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The Purpose and Practice of Precedent: What the Decade Long Debate Over Stare Decisis Teaches Us About the New Roberts Court

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The Purpose and Practice of Precedent: What the Decade Long Debate Over *Stare Decisis* Teaches Us About the New Roberts Court

RUSSELL A. MILLER[*]

ABSTRACT

The Supreme Court's tectonic decision in Dobbs v. Jackson Women's Health *upended the Doctrine of Substantive Due Process by radically reinterpreting the doctrine of* stare decisis*. The Court's established practice regarding* stare decisis *should have operated to preserve the fifty-year-old abortion jurisprudence. But we should have seen this change coming. Although there has been an intense and involved debate over the purpose and practice of precedent for generations, that debate shifted at the beginning of 2018. Four approaches to stare decisis emerged along a continuum, from complete abandonment of the doctrine and incremental erosion to modernized adherence to precedent. This article examines how six key cases not only laid the foundation for the new* stare decisis *doctrine articulated in* Dobbs*, but it considers what we might expect from this Court as the Justices try to convince others to embrace one or a mixture of these four perspectives.*

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INTRODUCTION

Speaking only of legal doctrine, if *Dobbs v. Jackson Women's Health Organization* is a crime scene, then there were two victims of the Supreme Court's divisive and damaging 6-3 decision.[1] First and foremost, a mere five Justices voted in *Dobbs* to annul women's long-established constitutional right to terminate a pregnancy, dealing a devastating blow to women's freedom and autonomy.[2] Second, as everyone observing the case was aware, getting to that outcome would require the Justices in the majority to manipulate and mangle the doctrine of *stare decisis*.[3] The controlling precedents in the case—*Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*—should have precluded the majority's ruling.[4] To overturn these cases, the majority had to blast through the traditional practice of precedent.[5] By distorting the doctrine of *stare decisis* and its promises, the Court has jeopardized legal stability, the rule of law, and judicial integrity.

While there already exists profound commentary on the meaning and impact of the Court's substantive ruling in *Dobbs*, we can expect many future scholars to write about that calamitous conclusion.[6] We should, however, examine the *Dobbs* decision in the context of a broader change: the majority's deliberate erosion of *stare decisis* was the product of extensive planning

1. 142 S. Ct. 2228 (2022).

2. *Id.* at 2279; *id.* at 2333 (Kagan, J., dissenting) ("Today's decision strips women of agency over what even the majority agrees is a contested and contestable moral issue. It forces her to carry out the State's will, whatever the circumstances and whatever the harm it will wreak on her and her family. In the Fourteenth Amendment's terms, it takes away her liberty.").

3. *Id.* at 2334 ("None of those [traditional *stare decisis*] factors apply here: Nothing—and in particular, no significant legal or factual change—supports overturning a half-century of settled law giving women control over their reproductive lives.").

4. *See Roe*, 410 U.S. 113, 163–65 (1973). The Supreme Court reaffirmed the central holding of *Roe* in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, in which a majority found that, pursuant to the Fourteenth Amendment to the Constitution, "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." 505 U.S. 833, 879 (1992) (plurality opinion).

5. *Dobbs*, 142 S. Ct. at 2334 (Kagan, J., dissenting).

6. *See, e.g.*, Nina Varsava, *Precedent, Reliance, and* Dobbs, 136 HARV. L. REV. 1845 (2023) [hereinafter "Varsava, *Precedent"*]; Jessica Quinter & Caroline Markowitz, *Judicial Bypass and Parental Rights After* Dobbs, 132 YALE L.J. 1908 (2023); Aaron Tang, *After Dobbs: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban*, 75 STAN L. REV. 1091 (2023); David Litt, *A Court Without Precedent*, THE ATLANTIC (July 24, 2022), https://www.theatlantic.com/ideas/archive/2022/07/supreme-court-stare-decisis-roe-v-wade/670576/.

and years of judicial debate targeting the doctrine. This planning began in earnest in 2018 when the Court's newly-consolidated conservative majority started to chip away at precedent with an increasing number of reversals.[7] The Court overturned more than ten precedents in the last five years,[8] which is more than in the preceding ten years combined.[9] I explore six of these reversals in depth—as well as several other cases in which the Court disputed precedent but it managed to hold—to flesh out the complex debate over *stare decisis* that unfolded at the Court. In doing so, I expose the four main analytical approaches advanced by the Justices in this debate.[10] Each approach helps explain how we arrived at the radical reinterpretation of the doctrine of *stare decisis* that resulted from *Dobbs.*

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7. After a long, stable season at the start of this century that featured more than a decade without a new appointment to the Court, we entered a dynamic period in the Supreme Court's jurisprudence explained in part by the empanelment of six new Justices in the last fifteen years. One consequence of this turnover on the highest bench has been a remarkable re-engagement with rules and doctrine that seemed well-settled, including a number of decisions that overruled controlling precedent. BARRY J. MCMILLION, CONG. RSCH. SERV., RL33225, SUPREME COURT NOMINATIONS, 1789 TO 2022: ACTIONS BY THE SENATE, THE JUDICIARY COMMITTEE, AND THE PRESIDENT (2022).

8. *See* Trump v. Hawaii, 138 S. Ct. 2392 (2018) (overruling Korematsu v. United States, 323 U.S. 214 (1944)); Janus v. Am. Fed. of State, Cty., and Mun. Emp., Council 31, 138 S. Ct. 2448 (2018) (overruling Abood v. Detroit Bd. Of Ed., 431 U.S. 209 (1977)); South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018) (overruling Quill Corp. v. North Dakota, 504 U.S. 298 (1992)); Rucho v. Common Cause, 139 S. Ct. 2484 (2019) (overruling Davis v. Bandemer, 478 U.S. 109 (1986)); Knick v. Twp. of Scott, 139 S. Ct. 2162 (2019) (overruling Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985)); Franchise Tax Bd. of California v. Hyatt, 139 S. Ct. 1485 (2019) (overruling Nevada v. Hall, 440 U.S. 410 (1979)); Herrera v. Wyoming, 139 S. Ct. 1686 (2019) (overruling Ward v. Race Horse, 163 U.S. 504 (1896)); Ramos v. Louisiana, 140 S. Ct. 1390 (2019) (overruling Apodaca v. Oregon, 406 U.S. 464 (1972)).

9. *See* Pearson v. Callahan, 555 U.S. 223 (2009) (overruling Saucier v. Katz, 533 U.S. 194 (2001)); Montejo v. Louisiana, 556 U.S. 778 (2009) (overruling Michigan v. Jackson, 475 U.S. 625 (1986)); Citizens United v. FEC, 558 U.S. 310 (2010) (overruling McConnell v. FEC, 540 U.S. 93 (2003)); Alleyne v. United States, 570 U.S. 99 (2013) (overruling Harris v. United States, 536 U.S. 545 (2002)); Obergefell v. Hodges, 576 U.S. 644 (2015) (overruling Baker v. Nelson, 409 U.S. 810 (1972)); Johnson v. United States, 576 U.S. 591 (2015) (overruling Sykes v. United States, 565 U.S. 1 (2011) and James v. United States, 550 U.S. 192 (2007)); Hurst v. Florida, 577 U.S. 92 (2016) (overruling Hildwin v. Florida, 490 U.S. 638 (1989) and Spaziano v. Florida, 486 U.S. 447 (1984)).

10. *See, e.g.*, Linda Greenhouse, *A Precedent Overturned Reveals a Supreme Court in Crisis*, N.Y. TIMES (Apr. 23, 2020), https://www.nytimes.com/2020/04/23/opinion/supreme-court-precedent.html; Richard Wolf, *Casting Aside Its Precedents, Supreme Court Moves Inexorably Toward Those on Abortion Rights*, USA TODAY (Apr. 24, 2020, 5:00 AM), https://www.usatoday.com/story/news/politics/2020/04/24/abortion-supreme-court-precedent-roe-v-wade/3002575001/.

I. THE ESTABLISHED PRACTICE OF *STARE DECISIS*

Dobbs dramatically departs from the long and rich history of deliberation over the purpose and practice of precedent in American law.[11] But perhaps such a departure was an inevitable consequence of the inconsistencies embedded in that same history, combined with the intensity surrounding the topic at issue.

This debate arose from founding-era concerns over judicial power.[12] Then as with all areas of the law, the doctrine adapted along with broader changes in jurisprudence spurred by the end of the Civil War, the New Deal era, and the era of expanding constitutional rights following World War II.[13] Despite all that dynamism, by the late 20th Century it was possible to speak of an established practice of precedent. In part, the Court's momentous engagement with *stare decisis* is a product of the dramatic ruling of *Roe v. Wade* in 1973.[14] The abortion controversy became the definitive test for *stare decisis* because of the sustained and spirited opposition to *Roe*.[15] That movement seemed to swell to a peak in 1992 with the Court's decision in *Planned Parenthood v. Casey*.[16] 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* reluctantly reaffirmed the "essential holding of *Roe*," largely out of respect for *Roe's* precedential authority.[17] "*Stare decisis* promotes legal certainty," the plurality explained, and the Justices linked that value to a broader commitment to the rule of law. The *Casey* plurality urged: "Liberty finds no refuge in a jurisprudence of

11. *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. COMP. L. 67 (2006); Michael Gentithes, *Janus-Faced Judging: How the Supreme Court is Radically Weakening Stare Decisis*, 62 W. & 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 and the 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); Amy C. Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011 (2003).

12. *See* Randy J. Kozel, *Precedent and Constitutional Structure,* 112 NW. UNIV. L. REV. 790 (2018).

13. *See* Lee, *supra* note 11 for a historical analysis of precedential force across the nation's history.

14. *See, e.g.*, Melissa Murray, *The Symbiosis of Abortion and Precedent*, 134 HARV. L. REV. 308 (2020); Clarke D. Forsythe & Rachel N. Morrison, *Stare Decisis, Workability, and Roe v. Wage: An Introduction*, 18 AVE MARIA L. REV. 48 (2020).

15. *See generally* N. E. H. HULL & PETER CHARLES HOFFER, ROE V. WADE: THE ABORTION RIGHTS CONTROVERSY IN AMERICAN HISTORY (2d ed. 2010).

16. 505 U.S. 833 (1992).

17. *Id.* at 845–46.

doubt."[18] The Justices maintained that overruling precedent should remain a "rare" act that the Court might undertake only when consistent with prudential and pragmatic considerations that show respect for the rule of law.[19]

Under the established *stare decisis* analysis, one factor that a judge should consider when deciding whether to overrule precedent is evidence of substantial reliance that would lead to hardship if the established rule were to be overturned.[20] The *Casey* plurality explained that the cost of a rule's repudiation would "fall heaviest on those who have relied reasonably on the rule's continued application."[21] The Justices conceded that this consideration drew its logic from commercial concerns.[22] But they brushed aside arguments that the existence of *Roe* and the constitutional right to abortion it announced had done little to alter decision-making in the *de minimis* and discrete sphere of sexual conduct.[23] The plurality understood *Roe's* impact on society to be more encompassing, more amorphous. The Justices explained that *Roe* was not about planning one's sexual behavior in concrete interpersonal episodes.[24] Instead, it had informed two decades of economic and social development, including but not limited to Americans' understanding of intimate relationships and the status of women in society.[25] Dependence upon the *Roe* rule did not have to involve the kind of discrete and practical reliance that operates in a property or contract transaction. The *Casey* plurality was satisfied that *Roe* had engendered 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.[26] "The Constitution serves human values," the plurality wrote, "and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed."[27]

The plurality's concession to precedent in *Casey* kept with the Rehnquist Court's approach to *stare decisis*. For example, in the often-cited case of *Payne v. Tennessee*,[28] even while narrowing existing precedent the Court identified and endorsed the core values justifying *stare decisis*:

18. *Id.* at 844.
19. *Id.* at 854.
20. *Id.*
21. *Id.* at 855.
22. *Id.* at 856.
23. *Id.*
24. *Id.* at 856–57.
25. *Id.* at 856.
26. *Id.*
27. *Id.*
28. 501 U.S. 808 (1991).

jurisprudential stability resulting from evenhanded decision-making and predictability; the promotion of fairness and justice, including concerns about 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.[29]

Despite the Court's settled commitment to those core values, the established practice of precedent also acknowledged that the doctrine of *stare decisis* was not absolute. In *Payne*, Chief Justice Rehnquist insisted that *stare decisis* does not involve "an inexorable command."[30] He attributed greater significance to precedent in statutory or private law cases and lesser significance to precedent in constitutional law cases.[31] And, he identified several factors a court should assess when considering whether to overrule precedent. These factors included whether the previous rule had proven to be unworkable and whether the decision announcing the rule was poorly reasoned.[32] Discussing the vulnerability of the precedent at issue in *Payne*, the Chief Justice noted several other concerns: the controlling rule was mired in ongoing, spirited debate; the rule had been decided and sustained by narrow voting margins on the Court; and the rule had been inconsistently applied.[33] In light of these adverse factors, Rehnquist and the majority had no reservations when they significantly narrowed that case's associated precedent.[34]

The Rehnquist Court addressed other issues when grappling with the force owed to precedent, including the margin of victory by which a precedent was established, the age of the prior decision, and the merit of the prior decision.[35] If only a thin majority endorsed the rule, for example, then it might be less secure.[36] So were more recently announced rules, in part because older precedent acquires weight as successive generations rely on it.[37]

29. *Id.* at 827.

30. *Id*. at 828.

31. *Id.*

32. *Id.*

33. *Id*. at 827–30 (comparing how the court decided in similar "victim impact" evidence cases like *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989), *overruled by Payne*, 501 U.S. 808 (1991), in order to show necessity for Rehnquist's factor analysis).

34. *Id.* at 828–30.

35. 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.

36. *Id.* at 78–79 (citing *Payne*, 501 U.S. 808 (1991)); 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 these opinions generally).

37. Consovoy, *supra* note 35, at 79.

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.38

But how Justice Scalia engaged with the doctrine of *stare decisis* in the quote above is even more remarkable because it explicitly introduces the integrity or merit of the established rule as a factor in deciding whether to overturn precedent. This contentious consideration—what Scalia referred to as the underlying precedent's "error"—emerged as the flashpoint that would inform the Court's current debate over, and eventual departure from, *stare decisis*.[39] It would become the pivotal factor in the *Dobbs* majority's new approach to precedent and the reversal of *Roe* and *Casey*.[40]

A desire to produce particular ideological or policy outcomes may have motivated any inconsistencies in the Rehnquist Court's application of precedent. As William Consovoy noted, the "Justices offer contradictory rationales in seemingly analogous cases."[41] Still, the practice the Court left behind for implementing the doctrine of *stare decisis* involved some key elements.[42] As mentioned, reliance was a prominent consideration; but, so were concerns about the established rule's workability, about intervening developments in the law, and about changes to the relevant facts.[43] These factors proved to be decisive in the plurality's all-important opinion in *Casey*.[44] More significantly, even if the established practice of precedent wasn't perfectly framed or invariably applied, the purposes traditionally informing the doctrine of *stare decisis* had been clearly articulated and consistently reaffirmed. Prior to the current Court, very few voices promoted a radical reimaging of the

38. *Gathers*, 490 U.S. at 824 (Scalia, J., dissenting),.

39. 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 supra* note 35, at 80.

40. *See Dobbs*, 142 S. Ct. at 2265, 2279–2280.

41. *See* Consovoy, *supra* note 35, at 55.

42. *Id.* at 56.

43. *Id.* at 76–78.

44. *See Casey*, 505 U.S. at 854–855.

purpose and practice of precedent, and arguments to abandon the doctrine of *stare decisis* altogether were rare.[45]

II. CHANGES ON THE BENCH AND *STARE DECISIS*

The Supreme Court's many recent decisions overturning settled precedent—or failing to do so in the face of robust debate over the role of precedent—required the Roberts Court to develop a new way to engage with the doctrine of *stare decisis*. The abortion controversy propelled the contemporary debate, even if it mostly simmered in the background (at least until the *Dobbs* case). The result was a complex and sometimes bad-tempered examination of the purpose and practice of precedent that paved the road to the *Dobbs* decision's disruptive and damaging denouncement.

Involving nearly twenty cases, the contemporary debate over *stare decisis* has been one of the defining features of the Court's recent jurisprudence.[46] In part, the significant turnover at the Court prompted this change. The Court's membership was stable, unchanged from 1994 to 2005, but by 2018 a new conservative majority had formed on the bench.[47] During the stable, previous decade, the Court consisted of two settled, four-Justice flanks on the conservative and progressive ends of the ideological spectrum.[48] Justice Kennedy often cast a decisive—some would argue moderate or non-aligned—vote between these two blocks.[49] The Court reversed

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45. *See, e.g.*, Consovoy, *supra* note 35, 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 AVA MARIE L. REV. 1 (2007). *See also* Adam Liptak, *Precedent, Meet Clarence Thomas. You May Not Get Along.*, N.Y. TIMES (Mar. 4, 2019) (describing Justice Clarence Thomas's approach to *stare decisis*).

46. *See* BRANDON J. MURRILL, CONG. RSCH. SERV., R45319, THE SUPREME COURT'S OVERRULING OF CONSTITUTIONAL PRECEDENT (2018).

47. *See* Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 157 (2019).

48. After a long, stable season at the start of this century that featured more than a decade without a new appointment to the Court, we entered a dynamic period in the Supreme Court's jurisprudence explained in part by the empanelment of six new Justices in the last fifteen years. One consequence of this turnover on the highest bench has been a remarkable re-engagement with rules and doctrine that seemed well-settled, including a number of decisions that overruled controlling precedent. 166 CONG. REC. S6554–6588 (2020) (Confirmation of Amy Coney Barrett's nomination to be an Associate Justice of the United States Supreme Court). *See also* Neal Devins, *Ideological Cohesion and Precedent (Or Why the Court Only Cares About Precedent When Most Judges Agree With Each Other)*, 86 N.C. L. REV. 1400, 1436–1441 (2008).

49. *See* Kristin M. McGaver, *Getting Back to Basics: Recognizing and Understanding the Swing Voter on the Supreme Court of the United States*, 101 MINN. L. REV. 1247, 1277–81 (2017) (supporting Justice Kennedy's swing voter characterization with a discussion of his unpredictable

precedent at a normal pace.[50] That stability and balance began to wobble starting in 2005 as the succeeding years saw a steady flow of vacancies and new appointments at the Court, ultimately climaxing in the contentious appointment of Judge Neil Gorsuch by President Trump in 2017.[51] Justice Gorsuch reached the bench only after the Republican-controlled Senate refused to consider President Obama's nominee to replace Justice Scalia, who died unexpectedly in 2016.[52] Ultimately, that norm-defying gambit handed the opportunity to replace Scalia to newly-elected President Donald Trump.[53] Trump then nominated Gorsuch while many Democrats protested that the Republicans had "stolen" a seat on the Court.[54] Of course, replacing Scalia with another conservative Justice did not definitively shift the ideological balance at the Court. That change occurred when President Trump appointed conservative Judge Brett Kavanaugh to replace the swing-voting moderate Justice Kennedy who retired in 2018. Justice Kavanaugh then joined the Court as a reliable, conservative vote.[55] Finally, President Trump entrenched a 6-3 conservative "super majority" on the Court when he appointed Judge Amy Coney Barrett, who previously clerked for Justice Scalia, to replace Justice Ruth Bader Ginsburg in 2020.[56]

In pursuit of its conservative agenda, the Court's new majority began to probe precedential parameters with an increasing number of reversals. This trend involved several major doctrines, leading some observers to wonder if the Supreme Court was in a "crisis."[57] The Justices' soul-searching regarding the purpose and practice of precedent in the lead-up to *Dobbs* involved

decision-making style); Patrick D. Schmidt & David A. Yalof, *The "Swing Voter" Revisited: Justice Anthony Kennedy and the First Amendment Right of Free Speech*, 57 POL. RES. Q. 209 (2004); Erwin Chemerinsky, *The Kennedy Court*, 9 GREEN BAG 2D 335 (2006).

50. *See* MURRILL, *supra* note 46, at 46–48.

51. *See* MCMILLION, *supra* note 7, at 44.

52. *See, e.g.*, *id*.; Jess Bravin, *President Obama's Supreme Court Nomination of Merrick Garland Expires*, WALL ST. J. (Jan. 3, 2017), https://www.wsj.com/articles/president-obamas-supreme-court-nomination-of-merrick-garland-expires-1483463952; Alan Rappeport, *Donald Trump Rejects Garland Nomination*, N.Y. TIMES (Mar. 16, 2016), https://archive.nytimes.com/www.nytimes.com/live/obama-supreme-court-nomination/donald-trump-rejects-garland-nomination/.

53. *See* MCMILLION, *supra* note 7, at 44. *See also* Editorial, *Neil Gorsuch, the Nominee for a Stolen Seat*, N.Y. TIMES (Jan. 31, 2017), https://www.nytimes.com/2017/01/31/opinion/neil-gorsuch-the-nominee-for-a-stolen-seat.html.

54. *See* Epps & Sitaraman, *supra* note 47, at 156–57.

55. *See id*. at 158.

56. Victoria L. Killion, CONG. RSCH. SERV., LSB10540, PRESIDENT TRUMP NOMINATES JUDGE AMY CONEY BARRETT: INITIAL OBSERVATIONS (2020).

57. *See* Linda Greenhouse, *A Precedent Overturned Reveals a Supreme Court in Cris*is, N.Y. TIMES (Apr. 23, 2020), https://www.nytimes.com/2020/04/23/opinion/supreme-court-precedent.html.

nine explicit reversals of controlling case law.[58] Naturally, those cases served as open skirmishes over the doctrine of *stare decisis*. But several other cases in which the Court ultimately reaffirmed established precedent also featured prominently in this debate.[59] In those cases, the debate arose either as a central part of the majority's reasoning for upholding and respecting the controlling rule; as part of the alternative reasoning that informed concurring opinions, perhaps as an argument for overturning precedent in order to reach the same holding; or in dissenting opinions that argued that precedent should have been disregarded or that the majority's embrace of precedent inappropriately departed from proper *stare decisis* practice.[60]

Nearly every Justice who participated in the *Dobbs* decision contributed to the debate, penning majority opinions, concurrences, and dissents in an attempt to reimagine, redefine, or reinforce the doctrine of *stare decisis*.[61] There was an added intensity to this legal jousting because the Justices—and really everyone—understood this debate as preparation for a case that would eventually place the survival of *Roe* and *Casey* squarely before the Court.[62] The following six cases are representative of the Court's recent debate over the purpose and practice of precedent and they show how these decisions paved the road to the new doctrine of *stare decisis* that enabled the *Dobbs* majority to overrule *Roe* and *Casey*.

III. SIX HIGHLIGHTS FROM THE CONTEMPORARY DEBATE

A. *Janus v. AFSCME* (June 2018)

In June 2018, the Court overruled the 1977 decision *Abood v. Detroit Board of Education*, launching the first significant volley in the contemporary *stare decisis* debate.[63] That surprising reversal, announced in the case

58. *See Janus*, 138 S. Ct. 2448 (2018); *Franchise Tax Bd.,* 139 S. Ct. 1485 (2019); *Knick*, 139 S. Ct. 2162 (2019); *Ramos,* 140 S. Ct. 1390 (2020); Edwards v. Vannoy, 141 S. Ct. 1547 (2021).

59. *See* Gamble v. United States, 139 S. Ct. 1960 (2019); June Med. Servs., L.L.C. v. Russo, 140 S. Ct. 2103 (2020); Selia Law L.L.C. v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020); Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335 (2020); Jones v. Mississippi, 141 S. Ct. 1307 (2021); *Edwards*, 141 S. Ct. 1547 (2021); Collins v. Yellen, 141 S. Ct. 1761 (2021); Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021).

60. *See generally* Gentithes, *supra* note 11.

61. Justice Brown Jackson joined the Court after much of the recent *stare decisis* debate had unfolded. 168 CONG. REC. S2063–S2069 (2022) (Nomination of Ketanji Brown Jackson); 168 CONG. REC. S2075–S2076 (2022) (Confirmation of Ketanji Brown Jackson's nomination to be an Associate Justice of the United States Supreme Court).

62. *See, e.g.*, Varsava, *Precedent*, *supra* note 6, at 1846–1848; Darren L. Hutchinson, *Thinly Rooted: Dobbs, Tradition, and Reproductive Justice*, 65 ARIZ. L. REV. 385 (2022).

63. 431 U.S. 209 (1977).

Janus v. AFSCME, required the new generation of Justices to explain their views on the doctrine of *stare decisis*.[64]

In *Abood*, a unanimous Court held that union shop laws, legal in the private sector, were also legal in the public sector.[65] If authorized under state law, these "agency shop agreements" permit the union and the employer to agree to compel employees' membership in and dues-payment to the union as part of a collective bargaining agreement.[66] But the Court limited the scope of a public sector "agency shop," concluding that First Amendment free speech protections permit an employee to opt-out of paying dues that are used for something other than collective bargaining purposes.[67] An "agency shop agreement," the Court explained, can permit the collection of dues or assessments only from public sector employees who do not object to advancing the union's non-bargaining agenda and who are not coerced into participating against their will by the threat of loss of governmental employment.[68] The Court ruled that an "agency shop agreement" must draw a line between "chargeable fees" that would support collective bargaining activities, on the one hand, and "non-chargeable fees" that could support political or ideological activities, on the other hand.[69]

Justice Alito, writing for the five-Justice majority in *Janus*, explained that the Court could no longer tolerate "the First Amendment violations that *Abood* has countenanced for the past 41 years."[70] He wrote that "[w]e recognize the importance of following precedent … unless there are strong reasons for not doing so. But there are very strong reasons in this case."[71] Alito began his *stare decisis* analysis by recalling the doctrine's importance and reiterating the three justifications that Chief Justice Rehnquist identified in *Payne*: the evenhanded, predictable, and consistent development of legal principles; fostering reliance on judicial decisions; and contributing to the actual and perceived integrity of the judicial process.[72] Alito also confirmed

64. 138 S. Ct. 2448 (2018).

65. *Abood*, 431 U.S. at 232.

66. *Id.* at 229–32.

67. *Id*. at 234.

68. *Id*. at 236.

69. *Id*.

70. 138 S. Ct. at 2460. For more on the underlying substantive First Amendment issue in *Janus* opinion *see* Alana Semuels, *Is this the End of Public Sector Unions in VA*?, THE ATLANTIC (June 27, 2018), https://www.theatlantic.com/politics/archive/2018/06/janus-afscme-public-sector-unions/563879/; *See* Megan McArdle, *Why You Should Care About the Supreme Court's Janus Decision,* WASH. POST (June 27, 2018), https://www.washingtonpost.com/opinions/the-supreme-court-may-have-killed-collective-bargaining/2018/06/27/9b19bbc6-7a3c-11e8-aeee-4d04c8ac6158_story.html.

71. *Abood*, 431 U.S. at 2460.

72. *Id*. at 2478 (citing *Payne*, 501 U.S. at 827).

that, in the Court's *stare decisis* practice, precedent is less strictly enforced when constitutional law issues are involved because responding to or correcting the Court's interpretation of the constitution is prohibitively difficult.[73] Alito took this qualification of *stare decisis* a step farther, concluding that precedent exercises its weakest force in the First Amendment context.[74] He quoted Justice Scalia in support of this view: "this Court has not hesitated to overrule decisions offensive to the First Amendment (a fixed star in our constitutional constellation, if there is one)."[75]

Alito then turned to a consideration of several factors that he characterized as the Court's established practice when it contemplates overturning precedent: the quality of the controlling case's reasoning, the workability of the rule announced by the controlling case, the controlling case's consistency with related decisions, factual or legal developments since the controlling case was handed down, and reliance on the controlling case.[76] The majority found that *Abood's* precedential status failed under each of these factors: "All these reasons—that *Abood's* proponents have abandoned its reasoning, that the precedent has proved unworkable, that it conflicts with other First Amendment decisions, and that subsequent developments have eroded its underpinnings—provide the 'special justification[s]' for overruling *Abood*."[77]

Justice Kagan came out swinging in her dissent in *Janus*, decrying in her opening lines that "rarely if ever has the Court overruled a decision—let alone one of this import—with so little regard for the usual principles of *stare decisis*."[78] She condemned the majority's failure to show a "special justification" for overruling *Abood*.[79] She insisted that the majority's mere conclusion that the case was "wrong" is not adequate for overturning precedent.[80] Citing Justice O'Connor's majority opinion in *Rumsey v. Arizona*,[81]

73. *Id.*; *See* Agostini v. Felton, 521 U.S. 203, 235 (1997) ("[*Stare decisis*] is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions."); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–07 (1932) ("[I]n cases involving the Federal Constitution, where correction through legislation is practically impossible, this Court has often overruled its earlier decisions."); Lee, *supra* note 11, at 703; Gentithes, *supra* note 11, at 94; Nina Varsava, *Precedent on Precedent*, 169 U. PA. L. REV. 118 (2020).

74. *Janus*, 138 S. Ct. at 2478.

75. *Id.* (quoting Fed. Election Comm'n v. Wisconsin Right to Life, Inc., 551 U.S. 449, 500 (2007) (Scalia, J., concurring in part and concurring in judgment) (internal quotation marks omitted)).

76. *Id.*, 138 S. Ct. at 2478–79. *See Casey*, 505 U.S. at 854–61.

77. *Janus*, 138 S. Ct. at 2486.

78. *See id.* (Kagan, J., dissenting).

79. *See id.*

80. *Id*. at 2497.

81. 467 U. S. 203 (1984).

Kagan explained that "any departure from settled precedent demands a special justification over and above the belief that the precedent was wrongly decided."[82] Justice Kagan welcomed Alito's explanation of the importance of *stare decisis*. But she aggregated the general principles he discussed and insisted that the sum of those concerns makes faithful respect for precedent a "foundation stone of the rule of law" because it ensures that decisions are "founded on law and not on the proclivities of individuals."[83]

Alito and Kagan would emerge as the leading voices in the Court's contemporary *stare decisis* debate. Several important points surfaced in this initial exchange of their views. First, Justice Kagan asserted that the majority's chief motivation for overruling *Abood* was little more than the conviction that the case had been "wrongly decided" in the first place. Kagan's dissent exposed the imprecision of the majority's *stare decisis* analysis, which doesn't make clear whether its critique of *Abood's* reasoning serves as part of an independent "wrongly decided" factor, or whether the work the majority does condemning *Abood* is in the service of another *stare decisis* factor: the quality of the controlling case's reasoning. Maybe the Court assesses whether a case had been "wrongly decided" as an independent factor. Or it might be an ancillary insight of the conclusion that a case was weakly reasoned, which is the concern of the first factor Alito considered. The emphasis the majority placed on *Abood*'s flaws foreshadows an important facet of the Court's contemporary *stare decisis* debate. When deciding to overrule precedent, is it adequate (or even necessary) that the contemporary court concludes that the controlling case was "wrongly decided"? Kagan seemed to urge that "wrongness" should not be a factor in a *stare decisis* analysis at all; or at least that the Court should consider it as part of the any *stare decisis* factor that is concerned with the quality of the reasoning of the controlling case. Kagan explained that her reservations about prioritizing a contemporary assessment of a precedent's "wrongness" would protect the law from a mere change of winds brought on by a contemporary majority's different view of things.[84] In any case, the alleged "incorrectness" of a precedential case would become a key part of the debate. Ultimately, it would acquire momentous meaning in the *Dobbs* case. In *Janus*, however, the issue was only beginning to take shape.

Janus inspired a second line of inquiry based on another question: what role should the "special justification" element—what Kagan insisted was the primary basis for overturning precedent—play in the Court's analysis? To rebut Kagan's dissent, Alito seemed to understand the "special justification"

82. *Janus*, 138 S. Ct. at 2497 (Kagan, J., dissenting) (citing Arizona v. Rumsey, 467 U. S. 203, 212 (1984).

83. *Id*. at 2497.

84. *Id.* at 2487–2502.

element as an overarching expectation that *Abood* met when the Court reconsidered the case using the established *stare decisis* factors.[85] But how Kagan treated the "special justification" factor raised the possibility that the Court should regard it as an independent element. If so, then what does the Court achieve by distinguishing the "special justification" factor from the other factors in a *stare decisis* analysis? Would it call on the Justices to reflect on the fundamental values advanced by respect for precedent? Does it establish a presumption in favor of precedent? Or would it stand as a mere threshold truism, preventing a majority from reasoning only that a previous case had been "incorrectly decided" as the justification for overruling precedent?

The third important point to take away from *Janus* involves the identification, content, and application of the established *stare decisis* factors. Justice Alito addressed the factors considered by the plurality in *Casey*, but he left several issues open.[86] It is unclear whether the factors represent an exhaustive list, or whether the analysis might consider others. As the *stare decisis* debate unfolded, the Court would neglect some of these elements and consider others not mentioned here. The Justices disagreed about how to define or redefine the scope and character of the relevant factors. Justice Kagan seemed concerned about this as she expressed dismay at the majority's engagement with the second factor: the workability of the rule announced by a controlling case. She acknowledged that the *Abood* rule was not "perfectly and pristinely precise" but insisted that "as exercises in constitutional line drawing go, *Abood* stands well above average."[87] Just how unworkable would a precedential rule have to be to trigger *stare decisis* concerns? Justice Kagan scorned the majority's engagement with the third factor: a controlling case's consistency with related and subsequent jurisprudence. She worried that *Abood's* precedential status had been eroded by the accumulated effect of the Court's expressed doubts about the case over the years.[88] She wondered if it "mocked *stare decisis*" to credit the practice of "throwing some gratuitous criticisms into a couple of opinions" as a way for

85. *Id.* at 2486.

86. *Id.* at 2478–83 (plurality opinion). *See also Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 318–319 (2006) (Justice Alito responding to Chairman Specter about *Casey*) ("I think the doctrine of *stare decisis* is a very important doctrine. It's a fundamental part of our legal system . . . that courts in general should follow their past precedents. It's important because it limits the power of the judiciary . . . protects reliance interest."); Bruce Fein, *Alito's Draft Rejects What He Once Acknowledged as an Established Precedent*, THE HILL (May 4, 2022), https://thehill.com/opinion/judiciary/3477094-alitos-draft-rejects-what-he-once-acknowledged-as-an-established-precedent/.

87. *Janus*, 138 S. Ct. at 2498 (Kagan, J., dissenting).

88. *Id.*

the Court to later claim that the precedent is at odds with related jurisprudence.[89] Kagan disputed the majority's consideration of the fifth factor: a controlling case should not be overruled if doing so would create reliance costs. Kagan argued that overturning *Abood* would trigger enormous reliance problems.[90] She protested the majority's conclusion that persistent criticism of *Abood* removed any reliance concerns because, according to Justice Alito's logic, parties should have been on notice of the rule's vulnerability.[91] The prominence, and the meaning, of the reliance factor in a *stare decisis* analysis would occupy a prominent place in the debate. Finally, the *Janus* majority concluded that *Abood* raised concerns about all the established *stare decisis* factors, but it did not clarify whether checking all five boxes would be necessary to justify overruling precedent. Would it be possible to overturn precedent if the case met only one or a few of the factors based on their greater weight or intensity?

Janus clouded, as much as it clarified, the *stare decisis* analysis. Despite the uncertainties surrounding *stare decisis* that *Janus* confirmed and perpetuated, one thing was clear: Justice Kagan sparked the often-heated tone of the contemporary *stare decisis* debate with her opinion's caustic closing. The majority's discussion of *stare decisis* in *Janus*, she objected, "barely limps to the finish line."[92] She argued that the majority overruled *Abood* "for no exceptional or special reason, but because it never liked the decision."[93] This, Justice Kagan insisted, is the worst kind of "judicial disruption."[94]

B. *Gamble v. United States* (June 2019)

The Justices drew the initial battle lines in the contemporary debate over *stare decisis* in *Janus*, as well as in *Franchise Tax Board v. Hyatt*,[95] and *Knick v. Township of Scott, Pennsylvania*, cases that overruled forty-year and thirty-five year old precedents respectively.[96] The *stare decisis* debate burst into an intense new phase when the Court took up *Gamble v. United States*, a case decided in the same year as *Janus*.[97]

89. *See id.*
90. *Id*. at 2499.
91. *Id*. at 2500.
92. *Id.* at 2501.
93. *See id.*
94. *Id*. at 2488.
95. *Franchise Tax Bd.*, 139 S. Ct. 1485 (2019).
96. *Knick*, 139 S. Ct. 2162 (2019) (overruling Williamson Cty. Reg. Plan. Com'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985)).
97. 139 S. Ct. 1960 (2019).

Gamble involved a challenge to a federal firearms prosecution that followed a state conviction for the same conduct.[98] There is more than a century and a half of Supreme Court case law articulating and enforcing the dual-sovereigns rule, which permitted follow-on prosecutions by a second sovereign under the Fifth Amendment's double jeopardy clause.[99] The Court prominently reasserted that traditional position in the 1985 case *Heath v. Alabama*, holding that two prosecutions for a single wrongful act will not count as the "same offense" for double jeopardy purposes if they are "prosecuted by different sovereigns."[100] Despite all of this precedent, Gamble argued that the practice of follow-on prosecutions violated the Fifth Amendment.[101] He therefore urged the Court to overturn this well-settled line of dual-sovereigns cases.[102]

Writing for a seven-Justice majority, Justice Alito declined to abandon the dual-sovereigns rule.[103] Justice Kagan joined the majority. So did Justice Thomas. But, because the case so directly involved the application of precedent, Thomas wrote a separate concurring opinion to clarify his views on the doctrine of *stare decisis*.[104] Justices Ginsburg and Gorsuch dissented.[105]

Justice Alito settled Gamble's claim in conformity with the string of Supreme Court opinions dating back to 1847 that repeatedly embraced the dual-sovereigns rule.[106] This controlling case law's reading of the Fifth

98. *Id.* at 1964.

99. *See* United States v. Lanza, 260 U.S. 377, 382 (1922) ("[A]n act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each."); Abbate v. United States, 359 U.S. 187 (1959) (holding the double jeopardy clause of the Fifth Amendment does not prohibit prosecution by the federal government after a conviction by a state for the same act); Bartkus v. Illinois, 359 U.S. 121 (1959) (allowing for prosecution by a state after federal acquittal even when the crimes share the same evidence); *see generally* Anthony J. Colangelo, *Gamble, Dual Sovereignty, and Due Process*, 2018-2019 CATO SUP. CT. REV, 189 (2019) (exploring the background of the dual sovereign rule in consideration prior to *Gamble*).

100. *Gamble*, 139 S. Ct. at 1964.

101. Brief for Petitioner at 4–5, *Gamble*, 139 S. Ct. 1960 (2019) (No. 17-646) ("The framers of the Bill of Rights understood the Double Jeopardy Clause to incorporate English common law protections against successive prosecutions, including the well-established rule barring successive prosecutions by separate sovereigns").

102. *Id*. at 7 (expressing that the "separate-sovereigns exception was egregiously wrong from the start, in ways that lend it less precedential force" and that bare majorities decided *Bartkus* and *Abbate* and questioned by many).

103. *Gamble*, 139 S. Ct. at 1964.

104. *Id*. at 1980 (Thomas, J., concurring).

105. *Id*. at 1989 (Ginsburg, J., dissenting).

106. *See generally*, Heath v. Alabama, 474 U.S. 82 (1985); United States v. Wheeler, 435 U.S. 313 (1978); Abbate v. United States, 359 U. S. 187 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959); United States v. Lanza, 260 U.S. 377 (1922); United States v. Cruikshank, 92 U.S. 542 (1876); Moore v. Illinois, 55 U.S. 13 (1852), United States v. Marigold, 50 U.S. 560 (1850), Fox v. Ohio, 46 U.S. 410 (1847).

Amendment responds to the double jeopardy clause's use of the term "offense" as opposed to "act," and it relies on the logic that an "offense" is defined by a particular law and that each law, in turn, is established by a particular sovereign.[107] The point of these cases all along, Justice Alito explained, has been to acknowledge the substantively different policy interests expressed by each sovereign's criminal code.[108]

After confirming the wisdom of the well-settled dual-sovereigns doctrine, Justice Alito then explained that the rule should be sustained as a matter of *stare decisis*.[109] Justice Alito authored the majority opinion in *Janus*, and he reasserted the principles justifying the application of *stare decisis* that he outlined in that year-old case. For example, he again explained the values that *stare decisis* advances.[110] He again noted that precedent need not bind subsequent courts if it is "wrongly decided," especially in the constitutional law context.[111] More importantly, Justice Alito embraced Justice Kagan's repeated admonition from her dissents in *Janus* and other cases that overruling precedent requires a "special justification," as in something more than ambiguous historical evidence suggesting that the controlling rule was a mistake.[112] Alito and five other Justices, including Justice Kagan, endorsed this understanding of *stare decisis* in *Gamble* and it appeared to be the controlling standard for all nine Justices in *Janus*—even if the majority and dissenters reached different outcomes when applying the standard.

The *Gamble* majority found that the challenge to the well-established dual-sovereigns rule lacked the "quantum of support" needed to withstand the high burden Gamble faced under the *stare decisis* doctrine.[113] Justice Alito complained that Gamble pointed to nothing but "middling historical evidence."[114] He also protested that Gamble invoked only two old cases when arguing that the dual-sovereigns rule conflicted with related jurisprudence.[115] Gamble asserted that the application of the dual sovereigns rule would lead to a massive, unanticipated increase in federal crimes.[116] But Justice Alito and the majority were not convinced that this constituted a practical change of facts necessitating a new rule.[117]

107. *Gamble*, 139 S. Ct. at 1966.
108. *Id*. at 1968.
109. *Id*. at 1969.
110. *See id.*
111. *See id.*
112. *See id.*
113. *Id*. at 1976.
114. *Id*. at 1969.
115. *See id.*
116. *See id.* at 1966–67.
117. *See id*. at 1980.

Justice Thomas joined the holding in the case, concurring that the Court should apply the dual-sovereigns rule and that Gamble's claim should fail. But he did not reach this conclusion by resorting to precedent as Justice Alito had.[118] The dual-sovereigns rule, Thomas argued, should apply because it is plainly the correct reading of the text of the Fifth Amendment's double jeopardy clause.[119] The majority's respect for precedent in the case didn't persuaded Justice Thomas, who wrote a seventeen page concurrence to explain why. As he put it, he wrote separately to "address the proper role of the doctrine of *stare decisis*."[120] Thomas essentially argued that the Court's precedent about precedent—its "traditional formulation" of the rule of *stare decisis* probably also including *Janus*—should be corrected, if not abandoned.[121] Thomas dramatically claimed that the common understanding of precedent—the established practice of *stare decisis* in American law endorsed by the other six Justices in *Gamble's* majority—was "clearly wrong."[122] Justice Thomas's concurrence in *Gamble* should be understood for what it is: a categorical rejection of the American doctrine of *stare decisis*.[123]

Thomas advanced a multi-part argument to make his case against *stare decisis*. First, he argued that, as previously applied, the doctrine of *stare decisis* is altogether too strict because it requires a "special justification," as well as the consideration of other factors, to overrule precedent.[124] Second, Thomas argued that the historical application of *stare decisis* is constitutionally problematic because *stare decisis* should have no role in the practice of the federal judiciary.[125] Justice Thomas explained that precedent seeped into the practice and culture of state courts as an inheritance of the English common law.[126] But, as Thomas recalled, the federal government's jurisdiction was famously stripped of most of its common law contours and content by the *Erie* doctrine.[127] Even when less problematically deployed in state common law, however, Justice Thomas insisted that *stare decisis* was never

118. *Id.* at 1980–81 (Thomas., J., concurring).

119. *Id.* at 1980.

120. *Id.* at 1981.

121. *Id.* at 1984.

122. *Id.*

123. *See* Jeffrey Toobin, *Clarence Thomas's Astonishing Opinion on A Racist Mississippi Prosecutor*, THE NEW YORKER (June 21, 2019), https://www.newyorker.com/news/daily-comment/clarence-thomass-astonishing-opinion-on-a-racist-mississippi-prosecutor ("It's customary for the Justices to at least pretend to defer to past decisions, but Thomas apparently no longer feels obligated even to gesture to the Court's past.").

124. *Gamble*, 139 S. Ct. at 1986 (Thomas, J., concurring).

125. *Id.*

126. *Id.* at 1982.

127. *Id.* at 1984.

meant to be strictly applied.[128] For this point, he cited the English jurist William Blackstone, who urged the vindication of the "correct" rule by rejecting "demonstrably erroneous" or "manifestly absurd" precedents.[129] In other words, Thomas would make the "incorrectness" of a precedential case a nearly determinative factor. Third, in contrast to the states' common law judicial authority, Justice Thomas explained that the federal courts are charged by Article III of the Constitution with nothing less, but also nothing more, than the "judicial power."[130] He distinguished this competence from the "law-making" power that the Constitution assigns to the political branches.[131] The former consists of the authority to decide cases under the written law, an undertaking he characterized as "liquidating" or "ascertaining" the meaning of the law.[132] The latter consists of the more dynamic and contingent "force" of the legislator to express his or her "will."[133] Justice Thomas portrayed the "judicial power" assigned to the federal courts as the "modest" work of interpreting and applying written law to the facts of the case.[134] He insisted on the systematic normative detachment of that practice.[135] The work of "liquidating" law, or rendering it unambiguous, is the pursuit of the law's ascertainable, objectively correct meaning.[136] Thomas insisted that "there are right and wrong answers about what the law is."[137] Of course, for Justice Thomas, the correct answers about the meaning of the law come from the "original understanding of relevant legal text."[138] Finally, all of this circles back around to *stare decisis* because, inappropriately applied in the federal courts in a too-strict manner, a precedent would risk elevating the "force" and "will" bound up in a judge's mistaken interpretation of the law above the positive law itself.[139]

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128. *Id.* at 1985.

129. *Id.* at 1983.

130. *Id.* at 1982; *see* U.S CONST. art. III, § 2.

131. *Gamble*, 139 S. Ct. at 1982 (Thomas, J., concurring).

132. *Id.* at 1984–86.

133. *Id.* at 1982.

134. *Id.* at 1984.

135. *Id.* at 1986.

136. *Id.*

137. *Id.*

138. *Id.* at 1985. *See generally* Gregory E. Maggs, *How Justice Thomas Determines the Original Meaning of Article II of the Constitution*, 127 YALE L.J. FORUM 210 (2017) (exploring the originalist tendencies of Justice Thomas with specificity as to Article II of the Constitution); William J. Pryor Jr., *Justice Thomas, Criminal Justice, and Originalism's Legitimacy,* 127 YALE L.J. FORUM 173 (2017) (looking through a criminal justice perspective attributes of Justice Thomas's originalism); D.A. Jeremy Telman, *Originalism; A Thing Worth Doing* . . ., 42 OHIO N.U. L. REV. 539 (2016) (exploring Justice Thomas's notions of originalism in comparison to Justice Scalia while also taking a look at the history of originalism).

139. *Gamble*, 139 S. Ct. at 1982 (Thomas, J., concurring).

In the *stare decisis* debate, a majority of the Court had been toying with giving decisive, and nearly fatal, significance to this "wrongly decided" argument as justification for overturning a controlling case.[140] Justice Thomas seized on this approach's logic to question the precedents that controlled the application of *stare decisis* itself. If those cases were incorrect—as he insisted in his concurrence in *Gamble*—then the Court should abandon the doctrine altogether.

In the wake of this complex condemnation, Justice Thomas proposed a radically new understanding of *stare decisis*. Precedent, he demanded, should not prevent courts from correcting demonstrably erroneous interpretations of the positive law.[141] Instead, three principles should control: first, the text of the constitution or a statute should have priority over case law; second, if a case provides a demonstrably erroneous rule, then the Court must overturn that precedent; and therefore, the Justices don't need a "special justification" or other inapposite considerations to achieve that outcome.[142]

Finally, Justice Thomas identified two circumstances in which the Court's flawed approach to precedent does the most harm: in connection with questions of expanding federal power, and in crafting new individual rights.[143] Thomas was especially concerned that the modern *stare decisis* doctrine found its most questionable use in cases involving Substantive Due Process jurisprudence under the 14th Amendment.[144] Although it remained implicit in Thomas's concurrence, this critique pointed unmistakably in the direction of *Roe* and *Casey*.

The revolutionary nature of Justice Thomas's approach to *stare decisis* is evident in the fact that no other Justice was willing to join his opinion.[145] As the contemporary debate over *stare decisis* proceeded, Thomas seemed to find himself isolated with this approach.[146] But, even if the extreme consequences of his reasoning gained little support, Thomas had succeeded in

140. *See, e.g.*, *Janus*, 138 S. Ct. 2448 (2018); *Franchise Tax Bd.*, 139 S. Ct. 1485 (2019); *Knick*, 139 S. Ct. 2162 (2019).

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

142. *Id*. at 1989.

143. *Id*. at 1981.

144. *Id*. at 1989.

145. *See* Henry Gass, *Overruled: Is precedent in danger at the Supreme Court?*, THE CHRISTIAN SCI. MONITOR (June 25, 2019), https://www.csmonitor.com/USA/justice/2019/0625/Overruled-Is-precedent-in-danger-at-the-Supreme-Court ("'On stare decisis I think he'll be on his own for a while,' he says. 'The other Justices aren't [always] willing to say what they think. Justice Thomas has no filter, as they say.'").

146. *See* McKee v. Cosby, 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring) ("*New York Times* and the Court's decisions extending it were policy-driven decisions masquerading as constitutional law."); Garza v. Idaho, 139 S. Ct. 738 (2019) (Thomas, J., dissenting) (expressing that the Court in *Gideon* never "attempted to square the expansive rights they recognized with the original meaning" of the Sixth Amendment).

elevating the concern for a controlling case's incorrectness and solidifying the significance of that point in the Court's contemporary *stare decisis* debate. It would resurface with troubling significance in the *Dobbs* case.

C. *Ramos v. Louisiana* (2020)

The next significant skirmish in the Court's recent *stare decisis* debate took place in *Ramos v. Louisiana*.[147] This case focused on a Sixth Amendment challenge to Louisiana's policy allowing convictions by non-unanimous juries—a practice rooted in the Jim Crow era that was, by now, extremely rare.[148] Even though Louisiana had abandoned the policy before the Court could settle Ramos's challenge,[149] the Court's 6-3 decision, which found the practice violated the Sixth Amendment, was not a slam dunk. The 1972 decision in *Apodaca v. Oregon*, which held that the Sixth Amendment did not require unanimous juries for state court convictions, stood in the way as a settled precedent.[150]

Five separate opinions accompanied Justice Gorsuch's judgement for the Court, which only carried five votes with respect to the decision to overrule *Apodaca*.[151] Justices Sotomayor and Kavanaugh joined Gorsuch's opinion but still wrote separately on the question of *stare decisis* to clarify their views.[152] Even though he didn't join any part of the majority opinion, Justice Thomas concurred with the Court's judgment and wrote separately to press

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147. 140 S. Ct. 1390 (2020).

148. *Id.* at 1394–95.

149. *Id.* at 1426 (Alito, J., dissenting) ("Louisiana has now abolished non-unanimous verdicts, and Oregon seemed on the verge of doing the same until the Court intervened."); *see also* LA. CONST. art. I, § 17(A), *amended in 2018*; 2018 La. Acts 722 (setting the 2018 Referendum on amending the Louisiana Constitution to require unanimous jury verdicts in criminal matters). Notably, Oregon was the last jurisdiction to permit this practice. *See* OR. CONST. art. I, § 11 (establishing in that in Oregon Circuit Courts that "ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first-degree murder, which shall be found only by a unanimous verdict.") Even after *Ramos*, this ineffective section remains textually part of the Oregon Constitution.

150. 406 U.S. 404, 411 (1972) (upholding Oregon's constitutional provision allowing non-unanimous jury verdicts in criminal matters, expressing that the Court sees "no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one"). *See generally* Aliza B. Kaplan and Amy Saack, *Overturning Apodaca v. Oregon Should Be Easy: Nonunanimous Jury Verdicts in Criminal Cases Undermine the Credibility of Our Justice System*, 95 OR. L. REV. 1 (2016) (exploring the background behind *Apodaca*, the Oregon constitutional change of 1934 allowing non-unanimous jury verdicts, and the weakness of the *Apodaca* precedent); Kate Riordan, *Ten Angry Men: Unanimous Jury Verdicts in Criminal Trials and Incorporation After McDonald*, 101 J. CRIM. L. & CRIMINOLOGY 1403 (2011) (exploring the potential incorporation of the Sixth Amendment's unanimous jury requirement against the states prior to the *Ramos* decision, heavily exploring the history around *Apodaca*).

151. *Ramos,* 140 S. Ct. at 1393, 1425.

152. *Id.* at 1390.

the revolutionary approach to *stare decisis* that he mapped in *Gamble*.[153] Justice Alito's dissent built on his *stare decisis* analysis from *Janus* and won endorsements from the Chief Justice and Justice Kagan.[154] Alito and Kagan were the Justices most deeply involved in the Court's debate over precedent.[155] Their agreement on the issue in *Ramos*—albeit in dissent—might have signaled a shared approach to the doctrine that transcended the Court's ideological divisions.[156]

Justice Gorsuch's straightforward approach to the authority owed to *Apodaca* focused on the Court's dynamics at the time of the decision and then applied a twist on the traditional factor-based *stare decisis* framework. First, he argued that the case never achieved the status of precedent because the disputed practice was the product of what he called Justice Powell's "idiosyncratic" assertion of "dual-track" incorporation.[157] That approach to incorporation advanced the idea that a single right "can mean two different things depending on whether it is being invoked against the federal or a state government."[158] But Gorsuch noted that Justice Powell cast the deciding vote in *Apodaca* without attracting any other Justices' support for this "dual-track" incorporation theory. Gorsuch found that this lack of wide support for Powell's reasoning demonstrated its precedential irrelevance.[159] He concluded that Powell's quirky position in *Apodaca* was not enough to overcome the Court's well-established contrary jurisprudence holding that the Sixth Amendment requires unanimous juries.[160]

Second, Justice Gorsuch argued that, even if the Court regarded *Apodaca* as a controlling precedent, he and his fellow Justice should still overrule it.[161] Justices Ginsburg, Breyer, Sotomayor, and Kavanaugh joined him for this argument. But this five-Justice block dwindled to three on the details of the applicable *stare decisis* standard. Justices Sotomayor and Kavanaugh wrote separate opinions that grappled with the issue of precedent.

153. *Id.* at 1420 (Thomas, J., concurring).

154. *Id*. at 1425 (Alito, J., dissenting).

155. *See* Gentithes, *supra* note 11, at 99, 107, 110.

156. *Dobbs*, however, would swiftly dash this hope.

157. *Ramos*, 140 S. Ct. at 1402, 1405.

158. *Id.* at 1398, *see* Johnson v. Louisiana 406 U.S. 356, 370 (1972) (Powell, J., concurring in judgment) (viewing the in incorporation the Sixth Amendment against the states, the invocation of "due process does not require that the States apply the federal jury-trial right with all its gloss") (case decided on the same day as *Apodaca*). S*ee generally* Jay S. Bybee, *The Congruent Constitution (Part One): Incorporation*, 48 BYU L. REV. 1 (2022) (exploring the history and process of how the Supreme Court has incorporated various provisions of the Bill of Rights against the States).

159. *Ramos,* 140 S. Ct. at 1398.

160. *Id*. at 1405.

161. *Id*. at 1404.

Gorsuch began his treatment of *stare decisis* by reiterating the established framework: precedent is owed respect but is not an inexorable command, precedent should be less strictly observed in the constitutional context, and the abandonment of precedent involves the consideration of several factors.[162] The factors to be considered include: the quality of the controlling case; the controlling case's consistency with related decisions; the impact of subsequent legal developments on the rule announced by the controlling case; and the extent of reliance on the controlling case.[163] Curiously, Gorsuch did not mention the workability factor identified by Alito in his *Janus* framework and by the plurality in *Casey*. Gorsuch concluded that *Apodaca*, which hinged on Justice Powell's unpopular opinion on the controlling rule, scores poorly on each of the *stare decisis* factors.[164] Gorsuch offered a particularly punchy assessment of *Apodaca's* integrity under the first factor, insisting that a "decision's reasoning is what gives it life" as precedent.[165] Gorsuch concluded that *Apodaca* suffers with respect to this factor because no one today, not even Louisiana in its defense of its non-unanimous jury policy, was willing to say that *Apodaca* had been correctly decided.[166] *Stare decisis*, he urged, is not supposed to be "the art of methodically ignoring what everyone knows to be true."[167] Gorsuch showed no regret in abandoning "an admittedly mistaken decision, involving the Constitution, [that was] an outlier when decided [and] that has become lonelier with time."[168] Gorsuch's analysis seems to conflate two elements: whether the controlling case was "wrongly decided" and the quality of the controlling case's reasoning. The interrelated nature of these factors combined with some Justices' insistence on treating them as distinct added uncertainty to the *stare decisis* standard that might emerge from the contemporary debate. Gorsuch implicitly sought to resolve that uncertainty by combining the questions. Similar to his *Gamble* dissent, Gorsuch also attempted to reclassify a demand for a "special justification" for overruling precedent as merely one among several factors, and not a requirement for reversal.

Justice Sotomayor, while joining the majority, described a narrower basis for overturning *Apodaca*.[169] Significantly, she insisted that *Ramos* does not involve the radical approach to *stare decisis* that Justice Thomas

162. *Id*. at 1405.
163. *Id*.
164. *Id*. at 1403.
165. *Id.* 1404.
166. *Id*. at 1405.
167. *Id*.
168. *Id*. at 1408.
169. *Id*. (Sotomayor, J., concurring).

proposed in *Gamble* and which he reasserted in his *Ramos* concurrence.[170] Sotomayor explained that overturning *Apodaca* in *Ramos* did not involve setting aside precedent merely because the Court disagrees with the outcome reached in *Apodaca*.[171] Instead, Sotomayor considered several factors to demonstrate that *Ramos* was qualitatively different. First, she noted that *Apodaca* always had been on shaky ground because it was at odds with constitutional reasoning and doctrine.[172] Second, she pointed out that *Apodaca* involved constitutional protections in the context of criminal procedure. Justice Sotomayor argued that the Court should apply *stare decisis* less rigorously when deciding questions of human liberty because overturning entrenched precedent invites a substantial risk of grave injustice.[173] This move enabled her to expand upon one of the subtleties within Alito's *stare decisis* analysis from *Janus*—in which he argued that precedent exercises its weakest force in the First Amendment context because of the significance of free speech and freedom of religion as liberty interests.[174] Sotomayor would add criminal procedure protections to the discrete set of constitutional questions over which the "right rule" and not the "settled rule" should have priority. Sotomayor explained that her proposal to apply *stare decisis* more liberally when deciding the constitutionality of criminal procedure would not extend to comparatively less important constitutional rights protecting economic liberties, such as contract and property interests.[175] I would contend that Sotomayor in fact intended this argument to rile conservative advocates who had called for the Court to revisit cases that they believed constrained economic liberties[176]—like its *United States v. Carolene Products Co.* decision, which expanded the federal government's power to regulate interstate commerce,[177] and *Lochner v. New York*, a case that had upheld a *laissez-faire* approach to employment contracts.[178]

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170. *Id*. at 1409.

171. *Id*.

172. *Id*.

173. *Id*.

174. *See Janus*, 138 S. Ct. at 2478 (asserting that "*stare decisis* applies with perhaps least force of all to decisions that wrongly denied First Amendment rights").

175. *Ramos,* 140 S. Ct. at 1409 (Sotomayor, J., concurring in part).

176. Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 745–746 (1985) (examining conservative thought on *Carolene*); David Bernstein, *"Reverse Carolene Products," the End of the Second Reconstruction, and Other Thoughts on Schuette v. Coalition to Defend Affirmative Action*, 2013 – 2014 CATO SUP. CT. REV., 261 (2014); Douglas LeJaime & Reva Siegel, *Answering the Lochner Objection: Substantive Due Process and the Role of Courts in a Democracy*, 96 N.Y.U. L. REV. 1902 (2021).

177. 304 U.S. 144 (1938).

178. 198 U.S. 45 (1905), *overruled by* Day-Brite Lighting Inc. v. State of Mo., 342 U.S. 421 (1952), *and* Ferguson v. Skrupa, 372 U.S. 726 (1963), *and abrogated by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

Justice Kavanaugh joined the majority in overruling *Apodaca*, but also wrote separately to "offer his own view on *stare decisis*."[179] His position must have been a blow to Justice Thomas, who might have hoped that Kavanaugh would join him on the barricades in calling for the abandonment of the doctrine. Instead, like Sotomayor, Kavanaugh distanced himself from Thomas's radical approach. He credited precedent with "keeping the scale of justice even and steady, and not liable to waver with every new judge's opinion."[180] More damaging for Thomas, Justice Kavanaugh explicitly rejected the argument that Article III establishes a strictly formalistic judicial competence in which precedent can play no role.[181] He explained that the judiciary has an Article III duty to honor *stare decisis* as part of the "ideal of the rule of law," but also agreed that precedent can be overruled.[182] He explained that no one argues that precedent is absolute.[183] To the contrary, he highlighted that "every current Member of the Court has voted to overrule multiple constitutional precedents."[184] Kavanaugh further noted that many of the Court's most celebrated cases involved a dramatic break with controlling precedent, such as its monumental reversal of racist ideology in *Brown v. Board of Education*.[185]

Kavanaugh charted his own course for a *stare decisis* analysis. First, he acknowledged that *stare decisis* is less strictly applied in the constitutional context.[186] Even so, he insisted that overturning precedent is a "serious business."[187] For that reason, Kavanaugh referred to a presumption in favor of adhering to precedent.[188] This norm should be overcome, he explained, only if a "special justification" exists that involves more than the belief that

179. *Ramos,* 140 S. Ct. at 1412 (Kavanaugh, J., concurring in part).

180. *Id*. at 1411 (quoting 1 W. Blackstone, Commentaries on the Laws of England 69 (1765).

181. *Id*.

182. *Id*.

183. *Id*.

184. *Id*.

185. *See id*. at 1411–12 (noting a list of nearly 50 cases where the Supreme Court discarded precedent, including among others Obergefell v. Hodges, 576 U. S. 644 (2015); Citizens United v. Fed.l Election Comm'n, 558 U. S. 310 (2010); Lawrence v. Texas, 539 U. S. 558 (2003); Planned Parenthood of Se. Pa. v. Casey, 505 U. S. 833 (1992); Illinois v. Gates, 462 U. S. 213 (1983), Brandenburg v. Ohio, 395 U. S. 444 (1969); Miranda v. Arizona, 384 U. S. 436 (1966); Gideon v. Wainwright, 372 U. S. 335 (1963); Baker v. Carr, 369 U. S. 186 (1962); Mapp v. Ohio, 367 U. S. 643 (1961); Brown v. Board of Education, 347 U. S. 483 (1954); and Erie R. Co. v. Tompkins, 304 U. S. 64 (1938)). *But see* Henry Gass, *Overruled: Is Precedent in Danger at the Supreme Court?*, CHRISTIAN SCI. MONITOR (June 25, 2019) (noting that much of the reversal of precedent in the Roberts Court has been by mere 5-4 decisions while many of the major reversals by the Warren Court were unanimous decisions), https://www.csmonitor.com/USA/justice/2019/0625/Overruled-Is-precedent-in-danger-at-the-Supreme-Court/.

186. *Id*. at 1412 (Kavanaugh, J., concurring in part).

187. *Id*. at 1413.

188. *Id.* at 1414.

precedent is "wrongly decided."[189] By invoking the elevated "special justification" standard Kavanaugh joined the six Justices who endorsed it as part of Alito's majority opinion in *Gamble*. Second, rather than the set of five *stare decisis* factors Justice Alito described in *Janus*, Justice Kavanaugh identified three broad concerns that frame the "high but not insurmountable standard" for overruling precedent.[190] Kavanaugh's three factors include: whether a decision is egregiously wrong, involving more than a garden variety error; whether a decision has caused significant negative jurisprudential or real-world consequences for citizens; and whether overruling a decision will unduly upset reliance interests, encompassing "the legitimate expectations of those who have reasonably relied on the precedent."[191] Applying these factors, Kavanaugh agreed with the Court's decision to overrule *Apodaca*.

While Kavanaugh's assessment of the doctrine of *stare decisis* appears to be little more than a refinement of the "traditional practice," his approach requires a second look because Justice Alito would invoke Kavanaugh's characterization of *stare decisis* in his majority opinion in *Dobbs*.[192] First, his approach's three broad concerns—the egregiousness of the error, associated negative jurisprudential or real-world consequences, and impact on reliance interests—are clearly less respectful of precedent than the well-settled rule announced by the plurality in *Casey*. After all, that understanding of precedent obliged the *Casey* plurality to reaffirm *Roe*, not reverse.[193] But nothing about Kavanaugh's *stare decisis* test precluded him from voting to overturn the entrenched Sixth Amendment case law announced by *Apodaca*. Second, and more significantly, Kavanaugh's portrayal of precedent in *Ramos* formally introduced the idea that the doctrine of *stare decisis* should not preserve incorrectly decided judgments. So, although he presented this theory more tactfully than others, Kavanaugh's concurrence expresses a willingness to ignore precedent when the controlling case law is "egregiously wrong," a position that may not be qualitatively different to Thomas's radical approach to *stare decisis*.

Thomas used his concurring opinion, among other things, to double down on the radical approach to *stare decisis* that he detailed in his *Gamble* concurrence.[194] S*tare decisis*, he insisted, is not encompassed in the formalistic judicial power granted to the federal courts by Article III.[195] To avoid

189. *Id.*
190. *Id*. at 1415.
191. *Id*.
192. *See Dobbs*, 142 S. Ct. at 2264.
193. *Id*. at 2301–2301 (Thomas, J., concurring).
194. *See Ramos,* 140 S. Ct. at 1423 (Kavanaugh, J., concurring in part).
195. *Id*. at 1421.

having precedent work its seductive power over the judiciary, he would overturn a controlling case if it is "demonstrably erroneous," that is, if it is outside the realm of the discoverable, objective, and permissible interpretation.[196] We can clearly see how Kavanaugh's "egregiously wrong" factor, and Thomas's "demonstrably erroneous" factor, echo each other.

Justice Alito, joined by Chief Justice Roberts and Justice Kagan, dissented to express why they would have ruled for Louisiana and permitted the states to rely on non-unanimous juries.[197] Alongside his effort to rehabilitate *Apodaca*, Justice Alito also demonstrated that the fealty to precedent he showed in *Gamble* was not a passing fancy or cynical pretext. He expressed grave worry that, by overturning *Apodaca*, the majority "gives rough treatment" to the principle of *stare decisis*.[198] He explained that *stare decisis* "has been a fundamental part of our jurisprudence since the founding, and it is an important doctrine."[199] He insisted that precedent benefits from a presumption of compliance and that it be overturned only based on a standard that would satisfy Wechsler's theory of neutral principles.[200] He doubted that the majority had made the case against *Apodaca's* status as precedent. To make his point, he accounted for the *stare decisis* factors he articulated in *Janus*. Alito argued that *Apodaca* was not as flawed as the majority made it out to be.[201] He disputed the majority's conclusion that *Apodaca* was in conflict with related decisions and recent legal developments.[202] Most importantly, however, Alito argued that *Apodaca* was owed respect as precedent because of Louisiana's and Oregon's "enormous reliance interests."[203] He urged that the reliance problem raised by overruling *Apodaca* was exponentially greater than it had been in the recent cases in which the Court had overturned precedent, including *Janus*.[204] Alito's concern for reliance in *Ramos* is worth keeping in mind considering the role that factor would play in his *stare decisis* analysis in the *Dobbs* majority.

Surprisingly, Alito's *Ramos* dissent did not address two things. First, he did not reiterate the elevated "special justification" standard even though he relied on that factor in *Janus* and *Gamble*. This glaring omission is particularly odd in light of the fact that Justice Kagan joined Alito's opinion. She did so despite Alito's neglect of the "special justification" standard, for

196. *Id.*
197. *Id.* at 1425 (Alito, J., dissenting).
198. *Id*.
199. *Id*. at 1432.
200. *Id*.
201. *Id*. at 1433.
202. *Id*. at 1436.
203. *Id*.
204. *Id*. at 1438–39.

which she had consistently and passionately advocated in the Court's recent *stare decisis* cases. Instead of explicitly condemning the majority's failure to provide a "special justification" to overrule *Apodaca*, Alito spoke merely of the majority's "explanation."[205] Perhaps the dissenters let Justice Kavanaugh advance that cause in his concurring opinion because they believed that the reliance issues alone justified *Apodaca's* survival. Second, the dissent also seemed to reject Justice Sotomayor's bid to add criminal procedure issues to First Amendment questions as constitutional law subjects over which precedent exercises its weakest force. "Otherwise," Justice Alito explained, "*stare decisis* would never apply in a case in which a criminal defendant challenges a precedent that led to a conviction."[206]

In the end, Justice Alito cautioned against the consequences of the majority's approach which could upset the "massive and entirely reasonable reliance" on precedent, and he expressed the hope "that the majority will apply the same standard in future cases."[207] Ironically, Alito himself would most consequentially apply the weaker reliance standard from *Ramos* in his *Dobbs* opinion. In fact, he would weaken it further when the time came.

D. *June Medical Services v. Russo* (2020)

While precedent influences all areas of law, the historic legal and political campaigns waged against *Roe* and *Casey* over decades show that abortion has been a driving force in the debate over the doctrine of *stare decisis*.[208] Indeed, the Justices' careful efforts to reframe or refashion the *stare decisis* framework paved the way to the *Dobbs* decision.

The Court's 2019 decision in *June Medical Services v. Russo* made a subtle contribution to the role of precedent in the abortion context.[209] The case involved challenges to Louisiana's Act 620, which required medical doctors who perform abortions to hold admitting privileges at a nearby hospital.[210] This provision essentially mirrored the Texas law from *Whole Woman's Health v. Hellerstedt* that the Court found to be unconstitutional in 2016 and therefore that case should have controlled the outcome.[211] But the Louisiana law seemed to provide the Court's conservative majority with an

205. *Id*. at 1432.

206. *Id.* at 1438.

207. *Id*. at 1440.

208. *See, e.g.*, WILLIAM D. GAIRDNER, THE WAR AGAINST THE FAMILY: A PARENT SPEAKS OUT ON THE POLITICAL, ECONOMIC, AND SOCIAL POLICIES THAT THREATEN US ALL (2007); MARY ZIEGLER, AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE (2015).

209. 140 S. Ct. at 2103 (2020), *abrogated by Dobbs*, 142 S. Ct. 2228 (2022).

210. *See id*. at 2112 (explaining the background of Act 620 by comparing to the law struck down in Whole Woman's Health v. Hellerstedt, 579 U.S. 582 (2016)).

211. *See id*. (noting that the statute "is almost word-for-word identical to Texas' admitting-privileges law").

opportunity to overturn *Roe* and *Casey* by adjusting the fundamental test for *stare decisis* to benefit pro-life advocates.[212] It was always going to be the abortion controversy that would be the final test of the Court's approach to *stare decisis*, and it seemed that the test had arrived.

Erwin Chemerinsky believed that the clash between deeply held opposition to abortion rights, on the one hand, and the duty to respect *Roe* and *Casey* (or *Whole Woman's Health* in the context of *June Medical Services*) as precedent, on the other hand, had been the barely veiled subtext of the recent debate over *stare decisis*. He explained: "Ultimately, [the Court's approach to *stare decisis*] will be crucial as the U.S. Supreme Court reconsiders the issue of abortion."[213] Recall that the controlling plurality opinion in *Casey*, which conclusively reaffirmed *Roe's* central holding, began with the admonition that "liberty finds no refuge in a jurisprudence of doubt."[214] And then, after engaging in a comprehensive *stare decisis* analysis, the *Casey* plurality concluded that:

> A decision to overrule *Roe's* essential holding [would come] at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of *Roe's* original decision, and we do so today.[215]

The fact that *Casey's* exemplary *stare decisis* analysis received almost no mention in the contemporary debate over precedent made the abortion controversy more present for its glaring absence.[216] But it would be impossible to avoid that connection in *June Medical Services*. In its brief in support of Louisiana, the Trump administration urged the Justices to defy *stare decisis* and overrule *Whole Woman's Health*.[217] At the oral argument in *June Medical Services*, the advocate for the abortion provider told the Justices that

212. *Id.* at 2141–42.

213. Erwin Chemerinsky, *Does Precedent Matter to Conservative Justices on the Roberts Court?*, A.B.A. (June 27, 2019, 6:00 AM), https://www.abajournal.com/news/article/chemerinsky-precedent-matters-little-to-conservatives-on-the-roberts-court.

214. *Casey*, 505 U.S. at 844.

215. *Id.* at 869.

216. *See Ramos,* 140 S. Ct. at 1411–12 (2020) (Kavanaugh, J., concurring in part) (citing *Casey* as an example of a notable case overruling precedent); *id.* at 1425 (2020) (Thomas, J., concurring in judgment) (citing *Casey* when explaining why reliance is not enough to save bad precedent); *Gamble*, 129 S. Ct. at 1981 (2019) (Thomas, J., concurring) (citing *Casey* to explain the Court's approach to *stare decisis*, which is incorrect in his opinion); *Franchise Tax Bd.*, 139 S. Ct. at 1504 (Breyer, J., dissenting) (citing *Casey* to explain why *stare decisis* should require adherence to precedent in the case).

217. Brief for the United States as Amicus Curie Supporting Vacatur for Lack of Third-Party Standing or Affirmance on the Merits at 30-31, June Medical Services v. Russo, 140 S. Ct. 2103 (2020) (Nos. 18-1323 and 18-1460).

"this case is about respect for the Court's precedent."[218] The lawyer emphasized that Louisiana's admitting-privileges requirement was "expressly modeled on" the Texas law that the Supreme Court struck down in 2016, and she insisted that "nothing has changed that would justify such a legal about-face from that ruling."[219]

Ultimately, the Court ruled that Act 620 was unconstitutional. Justice Breyer, writing for the four liberal Justices, explained how the precedential weight of *Whole Woman's Health* informed his opinion. The plurality believed that they were enforcing the new balancing test that had been announced in *Whole Woman's Health*.[220] That balancing test charged courts, when reviewing abortion restrictions, with weighing the measures' benefits (for a woman's health and for advancing a state's interest in protecting unborn life) against its burdens (on a woman's ability to exercise her right to terminate her pregnancy pre-viability).[221] Beyer also endorsed the District Court's conclusion, from an earlier stage in the litigation,[222] that there is "no legally significant distinction between this case and *Whole Woman's Health*."[223] He concluded that "this case is similar to, nearly identical with, *Whole Woman's Health*. And the law must consequently reach a similar conclusion."[224] But, the *June Medical Services* opinion did not explicitly engage with the Court's recent *stare decisis* debate.

Instead, Chief Justice Roberts had to enter the *stare decisis* debate because he provided the decisive fifth vote to strike down the Louisiana law, a remarkable departure from his past practice of voting to uphold abortion restrictions.[225] He wrote that: "I joined the dissent in *Whole Woman's Health*

218. Oral Argument at 0:16, June Medical Services v. Russo, 140 S. Ct. 2103 (2020) (No. 18-1323), https://www.supremecourt.gov/oral_arguments/audio/2019/18-1323.

219. *Id.* at 0:35.

220. *See* 579 U.S. 582, 2120 (2016) (Breyer, J., plurality opinion) (stating that "the balance tipped against the statute's constitutionality" when describing *Whole Woman's Health*).

221. *See Whole Women Health*, 579 U.S. at 607–08 (interpreting Casey as requiring that Court's "consider the burdens a law imposes on abortion access together with the benefits those laws confer").

222. *See* June Med. Servs., L.L.C. v. Kliebert, 250 F. Supp. 3d 27, 88 (M.D. La. 2017) *vacated by* June Med. Servs LLC v. Phillips, 640 F.Supp.3d 523 (M.D. La. 2022).

223. *See June Med. Servs*., 140 S Ct. at 2116 (citing *Kliebert*, 250 F. Supp. 3d at 88).

224. *Id.* at 2133.

225. At his confirmation hearing, Justice Roberts told the Senate that judges must "be bound down by [strict] rules and precedents." *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 142 (2005) (statement of John G. Roberts, Jr.) (quoting THE FEDERALIST NO. 78, at 529 (Alexander Hamilton)). But, in his decisions, the Chief Justice has explained that *stare decisis* is a "principle of policy" and "not an end in itself." Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 378 (2010) (Roberts, J., concurring) (citing in part Helvering v. Hallock, 309 U.S. 106, 119 (1940)). For more information on the Chief Justice's statements on *stare decisis see generally* Thomas J.

and continue to believe that the case was "wrongly decided." The question today, however, is not whether *Whole Woman's Health* was right or wrong, but whether to adhere to it in deciding the present case."[226] And so, after largely avoiding the debate, Roberts's concession to precedent in such a sensational, politically loaded case obliged him to explain his view of the doctrine.[227] Roberts offered a mix of theoretical and pragmatic justifications for why *Whole Woman's Health* precedent mandated his vote in *June Medical Services*, no matter how much he might regret the substantive outcome.

The Chief Justice offered several historical and philosophical perspectives that underpin his approach to the doctrine. He harkened back to William Blackstone who insisted on an "established rule to abide by former precedents."[228] Roberts also cited Blackstone's assertion that a commitment to precedent serves as a form of "basic humility" that calls on today's judge to accept that his or her predecessors confronted similar legal problems.[229] From this humble posture, Roberts explained, the judge can tap into the accumulated wisdom of "nations and of ages," a capital-stock of insight and competence that necessarily exceeds "the private stock of reason . . . in each man."[230] Roberts invoked Burkean theory—which elevates national identity and national community as forces that derive from a "body and stock of inheritance" from "our forefathers,"—to further support his choice to side with precedent.[231] The Chief Justice sought to reinforce these theoretical claims by referencing Hamilton's hope that *stare decisis* would preclude arbitrary

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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).

Still, according to one account, "the Chief Justice has voted to overturn precedent across a wide range of hot-button issues including campaign finance, reproductive health, workers' rights, gun safety, affirmative action, and procedural justice. In split-decision cases involving these issues, Roberts voted to overturn precedent 100% of the time, and his votes always lined up with the partisan interests of the GOP. The only time Roberts votes against overturning precedent in ideologically-charged cases is when doing so would lead to a liberal outcome, for example marriage equality." *Chief Justice Roberts Almost Always Votes to Overturn Precedent (For Partisan Ends)*, Take Back the Court (2010) https://www.takebackthecourt.today/chief-justice-roberts-almost-always-votes-overturn-precedent (last visited February 23, 2024). At the same time, Roberts has regularly joined majorities in upholding abortion restrictions. *See, e.g.,* Gonzales v. Carhart, 550 U.S. 124 (2007) *and Whole Woman's Health*, 579 U.S. 582 (2016).

226. *June Med. Servs*., 140 S Ct. at 2133 (Roberts, C.J., concurring in judgment).

227. *Id*.

228. *Id.* at 2134 (quoting 1 W. Blackstone, Commentaries on the Laws of England 69 (1765)).

229. *Id.*

230. *Id.* at 2134 (internal quotations omitted) (quoting 3 E. BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 110 (1790)).

231. E. BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE: A CRITICAL EDITION 181–83 (J.C.D. Clark ed., 2001); *see id*. (quoting Burke).

decision-making by the judiciary.[232] He cited Justice Robert Jackson who insisted that reliance on precedent involves the judiciary in a reasoned decision-making process that is distinct from the more discretionary acts of the political branches.[233]

Roberts also articulated the practical benefits of observing precedent already repeated throughout the Court's contemporary debate. The doctrine of *stare decisis*, he reiterated, advances three interests: it promotes the evenhanded, predictable, and consistent development of legal principles; fosters reliance on the judiciary's decisions; and contributes to the actual and perceived integrity of the judiciary.[234] But Roberts also accepted the well-established limits on *stare decisis*, repeating the qualification that precedent is not an "inexorable command."[235] He offered a streamlined version of the factors that might lead a court to reject precedent: problems administering the rule, a poor fit with subsequent factual and legal developments, and a lack of reliance interests as a reason for maintaining the rule.[236]

Armed with this understanding of the doctrine of *stare decisis*, Chief Justice Roberts explained that the controlling rule from precedent was the "undue burden test," which had been announced in *Casey* and which was applied in *Whole Woman's Health*.[237] He concluded that Louisiana's law "cannot stand under our precedents," because that law was "nearly identical to the Texas law struck down four years ago," and because the Louisiana law imposed an undue burden on access to abortion "just as severe as that imposed by the Texas law."[238] Chief Justice Roberts wrote that "the legal

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232. *See June Med. Servs*., 140 S Ct. at 2134 (2020) (Roberts, C.J., concurring in judgment) (citing FEDERALIST NO. 78 (A. Hamilton).

233. *See id.* (citing Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A. J. 334 (1944)).

234. *See id.* at 2134 (2020) (citing FEDERALIST NO. 78 (A. Hamilton) and Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A. J. 334 (1944)); *see also Payne*, 501 U.S. at 827 ("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").

235. *See June Med. Servs*., 140 S Ct. at 2134 (Roberts, C.J., concurring) (citing *Ramos,* 140 S. Ct. at 1390, 1405 (2020)), *see also Payne*, 501 U.S. at 828; *Knick*, No. 17-647, slip op. at 16; *Gamble*, No. 17–646, slip op. at 7 (Sup. Ct., June 17, 2019) (Ginsburg, J., dissenting); *Franchise Tax Bd.*, No. 17–1299, slip op. at 16 (Sup. Ct., May 13, 2019); *Janus*, No. 16-1466, slip op. at 31; *Wayfair, Inc.*, No. 17–494, slip op. at 17 (Sup. Ct., June 21, 2018) (citation omitted) ("Although we approach the reconsideration of our decisions with the utmost caution, stare decisis is not an inexorable command.").

236. *See June Med. Servs*., 140 S Ct. at 2134 (Roberts, C.J., concurring) ("The Court accordingly considers additional factors before overruling a precedent, such as its administrability, its fit with subsequent factual and legal developments, and the reliance interests that the precedent has engendered").

237. *See id*. at 2135, 2138 (noting the undue burden standard of *Casey* and that both parties viewed it as the applicable standard, and that *Whole Woman's Health* applied the undue burden standard).

238. *Id.* at 2133–34.

doctrine of *stare decisis* requires us, absent special circumstances, to treat like cases alike."[239] In this way, Roberts embraced Justices Alito and Kagan's heightened standard for a "special justification" to overturn precedent.[240] He further explained that a court can overturn precedent so long as the justification for doing so goes beyond the mere conclusion that the case was "wrongly decided."[241] In turn, he roundly rejected the claim that a majority of the Court could set aside precedent if they believe the controlling case was (demonstrably or egregiously) wrong—declining to endorse Justice Thomas's *Gamble* concurrence and Kavanaugh's *Ramos* concurrence.[242] Additionally, Roberts neglected the first and third factors from Alito's *stare decisis* analysis in *Janus*: the quality of the controlling case's reasoning, and the controlling case's fit with related jurisprudence. Perhaps Roberts's silence meant that none of the three factors he mentioned raised concerns with respect to the Court's abortion rights jurisprudence. In short, the Chief Justice's concurrence rationalized his adherence to precedent as simply unavoidable.

Notably, even though he reiterated his belief that *Whole Woman's Health* had been incorrectly decided, many conservatives saw the Chief Justice's concurrence in *June Medical Services* as a political betrayal,[243] representing a 180-degree reversal of the position in his dissent.[244] Roberts's decision to join the Court's liberal wing in a handful of other decisions during the 2019 Term likely added to this ire.[245] Other members of the Court seemed to share this frustration.

The dissenters in *June Medical Services*—Roberts's usual conservative companions—criticized the Chief Justice for claiming that the result in the case was determined by *Whole Woman's Health* while nonetheless reading

239. *Id.* at 2134.

240. *See Janus*, slip op. at 2, 19, 21, 26 (Kagan, J., dissenting); *Gamble*, slip op. at 11; *Knick*, slip op. at 16 (Kagan, J., dissenting).

241. *See June Med. Servs*., 140 S Ct. at 2134 (Roberts, C.J., concurring) ("But for precedent to mean anything, the doctrine must give way only to a rationale that goes beyond whether the case was decided correctly").

242. *Id.* at 2134.

243. *See, e.g.*, Quint Forgey, *Pence Blasts Chief Justice John Roberts as "Disappointment to Conservatives,"* POLITICO (Aug. 6, 2020, 7:30 AM), https://www.politico.com/news/2020/08/06/pence-john-roberts-disappointment-to-conservatives-392202; Marty Johnson, *Conservatives Blast Supreme Court Ruling: Roberts 'Abandoned His Oath,'* THE HILL (July 25, 2020, 8:48 AM), https://thehill.com/homenews/senate/509001-conservatives-blast-supreme-court-ruling-roberts-has-abandoned-his.

244. *Compare Whole Woman's Health*, 579 U.S. at 644 (2016) (Alito, J., dissenting); *with June Med. Servs*., 140 S Ct. at 2133 (Roberts, C.J., concurring in judgment).

245. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (6-3 decision); Dep't of Homeland Sec'y v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020) (5-4 decision).

that case differently to the four-Justice plurality in *June Medical Services*.[246] Roberts disputed this reading of *Whole Woman's Health* in his *June Medical Services* concurrence: he still insisted that *Casey* did not call for a balancing of burdens and benefits and argued that the majority in *Whole Woman's Health* claimed only to be "applying the undue burden standard of *Casey* … [n]othing more."[247] I will not address these substantive issues. It is enough to note that the dissenters in *June Medical Services* questioned Chief Justice Roberts's reliance on precedent to resolve the case because he and the other Justices in the majority voted to strike Act 620 while nevertheless disagreeing on the precedential rule they were applying.[248] Still, the Chief Justice's entrance into the debate over *stare decisis* revealed the possibility that, despite a formal claim of fealty to precedent, innovative or disputed interpretations to narrow or expand the controlling rule's applicable standard could eventually undo it altogether. Roberts's continued to pursue this "stealth reversal" or "overruling by erosion" approach to *stare decisis* in the years leading to the *Dobbs* decision.

Beyond this limited criticism, the doctrine of *stare decisis* received scattered attention from the dissenters. Only Justice Thomas, who had invested so much in his revolutionary critique of *stare decisis* in *Gamble*, felt obliged to harp on the role of precedent.[249] He zeroed in on the Court's privacy and Substantive Due Process jurisprudence as grievously misguided.[250] He asserted that these two jurisprudences only continued to operate through the *Roe* line of cases because of the Court's flawed formulation of the principle of *stare decisis*. But, as he explained in his *Gamble* concurrence, the Justices' authority to exercise judicial authority under Article III of the Constitution should oblige them to overturn case law that clearly conflicts with the text of the Constitution.[251] In Thomas's view, it is a compound sin to

246. *See id*. at 2179 (Gorsuch, J., dissenting) ("By contrast, and as today's concurrence recognizes, the legal standard the plurality applies . . . turns out to be exactly the sort of all-things-considered balancing of benefits and burdens this Court has long rejected").

247. *Id.* at 2138 (Roberts, J., concurring).

248. *Id.* at 2144.

249. *Gamble*, slip op. at 2–5 (Thomas, J., concurring).

250. *See June Med. Servs.,* 140 S. Ct. at 2138 (Thomas, J., dissenting) (expressing doubts about the Substantive Due Process and privacy jurisprudence of the Court). *See also* McDonald v. City of Chicago, 561 U.S. 742, 812 (2010) (Thomas, J., concurring) ("But any serious argument over the scope of the Due Process clause must acknowledge that neither its text nor its history suggests that it protects the many substantive rights this Court's cases now claim it does."); Obergefell v. Hodges, 576 U.S. 644, 722, slip op. at 2–3 (Sup. Ct., 2015) (Thomas, J., dissenting) ("Even if the doctrine of substantive due process were somehow defensible—it is not—petitioners still would not have a claim."); Evan D. Bernick, *Substantive Due Process for Justice Thomas*, 26 GEO. MASON L. REV. 1087, 1099–1102 (2019) (describing Justice Thomas's critique of Substantive Due Process).

251. *See Gamble*, 139 S. Ct. at 1984, 1985 (Thomas, J., concurring) (noting "[a] demonstrably incorrect judicial decision . . . is tantamount to making law, and adhering to it both disregards the

embrace the flawed doctrine of Substantive Due Process rights and then insist on enforcing them only because of the flawed doctrine of *stare decisis*. Thomas concluded that if the premise of *Roe* and its progeny are "demonstrably erroneous interpretation of the Constitution," then the Court should ignore their precedential status and refuse "to apply them here."[252]

The other dissenters insisted (as Chief Justice Roberts did) that the applicable rule in the case was *Casey's* undue burden or substantial obstacle test, and not the supposed balancing test the plurality derived from *Whole Woman's Health*.[253] The dissenters also argued that *Whole Woman's Health*, with whatever rule it might have announced, would not be controlling in *June Medical Services,* because the Court could distinguish the Louisiana and Texas cases. For example, Justice Alito noted that the Texas case involved a post-enforcement and as-applied challenge that had been asserted after the admitting privileges measure went into effect.[254] Therefore, the Court had been able to consider empirical evidence detailing how the admitting privileges provision erected a substantial obstacle to a woman's exercise of her abortion rights in *Whole Woman's Health*.[255] But he urged that there is no reason to believe that those empirical consequences will be the same in other states (such as Louisiana) where conditions are not the same as they were in Texas.[256] In any event, *June Medical Services* was decided without the benefit of any empirical evidence of the admitting privileges' effect on abortion services in Louisiana because the case involved a pre-enforcement, facial challenge to Act 620.[257]

Significantly, and anticlimactically, these positions do not raise the deeper, more fundamental challenge to the principle of *stare decisis* that

supremacy of the Constitution and perpetuates a usurpation of the legislative power", precluding the court under its judicial powers from "privilege a demonstrably erroneous interpretation of the Constitution over the Constitution itself").

252. *See June Med. Servs.,* 140 S. Ct. at 2151 (Thomas, J., dissenting) (citing *Gamble*, 139 S. Ct. at 1985).

253. *Id*. at 2154 (Alito, J., dissenting) (noting that the *Casey* test "should remain the governing standard" until the court reconsiders such precedent); *see also id.* at 2134–2135 (Roberts, C.J., concurring).

254. *Id.* at 2158 (Alito, J., dissenting) (emphasizing that "the two cases differ in a way that was critical to the Court's reasoning in *Whole Woman's Health*, i.e., the difference between a pre-enforcement facial challenge and a post-enforcement challenge based on evidence of the law's effects").

255. *See id.* (noting that the pre-enforcement action failed but one there were "post enforcement consequences" the actions succeeded").

256. *See id.* at 2157 (arguing that just because the Court found Texas's requirements to "have substantially reduced access to abortion in that State, it does not follow that Act 620 would have comparable effects in Louisiana" and he lists factors including demand, location of abortion clinics, geography, population distribution, or differences in licensing procedure for physicians).

257. *Id.* at 2158 (noting that because this is a pre-enforcement review, "it should therefore be obvious that this Court's decision in *Whole Woman's Health* is not controlling").

seemed inevitable from the breadth, complexity, and intensity of the contemporary debate. Instead, they embraced a more mundane, or what Justice Thomas viewed as the all-too-permissive, "traditional practice" of *stare decisis*. The dissenters simply contended that, under the common law, the majority misunderstood the controlling rule, or they mistakenly believed that the controlling rule applies when one could meaningfully distinguish present circumstances from the controlling case.[258]

The fiery political and legal fight over abortion rights as raised in *June Medical Services* largely overshadowed the Court's intense, contemporary debate over the purpose and practice of precedent. Justice Breyer's opinion for the controlling plurality only implied concern for the fate of the doctrine of *stare decisis*. Precedent served more explicitly as the basis of Chief Justice Roberts's surprising vote to strike the Louisiana law. But his opinion didn't give *stare decisis* the kind of deep, energetic, or inventive treatment the issue had received from other Justices in the debate. Thomas reasserted his revolutionary position on *stare decisis*, but knowing that the other Justices were unimpressed, his dissent in *June Medical Services* lacked the conviction and force of his *Gamble* concurrence. Justice Alito conceded the precedential force of *Whole Woman's Health*—at least to the degree that it involved nothing more than an application of the *Casey* rule— and instead engaged in a classic approach to *stare decisis* by seeking to distinguish *Whole Woman's Health* from the Louisiana case—largely aligning with his traditionalist position in the recent debate.[259]

Justice Alito's acknowledgement that the *Roe* and *Casey* remained the precedential authority for abortion rights jurisprudence is particularly interesting because of how sensational and politically salient this facet was in *June Medical Services*. But I will also note that he departed from the traditional *stare decisis* analysis that he had exhibited throughout much of the recent debate when it came to the question of whether the abortion clinic had third-party standing to challenge Act 620 on behalf of individual women as the subjects of the constitutional protection.[260] Alito argued that he would remove June Medical Services from the case and order the District Court to join a plaintiff with proper standing.[261] This change would be necessary, Alito explained, because the Court would overturn the "unconvincing"

258. *See* K. N. Llewellyn, *American Common Law Tradition, and American Democracy*, 1 J. LEGAL & POL. SOC. 14, 30 (1942) (describing the integral role of distinguishing cases in the common law system).

259. *See June Med. Servs.,* 140 S. Ct. at 2154 (Alito, J., dissenting) ("Unless *Casey* is reexamined . . . the test it adopted should remain the governing standard").

260. *Id.* at 2165–66.

261. *Id.*

Singleton v. Wulff case,[262] in which a plurality granted third-party standing to abortion providers in abortion rights challenges.[263] Citing *Franchise Tax Board* and *Janus* from the recent debate, Alito argued that the *Singleton* precedent was vulnerable under two of the traditional *stare decisis* factors.[264] First, he explained that the case no longer aligned with significant developments in the Court's general jurisprudence on standing as well as its more specific jurisprudence of third-party standing.[265] The trend in the law has "stressed the importance of insisting that a plaintiff assert an injury that is particular to its own situation" and it has insisted "that a plaintiff cannot sue on behalf of a third party if the parties' interests may conflict."[266] Second, Alito noted that "neither the plurality nor the Chief Justice claims that any reliance interests are at stake here."[267] Indeed, this juxtaposition suggest that Justice Alito's engagement with the doctrine of *stare decisis* lacks unconformity to say the least.

Despite all the sound and fury accompanying the debate over *stare decisis*, the Court essentially sidestep the issue when the moment came to do something dramatic in *June Medical Services*. Yet, the case did produce an important dimension: Robert's incremental approach to *stare decisis* that he would continue to employ in the next cases.

E. *Seila Law LLC v. Consumer Financial Protection Bureau* (June 2020)

Decided the same day as *June Medical Services*, *Seila Law* could have served as another front in the lengthening battle over *stare decisis* at the Supreme Court.[268] Yet, it did not. Maybe the Justices thought that they would need all their forces for the fight in *June Medical Services* that never materialized. As it was, only Justice Thomas continued to engage in the debate in *Seila Law*. Chief Justice Roberts, writing for and reassuming his place alongside the other conservative Justices, portrayed Justice Thomas's precedent-disregarding posture in the case as a "bulldozer."[269] Still, it is interesting to note that Thomas didn't use *Seila Law* to advance his radical approach to *stare decisis*.[270] To the contrary, at least part of his reasoning seemed to revert to a more traditional application of precedent. The rest of the Justices

262. 96 S. Ct. 2868 (1976).

263. *June Med. Servs.,* 140 S. Ct. at 1171(Alito, J., dissenting); *June Med. Servs.*, Nos. 18–1323 and 18–1460, slip op. at 30 (Sup. Ct., June 29, 2020).

264. *June Med. Servs.,* 140 S. Ct. at 1171; *June Med. Servs.*, slip op. at 32.

265. *June Med. Servs.,* 140 S. Ct. at 1170–71; *June Med. Servs.*, slip op. at 32–33.

266. *June Med. Servs.,* 140 S. Ct. at 1171; *June Med. Servs.*, slip op. at 33.

267. *June Med. Servs.,* 140 S. Ct. at 1171.

268. 140 S. Ct. 2183 (2020).

269. *Id.* at 2210 (Thomas, J., concurring in part).

270. *Id.*

who joined Roberts' majority opinion or wrote separately, as well as those who joined Justice Kagan's dissent, reaffirmed old precedent even though these camps strongly disagreed about how to interpret those controlling cases. The Justices' deep disagreement over the meaning of the controlling rule cast light on a subtler, but significant *stare decisis* specter: overruling precedent by way of inventive or disputed subsequent (re)interpretation of the controlling rule. As in *June Medical Services*, Chief Justice Roberts added this new dimension in *Seila Law*

Seila Law brought the debate over *stare decisis* into the realm of administrative law when a law firm challenged the authority of the Consumer Financial Protection Bureau (CFPB) created by the Dodd-Frank Act. Seila Law sought to resist a subpoena issued by the Bureau by arguing, in part, that the CFPB's removal process violated the principle calling for the separation of powers, thereby rendering the agency's framework unconstitutional.[271] Specifically, the Act gave the President the power to appoint the Bureau's Director to a five-year term with the advice and consent of the Senate, but then restricted the President's authority to remove the Director to circumstances involving his or her "inefficiency, neglect of duty, or malfeasance in office."[272] Congress created this for-cause limitation on the President's removal powers as an attempt to insulate this independent administrative agency from the political winds, and protect the agency's technical expertise in light of the political implications of its work.[273] But this agency structure wasn't new. In fact, the Court previously considered these issues in *Free Enterprise Fund v. Public Company Oversight Board* a decade earlier, in which the Court held that such restrictions on the removal of agency officials violated the constitution.[274]

Chief Justice Roberts's five-Justice majority in *Seila Law* agreed with the four dissenters (led by Justice Kagan) that a historical range of cases, leading up to and reaffirmed in *Free Enterprise Fund*, provided the controlling precedent for the dispute. The Chief Justice identified those cases as *Meyers v. United States*,[275] *Humphrey's Executor v. United States*,[276] and *Morrison v. Olson*.[277] The majority concluded that, under the doctrine established by these cases, the CFPB's removal provisions did not fit within any narrowly-construed exceptions to the general rule that the Constitution

271. *Id.* at 2194.

272. Dodd-Frank Wall Street Reform and Consumer Protection Act, 124 Stat. 1376; 12 U.S.C. §§ 5491(b)(2), §§ 5491(c)(1).

273. *Free Enter. Fund.*, 561 U.S. at 481, 501.

274. *Id.* at 492.

275. 272 U.S. 52 (1926).

276. 295 U.S. 602 (1935).

277. 487 U.S. 654 (1988).

granted the President exclusive and unrestricted removal power.[278] Roberts portrayed the case as an invitation to "extend" the exceptions to the general rule that had emerged from *Humphrey's Executor* and *Morrison*.[279] Declining to "take that step," Roberts explained that the majority's decision did not require the Court to "revisit our prior decisions."[280] The majority merely distinguished the CFPB framework from the narrowly construed exceptions to find that *Humphrey's Executor* and *Morrison* did not resolve the case.

Justice Kagan, who had rigorously defended the role of precedent in the Court's contemporary *stare decisis* debate, was surprisingly muted in her dissenting opinion in *Seila Law*.[281] Kagan agreed that the controlling cases here included *Meyers*, *Humphrey's Executor*, *Morrison*, and *Free Enterprise*, but she argued that these cases repeatedly embraced restrictions on the President's removal powers.[282] The dissenters objected to how the majority derived a "new approach" from these cases when "nowhere do those precedents suggest what the majority announces today."[283] Rather than a fight over the fate of precedent and the application of *stare decisis* more broadly, *Seila Law* seemed to involve a dispute over the meaning and scope of the rules that had been established by the case law.

Only Justice Thomas sought to overturn the apple-cart of precedent and redefine the Court's approach to the interbranch balance created by the separation of powers. He concurred with the majority's conclusion that the CFPB's removal provisions violated the Constitution.[284] But he would have used the case to rewrite and reframe the jurisprudence around the President's removal power. Justice Thomas complained: "The Court's decision today takes a restrained approach on the merits by limiting *Humphrey's Executor v. United States*, rather than overruling it."[285] Characteristically, Thomas declared that "I would repudiate what's left of this erroneous precedent,"[286] because that case departed from what he believed to be the true understanding of the separation of powers cannon, one rooted in the Constitution's text, its design, and the original intent of the Framers.[287] He deployed the radical

278. *Selia Law*, 140 S. Ct. at 2197–201.

279. *Id.* at 2192.

280. *Id.*

281. *Id.* at 2224 (Kagan, J., dissenting in part).

282. *Id*. at 2228–33.

283. *Id.* at 2233.

284. *Id.* at 2217–18 (Thomas, J., dissenting in part).

285. *Id.* at 2211 (citations omitted).

286. *Id.* at 2212 (citations omitted).

287. *Id.* at 2211–12 (citations omitted); *see also id*. at 2218–19 ("Continued reliance on Humphrey's Executor to justify the existence of independent agencies creates a serious, ongoing threat to our Government's design. Leaving these unconstitutional agencies in place does not enhance this Court's legitimacy; it subverts political accountability and threatens individual liberty.").

theory of precedent that he advanced in *Gamble* to conclude that *Humphrey's Executor* involved "flawed" precedent sufficient enough to justify its demise.[288] But Thomas pushed further by highlighting factors considered in classical *stare decisis* analysis—such as the quality of the reasoning in the controlling case and its inconsistency with subsequent case law. His critique of *Humphrey's Executor* even took aim at the plurality's suggestion from *Casey* that respect for precedent could help preserve the Court's legitimacy.[289] Thomas instead insisted that continuing to support flawed precedent would "not enhance this Court's legitimacy."[290]

Justice Thomas's anti-precedent "bull-dozer" approach also led him to oppose the severability remedy that the Court announced in *Seila Law*. *Alaska Airlines, Inc. v. Brock Airlines*, which held that courts should presume "that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision," underpinned the Court's severability doctrine since 1987.[291] *Free Enterprise* also reaffirmed this presumption of congressional supremacy,[292] and Chief Justice Roberts applied it in *Seila Law* without any reservations, attracting the votes of six additional Justices.[293] Roberts used these precedential cases to conclude that the Court could sever the constitutionally invalid provisions from the rest of the CFPB scheme and that the case need not result in a more sweeping invalidation of the entire statutory framework.[294] Although they disputed the majority's views on the merits, the Chief Justice convinced four dissenters to join this severability ruling. But not Justice Thomas, whose textual analysis made him thoroughly doubt the integrity of the Court's "questionable" severability precedent.[295] Thomas's critique of the settled precedent on severability was blunter than his approach to the separation of powers issue in the case, which better aligned with his understanding of precedent from *Gamble*: error, and nothing more, was enough to convince him that a reversal of precedent was in order. He and Justice Gorsuch therefore would have overturned what the majority deemed were severable rules,

288. *Id.* at 2215 n.2 (stating that *Humphrey's Executor* "distinguished Myers based on the flawed premise that the FTC exercised 'quasi-legislative' and 'quasi-judicial' power that is not part of 'the executive power vested by the Constitution in the President.'")

289. *Id.* at 2219 (citations omitted).

290. *Id.*

291. 480 U.S. 678, 686 (1987).

292. 561 U.S. at 508–509.

293. *Selia Law*, 140 S. Ct. at 2209.

294. *Id.* at 2211.

295. *Id.* at 2223 (Thomas, J., dissenting in part); *id* at 2221 ("Ultimately, I cannot see how the resolution of the severability question affects the dispute before us. And even if severability could affect this case in some hypothetical scenario, I would not reach out to resolve the issue given my growing discomfort with our current severability precedents.").

leading them to strike down the entire CFPB statute.[296] Since he believed that the severability remedy provided by *Alaska Airlines* created tension with "historic practice," and wrongly encouraged the judiciary to engage in the unconstitutional act of rewriting legislation, Justice Thomas urged his colleagues "to take a close look at our precedents to make sure that we are not exceeding the scope of the judicial power."[297] The Chief Justice declined Thomas's summons to "junk" the Court's "settled severability doctrine and start afresh."[298]

One could characterize *Seila Law* as a careful application of controlling precedent. Even the dissenters seemed concerned about the scope of the removal rule, not its continuing viability based largely on the force of *stare decisis*. But is that really the conclusion that we should take from *Seila Law*? Rather, we can find a subtler, maybe even more sinister, maneuver to circumvent the binding constraints of established doctrine. Justice Thomas may have been accused of bull-dozing precedent in the case, but Roberts's subtle, "stealthy" approach to overrule precedent by erosion—narrowing the scope or meaning of the majority's interpretation of case law while nevertheless formally claiming to endorse the precedent—seems to simmer beneath the surface.[299] Roberts acknowledged this subtler engagement with *stare decisis* in a footnote: he conceded that the real dispute between the majority and dissent centered on the way the Court should interpret and apply the controlling removal cases.[300] Roberts portrayed the dissenters' approach as a freewheeling "reimagination" of the rule that would blend *Meyers* with the development and interpretation of the doctrine in subsequent cases.[301] The Chief Justice instead insisted that the majority would "take

296. *Id.* at 2219.

297. After joining Thomas's opinion in *Seila Law*. Gorsuch would add his voice to the critique of the Court's severability jurisprudence a few weeks later. Frustrated with the Court's decision to sever unconstitutional provisions in *Barr v. American Association of Political Consultants*, Gorsuch would complain: "Respectfully, if this is what modern 'severability doctrine' has become, it seems to me all the more reason to reconsider our course." 140 S. Ct. 2335, 2367 (2020). Neither Thomas in *Seila Law* nor Gorsuch in *Barr* offer a full *stare decisis* analysis for their calls to reverse the Court's severability precedent. The most that I can say about these claims, as they relate to the Justices' posture towards precedent, is that they demonstrate the comfort and ease with which Thomas and Gorsuch might approach overruling settled case law.

298. *Selia Law*, 140 S. Ct. at 2211.

299. *See, e.g.*, Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861 (2014); Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to* Miranda v. Arizona), 99 GEO. L.J. 1, 6–16 (2010); Richard L. Hasen, *Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How Supreme Court Justices Move the Law*, 61 EMORY L.J. 779 (2012); Riley T. Svikhart, *Dead Precedents*, 93 NOTRE DAME L. REV. 1 (2017); Thomas J. Molony, *Taking Another Look at the Call on the Field:* Roe*, Chief Justice Roberts, and Stare Decisis*, 44(3) HARV. J.L. & PUB. POL'Y 773 (2020).

300. *Selia Law*, 140 S. Ct. at 2200 n.4.

301. *Id.*

[*Humphrey's Executor*] on its own terms, not [read it] through the gloss added by a later Court in *dicta*."[302] Indeed, unlike Thomas's boisterous declarations, this superficially modest proposal to gutting precedent may evade detection on one's first read of the case.

Seila Law engaged several significant questions about the application of precedent, all without explicitly calling the *stare decisis* doctrine into question like this debate had in previous years. First, how should the Justices interpret precedent? Particularly when significant new interpretations could influence which analysis the Court applies when reversal would explicitly threaten controlling doctrine. Then there's the fundamental question of how the Court should define the controlling rule when interpreting or reversing precedent. As a narrow reading of a single, precedential case, or as a framework of cases that illuminate and aid interpretation in subsequent matters? Roberts' ostensibly restrictive answers to these questions in his *Seila Law* footnote provided sufficient reason for Kagan and the dissenters to criticize the Justices who prefer to undermine precedent through seemingly innocuous, but ultimately corrosive re-interpretation rather than outright reversal. Perhaps seeing through Roberts' claim that he was, in fact, upholding and applying precedent, these Justices accused the majority in *Seila Law* of a "suspicious departure from" the controlling rule for presidential removals that the Court has held for "almost a century."[303] These criticisms would not stop the Chief Justice from increasingly deploying this indirect, elusive engagement with precedent—including in his *Dobbs* concurrence. But in doing so, Roberts would continue to struggle to promote compromise on the Court while also staying true to his jurisprudential and ideological positions.

F. *Edwards v. Vannoy* (May 2021)

The Court's debate over the purpose and practice of precedent once again boiled over in *Edwards v. Vannoy*.[304] *Edwards* arguably ignited one of the most intense clashes over *stare decisis* in recent history, and for good reason. The Court was in the midst of a steady stream of reversals, fueled in part by the appointment of three new Justices that entrenched a conservative majority. The last of these appointments was the conservative Judge Amy Coney Barrett who replaced the progressive icon Justice Ruth Bader Ginsburg.[305] In addition, the Justices' rhetoric became increasingly combative

302. *Id.*

303. *Id.* at 2236.

304. 141 S. Ct. 1547 (2021).

305. *See generally* Seung Min Kim, *Senate Confirms Barrett to Supreme Court, Cementing Its Conservative Majority*, WASH. POST (Oct. 26, 2020), https://www.washingtonpost.com/politics/courts_law/senate-court-barrett-trump/2020/10/26/df76c07e-1789-11eb-befb-8864259bd2d8_story.html/.

and, in some cases, veered into personal slights. The Justices' opinions on *stare decisis* continued to pile up and, unavoidably, left them susceptible to accusations of inconsistency, serving as fodder for cross-references and bear-baiting citations.[306] Maybe it was no surprise that Justice Kavanaugh, who often made himself a target by throwing the first barbs, emerged as a leading voice in the Court's increasingly tense *stare decisis* debate. For example, when he authored the plurality opinion in *Barr*, he harangued Justice Breyer's dissent for playing loose with precedent and, according to Kavanaugh, for failing to "analyze the usual *stare decisis* factors."[307] Kavanaugh claimed to be assiduously upholding precedent in his *Jones v. Mississippi* opinion; nevertheless, Justice Sotomayor felt compelled to criticize him for fatally eroding precedent if not explicitly overruling it.[308]

And then came *Edwards*, a case about whether the rule from *Ramos*—requiring state juries to unanimously convict criminal defendants that commit serious offenses and overruling *Apodaca*[309]—could apply retroactively to overturn final convictions on federal collateral review.[310] Kavanaugh wrote that "[u]nder this Court's retroactivity precedents, the answer is no."[311] What made this 6-3 majority opinion formally reversing precedent so incendiary was the fact that the Court was asked to rule on the precedential effect of precedent it had established when overturning precedent only months earlier. The Court decided *Ramos* on April 20, 2020,[312] then decided *Edwards* on May 17, 2021,[313] gutting the supposedly intended effects of *Ramos*. That's how far the Court's perspective on *stare decisis* had drifted. Court watchers witnessed a kind of jurisprudential shipwreck as freshly hobbled, convoluted, and abandoned precedents succumb to a riptide of ideological incoherence.

The *Edwards* majority went further when it decided to cast away part of the Court's 1989 *Teague v. Lane* decision—a case that established an exception to the general rule that courts should not retroactively apply newly articulated principles of constitutional criminal procedure in federal

306. *See, e.g.*, Jeffrey Toobin, *Clarence Thomas Has His Own Constitution*, THE NEW YORKER (June 30, 2016), https://www.newyorker.com/news/daily-comment/clarence-thomas-has-his-own-constitution; Kimberly S. Robinson, *Clarence Thomas Wins Long Game Against Affirmative Action*, BLOOMBERG LAW (June 29, 2023), https://news.bloomberglaw.com/us-law-week/clarence-thomas-wins-long-game-against-affirmative-action.

307. *Barr*, 140 S. Ct. at 2347 n.4.

308. *See Jones*, 141 S. Ct. at 1331 (start of Justice Kavanaugh's majority opinion in *Jones*).

309. *See supra* note 160 (exploring the overruling of *Apodaca* in *Ramos*).

310. *Edwards*, 141 S. Ct. at 1551.

311. *Id*.

312. *Id*. at 1440 (Alito, J., dissenting).

313. *Id*. at 1551.

collateral review proceedings.[314] *Teague* held that those new constitutional rules would not apply retroactively unless they involved "bedrock procedural elements" that "implicate the fundamental fairness of the trial."[315] Another name for this holding was the "watershed rule" exception of criminal procedure.[316]

The Court therefore had to confront the "watershed rule" exception in *Edwards* as a result of its *Ramos* decision.[317] As previously explored, *Ramos* attracted extensive commentary on the nature and application of precedent from the Justices both in the majority and the dissent; a discussion that hinted at the possible implications of the *Ramos* rule under *Teague*.[318] And as one could have expected, *Ramos*'s new understanding of the Sixth Amendment invited offenders who had been convicted by a non-unanimous verdict to press for the application of the "watershed rule" exception in their newly-filed federal *habeas corpus* proceedings. And yet, in *Edwards*, Justice Kavanaugh and the majority concluded that the *Ramos* rule did not qualify for the *Teague* exception. More than that, the majority overruled the exception altogether, declaring that the "watershed exception is moribund. It must be regarded as retaining no vitality."[319]

Kavanaugh and the majority concluded that, if the Court had never found a new rule of constitutional criminal procedure that qualified as a watershed principle meriting retroactive application, then it would only be "candid" to formally concede that "no new rules of criminal procedure can satisfy the watershed exception" and that it would be irresponsible to "continue to suggest otherwise to litigants and courts."[320] Kavanaugh did not explicitly invoke the issues or factors that had attracted so much of the Court's attention in the debate over *stare decisis* to support this reversal. There was also

314. Teague v. Lane, 489 U.S. 288, 311–312 (1989) (expressing the two exceptions to the general rule of Teague, first that retroactivity should apply to "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe"; secondly "that a new rule should be applied retroactively if it requires the observance of those procedures that . . . are 'implicit in the concept of ordered liberty.'" (citing Mackey v. United Sates, 401 U.S. 667, 692–93 (1971) (internal citation removed))).

315. *Id.* at 311, 312 (citing in part *Mackey*, 401 U.S. at 693).

316. *Id.* at 311.

317. *Edwards*, 141 S. Ct. at 1556.

318. *See generally Ramos*, 140 S. Ct. 1390 (2020); *and see id*. at 1420 (Kavanaugh, J., concurring in part) ("So assuming that the Court faithfully applies *Teague*, today's decision will not apply retroactively on federal habeas corpus review and will not disturb convictions that are final."); *id*. at 1437 (Alito, J., dissenting) ("The majority cannot have it both ways. As long as retroactive application on collateral review remains a real possibility, the crushing burden that this would entail cannot be ignored. And while it is true that this Court has been chary in recognizing new watershed rules, it is by no means clear that *Teague* will preclude the application of today's decision on collateral review.")

319. *Edwards*, 141 S. Ct. at 1560.

320. *Id.* at 1559.

no explicit reference to *Payne v. Tennessee*, or even *Ramos* for that matter. The decision did not address the flashpoint question of whether mere error was adequate to justify the abandonment of precedent.

But one can read Kavanaugh's opinion and find some connections to a few of the established *stare decisis* factors. For example, the majority may have suggested that the *Teague* exception was not consistent with related case law by emphasizing the Court's failure to find even a single "watershed rule." Or perhaps this lack of case law provided the proof necessary for the Court to find that the *Teague* exception had become a manifestly unworkable rule. Instead, the majority insisted that the "purported exception has become an empty promise."[321] Kavanaugh also reasoned that the impossible promise of the *Teague* exception burdened the justice system because it "offer[ed] false hope to defendants, distort[ed] the law, misle[d] judges, and waste[d] the resources of defense counsel, prosecutors, and courts."[322] These assertions echo the concern about preserving the Court's or the legal system's integrity that sometimes factors into the *stare decisis* analysis.[323] Finally, Kavanaugh explicitly, albeit summarily, raised the issue of reliance. He explained, "[n]o one can reasonably rely on an exception that is non-existent in practice, so no reliance interests can be affected by forthrightly acknowledging reality."[324] It is not quite an argument for the reversal of precedent. But it is also little more than Justice Kagan, in her searing dissent, credited Kavanaugh with doing. Kagan argued that the majority "gives only the sketchiest reasons for reversing *Teague*'s watershed exception" and offers "just one ground for its decision."[325]

Those sentiments, arguably the mildest remarks in Kagan's dissent, prompted Kavanaugh to write an additional four pages to resolve her sharpest objections—which disputed the majority's reasoning for why *Ramos*'s unanimous jury rule did not merit retroactive application and questioned the integrity of the majority's decision to overturn *Teague's* watershed exception. This effort to address *stare decisis* added little to the majority's reasoning. Kavanaugh insisted that he had conducted a *stare decisis* analysis and concluded that none of the values justifying respect for precedent "would be served by continuing to indulge the fiction that *Teague's* purported

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321. *Id.* at 1561.

322. *Id.* at 1560.

323. *See, e.g.*, *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. 141 (2005) ("[T]he Founders appreciated the role of precedent in promoting the evenhandedness, predictability, stability [and] the appearance of integrity in the judicial process."); Frank B. Cross, *Chief Justice Roberts and Precedent: A Preliminary Study*, 86 N.C. L. REV. 1251 (2008).

324. *Edwards*, 141 S. Ct. at 1560.

325. *Id.* at 1581 (Kagan, J., dissenting).

watershed exception endures."[326] Referring to the earlier portions of the majority opinion, Kavanaugh's riposte to Kagan's dissent seemed to focus on reliance, the integrity of the law and the judicial system, and the workability of the rule announced by *Teague*. More significantly, Kavanaugh used these pages to express his incredulity at Kagan's dissent, suggesting that consistency of outcomes might itself be a factor in the application of the doctrine of *stare decisis*. Kavanaugh noted that Kagan dissented in the *Ramos* case, but in *Edwards,* she had cast herself as the defender of the principle that *Ramos* advanced. "It is another thing altogether," Kavanaugh bristled, "to dissent in *Ramos* and then to turn around and impugn today's majority for supposedly shortchanging criminal defendants."[327] This cross talk is why it is possible to characterize this part of Kavanaugh's opinion as a personal defense rather than a disciplined engagement with *stare decisis* analysis.

Before I describe how Justice Kagan's dissent grappled with the doctrine of *stare decisis*, it is important to note that Justice Gorsuch wrote a concurring opinion in *Edwards* dedicated to demonstrating that the *Teague* exception had always been flawed. For Gorsuch, that conclusion provided enough grounds for the majority's reversal. Gorsuch argued that *Teague's* project was "mystifying" from the beginning.[328] He argued that the Court's interpretation of constitutional rights (such as the Sixth Amendment in *Ramos*) wouldn't produce a "new" rule, and that the Court must view all such rules, in their constitutional character, as "fundamental."[329] Justice Gorsuch thus concluded that there shouldn't have been a constitutional exception for watershed retroactivity at all because *Teague* simply botched the constitutional analysis.[330] In light of this conclusion, Gorsuch could endorse the majority's abandonment of *Teague's* watershed exception because it would end the "strange business" of tangling with contradictory tests and inexplicable precedents.[331] This approach leaned heavily on Justice Thomas's argument that the Court owes no respect to erroneous or "wrongly decided" precedent.

Gorsuch responded to Kagan's dissent in a manner similar to Kavanaugh: insults layered into legal arguments. He strongly objected to her accusation that the majority, with its ruling in *Edwards*, was abandoning well-settled *habeas corpus* precedent. In footnote seven of his concurrence, Gorsuch pointed out what he saw as the layers of inconsistency in Kagan's supposed fealty to the doctrine of *stare decisis*. He complained that her

326. *Id.* at 1561.

327. *Id.* at 1562.

328. *Id.* at 1572 (Gorsuch, J., concurring).

329. *Id.* at 1571–72.

330. *Id.* at 1573.

331. *Id.*

characterization of *habeas corpus* precedent was selective.[332] And he fumed that the *habeas corpus* case law Kagan chose to accentuate involved departures from a century of the Court's precedents.[333] Gorsuch further wondered why Kagan felt so comfortable disregarding more than thirty years of relevant precedent involving *Teague*'s watershed exception, which, as the majority saw it, called for the exception's demise.[334]

Kagan's dissent in *Edwards* drew intense, and even *ad hominem*, responses from the Justices in the majority. Part of her opinion, however, was devoted to what Kagan characterized as "rebuttals" to her dissent.[335] For example, in footnote one of her dissenting opinion, Kagan responded to Kavanaugh's critique of the seeming conflict in her positions in *Ramos* and *Edwards*.[336] Kagan explained that she dissented in *Ramos* because she felt bound by *stare decisis* to uphold the *Apodaca* rule.[337] She dissented in *Edwards* because "respecting *stare decisis* means sticking to some wrong decisions," and so Kagan felt compelled to give *Ramos* full precedential force despite her reservations about it on the merits.[338] She returned to this critique in her opinion's final footnote, complaining that Kavanaugh's engagement with her dissent treated "judging as scorekeeping—and more, as scorekeeping about how much our decisions, or the aggregate of them, benefit a particular kind of party."[339] Sounding almost as if she were scolding the rookie Justice, Kagan continued: "No one gets to bank capital for future cases; no one's past decisions insulate them from criticism."[340]

Kagan did not hide her disdain for the majority's "sketchy" approach to precedent in the case.[341] She accused the majority of disregarding a "core judicial rule: respect for precedent."[342] She complained that the majority departed from "judicial practice and principle to abandon *Teague's* watershed rule exception" and failed to observe any of the "usual rules of *stare decisis*."[343] Instead of successfully clearing that high bar, Kagan argued that the

332. *See id.* at 1573 n.7 (arguing that the dissent "overlooks this Court's precedents refusing to afford retroactive application in every case since the 1980s").

333. *See id.* (noting that Justice Kagan's "dissent champions decisions from the 1950s, '60s, and '70s. But it disregards how those decisions departed from a century of this Court's precedents and the common law before that").

334. *Id.* at 1566.

335. *Id.* at 1580 (Kagan, J., dissenting).

336. *See id*. at 1573 n.1 (defending her dissent in *Ramos* as guided by *stare decisis*).

337. *Id.*

338. *Id*.

339. *Id*. at 1581 n.8.

340. *Id*.

341. *Id.* at 1581.

342. *Id*. at 1580.

343. *Id*. at 1574.

majority only managed to "crawl under" the standard."[344] She protested that the majority managed to overrule *Teague's* exception without considering the "familiar set of factors capable of providing the needed special justification."[345] Justice Kagan agonized in her conclusion: "Seldom has this Court so casually, so off-handedly, tossed aside precedent."[346]

Kagan also questioned the unusual procedural decisions that the majority made seemingly for the benefit of eroding precedent. She particularly took issue with the fact that no party to the *Edwards* case ever asked the Court to overrule the *Teague* exception.[347] She emphasized that the Court usually confines itself to the issues raised and briefed by the parties.[348] She acknowledged there might be some justifications for ignoring this practice. But doing "so in pursuit of overturning precedent," Kagan objected, "is nothing short of extraordinary."[349] She cited Kavanaugh's language from *Ramos*, where he described this *sua sponte* concern as an "important factor" protecting *stare decisis*.[350] The scope of the Court's inquiry had emerged as another consistent consideration in the Court's churning *stare decisis* analysis. But the majority's dismissal of this concern incensed Kagan:

> We are supposed to (fairly) apply the prevailing law until a party asks us to change it. And when a party does make that request, we are supposed to attend to countervailing arguments—which no one here had a chance to make. That orderly process, skipped today, enables a court to arrive at a considered decision about whether to overthrow precedent.[351]

Kagan would continue to demand adherence to a strict and formalistic respect for precedent in the Court's contemporary *stare decisis* debate. But the increasingly rapid erosion of precedent would—and probably will continue to—force her to choose between upholding a newly-minted doctrine to which she had previously objected or disregard the force of precedent to advance her jurisprudential or ideological commitments.[352]

344. *Id.* at 1580.

345. *Id.* at 1581.

346. *Id.*

347. *Id.* at 1580.

348. *Id.*

349. *Id.*

350. *Id.* at 1581.

351. *Id.*

352. A few weeks after *Edwards*, Kagan had to confront an unhappy Solomonic choice in *Collins v. Yellen*: hew to newly-minted doctrine to which she had previously lodged her objection or disregard the force of precedent to advance her jurisprudential or ideological commitments. *See Yellen*, 141 S. Ct. at 1800 (Kagan, J., concurring in part and concurring in the judgment) (quoting *June Med. Servs*, 140 S. Ct. at 2133 (Roberts, C. J., concurring in judgment) ("But the 'doctrine of

IV. CONCLUSION

Although Kagan's dissenting opinion in *Edwards* was not the last episode in the *stare* decisis debate,[353] the Justices had essentially established the battle lines by that point. In just twelve months—less if one credited the unprecedented leak of the Court's draft opinion in the *Dobbs* case—we would know what all of this would mean for the abortion controversy and the fate of *stare decisis*.[354]

The outcome of the abortion question might have seemed like a foregone conclusion considering the Court's new, conservative majority.[355] But the winding, oftentimes confusing contemporary debate over the doctrine of *stare decisis* was less clear-cut, even if it was an essential precondition to the expected outcome in the coming *Dobbs* case. This Article suggests that at least four approaches to precedent emerged from the debate. These positions fall along a spectrum from the least respect for precedent to the greatest respect for precedent.

Unsurprisingly, Justice Thomas, who called for the abolition of the doctrine of *stare decisis* altogether, anchors the least respectful end of that spectrum.

The main cohort of the Court's new conservative majority (Alito, Gorsuch, Kavanaugh, and Barrett) took a less radical position while still advancing doubts about the power of precedent. This position conceded the value of the doctrine of *stare decisis* for the rule of law but insisted that precedent should not be categorically binding in constitutional law cases. According to this position, overruling precedent should largely depend on whether a

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stare decisis requires us, absent special circumstances, to treat like cases alike'—even when that means adhering to a wrong decision. So the issue now is not whether *Seila Law* was correct. The question is whether that case is distinguishable from this one. And it is not."); *id*. (citing *Payne*, 501 U.S. at 827) ("In thus departing from Seila Law, the majority strays from its own obligation to respect precedent. To ensure that our decisions reflect the 'evenhanded and 'consistent development of legal principles,' not just shifts in the Court's personnel, stare decisis demands something of Justices previously on the losing side.'").

353. *See* Shinn v. Ramirez, 142 S. Ct. 1718, 1740, 1747 (2022) (Sotomayor, J., dissenting); Jones v. Hendrix, 143 S. Ct. 1857, 1878 (2023) (Jackson, J., dissenting); Brown v. Davenport, 142 S. Ct. 1510, 1528 ("At its best, [*stare decisis*] is a call for judicial humility. It is a reminder to afford careful consideration to the work of our forbearers, their experience, and their wisdom. But respect for past judgements also means respecting their limits.").

354. *See Dobbs*, 142 S. Ct. 2228 (2022); *see also* Josh Gerstein & Alexander Ward, *Supreme Court has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 3, 2022), https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473; David Schultz, *Is any Precedent Safe Now? The Impact of Dobbs on Other Rights*, THOMAS REUTERS WESTLAW TODAY (July 14, 2022), https://today.westlaw.com/Document/I9d2ea05703a111ed9f24ec7b211d8087/View/FullText.html?contextData=(sc.Default)&transitionType=Default&firstPage=true&bhcp=1.

355. *See generally*, Lawrence Hurley, *Analysis: Supreme Court Conservatives Assert Power with Abortion, Gun Rulings*, REUTERS (June 27, 2022), https://www.reuters.com/world/us/conservative-us-justices-show-maximalism-guns-abortion-2022-06-25/.

contemporary majority of the Court believes that the binding rule was "wrongly decided." There's no need for a "special justification," beyond this perceived error to overturn controlling case law. Still, this position also sought to weaken the traditional factors that, for decades, informed the decision of whether to overrule precedent. Justice Kavanaugh's framing of this approach in *Ramos* would prove to be decisive in the *Dobbs* decision.

Meanwhile, Chief Justice Roberts charted a unique course in the Court's recent *stare decisis* debate. He is a fully-fledged member of the Court's new conservative majority. Yet, as in other contexts, his approach to precedent seeks to manage and mitigate the institutional fallout from the new conservative majority's agenda, particularly the increasing frequency and significance of overturned precedent. In that spirit, Roberts often insisted on formally leaving precedent intact while nonetheless recasting the rules or standards announced by controlling cases so that they would permit his desired substantive outcome. Usually, that involved a conservative victory. But on a few sensational occasions, Roberts sided with the Court's progressives. This position drew disdain from all sides. While the Court's conservatives viewed it as unnecessarily solicitous of precedent, the Court's progressives complained that Roberts's approach involved little more than the mere formalistic respect for the doctrine of *stare decisis* while nevertheless pursuing "reversal by stealth" or "overruling by erosion."[356]

Finally, led by Justice Kagan, the Court's progressive minority largely argued for robust respect for precedent; often expressed in bitter dissenting opinions. This position viewed *stare decisis* as a "foundation stone of the rule of law." With that, the progressive Justices insisted that the Court could overturn precedent only if a "special justification" exists. Most importantly, this standard requires demonstrating something more than the mere contemporary conclusion that the controlling case was "wrongly decided." Instead, the progressive Justices reaffirmed the factors that had informed the practice of *stare decisis* since *Casey*, especially concerns about reliance on an established rule.

Even if the Court's recent *stare decisis* debate studiously avoided explicit references to the abortion controversy (except in *June Medical Services*),[357] there was every reason to believe that the fate of *Roe* and *Casey*

356. *See, e.g.*, Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861 (2014); Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to* Miranda v. Arizona), 99 GEO. L.J. 1, 6–16 (2010); Richard L. Hasen, *Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How Supreme Court Justices Move the Law*, 61 EMORY L.J. 779 (2012); Riley T. Svikhart, *Dead Precedents*, 93 NOTRE DAME L. REV. 1 (2017); Thomas J. Molony, *Taking Another Look at the Call on the Field:* Roe*, Chief Justice Roberts, and Stare Decisis*, 44(3) HARV. J. L. & PUB. POL'Y 773, 780 (2020).

357. *June Med. Servs.,* 140 S. Ct. at 2112.

had been the whole point of this complex, contentious, and wordy affair.[358] *Dobbs* has now confirmed that suspicion. Justice Alito's lengthy discussion of *stare decisis* in the *Dobbs* majority opinion cites several of the cases from the Court's post-2018 *stare decisis* debate: paving the way for the end of *Roe* and developing a new understanding of the purpose and practice of precedent. But, as these approaches gain traction, it seems likely that the debate over *stare decisis* is far from over.

358. *See* Ruth Marcus, *Why a Case About Jury Verdicts Could Spell Trouble for* Roe v. Wade, WASH. POST (Apr. 24, 2020), https://www.washingtonpost.com/opinions/why-a-case-about-jury-verdicts-could-spell-trouble-for-roe-v-wade/2020/04/24/2a3e2072-8660-11ea-878a-86477a724bdb_story.html; Amy Howe, *Opinion Analysis: With Debate Over Adherence to Precedent, Justices Scrap Nonunanimous Jury Rule*, SCOTUSBLOG (Apr. 20, 2020), https://www.scotusblog.com/2020/04/opinion-analysis-with-debate-over-adherence-to-precedent-justices-scrap-nonunanimous-jury-rule/.

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