the high priority our constitution grants to equality, regardless of how equality has been interpreted and defined by the Court. New and obvious problems arise. How should those foundational or benchmark constitutional values be determined? How should they be defined? Answers to these questions are needed so that we can know whether flawed precedent is also “egregiously wrong” because of the affront it offers to these sacred values. This maneuver seems far removed from the formalist posture of the textualist Justices who now dominate the Court’s conservative majority and who joined the *Dobbs* majority. That critique especially matters in this context because the majority’s engagement with a precedent’s flaws in *Dobbs* is justified by the ambition that the objective truth of the material constitutional law can be discovered, excavated, and liquidated. But the open-textured constitutional construal of egregiousness conflicts with this yearning for formal objectivity in the law. The majority claims to be doing objective jurisprudential work—concluding that a precedent is egregiously wrong—but it uses a wildly subjective tool to get there.

Perhaps sensing the flawed logic and interpretive subjectivity involved in these possible determinations of egregiousness, Alito pivoted to explain that *Roe* was

¹⁶⁹ See *id.*

¹⁷⁰ See *id.*

¹⁷¹ This hints at the interpretive modality Bobbitt described as “ethos.” See PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 94–97 (1982).

manifestly wrong because it involved an interpretation “far outside the bounds of any reasonable interpretation of . . . various constitutional provisions.”¹⁷² But this is an unilluminating tautology. A precedent can be disregarded as egregiously wrong because it is manifestly unreasonable.

Finally, Alito explained that the egregiousness of *Roe*’s error lay in the current Court’s assessment that it involved “nothing but ‘raw judicial power.’”¹⁷³ If this conceptualization of the egregiousness limitation also seems ill-defined and ambiguous, then Alito at least offered another circular explanation: “Together, *Roe* and *Casey* represent an [egregious error because they involved] an error that cannot be allowed to stand.”¹⁷⁴ This suggests that egregiousness might be measured by the universality of the condemnation of a past decision. No one now defends *Plessy*, on doctrinal or policy or moral terms.¹⁷⁵ *Plessy* and *Dred Scott* are resoundingly viewed as the Court’s greatest mistakes and are often spoken of as anti-canon.¹⁷⁶ But, if that is what Alito (and Kavanaugh) mean by “egregious,” then the polarized divide over *Roe* and *Casey* (with equally animated proponents and opponents) confirms that the Court’s abortion jurisprudence had not attained that undisputed, ignominious status.¹⁷⁷

It was revolutionary to introduce past jurisprudential error as the first and most prominent factor in the *stare decisis* analysis. This was, after all, the keystone in the extreme approach to *stare decisis* that Justice Thomas advanced in the recent debate over precedent. In his *Gamble* concurrence, Thomas insisted that “demonstrably erroneous” precedent should be discarded.¹⁷⁸ Alito adopted Kavanaugh’s “egregiousness” terminology.¹⁷⁹ Still, he elevated the contemporary conclusion that a previous court

¹⁷² See *Dobbs*, 597 U.S. at 268.

¹⁷³ See *id.* at 268–69 (quoting *Roe v. Wade*, 410 U.S. 113, 222 (1973) (White, J., dissenting)).

¹⁷⁴ See *id.* at 269.

¹⁷⁵ Americans vehemently disapprove of *Plessy* and *Dred Scott*. See Scott H. Howe, *Atoning for Dred Scott and Plessy While Substantially Abolishing the Death Penalty*, 95 WASH. L. REV. 737, 739 (2020) (“*Dred Scott* and *Plessy* are so widely reviled that they constitute the core of constitutional law’s anti-canon.”).

¹⁷⁶ See *id.*; see also Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011); Akhil Reed Amar, *Plessy v. Ferguson and the Anti-Canon*, 39 PEPP. L. REV. 75 (2011).

¹⁷⁷ According to Gallup, 61% of Americans disapproved of the *Dobbs* decision, and Ipsos polling demonstrates that 64% believe that *Roe v. Wade* was correct. See Lydia Saad, *Broader Support for Abortion Rights Continues Post-Dobbs*, GALLUP (June 14, 2023), <https://news.gallup.com/poll/506759/broader-support-abortion-rights-continues-post-dobbs.aspx> [<https://perma.cc/8DYD-9E4W>]; Chris Jackson et al., *Has the Dobbs Decision Made the Public More Divided on Abortion?*, IPSOS (June 22, 2023), <https://www.ipsos.com/en-us/has-dobbs-decision-made-public-more-divided-abortion> [<https://perma.cc/JS9Q-TC8Y>]; see also Karrer, *supra* note 7, at 48 (“For anti-abortion scholars and lawyers, *Roe* stood with *Dred Scott* (1857) as an aberration of American justice and moral law.”).

¹⁷⁸ *Gamble v. United States*, 587 U.S. 678, 711–12 (2019) (Thomas, J., concurring).

¹⁷⁹ See *Dobbs*, 597 U.S. at 268 (quoting *Ramos v. Louisiana*, 590 U.S. 83, 122 (2020) (Kavanaugh, J., concurring in part)). But Kavanaugh was not the first to use this phrase. Justice

had erred to a nearly determinative status in *Dobbs*'s novel *stare decisis* analysis. This was the approach Thomas advocated in *Gamble*. The move was made more radical, however, by the fact that Alito did so little to chart the limits imposed by qualifiers such as "egregious" and "demonstrable." The factor appears to be narrow. But, in practice, judges are left to decide for themselves when precedent is so categorically erroneous that it merits abandonment. The slack in this standard is underscored by the fact that Alito approvingly cited nearly 30 examples of other overruled precedents from the Court's history in footnote 48.¹⁸⁰ It is inconceivable that each of those rejected precedents could satisfy the "egregious error" standard, whatever it might be. How many faulty decisions bearing the ignominious gravity of *Plessy* has the Court issued and then corrected through reversal?

What all of this groping and indirection with respect to assessing egregiousness really means is that Alito intends to empower current majorities of the Court to reverse controlling cases that they now conclude were wrongly decided. He only obliges them to dress that patent power play up in a costume of extremity, flagrancy, and egregiousness. What that might consist of, beyond a facile analogical nod towards *Plessy*, is unclear. The majority, we are led to understand, will know egregiousness when they see it.

ii. Flawed Reasoning

To make the matter worse, the second factor considered in the majority's new *stare decisis* analysis doubles down on the issue of error. Justice Alito explained: "Under our precedents, the quality of the reasoning in a prior case has an important bearing on whether it should be reconsidered."¹⁸¹ Significantly, he did not cite *stare decisis* classics, such as *Payne* or the plurality opinion in *Casey*, for this proposition. Instead, Alito referred to highlights from the recent debate over *stare decisis*, including his opinion in *Janus* and (once again) Kavanaugh's concurrence in *Ramos*.¹⁸² With this, Alito canonized those opinions as the new controlling precedents on precedent.

Whatever the provenance or pedigree of this factor, it is unclear how a precedent's "poor reasoning" differs from the "egregious nature" of its error. Alito merely offered: "*Roe* was incorrectly decided, but that decision was more than just wrong.

Brennan coined it in *Butler v. McKellar*, 494 U.S. 407, 421 n.2 (1990) (Brennan, J., dissenting). And Ginsburg and Scalia picked it up later. See *Payne v. Tennessee*, 501 U.S. 808, 834 (1991) (Scalia, J., concurring); *Coleman v. Ct. Appeals Md.*, 566 U.S. 30, 56–57 (2012) (Ginsburg, J., dissenting); *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 527 (2018) (Ginsburg, J., dissenting).

¹⁸⁰ See *Dobbs*, 597 U.S. at 265 n.48.

¹⁸¹ *Id.* at 269.

¹⁸² *Id.*

It stood on exceptionally weak grounds.”¹⁸³ The point is that, under Alito’s new *stare decisis* analysis, contemporary majorities on the Court are invited to reassess the merits of previous cases *de novo* in a search for wrongness that they regard as egregious and as the product of exceptionally weak reasoning. This, however, is an approach to *stare decisis* that the established practice never embraced. It is hard to square the demand that contemporary Justices search for error—or poor reasoning—with the notion that precedent imposes any limits on the Court’s future decision-making. An assessment of past failings is, in any case, an elusive—should I say inherently subjective and ideological—enterprise.

If Alito’s resort to egregious error was ill-defined, then at least he sought to better describe what might count as fatally weak reasoning. First, he noted that the controlling plurality in *Casey* refused to ratify *Roe*’s reasoning while reluctantly concluding they must uphold its central rule. The lack of an endorsement of the Court’s reasoning by the three Justices who were most essential to *Roe*’s survival, Alito concluded, was damning evidence of that precedent’s poor quality.¹⁸⁴ One has to ask, however, why Alito is willing to credit the *Casey* plurality’s reservations about *Roe* but not its clear statement on the doctrine of *stare decisis*? In any event, Alito made an independent case for *Roe*’s weak reasoning. This built on the first half of the *Dobbs* majority opinion, which was also concerned with *Roe*’s error.¹⁸⁵ Alito

¹⁸³ *Id.* at 270.

¹⁸⁴ In a fruitful exchange about this project, William Funk rightly pointed out that *Casey* is not an example of a controlling majority of the Court insisting on the continuing force of precedent despite the conclusion that the controlling case had been wrongly decided. On one hand, Funk explained, it was only a three-Justice plurality that seemed troubled by the integrity of *Roe*’s holding while nevertheless sustaining the abortion rights doctrine due to *stare decisis*. The other members of the judgment’s fractured majority were convinced of *Roe*’s integrity and were not exclusively animated to uphold the case on the basis of *stare decisis*. On the other hand, Funk argued that the three Justices did not even conclude that the *Roe* had been wrongly decided. This insight fuels Funk’s general skepticism towards the practical significance of the doctrine of *stare decisis*, leaving him to wonder if there ever had been a decision in which a *majority* found that a precedent was deeply flawed but, solely due to the demands of *stare decisis*, felt obliged to let the flawed case stand. I think it might be too literal a reading of the *Casey* plurality to suggest that they didn’t condemn *Roe* for being incorrectly decided. But even if I’m right about this, the question remains: Has *stare decisis* ever driven a *majority* to uphold a precedent it views as manifestly wrong? A possible answer seems to come from the *Dickerson* case in which a majority of the Court expressed grave misgivings about *Miranda v. Arizona* but nevertheless left the *Miranda* rule in place, at least in part out of respect for *stare decisis*. See *Dickerson v. United States*, 530 U.S. 428, 432 (2000).

¹⁸⁵ The majority concluded that, contrary to the central holding of *Roe*, the “Constitution[] properly understood” does not confer a right to obtain an abortion. See *Dobbs*, 597 U.S. at 234. What did *Roe* get wrong on this substantive matter? Alito explained that *Roe*’s conceptualization of a Substantive Due Process protection of privacy “was remarkably loose in its treatment of the constitutional text.” *Id.* at 235. *Roe* also involved an incorrect assessment of the history and tradition that are meant to substantiate the existence of a Substantive Due Process right. See *id.* at 241–50. “The inescapable conclusion,” Alito explained in his condemnation of *Roe*, “is that a right to abortion is not deeply rooted in the Nation’s history and traditions.”

concluded: “The weaknesses in *Roe*’s reasoning are well-known.”¹⁸⁶ The rule announced by *Roe* involved an “elaborate scheme” that “resemble[d] the work of a legislature.”¹⁸⁷ That framework, Alito complained, was the “Court’s own brainchild” and not the product of “the [interpretive] sources on which constitutional decisions are usually based.”¹⁸⁸ *Roe* relied on inapposite precedent as an analogy for the abortion right it identified.¹⁸⁹ Alito described the reasoning in *Roe* as lacking a “cogent justification” and as “arbitrary.”¹⁹⁰ Finally, Alito sought to confirm *Roe*’s “exceedingly weak” reasoning by noting that academic commentators shared that view.¹⁹¹ Even scholars “who agreed with the decision as a matter of policy,” Alito explained, “were unsparing in their criticism.”¹⁹² To substantiate this claim, Alito cited the work of just six (male) scholars, quoting only three of them in the most summary fashion.¹⁹³ The academy’s supposed doubts about *Roe*’s reasoning are not derived from a close analysis of the substance of these scholars’ work on the abortion issue. Nor does it engage with the rest of the vast mountain of scholarly literature addressing *Roe* and abortion from every possible viewpoint or perspective, including a whole universe of scholarship endorsing the *Roe* and *Casey* jurisprudence.¹⁹⁴ Alito sought to add weight to the handful of academic critiques he cites by noting the authors’ Democratic Party or progressive *bona fides*.¹⁹⁵

In the end, the *Dobbs* majority refers to its own conclusions about the poor quality of the *Roe* and *Casey* decisions as the primary basis for its conclusion that

Id. at 250. Alito then explained that the majority in *Roe* mistakenly sought to justify the abortion right by analogizing to precedent. *See id.* at 256. But “the right to obtain an abortion,” Alito insisted, does not have “a sound basis in precedent.” *Id.* Added to all of this, Alito concluded that the dissent in *Dobbs* candidly admits that “it cannot show that a constitutional right to abortion has any foundation, let alone a ‘deeply rooted’ one, ‘in this Nation’s history and tradition.’” *Id.* at 260.

¹⁸⁶ *Id.* at 270.

¹⁸⁷ *Id.* at 271.

¹⁸⁸ *Id.*

¹⁸⁹ *See id.* at 272–73.

¹⁹⁰ *Id.* at 274–75.

¹⁹¹ *Id.* at 278.

¹⁹² *Id.*

¹⁹³ *Id.* at 275.

¹⁹⁴ *See, e.g.,* MARY ZIEGLER, ABORTION AND THE LAW IN AMERICA: *ROE V. WADE* TO THE PRESENT (2020); Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025 (2021); Clarke D. Forsythe & Stephen B. Presser, *The Tragic Failure of Roe v. Wade: Why Abortion Should Be Returned to the States*, 10 TEX. REV. L. & POL’Y 85 (2005); Richard S. Myers, *Re-reading Roe v. Wade*, 71 WASH. & LEE L. REV. 1025 (2014); Kathryn N. Peachman, *The Need to Codify Roe v. Wade: A Case for National Abortion Legislation*, 45 J. LEGIS. 272 (2018); *see also* Neal Devins, *How Planned Parenthood v. Casey (Pretty Much) Settled the Abortion Wars*, 118 YALE L.J. 1318 (2009).

¹⁹⁵ *See Dobbs*, 597 U.S. at 278 (noting that Archibald Cox “served as Solicitor General under President Kennedy”).

those precedents were poorly reasoned. The majority's superficial, unsystematic, and specious reference to academic writing cannot cure that tautological maneuver. Similar to the assessment of "egregious error," the Court's consideration of a precedent's quality is an unformed and subjective tool for discrediting controlling case law.

In all of this—concern for egregious error and critiques of weak reasoning—the *Dobbs* majority empowers contemporary majorities to reach their own conclusions about the substantive law in a dispute rather than imposing an outcome dictated by the controlling case law. This is a radical devaluation of the force of precedent. Of course, the subjectivity involved in defining error (not to mention its egregiousness) and assessing the quality of past Courts' work leaves the approach open to the risk that it amounts to little more than a contemporary majority's scruples about a past decision. A *stare decisis* doctrine that embraces that possibility is no doctrine at all. That insight, in fact, is what drove Justice Kagan's repeated acknowledgment, during the recent debate over the purpose and practice of precedent, that the traditional practice of *stare decisis* requires a "special justification" (beyond the mere conclusion that a past case was wrongly decided) for the reversal of a controlling case.

b. Reliance Reduced

The "traditional factors" in a *stare decisis* analysis sought to account for reliance on existing case law as part of the decision whether to overrule precedent. The idea was that substantial reliance on a norm strengthened its acceptance and, in turn, its prospects for enforcement and implementation. There is also an element of fairness in the concern for reliance. It is simply unjust to abruptly change the law when people have sought to arrange their affairs in a way that conforms to the rule. These points informed the emphasis the *Casey* plurality placed on reliance when concluding that the central holding of *Roe* should be sustained.¹⁹⁶ The Justices in the plurality explained that *stare decisis* doctrine requires the Court to consider "whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation."¹⁹⁷ This understanding of reliance was not exceptional. The extent of society's reliance on the established rule served as a prominent justification for following precedent in the post-*Brown v. Board* era of *stare decisis* doctrine.¹⁹⁸

But, even while it is possible to refer to both *Payne* and *Casey* for the conclusion that reliance has a "great weight" amongst the established *stare decisis* factors,

¹⁹⁶ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992).

¹⁹⁷ *Id.* at 854.

¹⁹⁸ See *id.* at 854–55; *Dickerson v. United States*, 530 U.S. 428, 443 (2000); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 231–34 (1995); *Hubbard v. United States*, 514 U.S. 695, 715 (1995); *Payne v. Tennessee*, 501 U.S. 808, 830 (1991).

the *Casey* plurality opinion acknowledged that there were significant differences between the nature of the reliance involved in *Payne* and *Casey*.¹⁹⁹ The plurality Justices noted that *Payne* was a commercial case in which “advance planning of great precision is most obviously a necessity.”²⁰⁰ The abortion issue addressed by *Casey*, however, was more inexact and involved broadly conceived “economic and social developments.”²⁰¹ The *Casey* plurality sought to credit “the fact that for two decades . . . people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail.”²⁰² This involves a “human value[],” the plurality Justices reasoned, such as “[t]he ability of women to participate equally in the economic and social life of the Nation.”²⁰³ Admittedly, these reliance concerns cannot be “exactly measured” in the way that the commercial affairs in *Payne* can be. Still, the *Casey* plurality believed that this kind of reliance strongly counseled for the continuing respect owed to the *Roe* precedent.²⁰⁴

The *Dobbs* majority forcefully rejected this broader conceptualization of reliance as a factor in the *stare decisis* analysis. Alito insisted that the “intangible” reliance concerns raised by the *Casey* plurality did not involve the “conventional, concrete reliance interests” implicated by the commercial dispute in *Payne*.²⁰⁵ Instead, Alito was only willing to credit “very concrete reliance interests” that are susceptible to empirical assessment by a court.²⁰⁶ However Americans (and especially American women) might have come to count on the abortion right secured by *Roe* and *Casey*, Alito concluded that this reliance was too speculative—and contested—to demand continued fealty to those cases.²⁰⁷

The new, narrow understanding of reliance advanced by the *Dobbs* majority diminishes that traditional *stare decisis* factor, making it relevant only in a small range of cases involving specific and quantifiable expectations towards a precedential rule “like those [expectations] that develop in ‘cases involving property and contract rights.’”²⁰⁸ Going forward, precedent will be owed respect on the basis of “substantial reliance” only if the impact of abandoning a rule could be concretely

¹⁹⁹ See *Casey*, 505 U.S. at 856, 872.

²⁰⁰ *Id.* at 855–56.

²⁰¹ *Id.* at 856.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ See Randy J. Kozel, *Precedent and Reliance*, 62 EMORY L.J. 1459, 1493 (2013); Nina Varsava, *Precedent, Reliance, and Dobbs*, 136 HARV. L. REV. 1845, 1856–57 (2023); Rachel Bayefsky, *Tangibility and Tainted Reliance in Dobbs*, 136 HARV. L. REV. F. 384, 385–86 (2023); Alexander Lazaro Mills, *Reliance by Whom? The False Promise of Societal Reliance on Stare Decisis Analysis*, 95 N.Y.U. L. REV. 2094, 2101–02 (2017).

²⁰⁵ See *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 288 (2022).

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 288–89.

²⁰⁸ *Id.* at 288.

and empirically measured. The broader resonance and relevance of a controlling rule for society—what Alito condescendingly characterized as “generalized assertions about the national psyche”—will no longer be a dimension of reliance in a *stare decisis* analysis.²⁰⁹ But it goes without saying that law exercises its force in more than just the narrow, concrete, and empirically identifiable fashion credited by Alito’s understanding of reliance. All of the broad policy-and-social-ordering functions of law are discounted by this claim, which suggests that the potential of the doctrine of *stare decisis* is limited only to court-announced rules involving commercial or contracting affairs. Embedded in the *Dobbs* majority’s evisceration of the old reliance factor is the idea that the Court’s constitutional jurisprudence, from free speech to federalism, might be revisited. The broadest and most natural forms of Americans’ reliance on those rules no longer merit consideration when determining whether those rules require our respect. In any case, in advancing this anemic understanding of the reliance factor, the *Dobbs* majority was again corroding the continuing credibility of the *Casey* plurality opinion as the canonical statement on the purpose and practice of precedent.

c. The Court’s Integrity

Alito’s use of *Payne* to assert a narrow understanding of reliance did not oblige him to embrace other facets of *Payne*’s portrayal of the doctrine of *stare decisis*. As I noted earlier in this Article, Chief Justice Rehnquist’s majority opinion in *Payne* identified the core justifications for respecting precedent. Among those values was the desire to support the actual and perceived integrity of the judicial process by signaling the constrained nature of the judiciary’s work.²¹⁰ The final major revision the *Dobbs* majority made to the traditional practice of *stare decisis* involved the disregard of this core value.

The *Dobbs* majority recognized that respect for precedent promotes the “American people’s belief in the rule of law [and] . . . respect for this Court as an institution.”²¹¹ Alito even conceded that the *Casey* plurality was right to conclude that “it is important for the public to perceive that our decisions are based on principle” rather than the whims of newly appointed Justices.²¹² But Alito dismissed the idea that respect for precedent should be prioritized in pursuing these aims. The doctrine of *stare decisis*, he explained, is adjunct to the Court’s duty to accurately interpret and enforce the Constitution. Alito insisted that the public’s reaction to a decision

²⁰⁹ See *id.* (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 957 (1992) (Rehnquist, C.J., concurring in part and dissenting in part)).

²¹⁰ See *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (“*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.”).

²¹¹ *Dobbs*, 597 U.S. at 290.

²¹² *Id.* at 290–91.

to overrule precedent—what he called public opinion—amounted to an “extraneous influence[.]” beyond the positive law and the text of the Constitution itself.²¹³ Alito reasoned that the Court is charged with correctly declaring the meaning of the law and it derives the greatest share of its legitimacy from that function.²¹⁴ Following flawed precedent simply because doing so will please the public, he argued, is a posture that will truly place the Court’s tenuous legitimacy at risk.²¹⁵

Yet, even if the public’s views of precedent or of the Court might be relevant in deciding whether to sustain or abandon controlling cases, Alito worried that the Court would lack the tools needed to assess the public’s perception of a precedential rule or of the principled nature of the Court’s decision-making. Almost laughably, Alito explained that “[w]e do not pretend to know how our political system or society will respond to today’s decision overruling *Roe* and *Casey*.”²¹⁶ But more importantly for this line of argument, Alito insisted that it would be inappropriate for the Court to “let that knowledge influence our decision.”²¹⁷ The work of the judiciary, from which it primarily derives its legitimacy, “is to interpret the law.”²¹⁸ It is important to hear, in this formalistic depiction of the judicial function, the echoes of Justice Thomas’s categorical rejection of the doctrine of *stare decisis* in his contributions to the recent debate.²¹⁹ In his concurrence in *Gamble*, Thomas advanced the extreme view that announcing and complying with precedent constituted a form of judicial lawmaking that departs from the proper function of the federal judiciary, which he characterized as little more than deciding cases in accordance with the written law.²²⁰ Similar to Alito’s claims about the relationship between the doctrine of *stare decisis* and the Court’s integrity, Thomas insisted that the judicial power consists of nothing more than “liquidating” or “ascertaining” the meaning of the positive law, that is, rendering the law unambiguous through the announcement of its ascertainable, objectively correct meaning.²²¹ For both Justices, that aim should take priority, even over the integrity of the institution designed to pursue it.

The *Dobbs* majority’s disregard for concerns about the integrity of the Court in the practice of precedent was presented as a critique of a “final argument that featured prominently in the *Casey* plurality opinion.”²²² This part of the majority opinion involved yet another condemnation of *Casey* as a leading statement on the doctrine of *stare decisis*.

²¹³ *Id.* at 291.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* at 292.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ See *Gamble v. United States*, 587 U.S. 678, 711 (2019) (Thomas, J., concurring).

²²⁰ *Id.* at 713.

²²¹ *Id.* at 714.

²²² *Dobbs*, 597 U.S. at 290.

3. The Concurring Opinions and *Stare Decisis*

Three Justices in the Court's newly entrenched conservative majority wrote separately in *Dobbs*. Thomas and Kavanaugh wrote concurring opinions to clarify their positions and understanding of Alito's opinion for the Court.²²³ Chief Justice Roberts wrote separately to concur in the judgment (bringing to six the total number of Justices voting to uphold the draconian Mississippi abortion law) but to distance himself from the majority's decision to overrule *Roe* and *Casey*.²²⁴ These Justices' engagement with the doctrine of *stare decisis* is of varying—and potentially marginal—significance for the future of precedent. Their analyses neither attracted a supporting majority nor did they anchor a decisive plurality, as was the case for the plurality opinion in *Casey*.²²⁵ These opinions are not central to the Court's innovation with respect to precedent in *Dobbs*. Still, they help to illuminate the scope and character of the significant changes the *Dobbs* majority opinion makes to the doctrine of *stare decisis*.

a. Justice Thomas

Justice Thomas joined the Court's conservative majority in *Dobbs*.²²⁶ But he wrote a concurring opinion to underscore his view that *Roe* and *Casey* were doomed because their reliance on the contested doctrine of Substantive Due Process was fundamentally misguided. That conclusion required Thomas to call for the reconsideration of “all of this Court's substantive due process precedents.”²²⁷ Reveling in this provocation, Thomas explicitly identified prized progressive policies that, pursuant to his reasoning, would now also suddenly be imperiled. This included constitutional rights to contraception and same-sex marriage.²²⁸ The dissenting Justices took Thomas's bait, agonizing that

no one should be confident that the majority is done with its work. The right *Roe* and *Casey* recognized does not stand alone. To the contrary, the Court had linked it for decades to other settled

²²³ See *id.* at 330 (Thomas, J., concurring); *id.* at 336 (Kavanaugh, J., concurring).

²²⁴ See *id.* at 347 (Roberts, C.J., concurring).

²²⁵ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

²²⁶ See *Dobbs*, 597 U.S. at 330 (Thomas, J., concurring).

²²⁷ See *id.* at 332; see also *Gamble v. United States*, 587 U.S. 678, 725 (Thomas, J., concurring) (arguing that “the most egregious example of this illegitimate use of *stare decisis* can be found in our ‘substantive due process’ jurisprudence” (quoting *McDonald v. Chicago*, 561 U.S. 742, 811 (2010) (Thomas, J., concurring in part and concurring in judgment))); *Ramos v. Louisiana*, 590 U.S. 83, 133–34 (2020) (Thomas, J., concurring).

²²⁸ See *Dobbs*, 597 U.S. at 332 (Thomas, J., concurring) (arguing that the Court should specifically reconsider *Griswold*, *Lawrence*, and *Obergefell*).

freedoms involving bodily integrity, familial relationships, and procreation. [Rights to contraception, same-sex intimacy, and same-sex marriage] . . . are all part of the same constitutional fabric . . . [as a woman’s right to terminate her pregnancy]. Either the mass of the majority’s opinion is hypocrisy, or additional constitutional rights are under threat.²²⁹

Yet, Justice Alito and the other Justices in the majority insisted that, in contrast to Thomas, they were not stepping out onto that slippery slope. “[O]ur decision,” Alito wrote, “concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.”²³⁰ Justice Alito explained that these other precedents would not be threatened because the *Dobbs* ruling accepted the Court’s established understanding that “[a]bortion is a unique act” involving the termination of “life or potential life.”²³¹ Alito noted that *Roe* itself acknowledged that “abortion is ‘inherently different from marital intimacy,’ ‘marriage,’ or ‘procreation.’”²³² The implication of this is that abortion called for special scrutiny (dare I say a “special justification”) from the Court when concluding that *Roe* and *Casey* were wrongly decided and should be abandoned. But this element of material reasoning isn’t layered into Alito’s development of the “error” element of the new *stare decisis* analysis.

Next to his critique of Substantive Due Process, Thomas said nothing at all about the doctrine of *stare decisis*. This is a consequential omission considering the force with which Thomas advanced his radical effort to discredit the doctrine altogether in the Court’s recent debate over the purpose and practice of precedent.²³³ Thomas’s sudden silence on the matter raises the question: Did he not feel compelled to write on the subject in *Dobbs* because he was satisfied that the majority’s treatment of *stare decisis*—even if only implicitly—essentially vindicated his radical position, especially with respect to the question of error and the formalistic lens through which that issue is to be implemented? Ultimately, when viewed in the light of his *Gamble* concurrence, the cavalier manner in which Thomas called for the abandonment of other settled precedents in his *Dobbs* opinion says all that can be said about his view of the future of the doctrine of *stare decisis*. He didn’t need to add to that critique in *Dobbs*.

²²⁹ See *id.* at 362–63 (Breyer, J., dissenting).

²³⁰ See *id.* at 290 (majority opinion).

²³¹ See *id.* (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992)).

²³² *Id.* (quoting *Roe v. Wade*, 410 U.S. 113, 159 (1973)).

²³³ See, e.g., *Ramos v. Louisiana*, 590 U.S. 83, 133–34 (2020) (Thomas, J., concurring); *Gamble v. United States*, 587 U.S. 678, 712 (2019) (Thomas, J., concurring); *Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. 230, 248 (2019); *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 633 (2012); *McDonald v. Chicago*, 561 U.S. 742 (2010) (Thomas, J., concurring in part and concurring in judgment); *United States v. Int’l Bus. Machs. Corp.*, 517 U.S. 843, 856 (1996).

b. Justice Kavanaugh

Justice Kavanaugh also wrote a concurring opinion. But unlike Thomas, Kavanaugh's chief purpose in doing so was to clarify his view of *stare decisis*, what he called "[t]he more difficult question in this case."²³⁴

Kavanaugh's treatment of the doctrine of *stare decisis* in *Dobbs* adds little to the work he did on the subject in his concurring opinion in *Ramos*.²³⁵ In fact, that opinion came to be one of the statements of the doctrine upon which Alito relied in the majority's *stare decisis* analysis.²³⁶ Kavanaugh's views on precedent—whether expressed in *Ramos* or reiterated in his *Dobbs* concurrence—merit special consideration. Chief Justice Roberts's departure from the conservative camp on the issue of *stare decisis* in *Dobbs* means that Alito only mustered a five-Justice majority around the issue of precedent. With Kavanaugh writing separately (albeit approvingly), Alito's characterization of *stare decisis* in *Dobbs* ultimately attracted a mere four Justices in support. Kavanaugh's approach to precedent provided the decisive vote—and reasoning—in support of a reframed doctrine of *stare decisis* that permitted the reversal of *Roe* and *Casey*. *Dobbs* and the annulment of the right to abortion are clearly Alito's legacy. But a strong case can be made that the decision's other major achievement—the revolutionary reframing of the purpose and practice of precedent—belongs to Kavanaugh.

First, Kavanaugh was determined to confirm that *stare decisis* is not an inexorable command. He pointed out that "[e]very current Member of this Court has voted to overrule precedent" and that "every one of the 48 Justices appointed to this Court [since 1921] has voted to overrule precedent" including a "substantial number of very significant and longstanding precedents."²³⁷ Of course, this empirical flourish was not new. Rehnquist made a similar argument for precedent's limits in *Payne*.²³⁸ But, it should also be said that pointing out the fact of a significant heritage of reversals is not insightful on its own. Neither the traditional practice of *stare decisis*, nor the dissenters' position in *Dobbs*, demanded absolute and blind fealty to precedent. Instead, precedent should be understood to be susceptible to abandonment. But only upon a showing of a "special justification" beyond a contemporary majority's conclusion that the controlling case was wrongly decided. A list of prior reversals—long as it may be—could be seen to confirm a more cautious approach to the reversal of precedent. After all, a more sophisticated approach aligned with the "special justifications" discussed in *Casey*, might have shaped the list of cases Kavanaugh cites. Or, to put it another way, the mere existence of Kavanaugh's long list, on its own, neither confirms nor denies the significantly weaker standard that Alito and

²³⁴ See *Dobbs*, 597 U.S. at 341 (Kavanaugh, J., concurring).

²³⁵ See *Ramos*, 590 U.S. at 115–32 (Kavanaugh, J., concurring).

²³⁶ See *Dobbs*, 597 U.S. at 220.

²³⁷ See *id.* at 342 (Kavanaugh, J., concurring).

²³⁸ See *Payne v. Tennessee*, 501 U.S. 808, 827–28 (1991).

Kavanaugh advance in *Dobbs*. More than counting cases, Kavanaugh should have done the tedious work of demonstrating how all those prior reversals confirm his new approach to the doctrine of *stare decisis* rather than substantiating the traditional practice, which anticipates and permits the reversal of precedent but only when the factors established by *Casey* are found to exist. Kavanaugh doesn't tell us what kind of reversals those cases involved.

Second, Kavanaugh acknowledged that “the *stare decisis* analysis [in *Dobbs*] is somewhat more complicated because of *Casey*.”²³⁹ *Casey* made things more difficult, he explained, because it served as a definitive treatment of the doctrine of *stare decisis*, which was the sole basis for the *Casey* plurality's endorsement of the central holding of *Roe*.²⁴⁰ This, according to Kavanaugh, required the majority in *Dobbs* to find a double error: in the *Roe* majority's interpretation of the Constitution respecting privacy and abortion rights, and in the *Casey* plurality's application of the doctrine of *stare decisis*.²⁴¹ Regarding the latter of these challenges, Kavanaugh explained that “*Casey*'s approach to *stare decisis* pointed in two directions.”²⁴² It upheld a part of *Roe* (a right to abortion pre-viability) while expressly overturning another part of *Roe* (that a rigid trimester framework could be sued to demarcate viability).²⁴³ The first step in undermining *Casey*'s power as the precedent on precedent was to demonstrate that *Casey*, serving as the traditional *stare decisis* analysis, was flawed.²⁴⁴ Kavanaugh expressed “deep and unyielding respect” for the *Casey* plurality but lamented those Justices' failed hope that by both enforcing precedent (sustaining *Roe*'s central rule) and overturning precedent (rejecting *Roe*'s trimester scheme) the Court might “locate some middle ground or compromise that could resolve [the abortion] controversy for America.”²⁴⁵ Kavanaugh concluded that the *Casey* compromise failed in that ambition. This error in predictive judgment, Kavanaugh explained, “undermines *Casey*'s precedential force.”²⁴⁶ Kavanaugh regarded the *Casey* plurality's good-faith effort at compromise as a new and special factor in a *stare decisis* analysis and he concluded that the plurality's engagement with that factor was incorrect, thereby eroding *Casey*'s canonical status in the jurisprudence on *stare decisis*.²⁴⁷ “[A]lthough *Casey* is relevant to the *stare decisis* analysis,” Kavanaugh urged, “the question of whether to overrule *Roe* cannot be dictated by *Casey* alone.”²⁴⁸ That conclusion cleared the path for the emergence of

²³⁹ See *Dobbs*, at 343 (Kavanaugh, J., concurring).

²⁴⁰ *Id.* at 342–45.

²⁴¹ *Id.* at 344–45.

²⁴² *Id.* at 344 n.4.

²⁴³ *Id.*

²⁴⁴ See *id.* at 344.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 345.

²⁴⁷ *Id.* at 345 n.5.

²⁴⁸ *Id.* at 345.

Kavanaugh's *Ramos* framework—in part asserted by Alito in the *Dobbs*'s majority opinion—as the new controlling precedent on precedent.

c. Chief Justice Roberts

Chief Justice Roberts was the last member of the Court's conservative majority to write a separate opinion in *Dobbs*.²⁴⁹ He joined Alito and the other Justices in holding that Mississippi's abortion regime should survive the constitutional challenge asserted in the *Dobbs* case.²⁵⁰ But he disputed the majority's reasoning in the case. Roberts explained that the Court granted *certiorari* in the case for the limited purpose of determining whether *all* pre-viability prohibitions on elective abortions (such as those established by the Mississippi law) are unconstitutional.²⁵¹ This discrete issue, Roberts argued, should have been resolved without the majority's more sweeping move to overturn the central holding of *Roe* and *Casey*.²⁵² This posture aligns with the pragmatic approach to *stare decisis* that Roberts charted in the Court's recent debate.²⁵³

Roberts argued that in *Dobbs* the Court was tasked with the narrow work of conducting a *stare decisis* analysis of the “viability line” introduced by *Roe* (as part of the trimester scheme) and elevated by the *Casey* plurality (as the viability rule).²⁵⁴ Roberts concluded that, severed from the central holding of *Roe* and *Casey* (finding a Substantive Due Process right to privacy that encompasses a woman's right to choose an abortion), the viability rule should be overturned.²⁵⁵ But only the viability rule. Roberts was willing to leave *Roe*'s foundational conclusion about the Fifth and Fourteenth Amendments intact.²⁵⁶

In reaching the conclusion that the viability rule should be discarded, however, Roberts applied his own permissive and novel *stare decisis* analysis. For example, he was content to discard *Casey*'s “viability rule” because it was “arbitrary” and drawn from “thin air.”²⁵⁷ With this, Roberts implicitly emphasized the “error” factor that had occupied the Court throughout much of the recent *stare decisis* debate and which Alito had elevated to a decisive factor in the *Dobbs* majority opinion. The damning strike against the viability rule, Roberts reasoned, was “that neither *Roe* nor *Casey* made a persuasive or even colorable argument for [the rule's constitutionality].”²⁵⁸

²⁴⁹ *Id.* at 347 (Roberts, C.J., concurring in judgment).

²⁵⁰ *Id.* at 348.

²⁵¹ *Id.* at 347–48.

²⁵² *Id.* at 348.

²⁵³ Miller, *supra* note 6, at 260–62.

²⁵⁴ See *Dobbs*, 597 U.S. at 348 (Roberts, C.J., concurring in judgment).

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 348.

²⁵⁷ *Id.* at 349, 352.

²⁵⁸ *Id.* at 349.

Roberts concluded that the Court in *Roe* “seriously erred” in constitutionally entrenching viability as part of the abortion framework, and this error justified discarding the rule now.²⁵⁹ But, to reinforce the conclusion that the viability rule was “wrong when decided,” Roberts also pointed to some of the traditional *stare decisis* factors. He complained, for example, that *Casey* endorsed the viability rule on the basis of nothing more than the fact that the rule had proven to be workable.²⁶⁰ He also explained that the rule had been eroded by subsequent jurisprudence.²⁶¹ Roberts complained that the Court in *Casey* hadn’t conducted a thorough and systematic *stare decisis* analysis.²⁶² But, considering his compromise-oriented contributions to the Court’s contemporary debate, Roberts’s analysis in *Dobbs* cannot be portrayed as a significant departure from his earlier positions on precedent. That position involved efforts to formally endorse precedent (as he would have done with *Roe* and *Casey*, and in *Dobbs*) while nevertheless pragmatically redefining the controlling rule or standard in a way that permits a particular outcome (often, but not always, in line with a conservative constitutional agenda). This was the approach he took to *stare decisis* in *June Medical Services*.²⁶³ He repeated that effort in his *Dobbs* concurrence. Roberts would have allowed *Roe* and *Casey* to survive while nevertheless gutting a key element of the rule they established. A move of this kind is what led to the criticism that Roberts’s approach to *stare decisis* amounted to little more than “reversal by stealth” or “overruling by erosion.”²⁶⁴

Roberts also considered factors that had not emerged as part of the traditional *stare decisis* analysis. He noted, for example, that the viability rule had been created outside the ordinary course of litigation.²⁶⁵ He complained that, for this reason, the viability rule did not adequately account for state interests (and, thus, constitutional federalism doctrine).²⁶⁶ He also objected that the viability rule was out of step with

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 350.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *See June Med. Servs., LLC v. Russo*, 599 U.S. 299, 345–46 (2020) (Roberts, C.J., concurring in judgment).

²⁶⁴ *See* Richard L. Hasen, *Beyond Incoherence: The Roberts Court’s Deregulatory Turn in FEC v. Wisconsin Right to Life*, 92 MINN. L. REV. 1064, 1065 (2008) (stating that “Chief Justice Roberts and Justice Alito have made . . . deregulatory moves without expressly overturning existing precedent”); Geoffrey R. Stone, *The Roberts Court, Stare Decisis, and the Future of Constitutional Law*, 82 TUL. L. REV. 1533, 1538 (2008) (claiming Chief Justice Roberts’s and Justice Alito’s technique “is to purport to respect a precedent while in fact cynically interpreting it into oblivion”); Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 19 (2013) (noting the “Roberts Court’s habit of approaching disfavored precedents obliquely, gradually undermining them by ‘stealth overruling’”).

²⁶⁵ *See Dobbs*, 597 U.S. at 349 (Roberts, C.J., concurring in judgment) (“That [viability] framework, moreover, came out of thin air.”).

²⁶⁶ *See id.* at 351.

international standards concerning abortion, which coalesced around a twelve-week demarcation as the outer time limit for a woman's unrestricted right to terminate her pregnancy.²⁶⁷ In no previous analysis in the Court's contemporary debate had comparative law considerations been treated as a factor for determining whether precedent was owed the Court's respect. The significance of these novel considerations might be limited. After all, no other member of the Court endorsed Roberts's concurring opinion. Still, one feature of the Court's contemporary *stare decisis* debate was the expansion of the list of standard factors to be analyzed. If the *Dobbs* case doesn't definitively reset the doctrine of *stare decisis*, then the factors addressed by Roberts must be added to the growing and evolving array of factors a court can use to disregard precedent. That possibility, however, seems like little more than an invitation for the Court to find any reason—even newly conjured justifications—for rejecting controlling case law and doing what it wants.

The more significant *stare decisis* innovation advanced by Roberts, however, was his insistence that the Court, when moving to overturn existing precedent, should do so on the narrowest possible terms. Roberts explained that such surgical precision is a "basic principle[] of *stare decisis* and judicial restraint."²⁶⁸ The required modesty, he asserted, ensured that the legal system would not be given "a serious jolt."²⁶⁹ He seemed to link these concerns to the traditional consideration of reliance in a *stare decisis* analysis.²⁷⁰ But it goes beyond that factor. This facet of Roberts's opinion can be read to promote two novel *stare decisis* elements. First, even if it is not binding in a categorical sense, the principle of *stare decisis* permits the reversal of precedent only when the Court assumes a modest and cautious posture. Second, one way to achieve this is to demand that the Court reverse only the narrowest and most problematic features of the controlling case law, rather than tossing the wine out with the cork. In fact, the light-touch reversal Roberts advocated in his concurrence in *Dobbs* is related to the compromise approach he championed in the recent *stare decisis* debate.²⁷¹ This is something different than "stealth reversal" because it involves an explicit overruling (as he would have done with the viability rule in the abortion context). But it also is not the blunt approach—to enforcing or reversing precedent—that had been advanced by the leading voices on both sides of the *stare decisis* debate. Roberts didn't round out this discussion. He didn't cite *stare decisis* cases to justify the precision approach he would have applied in *Dobbs*. Besides pointing to the fact that the petitioner in *Dobbs* had only asked for the narrow assessment of the integrity of *Roe*'s and *Casey*'s viability rule, Roberts didn't explain how to identify and implement the minimalist intrusion on precedent that he was advocating.

²⁶⁷ See *id.* at 351–52.

²⁶⁸ See *id.* at 357.

²⁶⁹ See *id.*

²⁷⁰ *Id.*

²⁷¹ See Miller, *supra* note 6, at 272.

4. The *Dobbs* Dissent and the Traditional Practice of *Stare Decisis*

The Court's beleaguered liberal minority (Justices Breyer, Sotomayor, and Kagan) joined in an agonized dissent authored by Justice Breyer.²⁷² This opinion contains an impassioned defense of the constitutional integrity of the *Roe* and *Casey* jurisprudence.²⁷³ But Breyer also was obliged to engage with the doctrine of *stare decisis*, which was central to the majority's resolution of the *Dobbs* case.

As Alito had done, Breyer began his *stare decisis* analysis by considering the purpose of precedent. He relied on *Payne* (and other sources) to identify the core justifications for the doctrine: "promot[ing] the evenhanded, predictable, and consistent development of legal principles"; crediting the public's reliance on settled rules, which "allows people to order their lives under law"; and contributing to "the integrity of our constitutional system" by avoiding change based on nothing more than "every new judge's opinion."²⁷⁴ These are the same justifications that surface again and again in discussions of the doctrine of *stare decisis*. Each one of them is undermined by the majority's approach to precedent. Predictability is eroded by the new opportunity to reverse "egregiously wrong" precedent. Reliance on established case law is devalued by the new, narrow construction of that traditional *stare decisis* factor. The Court's integrity is dismissed as an unknowable and irrelevant justification for respecting precedent. I have called this a new and more plastic doctrine of *stare decisis*. Justice Breyer and the other dissenters were more alarmed. "[T]he majority," Breyer concluded, "abandons *stare decisis*, a principle central to the rule of law."²⁷⁵

Importantly, Breyer did not argue for a rigid or absolute version of *stare decisis*. This is a straw man in the debate over precedent. No one was arguing for that approach. Kagan, often writing on behalf of the Court's progressive Justices in the recent *stare decisis* debate, had rejected the idea that the doctrine was owed categorical and blind fealty.²⁷⁶ Breyer also acknowledged that *stare decisis* "is 'not an inexorable command.'"²⁷⁷ "It is sometimes appropriate," he conceded, "to overrule an earlier decision."²⁷⁸ But Breyer insisted that those changes must conform to the traditional practice of precedent. Above all, disregard for precedent must be justified

²⁷² See *Dobbs*, 597 U.S. at 359–417 (Breyer, J., dissenting).

²⁷³ *Id.* at 363–88 (discussing the constitutional framework surrounding *Roe* and *Casey*).

²⁷⁴ *Id.* at 388 (internal quotations omitted).

²⁷⁵ *Id.* at 387.

²⁷⁶ See, e.g., *Edwards v. Vannoy*, 593 U.S. 255, 306 (2021) (Kagan, J., dissenting) (recognizing that "[a]dherence to precedent is, of course, 'not an inexorable command'"); *Knick v. Twp. of Scott*, 588 U.S. 180, 222 (2019) (Kagan, J., dissenting) (same); *Janus v. Am. Fed'n State, Cnty. & Mun. Emp., Council 31*, 585 U.S. 878, 949 (2018) (Kagan, J., dissenting) (recognizing that special justifications may support slight deviations from the doctrine of *stare decisis*).

²⁷⁷ See *Knick*, 588 U.S. at 222.

²⁷⁸ See *Dobbs*, 597 U.S. at 388 (Breyer, J., dissenting) (citing *Pearson v. Callahan*, 555 U.S. 223, 233 (2009)).

by a “special justification,” that is, by something more than the current majority’s conclusion that the controlling case had been wrongly decided.²⁷⁹ That special justification should be based on “one or more of the traditional *stare decisis* factors.”²⁸⁰ Breyer explained that the relevant *stare decisis* principles had been applied by the Court in *Casey*, which he described as “one of this Court’s most important precedents about precedent.”²⁸¹ I have highlighted, however, how Alito’s majority opinion and especially Kavanaugh’s concurring opinion work to displace *Casey* with statements of the doctrine drawn instead from the recent debate over *stare decisis* (such as *Janus* and *Ramos*). This, no doubt, further added to the dissenters’ consternation, and it substantiates my conclusion that *Dobbs*, alongside the annulment of the Substantive Due Process right to an abortion, also establishes a new precedent on the doctrine of precedent.

Breyer vehemently dismissed the first factors that Alito treated as decisive in the majority’s *stare decisis* analysis. Breyer devoted thirty pages of the dissent to an impassioned defense of *Roe* and *Casey* on the merits.²⁸² Still, he didn’t see how the integrity or quality of the abortion cases were decisive for the *stare decisis* question in the case. He concluded: “for all the reasons we have given, *Roe* and *Casey* were correct.”²⁸³ Then, Breyer strongly contradicted the majority’s understanding of precedent by arguing that the merit and quality of controlling precedent are not central to a *stare decisis* analysis.²⁸⁴ A contemporary majority’s views about the correctness of a prior precedent, Breyer explained, is independent of and unrelated to a *stare decisis* analysis.²⁸⁵ Instead, a decision to overrule precedent requires a “special justification,” a conclusion that the traditional *stare decisis* factors—definitively articulated and applied by *Casey*—“weigh heavily” in favor of overruling established case law.²⁸⁶ Notably, as I discussed earlier in this Article, these factors do not logically require a conclusion that the challenged precedent is flawed, nor do they imply such a finding. On the basis of those factors, it is entirely conceivable (even if not practically very likely) that a perfectly correct precedent might succumb to reversal under the weight of the traditional factors. The alleged defect of a case (whether “egregiously wrong” or “demonstrably erroneous”) is not one of those factors. Justice Breyer rejected Alito’s leading argument for reversing *Roe* and *Casey* as immaterial. By doing so, he underscored how revolutionary the “egregiously wrong” standard is as part of the majority’s new *stare decisis* analysis. Breyer complained that the majority’s new approach, preoccupied as it was with its

²⁷⁹ See *id.* (quoting *Gamble v. United States*, 587 U.S. 678, 691 (2019)).

²⁸⁰ See *id.* at 389.

²⁸¹ See *id.* at 390.

²⁸² See *id.* at 359–87.

²⁸³ See *id.* at 389.

²⁸⁴ See *id.* at 389–90.

²⁸⁵ See *id.* at 390.

²⁸⁶ See *id.*

contemporary (re)reading of the Constitution and with past decisions' flaws, threatened to "spell the end of any precedent with which a bare majority of the present Court disagrees."²⁸⁷ This would make "radical change too easy and too fast, based on nothing more than the new views of new judges."²⁸⁸

Justice Breyer insisted that the real test for the vitality of precedent involves the careful consideration of the "traditional *stare decisis* factors," which might amount to the "special justification" needed to overrule controlling case law.²⁸⁹ But, Breyer noted, the Court had already conducted the required *stare decisis* analysis of *Roe*.²⁹⁰ In *Casey*, especially propped up by the plurality opinion, a majority of the Court's Justices had concluded that *Roe* was owed continued respect as controlling precedent.²⁹¹ From the dissenters' perspective, that assessment in 1992 should have settled the Court's re-engagement with the abortion issue in *Dobbs*. "After assessing the traditional *stare decisis* factors," Justice Breyer explained, "*Casey* reached the only conclusion possible—that *stare decisis* operates powerfully here. It still does."²⁹²

But, having understood that the majority was determined to rewrite *stare decisis* doctrine, in part by casting *Casey* aside, Breyer nevertheless conducted a renewed assessment of the traditional *stare decisis* factors.

First, he urged that the standards established by *Roe* and *Casey* had proven to be workable.²⁹³

Second, and more significantly, Breyer concluded that there had been no "major legal or factual changes undermining" the abortion cases.²⁹⁴ Breyer regarded these concerns as central to a decision to overrule precedent. "When overruling constitutional precedent," he explained, "the Court has almost always pointed" to these factors.²⁹⁵ Taking a cue from Alito's majority opinion, Breyer suggested that this is what justified the reversals announced by *Brown v. Board of Education* and *West Coast Hotel Co. v. Parish*.²⁹⁶ Those were the model cases of egregious error that Alito said should justify an abandonment of precedent.²⁹⁷ In both of those cases, Justice Breyer argued, the Court found that the "heavy burden" had been met to overrule well-settled case law (*Brown* overruling *Plessy*; *Parish* overruling *Lochner*) because there had been substantial legal developments or substantial factual developments that dictated "that the values served by *stare decisis* [should] yield in favor

²⁸⁷ *See id.*

²⁸⁸ *See id.*

²⁸⁹ *See id.* at 389–90.

²⁹⁰ *See id.*

²⁹¹ *See id.*

²⁹² *See id.* at 390.

²⁹³ *See id.* at 390–91.

²⁹⁴ *See id.* at 394–95.

²⁹⁵ *See id.* at 394.

²⁹⁶ *See id.* at 400–02.

²⁹⁷ *See id.* at 264–65 (majority opinion).

of a greater objective.”²⁹⁸ The legal and factual foundations of *Roe* and *Casey*, to the contrary, were no less sound in 2022 than they had been in 1992. Especially the facts informing *Roe* remain unchanged. Breyer accepted that those facts included persistent opposition to abortion in American society.²⁹⁹ Disputation of the right announced and reaffirmed by *Roe* and *Casey* is not new, is not more intense, and is not more meaningful. The Court’s abortion jurisprudence always has and seemingly always must operate against the force of earnest and sincere disapproval. But it also remains true, Breyer insisted, that the “profound and ongoing change in women’s roles” in American life in the late twentieth century depends on them gaining control over their reproductive decisions.³⁰⁰ If changing facts might be a basis for abandoning precedent, then Breyer argued: “Nothing since *Casey*—no changed law, no changed fact—has undermined that promise.”³⁰¹

Third, Breyer noted the “overwhelming reliance interests” *Roe* and *Casey* had created.³⁰² Alito and the majority were able to dismiss this traditional *stare decisis* factor only by reconceiving it along the narrowest possible lines. Instead of the broad social significance assigned to reliance by the *Casey* plurality opinion, Alito called for concrete reliance of the kind that is relevant to commercial disputes.³⁰³ Breyer rejected this maneuver, pointing instead to the “profound” disruption that overturning *Roe* and *Casey* will cause.³⁰⁴ But the disruption he described was far removed from the very concrete—empirically ascertainable—reliance interests Alito was willing to credit. Breyer spoke instead of the majority’s failure to engage in “any serious discussion of how its ruling will affect women.”³⁰⁵ Most significantly, this included women’s reliance on the right to abortion to manage their pregnancies “when making countless life decisions” that, in turn, shape their “opportunities to participate fully and equally in the Nation’s political, social, and economic life.”³⁰⁶ By disregarding these concerns as “generalized assertions about the national psyche,” Justice Breyer argued that the majority revealed “how little it knows or cares about women’s lives or about the suffering its decision will cause.”³⁰⁷ He also should have added that it effectively erases any significance for reliance in the new *stare decisis* analysis.

Finally, the dissenters baited Justice Alito and the majority into their dismissive discussion of the impact overruling *Roe* and *Casey* might have on the perception of

²⁹⁸ See *id.* at 395 (Breyer, J., dissenting).

²⁹⁹ See *id.* at 398–99 (“Mississippi’s own record illustrates how little facts on the ground have changed since *Roe* and *Casey*.”).

³⁰⁰ See *id.* at 404.

³⁰¹ See *id.*

³⁰² *Id.*

³⁰³ See *id.* at 288–90 (majority opinion).

³⁰⁴ *Id.* at 405 (Breyer, J., dissenting).

³⁰⁵ See *id.*

³⁰⁶ See *id.* at 405–06.

³⁰⁷ See *id.*

the Court's integrity. Presented as a "final consideration," this might be better understood as a discussion of one of the doctrine's core values rather than a discrete factor to be assessed in a traditional *stare decisis* analysis. A version of this point is raised by the Court in *Payne*.³⁰⁸ In any case, Justice Breyer worried that the contested nature of the abortion jurisprudence placed particular emphasis on this value. In "sensitive political contexts" where "partisan controversy abounds," he urged that the Court's legitimacy requires that it apply the controlling case law.³⁰⁹ For the dissenters, this meant the material constitutional law in the case. But the admonition applied no less to the "law of *stare decisis*."³¹⁰ By this, Breyer clearly meant the traditional practice of precedent charted by *Casey* and now discarded by Justice Alito in his majority opinion. The Court's cavalier disregard of precedent, Breyer worried, could erode the public's confidence in the Court's commitment to legal principle.³¹¹ But that is the very thing upon which "respect for this Court depends."³¹²

Ultimately, the dissenters viewed the majority's decision in *Dobbs* as an "aggressive" and "grasping" effort "to reverse prior law 'upon a ground no firmer than a change in [the Court's] membership.'"³¹³ The chain reaction of harm done, according to Breyer, began with the Court's departure from controlling precedent without a "special justification" for doing so.³¹⁴ This, Breyer argued, weakened the doctrine of *stare decisis* generally and thereby created the risk of "profound legal instability," while also calling the Court's integrity into question.³¹⁵

CONCLUSION

Justice Alito understood that the conservative majority's ambitions for *Dobbs* regarding abortion would require them to establish a new controlling precedent on precedent. After all, only *Casey* and the plurality's rueful concession to *stare decisis* in that case stood in the way of overruling *Roe*. To achieve this instrumental end, Alito (and Kavanaugh, in his concurrence) actively sought to discredit the *Casey* plurality's approach to *stare decisis*. But that was the approach that had long served

³⁰⁸ See *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

³⁰⁹ See *Dobbs*, 597 U.S. at 413 (Breyer, J., dissenting) (quoting *Bush v. Vera*, 517 U.S. 952, 985 (1996) (opinion of O'Connor, J.)).

³¹⁰ See *id.* at 413.

³¹¹ See Megan Brenan, *Views of Supreme Court Remain Near Record Lows*, GALLUP (Sept. 29, 2023), <https://news.gallup.com/poll/511820/views-supreme-court-remain-near-record-lows.aspx> [<https://perma.cc/23UL-ZGJ6>]; Joseph Copeland, *Favorable Views of Supreme Court Fall to New Lows*, PEW RSCH. CTR. (Aug. 8, 2024), <https://www.pewresearch.org/short-reads/2023/07/21/favorable-views-of-supreme-court-fall-to-historic-low/> [<https://perma.cc/5PVA-FYGN>].

³¹² See *Dobbs*, 597 U.S. at 413 (Breyer, J., dissenting).

³¹³ See *id.* at 414–16.

³¹⁴ See *id.* at 390.

³¹⁵ See *id.* at 413.

as the traditional practice of the doctrine of *stare decisis*. Alito disingenuously characterized that approach as an “exceptional version of *stare decisis* that . . . this Court had never before applied and has never invoked since.”³¹⁶ The flaws of that traditional practice had three dimensions. First, according to Alito, the *Casey* plurality formalistically upheld the *Roe* precedent without accounting for its profound (egregious) error. Second, the *Casey* plurality invoked an intangible form of reliance on *Roe* that flirted with sociology and cultural psychology. Third, the *Casey* plurality was inappropriately concerned with the impact overruling *Roe* would have on the Court’s integrity and reputation. The *Dobbs* majority rejected or reframed all of these points to establish a new, more plastic understanding of *stare decisis*.

Significantly, each of these points also served as the long-recognized core justifications for the commitment to respecting precedent. This means that *Dobbs* cast aside the canonical statement of the doctrine (*Casey*) and, at the same time, undermined the doctrine’s core values. The doctrine of *stare decisis* was meant to promote stability in the law. But, on an ill-defined and subjective “egregiousness” standard, *Dobbs* empowered future courts to disregard precedent viewed as erroneously decided. The doctrine of *stare decisis* was meant to promote fairness by taking account of substantial reliance on controlling precedent. But *Dobbs* empowered future courts to disregard precedent unless concrete and empirically established reliance—of the kind found in commercial disputes—is implicated. Finally, the doctrine of *stare decisis* was meant to promote the integrity of the judiciary by reassuring the public that decisions are taken in accordance with legal principles, perhaps most prominently the principle calling for respect for precedent. But, on the fantastical grounds that such consequences are unknowable and irrelevant, *Dobbs* discredited this concern as an element of *stare decisis*.

Dobbs rewrote the purpose and the practice of precedent, leaving it vanishingly weak and suspect. In its place the *Dobbs* majority insisted that all succeeding courts assess established case law anew in order to correct erroneous decisions and, thereby, secure and implement the concretely and objectively proper interpretation of the positive law. Alito and the majority, freed of the bonds of precedent, claimed to be doing exactly that with the Fifth and Fourteenth Amendments’ guarantee of Substantive Due Process. That constitutional promise, the majority insisted, concretely and objectively does not extend to a woman’s privacy interest in deciding whether to obtain an abortion. This approach provides troubling insight into the Court’s new doctrine of *stare decisis*. Alito does not say so, but the new doctrine of *stare decisis* embraced key elements of the radical argument Justice Thomas made for abolishing precedent altogether. In *Gamble*, Thomas urged the abandonment of the doctrine of *stare decisis* where contemporary courts find the decision “demonstrably erroneous.”³¹⁷ And, instead of following flawed precedent, Thomas called

³¹⁶ See *id.* at 270 (majority opinion).

³¹⁷ See *Gamble v. United States*, 597 U.S. 678, 718 (2019) (Thomas, J., concurring)

on judges to pursue a normatively detached practice involving the “liquidat[ion]” of the law—in pursuit of the law’s ascertainable, objectively correct meaning.³¹⁸ In nearly complete agreement with Thomas, after *Dobbs*, the doctrine of *stare decisis* will not prevent courts from correcting “egregiously” erroneous interpretations of the Constitution—as any contemporary majority of the Court might see it.³¹⁹ Thomas’s three principles now control: The text of the Constitution or a statute should have priority over case law; if a case provides an “egregiously” erroneous rule, then precedent must be overturned; and no special justification or other factors are relevant to that outcome.³²⁰

This is the new judicial practice envisioned by the *Dobbs* majority. It is a jurisprudence that disregards the past, including the past appreciation for the purpose and practice of precedent.

(“When faced with a demonstrably erroneous precedent, my rule is simple: We should not follow it.”).

³¹⁸ *Id.* at 714 (quoting THE FEDERALIST NO. 78 (Alexander Hamilton)).

³¹⁹ *See id.* at 711.

³²⁰ *See id.* at 725–26.