
THE SYMBIOSIS OF ABORTION AND PRECEDENT

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Judges have to have the humility to recognize that they operate within a system of precedent

— Then-Judge John G. Roberts, Jr.¹

[Stare decisis is] important because it reflect[s] the view that courts should respect the judgments and the wisdom that are embodied in prior judicial decisions.

— Then-Judge Samuel A. Alito, Jr.²

INTRODUCTION

During his 2016 presidential campaign, Donald Trump repeatedly described himself as “pro-life”³ and vowed, if elected, to appoint Supreme Court Justices who would be reliable votes to overturn *Roe v. Wade*,⁴ the 1973 decision that expanded on prior interpretations of the Fourteenth Amendment⁵ to conclude that the right to privacy was “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”⁶

When President Trump put forth two nominees to the United States Supreme Court, then-Judge Gorsuch and then-Judge Kavanaugh, the confirmation proceedings unsurprisingly unfolded in the shadow of the

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¹ *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. 55 (2005) (statement of Judge John G. Roberts, Jr.) [hereinafter *Roberts Confirmation Hearing*].

² *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 318–19 (2006) (statement of Judge Samuel A. Alito, Jr.).

³ See, e.g., Emily Crockett, *Donald Trump Is Going All In on Banning Abortion*, VOX (Sept. 20, 2016, 8:30 AM), <https://www.vox.com/2016/9/20/12970076/donald-trump-ban-abortion-policy> [<https://perma.cc/3V2T-GFJK>]; Dan Mangan, *Trump: I’ll Appoint Supreme Court Justices to Overturn Roe v. Wade Abortion Case*, CNBC (Oct. 19, 2016, 10:00 PM), <https://www.cnbc.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html> [<https://perma.cc/F9E3-3S5F>].

⁴ 410 U.S. 113 (1973).

⁵ See *id.* at 152–53 (collecting cases).

⁶ *Id.* at 153.

President's pro-life promises. As has been the recent practice for nominees to the Court,⁷ both then-Judge Gorsuch and then-Judge Kavanaugh avoided providing specific views about abortion rights and instead "made the customary noises"⁸ about stare decisis and respect for settled precedent.⁹ Although neither nominee specifically stated his views about the continued longevity of *Roe v. Wade*, discussion of respect for precedent and stare decisis has become a stand-in for a more fraught conversation about the future of abortion rights.¹⁰

Latin for "to stand by what has been decided," stare decisis is a cornerstone of the Anglo-American legal tradition.¹¹ By its terms, stare decisis demands that lower courts follow the decisions of superior courts and that the United States Supreme Court defer to past decisions on the same, or similar, issues.¹² And while a court may overturn its own

⁷ Recent nominees have invoked the so-called "Ginsburg standard" to avoid discussing specific cases or controversial issues. See Abigail Simon, *Why Ruth Bader Ginsburg's Confirmation Fight Still Matters, 25 Years Later*, TIME (Aug. 3, 2018, 6:22 PM), <https://time.com/5357068/ruth-bader-ginsburg-anniversary-confirmation-fight-standard> [<https://perma.cc/PB95-X2KM>]. The informal rule refers to then-Judge Ginsburg's remarks during her confirmation hearing stating that she would "offer no forecasts, no hints" as to her rulings on future cases that might come before the Court. See *id.*

⁸ Jeffrey Toobin, *The Abortion Fight and the Pretense of Precedent*, NEW YORKER (May 19, 2019), <https://www.newyorker.com/magazine/2019/05/27/the-abortion-fight-and-the-pretense-of-precedent> [<https://perma.cc/M4WP-LWUZ>].

⁹ Then-Judge Gorsuch vowed to analyze cases with respect to the "law of precedent." *Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 74, 76, 135 (2017) (statement of Judge Neil M. Gorsuch). Then-Judge Kavanaugh assured the Senate Judiciary Committee of his commitment to precedent, noting that the concept of stare decisis "comes from Article III itself." *Confirmation Hearing on the Nomination of Hon. Brett M. Kavanaugh to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (Sept. 5, 2018) (statement of Judge Brett M. Kavanaugh) (transcript available at <https://edition.cnn.com/TRANSCRIPTS/1809/05/wolf.02.html>) [<https://perma.cc/46RC-FFUL>].

¹⁰ See, e.g., Anna North, *Brett Kavanaugh Won't Oppose Roe v. Wade Outright. Here's What He Might Say Instead*, VOX (Aug. 31, 2018, 8:10 AM), <https://www.vox.com/2018/8/31/17791858/brett-kavanaugh-judge-views-vote-abortion-roe> [<https://perma.cc/5K2V-C5WK>] (noting that vague remarks about respecting precedent and "settled law" are used as substitutes for articulating clear positions on reproductive rights).

¹¹ See *Stare Decisis*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/topic/stare-decisis> [<https://perma.cc/7TVD-HQXV>]; see also Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 792 (2012) (noting that federal courts have employed stare decisis since the Founding).

¹² See, e.g., Mead, *supra* note 11, at 790 ("Horizontal stare decisis is the practice of a court deferring to its own decisions, while vertical stare decisis is the practice of a lower court adhering to the decisions of courts with supervisory jurisdiction . . ."); see also Frederick Schauer, *Stare Decisis — Rhetoric and Reality in the Supreme Court*, 2018 SUP. CT. REV. 121, 124–25 ("The idea of vertical precedent, as it is sometimes called, is a widely accepted feature of a judicial system in which lower courts are called 'lower' for a reason, and one of those reasons is that these lower courts are expected, to put it loosely and roughly, to treat higher court decisions on matters of legal interpretation and application as if they were law themselves." *Id.* at 125 (footnote omitted)).

precedent, the demands of stare decisis suggest that such a step should be taken only if strong reasons exist for doing so.¹³

For the last fifty years, the debate over what it means to observe the strictures of stare decisis and follow precedent has centered largely around a single decision: *Roe v. Wade*.¹⁴ Not only is every Supreme Court nominee quizzed about her views on the role of precedent in decisionmaking and, indirectly, the continued vitality of *Roe v. Wade*, but each abortion case that comes before the Court is also framed in the context of whether it will provide the Court with the opportunity to overrule or uphold *Roe*.¹⁵

In this regard, stare decisis is the alpha and the omega of the Supreme Court's abortion jurisprudence. Because of stare decisis, Justices, regardless of their views as to whether *Roe* was correctly decided or properly reasoned, have been reluctant to jettison entirely the 1973 decision.¹⁶ And yet, the Court's failure to formally overrule *Roe* has cemented the decision's position as a precedent, legitimizing the abortion right to the dismay of abortion opponents. On this account, stare decisis is both the reason why *Roe* cannot be overturned and the reason why it must be.

But it is not simply that stare decisis principles are the alpha and the omega that shape the Court's approach to abortion; it is also that the Court's abortion jurisprudence, in turn, informs its approach to stare decisis. That is, conflicts over the scope and substance of the abortion right have shaped our understanding of what *is* precedential and what it means to follow precedent. Indeed, it has been in the context of the Court's abortion jurisprudence itself that the Justices have sought to delineate when — and how — they adhere to, or depart from, past precedents. In this regard, the relationship between stare decisis and the law of abortion is not confined to disputes over the constitutionality

¹³ See Mead, *supra* note 11, at 791 (“[T]he Supreme Court today is willing to revisit precedent only after considering several factors: ‘workability . . . [,] the antiquity of the precedent, the reliance interests at stake, and . . . whether the decision was well reasoned.’” (omissions in original) (footnote omitted) (quoting *Montejo v. Louisiana*, 556 U.S. 778, 792–93 (2009))).

¹⁴ See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992) (“[Nineteen] years after our holding that the Constitution protects a woman’s right to terminate her pregnancy in its early stages, that definition of liberty is still questioned.” (citation omitted) (citing *Roe v. Wade*, 410 U.S. 113 (1973))); *id.* at 854–61 (discussing factors of stare decisis analysis and applying them to *Roe*).

¹⁵ See, e.g., Henry J. Reske, *Is This the End of Roe?*, 78 A.B.A. J. 64, 66 (1992); Ian Millhiser & Anna North, *The Supreme Court Case that Could Dismantle Roe v. Wade, Explained*, VOX (Jan. 22, 2020, 10:53 AM), <https://www.vox.com/2019/10/4/20874618/roe-wade-supreme-court-louisiana-abortion-gee> [<https://perma.cc/B7RT-886R>].

¹⁶ See Leah Litman, Opinion, *Supreme Court Liberals Raise Alarm Bells About Roe v. Wade*, N.Y. TIMES (May 13, 2019), <https://www.nytimes.com/2019/05/13/opinion/roe-supreme-court.html> [<https://perma.cc/UP27-WVZ8>] (“[R]espect for precedent is one of the few things, if not the only thing, that stands between the conservative Roberts court and overruling *Roe v. Wade*.”).

of a particular abortion restriction or even whether the Constitution recognizes a fundamental right to choose an abortion. Instead, the relationship between the two informs every dispute in which the Court considers whether and how to defer to its past decisions.

The relationship between stare decisis and the Court's abortion jurisprudence is evident in the Court's disposition of *June Medical Services L.L.C. v. Russo*,¹⁷ a challenge to Louisiana's Act 620,¹⁸ which required physicians providing abortions to have admitting privileges at a local hospital.¹⁹ Although the Court voted 5–4 to invalidate the challenged law,²⁰ the Justices were fractured in their reasoning and the guidance they provided to lower courts judging future abortion restrictions.²¹ Indeed, one of the few points of agreement among all nine Justices was that principles of stare decisis dictated the outcome in the instant case.²²

It is perhaps unsurprising that all of the opinions in *June Medical Services* focused heavily on stare decisis and fidelity to precedent. After all, the case bore striking similarities to *Whole Woman's Health v. Hellerstedt*,²³ a challenge to a virtually identical Texas admitting privileges law that the Court decided only four years earlier.²⁴ But it was not just that, as a settled precedent squarely on point, *Whole Woman's Health* obviously should have dictated the outcome in *June Medical Services*. Stare decisis dominated the Court's disposition of *June Medical Services* in the same way that it has come to dominate almost every case that implicates the constitutional right to abortion.

¹⁷ 140 S. Ct. 2103 (2020).

¹⁸ Unsafe Abortion Protection Act, LA. STAT. ANN. § 40:1061.10 (2020), *invalidated by June Med. Servs.*, 140 S. Ct. 2103.

¹⁹ *Id.* § 40:1061.10(A)(2)(a).

²⁰ *June Med. Servs.*, 140 S. Ct. at 2133 (plurality opinion); *id.* at 2142 (Roberts, C.J., concurring in the judgment).

²¹ Despite concurring in the judgment, Chief Justice Roberts seemed to invite a future opportunity to revisit *Planned Parenthood of Southeastern Pennsylvania v. Casey*'s, 505 U.S. 833 (1992), undue burden standard and echoed the dissenters' disdain for *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). See Gretchen Borchelt, *Symposium: June Medical Services v. Russo: When a "Win" Is Not a Win*, SCOTUSBLOG (June 30, 2020, 12:31 PM), <https://www.scotusblog.com/2020/06/symposium-june-medical-services-v-russo-when-a-win-is-not-a-win> [<https://perma.cc/BD42-VXK7>].

²² In his plurality opinion, Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, noted the similarity of *June Medical Services* to *Whole Woman's Health* and argued that in such nearly identical cases "the law must consequently reach a similar conclusion." *June Med. Servs.*, 140 S. Ct. at 2133 (plurality opinion). In his concurrence, Chief Justice Roberts noted that "[s]tare decisis instructs us to treat like cases alike," *id.* at 2141 (Roberts, C.J., concurring in the judgment), and that the result in *June Medical Services* was dictated by past precedent, *id.* at 2141–42. In his dissent, Justice Alito, joined in full by Justice Gorsuch and in part by Justices Thomas and Kavanaugh, argued that the plurality and concurrence misapplied stare decisis and failed to consistently adhere to precedent. *Id.* at 2153 (Alito, J., dissenting).

²³ 136 S. Ct. 2292.

²⁴ *Id.* at 2300; see also *June Med. Servs.*, 140 S. Ct. at 2112 (plurality opinion) (describing Louisiana's Act 620 as "almost word-for-word identical to Texas' admitting-privileges law").

Using *June Medical Services* as a point of entry, this Comment surfaces and examines the complicated and constitutive relationship between the Court's approach to stare decisis and its abortion-related jurisprudence. This Comment proceeds in four parts. Part I considers the relationship between stare decisis and the Court's abortion jurisprudence. Focusing specifically on *Planned Parenthood v. Casey*²⁵ and *Gonzales v. Carhart*,²⁶ it argues that stare decisis and precedent have come to shape the public conflict over abortion rights and, more particularly, the Court's efforts to resolve that conflict in its jurisprudence.

Part II turns to *June Medical Services v. Russo* to elaborate the relationship between stare decisis and the Court's abortion jurisprudence. Specifically, it focuses on Chief Justice Roberts's concurrence²⁷ to show that the dynamics identified in *Casey* and *Gonzales* are not isolated, but rather are part and parcel of the Court's efforts to delineate the scope and substance of the abortion right. As this Part explains, the Chief Justice's concurrence wrestled with the question of what it means to be faithful to past precedent. While the Chief Justice acknowledged that, under principles of stare decisis, *Whole Woman's Health*, the Court's most recent abortion decision, controlled,²⁸ he was nonetheless selective about which aspects of the 2016 decision demanded deference.²⁹ This selective approach to stare decisis transformed the meaning — and precedential value — of *Whole Woman's Health*, as well as the standards by which abortion restrictions will be judged going forward.

Part III argues that even as stare decisis has shaped the Court's abortion jurisprudence, the doctrine has in turn been shaped by the Court's abortion jurisprudence. To elaborate this claim, this Part first explains how *Casey* has informed much of the Court's jurisprudence on stare decisis. Relatedly, it shows how the Court's abortion jurisprudence has served as both a blueprint and a roadmap for dealing with precedent in nonabortion contexts. More provocatively, this Part argues that *Roe* and the abortion right shadow all of the Court's efforts to define and observe the requirements of stare decisis. Part IV considers the normative implications of the abortion jurisprudence's influence on the Court's approach to precedent. The Comment then briefly concludes.

²⁵ 505 U.S. 833.

²⁶ 550 U.S. 124 (2007).

²⁷ *June Med. Servs.*, 140 S. Ct. at 2133–42 (Roberts, C.J., concurring in the judgment).

²⁸ *Id.* at 2134 (“The legal doctrine of *stare decisis* requires us, absent special circumstances, to treat like cases alike. The Louisiana law imposes a burden on access to abortion just as severe as that imposed by the Texas law, for the same reasons.”).

²⁹ *See id.* at 2135–36.

I. STARE DECISIS AND ABORTION

Concerns about stare decisis have long shaped the Court's abortion jurisprudence.³⁰ In *Roe v. Wade*, the Court recognized a constitutional right to choose an abortion.³¹ In the half century that has followed, the Court has faced a series of abortion-related legal challenges,³² many of which have presented the question of whether *Roe* was properly decided.³³ In these disputes, in particular, stare decisis has shaped the

³⁰ See, e.g., *Gonzales*, 550 U.S. at 191 (Ginsburg, J., dissenting) (criticizing the majority for being “[un]faithful to our earlier invocations of ‘the rule of law’ and the ‘principles of stare decisis’”); *Casey*, 505 U.S. at 845–46 (“[C]onsidering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, and the rule of *stare decisis*, . . . the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.”); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 419–20 (1983) (reaffirming *Roe v. Wade* out of respect for the principle of stare decisis).

³¹ *Roe v. Wade*, 410 U.S. 113, 153 (1973).

³² E.g., *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2370 (2018) (invalidating a California law requiring certain disclosures regarding abortion at crisis pregnancy centers); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016) (invalidating two Texas abortion restrictions); *McCullen v. Coakley*, 134 S. Ct. 2518, 2541 (2014) (invalidating a Massachusetts law proscribing “buffer zones” at abortion clinic entrances); *Gonzales*, 550 U.S. at 132–33 (upholding a federal law proscribing a particular abortion procedure); *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 323–24 (2006) (considering a facial challenge to New Hampshire's parental notification requirement); *Stenberg v. Carhart*, 530 U.S. 914, 921–22 (2000) (invalidating a Nebraska law proscribing a particular abortion procedure); *Hill v. Colorado*, 530 U.S. 703, 735 (2000) (upholding a Colorado law prohibiting sidewalk counseling within 100 feet of any healthcare facility, including abortion clinics); *Casey*, 505 U.S. at 844–46 (reaffirming *Roe*'s essential holding and upholding several provisions of the Pennsylvania Abortion Control Act); *Rust v. Sullivan*, 500 U.S. 173, 177–78 (1991) (upholding federal regulations prohibiting family planning clinics receiving Title X funding from providing counseling regarding abortion or referring clients for abortions); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 499–501 (1989) (upholding a Missouri law denying state funding for and prohibiting state employee participation in performing or providing counseling regarding abortions); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986) (invalidating a Pennsylvania law requiring informed consent on fetal development, abortion alternatives, and the medical risks of abortion; reporting of abortions; and that the physician use the abortion method most likely to preserve the life of a viable child); *City of Akron*, 462 U.S. at 452 (invalidating a range of abortion restrictions); *H.L. v. Matheson*, 450 U.S. 398, 413 (1981) (upholding a Utah parental notification requirement); *Harris v. McRae*, 448 U.S. 297, 326 (1980) (upholding the Hyde Amendment, which strictly limits the use of federal funds for abortions); *Bellotti v. Baird*, 443 U.S. 622, 651 (1979) (plurality opinion) (invalidating a Massachusetts parental consent requirement); *Colautti v. Franklin*, 439 U.S. 379, 401 (1979) (invalidating a Pennsylvania law requiring doctors to protect the life of a fetus that “may be viable” both during and after an abortion); *Maher v. Roe*, 432 U.S. 464, 474 (1977) (holding that a state has “authority . . . to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds”); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 84 (1976) (invalidating a range of abortion restrictions).

³³ E.g., *Casey*, 505 U.S. at 927 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (writing that the Court “correctly applied” principles of privacy rights in *Roe v. Wade*); *id.* at 944 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (“We believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases.”); *id.* at 999 (Scalia, J., concurring in the judgment in part and dissenting in part) (“[T]he Justices should do what is *legally*

Court's disposition of the cases. For example, throughout the 1980s, the Court entertained a series of cases that implicated *Roe* or openly challenged it.³⁴ Although some members of the Court insisted that *Roe* was wrongly decided and should be overruled,³⁵ a majority of the Court, nodding to *stare decisis*, avoided overruling a decision so recently rendered.³⁶ To do so, one Justice fretted, would undermine the predictability and legitimacy of the Court's pronouncements.³⁷

By 1992, a new challenge, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, seemed poised to overrule *Roe*. In a surprising turn, however, the *Casey* Court declined to do so.³⁸ Guided by "principles of institutional integrity, and the rule of *stare decisis*," the Court instead reaffirmed *Roe*'s "essential holding" that there is an individual right to terminate a pregnancy.³⁹

Because it explicitly declined to overrule *Roe*, *Casey* is widely credited with "saving" the 1973 decision.⁴⁰ But even as the *Casey* plurality professed fidelity to *stare decisis* and rejected claims that *Roe* was improperly reasoned, it did not leave *Roe* intact. The *Casey* joint opinion abandoned *Roe*'s trimester framework, decrying its "elaborate but rigid construct" as "unnecessary" and, more troublingly, an undue limit on "the State's permissible exercise of its powers."⁴¹ The *Casey* plurality also abandoned strict scrutiny as the appropriate standard of review for

right by asking two questions: (1) Was *Roe* correctly decided? (2) Has *Roe* succeeded in producing a settled body of law? If the answer to both questions is no, *Roe* should undoubtedly be overruled.").

³⁴ See, e.g., *Webster*, 492 U.S. at 521 (plurality opinion); *Thornburgh*, 476 U.S. at 759; *City of Akron*, 462 U.S. at 420.

³⁵ See, e.g., *Webster*, 492 U.S. at 532 (Scalia, J., concurring in part and concurring in the judgment) (calling on the Court to "more explicitly" overrule *Roe v. Wade*); *Thornburgh*, 476 U.S. at 788 (White, J., dissenting) ("In my view, the time has come to recognize that *Roe v. Wade* . . . 'depart[s] from a proper understanding' of the Constitution and to overrule it." (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557 (1985))).

³⁶ See, e.g., *City of Akron*, 462 U.S. at 420 ("We respect [the principle of *stare decisis*] today, and reaffirm *Roe v. Wade*.").

³⁷ See *Webster*, 492 U.S. at 559–60 (Blackmun, J., concurring in part and dissenting in part) ("By refusing to explain or to justify its proposed revolutionary revision in the law of abortion, and by refusing to abide not only by our precedents, but also by our canons for reconsidering those precedents, the plurality invites charges of cowardice and illegitimacy to [the Court's] door.").

³⁸ *Casey*, 505 U.S. at 845–46.

³⁹ *Id.*

⁴⁰ See, e.g., RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 117 (1996) (noting that *Casey* "saved" *Roe*); JOHN PAUL STEVENS, *THE MAKING OF A JUSTICE: REFLECTIONS ON MY FIRST 94 YEARS* 485 (2019) (noting that Justice Kennedy was "one of the three decisive votes that had saved *Roe v. Wade* from being overruled in *Planned Parenthood v. Casey*"); Nadine Strossen & Ronald K.L. Collins, *The Future of an Illusion: Reconstituting Planned Parenthood v. Casey*, 16 CONST. COMMENT. 587, 590 (1999) (describing *Casey* as having "fostered a 'Roe was saved' public mindset"); Mary-Rose Papandrea, *Sex and Religion: Unholy Bedfellows*, 116 MICH. L. REV. 859, 874 (2018) (book review) (noting that, in *Casey*, Justice Kennedy had joined Justices O'Connor and Souter to "save" *Roe*).

⁴¹ *Casey*, 505 U.S. at 872 (plurality opinion).

abortion regulations, in favor of the more permissive “undue burden” standard.⁴² The profundity of *Casey*’s alterations did not go unnoticed. As Chief Justice Rehnquist archly observed in dissent, the joint opinion “retains the outer shell of *Roe v. Wade* but beats a wholesale retreat from the substance of that case.”⁴³

In deference to *stare decisis*, *Casey* declined to explicitly overrule *Roe v. Wade*.⁴⁴ But in truth, *Casey*’s fidelity to *Roe* was selective — the joint opinion deferred to certain aspects of *Roe*, while abandoning others.⁴⁵ And in so doing, *Casey* dramatically altered the abortion landscape, allowing states broader authority to slowly strangle access to abortion via a steady stream of restrictions and regulations.⁴⁶ On this account, declining to overrule *Roe* was a mere formality. In practical effect, by authorizing states to legislate abortion rights out of existence, *Casey* overruled much of *Roe*’s substance, substantially curtailing access to abortion for most women.⁴⁷

But if *Casey* effectively overruled *Roe*, it also made clear why, for some, *actually* overruling the 1973 decision remained urgent and necessary. For abortion opponents, it was not enough to gut *Roe* and sharply

⁴² *Id.* at 874; *see also id.* at 929–34 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

⁴³ *Id.* at 944 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (citation omitted).

⁴⁴ *Id.* at 853 (majority opinion) (“While we appreciate the weight of the arguments made on behalf of the State in the cases before us, arguments which in their ultimate formulation conclude that *Roe* should be overruled, the reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*.”).

⁴⁵ *Compare id.* at 871 (plurality opinion) (“The woman’s right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce.”), *with id.* at 873 (“We reject the trimester framework, which we do not consider to be part of the essential holding of *Roe*.”). For further discussion of *Casey*’s impact on *Roe*, *see* CAROL SANGER, ABOUT ABORTION: TERMINATING PREGNANCY IN TWENTY-FIRST-CENTURY AMERICA 31–34 (2017).

⁴⁶ *See* Serena Mayeri, Opinion, *How Abortion Rights Will Die a Death by 1,000 Cuts*, N.Y. TIMES (Aug. 30, 2018), <https://www.nytimes.com/2018/08/30/opinion/brett-kavanaugh-abortion-rights-roe-casey.html> [<https://perma.cc/BF7Z-2T7V>] (“As abortion-rights leaders feared, *Casey*’s undue burden standard allowed more restrictions than *Roe*. Many states have enacted laws that drastically limit access to reproductive health care, particularly for poor, rural and immigrant women who cannot afford to miss work and make repeated trips to clinics hundreds of miles away.”).

⁴⁷ *See id.*; *see also* Brief of Amici Curiae Law Professors Melissa Murray, I. Glenn Cohen and B. Jessie Hill in Support of Petitioners at 12–13, *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (No. 15-274); *Induced Abortion in the United States*, GUTTMACHER INST. (Sept. 2019), <https://www.guttmacher.org/fact-sheet/induced-abortion-united-states> [<https://perma.cc/D83S-CZP7>] (calculating that approximately forty million women, or fifty-eight percent of American women of reproductive age, live in states that are considered hostile to abortion rights); Dan Keating, Tim Meko & Danielle Rindler, *Abortion Access Is More Difficult for Women in Poverty*, WASH. POST (July 10, 2019), <https://www.washingtonpost.com/national/2019/07/10/abortion-access-is-more-difficult-women-poverty> [<https://perma.cc/4G36-YUUT>].

limit abortion access. *Casey*'s failure to formally overrule *Roe* left the 1973 decision standing as a precedent — and in so doing, further entrenched the view that the Constitution recognizes and protects a right to choose an abortion.⁴⁸ In this regard, for abortion opponents, *Casey* was both a practical victory and an incalculable loss. In a legal tradition where respect for precedent looms large, functional victories are hollow and inadequate. *Stare decisis* does not simply demand respect for precedent as settled law; “by giving the veneer of respectability”⁴⁹ to the underlying precedent, it fuels the view that the precedent is properly reasoned and correct.

With this dynamic in mind, it is no surprise that when disputes over abortion rights come before the Court, they often turn on whether and how to apply extant precedent — and more particularly, whether and how to protect *Roe* and other precedents recognizing a right to abortion. *Gonzales v. Carhart* is illustrative of this dynamic. There, the Court took up a challenge to the federal Partial-Birth Abortion Ban Act of 2003⁵⁰ (PBABA), which prohibited the performance of certain second-trimester abortions.⁵¹ Critically, in enacting the challenged law, Congress explicitly understood itself to be testing the limits of precedent and *stare decisis*. Just three years earlier, the Court, in *Stenberg v. Carhart*,⁵² struck down a similar Nebraska statute partly because the law lacked a health exception that would allow the use of the prohibited abortion method where necessary to preserve the woman's health.⁵³ In enacting the federal ban, Congress deliberately excluded a health exception, thus provoking a direct challenge to the Court's precedents.⁵⁴

⁴⁸ The statements of those in the antiabortion movement express the concern that leaving *Roe* undisturbed as a formal matter lends credence to the view that abortion is a constitutionally protected right. For example, the United States Conference of Catholic Bishops notes on its website that many Americans view *Roe* “as being immutable, permanent, ‘settled law’” — “elevated . . . to the stature of ‘freedom of speech,’ ‘trial by jury’ and other bedrock American principles.” Susan E. Wills, *Ten Legal Reasons to Reject Roe*, U.S. CONF. CATH. BISHOPS, <http://www.usccb.org/issues-and-action/human-life-and-dignity/abortion/ten-legal-reasons-to-reject-roe.cfm> [<https://perma.cc/BF2H-XNSE>]; see also *Americans United for Life Observes that Roe v. Wade Is Not Settled Law nor Is Abortion Safe for Women*, AMS. UNITED FOR LIFE (Mar. 21, 2017), <https://aui.org/2017/03/21/americans-united-for-life-observes-that-roe-v-wade-is-not-settled-law-nor-is-abortion-safe-for-women> [<https://perma.cc/ACS9-M8AZ>] (challenging the idea of *Roe* as settled law).

⁴⁹ *Gamble v. United States*, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring).

⁵⁰ 18 U.S.C. § 1531.

⁵¹ See *Gonzales v. Carhart*, 550 U.S. 124, 132–36 (2007).

⁵² 530 U.S. 914 (2000).

⁵³ *Id.* at 929–30.

⁵⁴ Indeed, in its statement of findings, Congress noted that although the *Stenberg* Court had been “required to accept the very questionable findings issued by the district court judge,” Congress was “not bound to accept the same factual findings.” See Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2(7)–(8), 117 Stat. 1201, 1202 (2003). Instead, Congress found that “[a] moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion . . . is a gruesome and inhumane procedure that is never medically necessary and should be prohibited.” *Id.* § 2(1), 117 Stat. at 1201.

In *Gonzales*, a narrow 5–4 majority rejected two facial challenges to the PBABA⁵⁵ and, in so doing, all but ignored the 2000 decision in *Stenberg* and instead offered a narrow reading of *Casey*. Writing for a majority that included Chief Justice Roberts and Justices Scalia, Thomas, and Alito, Justice Kennedy distinguished the facts of *Stenberg* from those in *Gonzales*, thereby diminishing *Stenberg*'s relevance to the Court's determinations.⁵⁶ And though he "assume[d]" that *Casey* controlled,⁵⁷ Justice Kennedy explicitly noted that the *Casey* joint opinion "did not find support from all those who join the instant opinion."⁵⁸ Instead, Justice Kennedy and his fragile majority focused narrowly on one aspect of *Casey* — the joint opinion's conclusion that "the government has a legitimate and substantial interest in preserving and promoting fetal life."⁵⁹ This premise, which Justice Kennedy deemed "central" to the joint opinion's holding, "would be repudiated" were the Court to invalidate the PBABA.⁶⁰ To this end, in considering the challenged statute, Justice Kennedy asserted that the federal abortion ban could be justified in part as reflecting the government's interest in protecting women from the regret and emotional consequences they may suffer in the wake of choosing an abortion.⁶¹

As with *Casey*, *Gonzales* underscores the degree to which concerns about stare decisis and, particularly, deference to *Roe* have shadowed and shaped the Court's abortion jurisprudence. The *Gonzales* majority pantomimed respect for precedent by "assum[ing]" that *Casey* controlled.⁶² At the same time, however, it went to broad lengths to distinguish — and neuter — *Stenberg*'s precedential impact, while reducing *Casey* to a narrow endorsement of the state's interest in protecting fetal life. But even as the majority's disposition of *Gonzales* focused on the weight of *Stenberg* and *Casey*, its efforts to narrow the scope of these applicable precedents obviously implicated *Roe* — a point that Justice Ginsburg raised in a vigorous dissent.

Writing on behalf of herself and Justices Stevens, Souter, and Breyer,⁶³ Justice Ginsburg made clear that the majority's casual regard for precedent had broad implications for *Roe* and the abortion right. Despite its nod to stare decisis, the majority's decision was, in Justice Ginsburg's view, an "alarming"⁶⁴ "effort to chip away at a right declared

⁵⁵ *Gonzales*, 550 U.S. at 168.

⁵⁶ *See id.* at 151–53.

⁵⁷ *Id.* at 146.

⁵⁸ *Id.* at 145.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 159–60.

⁶² *Id.* at 146.

⁶³ *Id.* at 169 (Ginsburg, J., dissenting).

⁶⁴ *Id.* at 170.

again and again by this Court.”⁶⁵ Not only did the decision “refuse[] to take *Casey* and *Stenberg* seriously,”⁶⁶ “blur[ring] the line, firmly drawn in *Casey*, between previability and postviability abortions,”⁶⁷ but the Court also had, “for the first time since *Roe*, . . . blesse[d] a prohibition with no exception safeguarding a woman’s health.”⁶⁸ And perhaps most troubling of all, the majority’s uncritical acceptance of the narrative of “abortion regret” reflected its prioritization of what Justice Ginsburg termed “an antiabortion shibboleth” over medical evidence,⁶⁹ creating an “undisguised conflict with *Stenberg*.”⁷⁰

Justice Ginsburg’s point was clear. Although the majority in *Gonzales* did not confront *Roe* directly, as the *Casey* plurality had done, it nonetheless did not miss an opportunity to reflect upon — and revisit — the question of whether *Roe* was properly decided. And to the extent that *stare decisis* limited the majority’s predisposition to cast *Roe* as a constitutional impropriety, *Casey* furnished the template for achieving a similar practical result. In lieu of explicitly overruling an abortion precedent, the Court could simply distinguish or narrow past decisions, entirely undermining their force and scope.

And even in cases like *Gonzales*, where there was no direct conflict with *Roe*, the strategy of nodding to precedent, while simultaneously limiting it, could also incrementally lay a foundation for eventually overruling *Roe* and reimagining a more cabined understanding of abortion rights. In this regard, every abortion challenge — from *Casey* forward — is both a test of the Court’s commitment to its precedents and a fresh opportunity to utterly reimagine those precedents. And all of this ineluctably points to *Roe*. At bottom, the perfunctory performance of *stare decisis* in which the Court engages in every abortion challenge is one that leads inexorably to a single, preordained outcome — a final confrontation with *Roe* and the vexed question of whether the Court will overrule its most controversial decision.

Accordingly, every abortion-related challenge that the Court faces is a test of the Court’s commitment to *stare decisis* and, indirectly, its stomach for preserving *Roe*. And this dynamic can be glimpsed in the Court’s most recent foray into the abortion debate: *June Medical Services*.

⁶⁵ *Id.* at 191.

⁶⁶ *Id.* at 170.

⁶⁷ *Id.* at 171.

⁶⁸ *Id.*

⁶⁹ *Id.* at 183.

⁷⁰ *Id.* at 179.

II. *JUNE MEDICAL SERVICES V. RUSSO*

From the start, *June Medical Services v. Russo* raised questions of stare decisis. The case involved a challenge to Louisiana’s Act 620, a 2014 law that required physicians providing abortions to secure admitting privileges at a local hospital.⁷¹ That *June Medical Services* was even before the U.S. Supreme Court raised eyebrows. Just three years earlier, in *Whole Woman’s Health v. Hellerstedt*, the Court struck down, in a 5–3 decision, a virtually identical Texas admitting privileges law.⁷² As the Court in that case explained, under the undue burden standard announced in *Planned Parenthood v. Casey*, an abortion restriction could be upheld only if it did not have the “purpose or effect” of “plac[ing] a substantial obstacle in the path of a woman seeking” a pre-viability abortion.⁷³ To determine whether an abortion restriction was a substantial obstacle, courts were required to “consider the burdens a law imposes on abortion access together with the benefits those laws confer.”⁷⁴

These instructions were intended both to clarify *Casey*’s amorphous “substantial obstacle” language⁷⁵ and to inject more rigor into the calculus in the wake of *Gonzales*. On this logic, courts could not simply decide what obstacles were so substantial as to be impermissible and what obstacles fell within constitutional limits. Instead, lower courts were obliged to weigh the benefits that the state hoped to achieve through the legislation against the burdens that the legislation imposed.⁷⁶ If the burdens exceeded the likely benefits, then the challenged law posed a substantial obstacle under *Casey*.⁷⁷

Relying on *Whole Woman’s Health*, a Louisiana federal district court weighed the purported benefits against the burdens imposed and found that, if permitted to go into effect, Act 620 would leave Louisiana with only one physician available to perform abortions in the early stages of pregnancy and none available to perform abortions between seventeen and twenty-one weeks of pregnancy.⁷⁸ Although the state claimed that

⁷¹ Unsafe Abortion Protection Act, LA. STAT. ANN. § 40:1061.10(A)(2)(a) (2020), *invalidated by June Med. Servs.*, 140 S. Ct. 2103.

⁷² *See June Med. Servs.*, 140 S. Ct. at 2112 (plurality opinion) (“In this case, we consider the constitutionality of a Louisiana statute, Act 620, that is almost word-for-word identical to Texas’ admitting-privileges law.”).

⁷³ *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016) (emphasis omitted) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992) (plurality opinion)).

⁷⁴ *Id.* at 2309.

⁷⁵ *Casey*, 505 U.S. at 877 (plurality opinion) (“A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”).

⁷⁶ *Whole Woman’s Health*, 136 S. Ct. at 2309.

⁷⁷ *See id.* at 2300.

⁷⁸ *June Med. Servs. LLC v. Kliebert*, 250 F. Supp. 3d 27, 80, 82 (M.D. La. 2017).

the law was intended to ensure that physicians providing abortions had proper credentials, thereby protecting women's health, the court concluded that the burden on abortion access grossly outweighed the limited benefits that the challenged law achieved.⁷⁹ Accordingly, the district court enjoined Louisiana from implementing the admitting privileges requirement on the ground that it unconstitutionally imposed an "undue burden" on a woman's right to an abortion.⁸⁰

The U.S. Court of Appeals for the Fifth Circuit, however, reversed that ruling.⁸¹ The court conceded that it was "bound to apply [*Whole Woman's Health*]"⁸² and weigh the benefits of Act 620 against the burdens imposed,⁸³ but it maintained that "the facts in the instant case are remarkably different" from *Whole Woman's Health*.⁸⁴ According to the court, "[u]nlike Texas, Louisiana presents some evidence of a minimal benefit" and "far more detailed evidence of Act 620's impact on access to abortion."⁸⁵ "In light of the more developed record," the Fifth Circuit then purported to weigh the benefits and burdens and concluded that "[i]n contrast to Texas's H.B. 2, Louisiana's Act 620 does not impose a substantial burden on a large fraction of women," thus allowing the state to enforce the challenged provision.⁸⁶ The full Fifth Circuit, in a 9–6 vote, denied a rehearing en banc.⁸⁷ In October 2019, the Supreme Court granted the challengers' petition for certiorari, as well as the state's related petition for review.⁸⁸

That the Court granted review in *June Medical Services* was perhaps surprising, given that it had considered the constitutionality of an almost identical statute only a few years earlier.⁸⁹ For some, the fact that four votes could be mustered to grant certiorari under these unusual circumstances suggested that one wing of the Court was especially eager

⁷⁹ *Id.* at 89.

⁸⁰ *Id.* at 88–90.

⁸¹ *June Med. Servs. L.L.C. v. Gee*, 905 F.3d 787, 791 (5th Cir. 2018).

⁸² *Id.* at 815.

⁸³ *Id.* at 803.

⁸⁴ *Id.* at 791.

⁸⁵ *Id.* at 805.

⁸⁶ *Id.*

⁸⁷ *June Med. Servs., L.L.C. v. Gee*, 913 F.3d 573, 573 (5th Cir. 2019) (per curiam).

⁸⁸ *Gee v. June Med. Servs. L.L.C.*, 140 S. Ct. 35 (2019) (mem.).

⁸⁹ See, e.g., Linda Greenhouse, Opinion, *A Supreme Court Abortion Case that Tests the Court Itself*, N.Y. TIMES (Oct. 10, 2019), <https://www.nytimes.com/2019/10/10/opinion/supreme-court-abortion.html> [<https://perma.cc/H8BP-ARQ7>] ("The challenge for Louisiana is that the court answered precisely that question three years ago in *Whole Woman's Health v. Hellerstedt*, declaring that an identical law in Texas imposed an unconstitutional burden on access to abortion."); Jonathan B. Miller, *Symposium: June Medical Should Be Summarily Reversed*, SCOTUSBLOG (Mar. 7, 2019, 11:04 AM), <https://www.scotusblog.com/2019/03/symposium-june-medical-should-be-summarily-reversed> [<https://perma.cc/T6NZ-BPFQ>] (arguing that the Court should have summarily reversed *June Medical Services* given Act 620's similarities to the restrictions at issue in *Whole Woman's Health*).

to revisit the question of abortion rights.⁹⁰ Regardless of who had voted to grant certiorari, the mere fact of Court review was “likely to yield an unusually telling decision, reshaping the constitutional principles governing abortion rights.”⁹¹

On review, the Court considered whether the challenged admitting privileges law was an undue burden on the abortion right.⁹² Writing for himself and Justices Ginsburg, Sotomayor, and Kagan, Justice Breyer, the author of *Whole Woman’s Health*, applied “the constitutional standards set forth in our earlier abortion-related cases, and in particular in *Casey* and *Whole Woman’s Health*.”⁹³ As the plurality observed, “a statute which, while furthering [a] valid state interest has the effect of placing a substantial obstacle in the path of a woman’s choice cannot be considered a permissible means of serving its legitimate ends.”⁹⁴ On this logic, the plurality maintained that “[u]nnecessary health regulations’ impose an unconstitutional ‘undue burden’ if they have ‘the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion.’”⁹⁵ In determining whether a challenged abortion restriction constitutes a substantial obstacle, “courts must ‘consider the burdens a law imposes on abortion access together with the benefits those laws confer.’”⁹⁶ Such an inquiry requires courts to review legislative factfinding “under a deferential standard,”⁹⁷ but, as the plurality made clear, deference does not mean an abdication of the judicial role. Instead, the plurality cautioned, “the courts ‘retai[n] an independent

⁹⁰ See, e.g., Melissa Murray, *Symposium: Party of Five? Setting the Table for Roe v. Wade*, SCOTUSBLOG (July 24, 2019, 3:18 PM), <https://www.scotusblog.com/2019/07/symposium-party-of-five-setting-the-table-for-ro-v-wade> [<https://perma.cc/MSH8-3GJU>]; David G. Savage, *A Supreme Court Retreat from Roe vs. Wade Could Begin This Week with Louisiana Abortion Case*, L.A. TIMES (Mar. 2, 2020, 4:00 AM), <https://www.latimes.com/politics/story/2020-03-02/supreme-court-retreat-from-ro-v-wade-could-begin-this-week-with-louisiana-abortion-case> [<https://perma.cc/HGU7-X9BT>] (“For the first time, the court appears to have a majority of conservative justices inclined to sharply limit abortion rights or overturn *Roe vs. Wade* entirely.”).

⁹¹ Adam Liptak, *Supreme Court to Hear Abortion Case from Louisiana*, N.Y. TIMES (June 29, 2020), <https://www.nytimes.com/2019/10/04/us/politics/supreme-court-abortion-louisiana.html> [<https://perma.cc/N2LS-QF2T>].

⁹² *June Med. Servs.*, 140 S. Ct. at 2120 (plurality opinion). The Court also considered whether the abortion providers, as opposed to patients, were the appropriate parties to challenge the Louisiana law. *Id.* at 2117–20. On that point, the plurality concluded that Louisiana had “waived [the standing] argument,” *id.* at 2117, and that “a long line of well-established precedents foreclose[d] [this] belated challenge to the plaintiffs’ standing,” *id.* at 2120.

⁹³ *Id.* at 2120.

⁹⁴ *Id.* (alteration in original) (quoting *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016)).

⁹⁵ *Id.* (alteration in original) (emphasis omitted) (quoting *Whole Woman’s Health*, 136 S. Ct. at 2309).

⁹⁶ *Id.* (quoting *Whole Woman’s Health*, 136 S. Ct. at 2309).

⁹⁷ *Id.* (quoting *Whole Woman’s Health*, 136 S. Ct. at 2310).

constitutional duty to review factual findings where constitutional rights are at stake.”⁹⁸

In view of *Casey* and *Whole Woman’s Health*, Justice Breyer then carefully weighed the purported benefits of Act 620 against the burdens that its enforcement would entail, concluding that the district court’s determination that Act 620 “would place substantial obstacles in the path of women seeking an abortion in Louisiana”⁹⁹ while providing “no significant health benefits”¹⁰⁰ was not “clearly erroneous.”¹⁰¹ In “pos[ing] a ‘substantial obstacle’ to women seeking an abortion,” the plurality concluded, the challenged law “violate[d] the Constitution.”¹⁰²

Although Chief Justice Roberts joined in the Court’s judgment invalidating the Louisiana admitting privileges law, he did not join the plurality opinion, choosing instead to write separately.¹⁰³ And although he wrote only for himself, Chief Justice Roberts’s concurrence carries particular weight. As the narrowest opinion supporting the judgment, Chief Justice Roberts’s concurrence will be regarded as the controlling opinion.¹⁰⁴

And while Chief Justice Roberts joined in the judgment,¹⁰⁵ his concurrence was meaningfully different from the plurality opinion. Almost immediately, the Chief Justice made clear that, even as he joined the plurality to strike down the Louisiana law, his misgivings about abortion rights had not abated — he specifically noted that he “joined the dissent in *Whole Woman’s Health* and continue[d] to believe that the case was wrongly decided.”¹⁰⁶ But despite his skepticism of abortion rights more generally, and *Whole Woman’s Health* in particular, other values counseled in favor of invalidating Act 620. As Chief Justice Roberts explained, “[t]he legal doctrine of *stare decisis* requires us, absent special circumstances, to treat like cases alike.”¹⁰⁷ Because the Louisiana law imposed “as severe” a burden on abortion access as did the Texas law

⁹⁸ *Id.* (alteration in original) (quoting *Whole Woman’s Health*, 136 S. Ct. at 2310 (emphasis omitted)).

⁹⁹ *Id.* at 2130.

¹⁰⁰ *Id.* at 2131 (quoting *June Med. Servs. LLC v. Kliebert*, 250 F. Supp. 3d, 27, 86 (M.D. La. 2017)).

¹⁰¹ *Id.*

¹⁰² *Id.* at 2132.

¹⁰³ *Id.* at 2133 (Roberts, C.J., concurring in the judgment).

¹⁰⁴ Under *Marks v. United States*, 430 U.S. 188 (1977), “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.’” *Id.* at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)); see also *Ramos v. Louisiana*, 140 S. Ct. 1390, 1403 (2020) (plurality opinion) (discussing the *Marks* rule).

¹⁰⁵ *June Med. Servs.*, 140 S. Ct. at 2133 (Roberts, C.J., concurring in the judgment).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 2134.

invalidated in *Whole Woman's Health*, the Chief Justice concluded that it “cannot stand under our precedents.”¹⁰⁸

On this account, it would seem that stare decisis carried the day, leading a most recalcitrant Chief Justice to a decision that he otherwise would have avoided. But even as Chief Justice Roberts extolled the virtues of stare decisis — promoting “reliance on judicial decisions,” the “evenhanded, predictable, and consistent development of legal principles,” and the legitimacy of the judicial process¹⁰⁹ — he also acknowledged its limits. Stare decisis is not simply “a mechanical formula of adherence to the latest decision.”¹¹⁰ To the contrary, “[s]tare decisis principles . . . determine how we handle a decision that itself departed from the cases that came before it.”¹¹¹

On this point, the Chief Justice’s antipathy for *Whole Woman’s Health* — and the precariousness of his commitment to stare decisis — came into sharp focus. If fidelity to precedent demanded his vote to invalidate Act 620, it also demanded interrogating whether *Whole Woman’s Health*, the Court’s most recent abortion decision, had been faithful to the Court’s earlier abortion decisions, particularly *Planned Parenthood v. Casey*.

According to Chief Justice Roberts, although the majority in *Whole Woman’s Health* “faithfully recit[ed]” *Casey*’s substantial obstacle standard,¹¹² the decision to invalidate the Texas admitting privileges law also had gone beyond *Casey* to “require[] that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer.”¹¹³ But “[n]othing about *Casey* suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts.”¹¹⁴ As Chief Justice Roberts explained, if *Casey* required any consideration of the benefits of an abortion regulation, it was only in establishing the “threshold requirement that the State have a ‘legitimate purpose’ and that the law be ‘reasonably related to that goal.’”¹¹⁵

On this telling, *Whole Woman’s Health* was precedential only to the extent that it reiterated *Casey*’s substantial obstacle standard.¹¹⁶ By contrast, its directive to reviewing courts to weigh the benefits of an abortion regulation against its burdens was, in Chief Justice Roberts’s

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).

¹¹⁰ *Id.* at 2135 (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)).

¹¹¹ *Id.* at 2134.

¹¹² *Id.* at 2135.

¹¹³ *Id.* (quoting *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016)).

¹¹⁴ *Id.* at 2136.

¹¹⁵ *Id.* at 2138 (first quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882 (1992) (plurality opinion); and then quoting *id.* at 878).

¹¹⁶ See *id.* at 2139 (noting that *Casey*’s “substantial obstacle” test was a sufficient basis for the decision in *Whole Woman’s Health*).

view, a distortion of *Casey*'s logic and holding.¹¹⁷ Accordingly, if stare decisis dictated the outcome in *June Medical Services*, the precedent to be followed was not the full decision in *Whole Woman's Health*, as the plurality maintained, but rather only those aspects of *Whole Woman's Health* that reiterated the more limited standard first identified in *Casey*.

To underscore the point that fidelity to precedent demanded only consideration of substantial obstacles, rather than the weighing of benefits and burdens, Chief Justice Roberts cataloged the restrictions challenged in *Casey*,¹¹⁸ all but one of which were upheld on the ground that they did not pose a substantial obstacle to a woman seeking an abortion.¹¹⁹ More importantly, in reviewing the challenged restrictions, Chief Justice Roberts noted that the *Casey* plurality considered only "whether there was a substantial burden, not whether benefits outweighed burdens,"¹²⁰ including in its consideration of a twenty-four-hour waiting period that the lower court found "did 'not further the state interest in maternal health.'"¹²¹ As a result, Chief Justice Roberts concluded that "[t]he upshot of *Casey* is clear: The several restrictions that did not impose a substantial obstacle were constitutional, while the restriction that did impose a substantial obstacle was unconstitutional."¹²²

Having clarified that *Whole Woman's Health* was controlling precedent only insofar as it affirmed the substantial obstacle standard announced in *Casey* — and rejecting any benefits-burdens balancing test as beyond the scope of *Casey* — the Chief Justice turned to whether Act 620 was an unconstitutional substantial obstacle. Noting the district court's findings "that the Louisiana law would 'result in a drastic reduction in the number and geographic distribution of abortion providers'" and "longer waiting times for appointments, increased crowding and increased associated health risk,"¹²³ the Chief Justice thus concluded the challenged law was an unconstitutional substantial obstacle.¹²⁴

In many ways, Chief Justice Roberts's approach to precedent recalls Justice Scalia's partial concurrence in *Webster v. Reproductive Health*

¹¹⁷ See *id.* at 2136; see also *id.* at 2139 ("In neither [*June Medical Services* nor *Whole Woman's Health*], nor in *Casey* itself, was there call for consideration of a regulation's benefits, and nothing in *Casey* commands such consideration.")

¹¹⁸ See *id.* at 2136–37.

¹¹⁹ *Id.* at 2137 (noting that the spousal notification requirement was the only restriction found to be unconstitutional in *Casey*).

¹²⁰ *Id.*

¹²¹ *Id.* at 2136 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 886 (1992) (plurality opinion)).

¹²² *Id.* at 2138.

¹²³ *Id.* at 2140 (first quoting *June Med. Servs. LLC v. Kliebert*, 250 F. Supp. 3d 27, 87 (M.D. La. 2017); and then quoting *id.* at 81).

¹²⁴ See *id.* at 2134.

Servics,¹²⁵ a pre-*Casey* challenge to abortion funding restrictions in which the Court declined to explicitly overrule *Roe v. Wade*.¹²⁶ There, Justice Scalia outlined the four options before the Court when it confronted past precedent — “to reaffirm [the precedent], to overrule it explicitly, to overrule it *sub silentio*, or to avoid the question.”¹²⁷ According to Justice Scalia, the *Webster* Court took the “least responsible” path, avoiding the question of *Roe* entirely.¹²⁸ By contrast, in *June Medical Services*, Chief Justice Roberts took a dual-pronged approach — reaffirming *Whole Woman’s Health* for the purpose of distinguishing it and, in the process, implicitly overruling it.

Therein lies the irony of Chief Justice Roberts’s approach to precedent in *June Medical Services*. Chief Justice Roberts invoked stare decisis as a means of ensuring judicial modesty and restraint, noting that “[a]dherence to precedent is necessary to ‘avoid an arbitrary discretion in the courts.’”¹²⁹ Yet in the name of stare decisis and restraint, Chief Justice Roberts at once adhered to *Whole Woman’s Health* and simultaneously denounced the decision as a departure from past precedent (*Casey*). In this way, Chief Justice Roberts’s respect for precedent depended entirely on identifying those aspects of past decisions that he wished to follow and those that he did not. Indeed, Chief Justice Roberts’s version of stare decisis was so selective that one of the *June Medical Services* dissenters was compelled to name it. In a dissenting opinion, Justice Alito noted that, even as the Chief Justice “stresses the importance of *stare decisis* . . . he votes to overrule *Whole Woman’s Health* insofar as it changed the *Casey* test.”¹³⁰

But the issue is not simply that Chief Justice Roberts believes that *Casey* alone prescribes the appropriate standard for judging abortion restrictions;¹³¹ it is that in following only those aspects of *Whole Woman’s Health* that, in his view, cohere with *Casey*, Chief Justice

¹²⁵ 492 U.S. 490 (1989).

¹²⁶ See *id.* at 521 (plurality opinion) (“This case therefore affords us no occasion to revisit the holding of *Roe* To the extent indicated in our opinion, we would modify and narrow *Roe* and succeeding cases.”).

¹²⁷ *Id.* at 537 (Scalia, J., concurring in part and concurring in the judgment).

¹²⁸ *Id.*

¹²⁹ *June Med. Servs.*, 140 S. Ct. at 2134 (Roberts, C.J., concurring in the judgment) (quoting THE FEDERALIST NO. 78, at 470 (Alexander Hamilton) (Clinton Rossiter ed., 2003)).

¹³⁰ *Id.* at 2153 (Alito, J., dissenting).

¹³¹ See *id.* at 2138 (Roberts, C.J., concurring in the judgment) (“So long as that showing [that the law has a legitimate purpose and a reasonable relation to that goal] is made, the only question for a court is whether a law has the ‘effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.’” (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (plurality opinion))); see also *id.* at 2179 (Gorsuch, J., dissenting) (“[A]s today’s concurrence recognizes, the legal standard the plurality applies when it comes to admitting privileges for abortion clinics turns out to be exactly the sort of all-things-considered balancing of benefits and burdens this Court has long rejected.”).

Roberts transformed the meaning of *Whole Woman's Health* — and indeed, what it means to “follow” precedent. In a separate dissent, Justice Gorsuch noted precisely these incongruities in Chief Justice Roberts’s position.¹³² As Justice Gorsuch explained, though Chief Justice Roberts insisted that he was following *Whole Woman's Health*, Chief Justice Roberts’s claims to respect precedent were wholly unfounded in light of his rejection of the benefits-burdens balancing test.¹³³ As Justice Gorsuch archly underscored, “whatever else respect for *stare decisis* might suggest, it cannot demand allegiance to a nonexistent ruling inconsistent with the approach actually taken by the Court.”¹³⁴

Taken together, the dissents by Justices Alito and Gorsuch took a dim view of Chief Justice Roberts’s approach to *stare decisis*. Both dissents argued that Chief Justice Roberts’s characterization of *Whole Woman's Health* was a legal fiction — a remade ruling utterly inconsistent with the actual holding in *Whole Woman's Health*.¹³⁵ And they were correct. Although Chief Justice Roberts professed allegiance to *stare decisis*, in fact, the vision of *Whole Woman's Health* that he viewed as controlling bears little resemblance to the 2016 decision. In Chief Justice Roberts’s recasting, *Whole Woman's Health* became the legal version of Dorian Gray’s portrait¹³⁶ — aging backwards until it was recognizable only as a re-rendering of *Casey*.

This is all to say that, in *June Medical Services*, allegiance to *stare decisis* yielded a strikingly discordant outcome. In the name of preserving and following precedent, Chief Justice Roberts purported to maintain *Whole Woman's Health* but utterly transformed the case’s meaning. When all was said and done, *Whole Woman's Health*, which was once heralded as providing robust protections for abortion rights,¹³⁷ was left desiccated — a point that did not go unnoticed by other members of the *June Medical Services* Court. Surveying the jurisprudential landscape, dissenting Justice Kavanaugh observed that “[t]oday, five Members of the Court reject the *Whole Woman's Health* cost-benefit standard.”¹³⁸ In this regard, Chief Justice Roberts’s efforts to follow precedent led,

¹³² See *id.* at 2180 (Gorsuch, J., dissenting) (“Start with the concurrence’s discussion of *Whole Woman's Health*. Immediately after paying homage to *stare decisis*, the concurrence *refuses* to follow the all-things-considered balancing test that decision employed when striking down Texas’s admitting privileges law.”).

¹³³ See *id.* at 2181.

¹³⁴ *Id.*

¹³⁵ See *id.* at 2153 (Alito, J., dissenting); *id.* at 2180–81 (Gorsuch, J., dissenting).

¹³⁶ OSCAR WILDE, *THE PICTURE OF DORIAN GRAY* (Bernhard Tauchnitz 1908) (1890).

¹³⁷ See, e.g., Linda Greenhouse & Reva B. Siegel, *The Difference a Whole Woman Makes: Protection for the Abortion Right After Whole Woman's Health*, 126 YALE L.J.F. 149, 150 (2016) (“[*Whole Woman's Health*] decisively reaffirms robust judicial protection for the right declared two generations ago and under relentless attack for much of the time since.”).

¹³⁸ *June Med. Servs.*, 140 S. Ct. at 2182 (Kavanaugh, J., dissenting).

curiously, to a result in which the conservative wing of the Court rejected the substance of *Whole Woman's Health*, even as a shell of the decision stands as an “homage”¹³⁹ to stare decisis. That is, Chief Justice Roberts’s defense of stare decisis was also a departure from it — an effort to preserve precedent while simultaneously transforming it. Going forward, it is the 5–4 rejection of *Whole Woman's Health*’s benefits-burdens balancing test that will stand as the precedent that *June Medical Services* established.¹⁴⁰

Taken alongside *Casey*, *Gonzales*, and *Whole Woman's Health*, *June Medical Services* exemplifies the Court’s approach to stare decisis in the hothouse climate of abortion rights. In this politically pitched context, the Court has developed an approach to precedent that at once has generated important, and often incremental, doctrinal changes and simultaneously preserved the appearance of fealty to its past decisions. In these cases, the Court has distinguished and cabined earlier decisions, forging a line of jurisprudence that entrenches the abortion right while sharply limiting its scope.¹⁴¹

In this way, stare decisis has profoundly shaped the Court’s approach to abortion. But this is only part of the story. If stare decisis has shaped the law of abortion, it has also, in turn, been shaped *by* the law of abortion. As the following Part examines, the Court’s ongoing struggle over abortion rights has inexorably influenced our understanding of what it means to follow and be faithful to precedent.

¹³⁹ *Id.* at 2180 (Gorsuch, J., dissenting).

¹⁴⁰ For example, a few weeks after *June Medical Services*, the State of Texas filed a brief before the Fifth Circuit in a case challenging a law prescribing specific guidelines for the disposal of embryonic and fetal tissue, arguing that “Chief Justice Roberts’ concurrence in *June Medical* is controlling and explicit: There is no balancing test. . . . As the Chief Justice noted, the *Whole Woman's Health* majority stated that it was applying *Casey*, not changing it.” Supplemental Letter Brief at 4, *Whole Woman's Health v. Smith*, No. 18-50730 (5th Cir. July 10, 2020), https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/SuppLtrBrf_FM.pdf [<https://perma.cc/NBJ9-NMCQ>].

¹⁴¹ To be sure, in much of the Court’s abortion jurisprudence, the catch-22 of stare decisis works to limit the abortion right. But in rare cases, the same dynamic has worked to subtly enlarge the right as well. For example, *Whole Woman's Health* emphasized coherence with *Casey*, even as it sought to counter the Fifth Circuit’s interpretation of *Gonzales* as giving broad deference to legislatures with a more rigorous standard that required reviewing courts to weigh the benefits of the disputed legislation against the resulting burdens to abortion access. See Greenhouse & Siegel, *supra* note 137, at 156 & n.45 (noting that in *Whole Woman's Health* the Court “total[ly] repudiat[ed]” the lower court’s reasoning, *id.* at 156, stating that “[t]he Court of Appeals’ articulation of the relevant standard is incorrect” and “simply does not match the standard that this Court laid out in *Casey*,” *id.* at 156 n.45 (alteration in original) (first quoting *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016); and then quoting *id.* at 2310)).

III. ABORTION AND STARE DECISIS

As the previous Part demonstrates, questions of stare decisis and precedent shadow the Court's disposition of almost every abortion case.¹⁴² While this insight is important, it illuminates only one facet of the symbiotic relationship between abortion and stare decisis. Less obviously, the Court's efforts to grapple with abortion have, in turn, shaped its approach to stare decisis.

This Part develops this claim in three ways. First, it focuses on *Planned Parenthood v. Casey* to show how this "precedent on precedent" has shaped not only the Court's abortion jurisprudence, but also its jurisprudence on stare decisis. It then pivots from a granular discussion of cases to consider how the Court's abortion jurisprudence has provided a blueprint of interpretive moves that the Court has deployed in other contexts in which it has interpreted precedent. Finally, this Part makes clear that while cases from across the doctrinal spectrum may present questions of stare decisis, the Court's efforts to consider and apply precedent *always* occur in the shadow of *Roe v. Wade* and the abortion right. Put differently, *Roe* and the abortion right function as a gnomon, the central pillar of a sundial, casting shadows across the Court's encounters with stare decisis, even in nonabortion contexts.

A. Abortion as "Precedent on Precedent"

In decisions in which the Court confronts questions of stare decisis, it often adverts to its prior opinions identifying whether and how it will regard its past precedents. Not surprisingly, chief among these "precedents on precedent" is *Planned Parenthood v. Casey*. In *Casey*, a plurality of the Court not only salvaged (and sandbagged) *Roe v. Wade*, but also identified a series of factors designed to "gauge the respective costs of reaffirming and overruling a prior case."¹⁴³ Under *Casey*'s logic, when contemplating a departure from extant precedent, courts should consider:

[(1)] whether the rule has proven to be intolerable simply in defying practical workability; [(2)] whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; [(3)] whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned

¹⁴² See, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 191 (2007) (Ginsburg, J., dissenting) (criticizing the majority for not being "faithful to our earlier invocations of 'the rule of law' and the 'principles of stare decisis'"); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 944 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) ("We believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases."); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 420 (1983) ("We respect [the principle of stare decisis] today, and reaffirm *Roe v. Wade*.").

¹⁴³ *Casey*, 505 U.S. at 854.

doctrine; or [(4)] whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.¹⁴⁴

Critically, *Casey*'s factors have not only guided the Court in its review of subsequent abortion cases, like *Gonzales* and *June Medical Services*, but also explicitly informed the Court's understanding of *stare decisis* in nonabortion contexts. For example, in *Lawrence v. Texas*,¹⁴⁵ a challenge to a criminal prohibition on same-sex sodomy, the Court confronted *Bowers v. Hardwick*,¹⁴⁶ a 1986 decision upholding a similar sodomy prohibition. In overruling *Bowers*, the *Lawrence* majority explicitly weighed the *Casey* factors, concluding that *Bowers* had not engendered "individual or societal reliance" and had "cause[d] uncertainty, for the precedents before and after its issuance contradict its central holding."¹⁴⁷

Likewise, in *Agostini v. Felton*,¹⁴⁸ where the Court overruled an Establishment Clause precedent decided just twelve years earlier,¹⁴⁹ it referenced *Casey* for the proposition that "*stare decisis* does not prevent us from overruling a previous decision where there has been a significant change in, or subsequent development of, our constitutional law."¹⁵⁰ And in *Adarand Constructors, Inc. v. Peña*,¹⁵¹ a challenge to a federal affirmative action program, even as a plurality of the Court concluded that there was "special justification" that warranted overruling an earlier decision,¹⁵² it was at pains to distinguish the factual circumstances from those in *Casey*, where, in the context of a similarly divisive issue, the Court declined to overrule an earlier precedent.¹⁵³ The mere fact that two members of the narrow *Adarand* majority felt compelled to distinguish their decision from *Casey* speaks to *Casey*'s status as a critical "precedent on precedent" — both in and outside of the abortion context.

In this vein, it is unsurprising that those who disagree with a departure from precedent often root their disagreement in *Casey*'s logic. In *Citizens United v. FEC*,¹⁵⁴ for example, Justice Stevens objected to the

¹⁴⁴ *Id.* at 854–55 (citations omitted).

¹⁴⁵ 539 U.S. 558 (2003).

¹⁴⁶ 478 U.S. 186 (1986).

¹⁴⁷ *Lawrence*, 539 U.S. at 577.

¹⁴⁸ 521 U.S. 203 (1997).

¹⁴⁹ *Aguilar v. Felton*, 473 U.S. 402 (1985).

¹⁵⁰ *Agostini*, 521 U.S. at 235–36.

¹⁵¹ 515 U.S. 200 (1995).

¹⁵² *Id.* at 231 (plurality opinion).

¹⁵³ *See id.* at 233–34 ("[I]n this case . . . we do not face a precedent of [the kind discussed in *Casey*], because *Metro Broadcasting* itself departed from our prior cases — and did so quite recently. By refusing to follow *Metro Broadcasting*, then, we do not depart from the fabric of the law; we restore it.")

¹⁵⁴ 558 U.S. 310 (2010).

majority's decision to depart from established campaign finance precedents, citing *Casey* for the proposition that "[a] decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided."¹⁵⁵ Likewise, in his bitter dissent in *Lawrence v. Texas*, Justice Scalia cataloged the myriad ways that the majority opinion was inconsistent with *Casey*.¹⁵⁶ As importantly, he argued that if, by the majority's reasoning, *Bowers* was an unstable precedent, then so too was *Roe*.¹⁵⁷ Justice Scalia suggested that, rather than faithfully applying *Casey*'s factors, the majority had "revise[d]" the stare decisis calculus to suit its predisposition toward jettisoning *Bowers*.¹⁵⁸ In so doing, the majority, Justice Scalia crowed, had "exposed *Casey*'s extraordinary deference to precedent for the result-oriented expedient that it is."¹⁵⁹

In this regard, *Casey* not only has formed the core of the Court's post-*Roe* abortion jurisprudence, but also has come to serve as a pillar of its stare decisis jurisprudence. In its detailed consideration of whether and under what circumstances to overrule or retain *Roe*, *Casey* has informed the Court's subsequent discussions about stare decisis and precedent.

B. Abortion as Blueprint

Casey's imprint is evident on the face of the Court's stare decisis jurisprudence. Less obvious is the influence of the Court's abortion jurisprudence on the ways that the Court applies stare decisis principles in its treatment of precedent. As this section explains, the Court's abortion jurisprudence has also, more subtly, offered a blueprint for narrowing, limiting, and eventually overturning earlier precedents. And meaningfully, this blueprint for gradually eroding precedent has surfaced even in circumstances where the Court is not considering abortion or even explicitly averting to its abortion jurisprudence.

Payne v. Tennessee,¹⁶⁰ a 1991 challenge to the admissibility of victim impact statements, is instructive. There, a 6–3 majority of the Court overruled two prior decisions that prescribed a per se rule prohibiting the admission of victim impact statements in the penalty phase of a capital trial.¹⁶¹ In overruling the two earlier precedents, *Booth v.*

¹⁵⁵ *Id.* at 408–09 (Stevens, J., concurring in part and dissenting in part) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 864 (1992)).

¹⁵⁶ *Lawrence v. Texas*, 539 U.S. 558, 588–92 (2003) (Scalia, J., dissenting).

¹⁵⁷ *Id.* at 587.

¹⁵⁸ *Id.* at 592.

¹⁵⁹ *Id.*

¹⁶⁰ 501 U.S. 808 (1991).

¹⁶¹ *Id.* at 817–18, 830.

*Maryland*¹⁶² and *South Carolina v. Gathers*,¹⁶³ Chief Justice Rehnquist, who authored the majority opinion, conceded that “[s]tare decisis is the preferred course.”¹⁶⁴ Nevertheless, he noted that “when governing decisions are unworkable or are badly reasoned, ‘this Court has never felt constrained to follow precedent.’”¹⁶⁵ On this account, the per se rule against the admission of victim impact statements “defied consistent application by the lower courts”¹⁶⁶ and neglected criminal sentencing’s concern for the injuries to the victim and society.¹⁶⁷ And more troublingly, it diminished the states’ “traditional latitude to prescribe the method by which those who commit murder shall be punished.”¹⁶⁸

The Court’s disposition in *Payne* recalled its treatment of *Roe*’s trimester framework in *City of Akron v. Akron Center for Reproductive Health, Inc.*,¹⁶⁹ *Thornburgh v. American College of Obstetricians and Gynecologists*,¹⁷⁰ and *Webster v. Reproductive Health Services*,¹⁷¹ a trio of abortion cases decided in the 1980s. In those cases, members of the Court denounced the trimester framework first articulated in *Roe* as “outmoded,”¹⁷² unduly “rigid,”¹⁷³ and “on a collision course with itself.”¹⁷⁴ In a series of moves that the *Payne* Court would later apply in the context of capital sentencing, those skeptical of the trimester framework emphasized its incoherence with both obstetric practice¹⁷⁵ and the states’ traditional police powers.¹⁷⁶ In this way, the *Payne* Court’s concern that the per se rule against victim impact statements was impractical and inconsistent recalled the Court’s earlier efforts to limit *Roe*’s force.

Payne evinced an effort to translate interpretive moves used in the abortion context to other contested doctrinal arenas. But *Payne* is not alone in this regard. Take, for example, the Court’s decision this Term in *Ramos v. Louisiana*,¹⁷⁷ where it considered whether the Sixth

¹⁶² 482 U.S. 496 (1987).

¹⁶³ 490 U.S. 805 (1989).

¹⁶⁴ *Payne*, 501 U.S. at 827.

¹⁶⁵ *Id.* (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944)).

¹⁶⁶ *Id.* at 830.

¹⁶⁷ *Id.* at 825.

¹⁶⁸ *Id.* at 824 (quoting *Blystone v. Pennsylvania*, 494 U.S. 299, 309 (1990)).

¹⁶⁹ 462 U.S. 416 (1983).

¹⁷⁰ 476 U.S. 747 (1986).

¹⁷¹ 492 U.S. 490 (1989).

¹⁷² *Thornburgh*, 476 U.S. at 828 (O’Connor, J., dissenting).

¹⁷³ *Webster*, 492 U.S. at 518 (plurality opinion).

¹⁷⁴ *City of Akron*, 462 U.S. at 458 (O’Connor, J., dissenting).

¹⁷⁵ *See id.*

¹⁷⁶ *See Webster*, 492 U.S. at 519 (plurality opinion); *Thornburgh*, 476 U.S. at 828 (O’Connor, J., dissenting).

¹⁷⁷ 140 S. Ct. 1390 (2020).

Amendment required that guilty verdicts for serious crimes be unanimous.¹⁷⁸ Central to the Court's disposition of *Ramos* was its treatment of an earlier case on the same issue, *Apodaca v. Oregon*.¹⁷⁹ Decided in 1972 in tandem with *Johnson v. Louisiana*,¹⁸⁰ *Apodaca* had fractured the Court, producing together with *Johnson* "a tangle of seven separate opinions."¹⁸¹ By all accounts, the controlling opinion was Justice Powell's concurrence,¹⁸² which joined the judgment to uphold the Louisiana nonunanimous jury rule, while separately noting that the Sixth Amendment's unanimous jury requirement applied only to federal trials and was not incorporated against the states.¹⁸³

In *Ramos*, as in *Casey*, stare decisis took center stage. Writing for the majority, Justice Gorsuch gestured to the *Casey* factors, emphasizing the questionable "quality of [*Apodaca*'s] reasoning" and its incoherence with Sixth Amendment doctrine.¹⁸⁴ But the issue was not just that *Apodaca* failed to appreciate the degree to which the expectation of unanimity underlay the Sixth Amendment's jury right; it was also that the *Apodaca* Court failed to appreciate the "racist origins" of the Louisiana rule when it rendered its decision in 1972.¹⁸⁵ In this regard, the fact that Louisiana had adopted the nonunanimous jury rule in an effort to "establish the supremacy of the white race"¹⁸⁶ rendered *Apodaca* not only a Sixth Amendment "outlier,"¹⁸⁷ but also a case decided without due consideration of the challenged rule's complicated factual and historical context. Thus, the *Ramos* Court reflected *Casey*'s caution that new factual considerations could be a basis for reexamining — and discarding — an earlier decision, in order to distinguish, limit, and ultimately overrule it.

C. Abortion as Roadmap

If abortion jurisprudence has served as a blueprint for reconsidering and overruling unruly precedents, then why have these same strategies proven unsuccessful in dismantling *Roe* and the abortion right? Despite

¹⁷⁸ *Id.* at 1394.

¹⁷⁹ 406 U.S. 404 (1972).

¹⁸⁰ 406 U.S. 356 (1972).

¹⁸¹ Brief for Petitioner at 7, *Ramos*, 140 S. Ct. 1390 (No. 18-5924).

¹⁸² *Johnson*, 406 U.S. at 366 (Powell, J., concurring in *Johnson* and concurring in the judgment in *Apodaca*).

¹⁸³ *Id.* at 369.

¹⁸⁴ *Ramos*, 140 S. Ct. at 1405.

¹⁸⁵ *Id.* For further discussion of the role of race in interrogating past precedents, see Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. (forthcoming 2021) (on file with the Harvard Law School Library).

¹⁸⁶ *Ramos*, 140 S. Ct. at 1394 (quoting OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF LOUISIANA 374 (New Orleans, H.J. Hearsey 1898)).

¹⁸⁷ *Id.* at 1408 (plurality opinion).

efforts to challenge and overrule *Roe*, it has stubbornly survived. And its survival means that any effort to roll back abortion rights will not be accomplished by simply declaring some aspect of *Roe* unworkable or doctrinally incoherent, as the Court did with other precedents in *Payne* and *Ramos*. Instead, a different approach is required.

This section argues that the seeds of the strategy to dismantle *Roe* have already been sown — in nonabortion cases that, like *Payne* and *Ramos*, rely on an interpretation of precedent honed in the abortion context. Where this strategy departs from *Payne* and *Ramos* is that it is not simply a “one and done” effort. Indeed, it is a strategy in which distinguishing and limiting precedent is part of an incremental approach that, over time, destabilizes and discredits precedent, laying the foundation for later overruling.¹⁸⁸

We have yet to see the culmination of this strategy in the context of abortion. But because abortion jurisprudence has strongly influenced the Court’s approach to precedent more generally, we can see its culmination in other doctrinal contexts. Indeed, the template for this long-term strategy for undermining abortion rights can be glimpsed in the arc of a series of decisions considering the constitutionality of union shop fees.

In 1977, the Supreme Court unanimously decided *Abood v. Detroit Board of Education*,¹⁸⁹ upholding the constitutionality of agency shop fees for members of a public sector union.¹⁹⁰ Forty-one years later, in *Janus v. AFSCME, Council 31*,¹⁹¹ a 5–4 majority of the Court overruled *Abood* on the grounds that it was “poorly reasoned,” had “led to practical problems and abuse,” lacked sufficiently justifiable “reliance interests,” and, most troublingly, was “inconsistent with other First Amendment cases and ha[d] been undermined by more recent decisions.”¹⁹² Critically, when *Abood* was litigated, the Court explicitly considered whether the imposition of union shop fees violated the First Amendment rights of nonunion public employees and unanimously concluded it did not.¹⁹³ If *Abood* had proven unworkable and posed such a profound conflict with First Amendment principles, these frailties had

¹⁸⁸ See, e.g., Adam Liptak, *The Threat to Roe v. Wade in the Case of the Missing Precedent*, N.Y. TIMES (Sept. 17, 2018), <https://www.nytimes.com/2018/09/17/us/politics/kavanaugh-abortion-precedent.html> [<https://perma.cc/HK57-85LW>] (“Justice Alito’s approach in the case on public unions, coupled with his failure to cite *Casey*, suggested a road map to an eventual decision overruling *Roe*.”).

¹⁸⁹ 431 U.S. 209 (1977).

¹⁹⁰ See *id.* at 229–32.

¹⁹¹ 138 S. Ct. 2448 (2018).

¹⁹² *Id.* at 2460.

¹⁹³ See *Abood*, 431 U.S. at 222–23, 229–32 (“The differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights.” *Id.* at 232.).

surfaced only recently in a series of cases that preceded *Janus* by just a few years.

For example, in *Knox v. SEIU, Local 1000*,¹⁹⁴ decided in 2012, the Court began its reconsideration of *Abood*, noting that it “assumed without any focused analysis” that the First Amendment required only that public sector employees be permitted to opt out of certain union political expenditures.¹⁹⁵ Two years later, in *Harris v. Quinn*,¹⁹⁶ a majority of the Court distinguished *Abood* on the ground that it “involved full-fledged public employees.”¹⁹⁷ Yet, even as it found *Abood* distinguishable and therefore “not controlling,”¹⁹⁸ the *Harris* majority nonetheless reiterated its concerns that *Abood* was a First Amendment “anomaly,”¹⁹⁹ whose reasoning was “questionable on several grounds” — some of which “were noted or apparent at or before the time of the decision, but several [of which had] become more evident and troubling in the years since then.”²⁰⁰ In *Friedrichs v. California Teachers Ass’n*,²⁰¹ the Court was presented with “exhaustive briefing and argument on . . . whether *Abood* should be overruled,”²⁰² but Justice Scalia’s unexpected death left the Court without a full complement of Justices and the Court split evenly on the question.²⁰³ Two years later, a majority of the Court, including a newly appointed Justice Gorsuch, overruled *Abood* in *Janus*, explaining that it had for years expressed concern about the 1977 decision.²⁰⁴

Taken together, the *Knox-Harris-Friedrichs-Janus* suite of cases shares important features with the Court’s abortion cases. As an initial matter, the *Janus* majority’s focus on *Abood*’s “poor reasoning” and conflict with the First Amendment gestured toward the “prudential and pragmatic considerations” for overruling that *Casey* prescribed.²⁰⁵ In the context of public sector unions, the Court redefined notions of “unworkability” and “reliance” so as to destabilize and depart from *Abood*. And, as others have noted, in both contexts, the changing composition

¹⁹⁴ 567 U.S. 298 (2012).

¹⁹⁵ *Id.* at 313.

¹⁹⁶ 134 S. Ct. 2618 (2014).

¹⁹⁷ *Id.* at 2634.

¹⁹⁸ *Id.* at 2639.

¹⁹⁹ *Id.* at 2627 (quoting *Knox*, 567 U.S. at 311).

²⁰⁰ *Id.* at 2632.

²⁰¹ 136 S. Ct. 1083 (2016) (per curiam).

²⁰² *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2485 (2018); see also *id.* at 2484–85 (discussing *Friedrichs*).

²⁰³ See *Friedrichs*, 136 S. Ct. at 1083; see also Adam Liptak, *Victory for Unions as Supreme Court, Scalia Gone, Ties 4–4*, N.Y. TIMES (Mar. 29, 2016), <https://www.nytimes.com/2016/03/30/us/politics/friedrichs-v-california-teachers-association-union-fees-supreme-court-ruling.html> [<https://perma.cc/S3JV-BNJH>].

²⁰⁴ See *Janus*, 138 S. Ct. at 2463.

²⁰⁵ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992).

of the Court's personnel appears to have paved the way for reconsideration of decisions once viewed as well settled.²⁰⁶

But beyond the Court's shifting membership and the shifting understanding of unworkability, the public union cases recall the abortion cases in their instrumental treatment of precedent. As in *Casey*, where the plurality recognized *Roe* as precedent while simultaneously stripping it of its substantive content, the *Knox* majority acknowledged *Abood*'s controlling weight while simultaneously casting doubt on its coherence with the First Amendment.²⁰⁷ In *Harris*, as in *Gonzales* and *June Medical Services*, the Court expressed further skepticism of *Abood*, insisting that doing so was not inconsistent with stare decisis, but rather was part of its broader effort to achieve coherence in First Amendment doctrine.²⁰⁸ On this account, the majority's swipes at *Abood* are framed as efforts to promote doctrinal coherence. That is, they are recast as interpretive moves that *serve*, rather than detract from, stare decisis and the rule of law.

Recognizing this transformation-through-preservation dynamic²⁰⁹ helps to make sense of the stubborn incongruity between *Janus* and *June Medical Services*. In *Janus*, as in *Ramos*, the effort to unsettle earlier precedents ultimately resulted in the Court's overruling those precedents. By contrast, despite efforts to cabin its force and breadth, *Roe* has survived. What explains the difference? And does the Chief Justice's embrace of stare decisis in *June Medical Services* suggest that *Roe* and its progeny will continue to withstand future attacks?

With these questions in mind, it is worth noting that the shift from *Abood* to *Janus* was neither instantaneous nor serendipitous. Rather, it depended on changes in the Court's personnel and a long-game strategy of steadily eroding *Abood*'s foundations. In each case, from *Knox* to

²⁰⁶ See, e.g., MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* 11 (2008) (observing that in the Supreme Court's history, only four constitutional precedents have been reversed in the absence of any change in the Court's composition); Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 99 (1991) ("Change in personnel on the Court is often the catalyst for overrulings.")

²⁰⁷ See *supra* p. 334.

²⁰⁸ See *supra* p. 334.

²⁰⁹ This concept adverts to Professor Reva Siegel's theory of "preservation-through-transformation," which explains that status hierarchies are able to preserve themselves in the face of change by transforming the rationales upon which they are justified. See Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2175-88 (1996); see also Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1114-29 (1997) (identifying examples of the preservation-through-transformation dynamic in the context of racial and gender status law in the nineteenth century). In my view, the Court's approach to stare decisis works in the opposite direction — insisting on preserving the underlying precedent while subtly transforming it. And critically, in so doing, these "preserved-but-transformed" precedents may, as in the case of abortion, serve to perpetuate status hierarchies.

Janus, the Court either subtly distinguished *Abood* and its ilk or, alternatively, expressed skepticism of *Abood*'s coherence with the First Amendment. On this account, the majority's campaign to unsettle *Abood* was, like the Chief Justice's treatment of *Whole Woman's Health*,²¹⁰ one of transformation through preservation. That is, the majority professed fidelity to *Abood* and maintained the decision in principle, even as it worked assiduously to undermine *Abood* and gut its substance.

In this regard, the trajectory from *Abood* to *Janus* not only mirrors the degree to which the Court's abortion jurisprudence has informed the way the Court thinks about and treats extant precedents, but also suggests that the effort to subtly revise and reshape precedent glimpsed in cases like *June Medical Services* may be part of a slow-building and sedimentary strategy aimed at revising and rewriting abortion precedents out of existence. That is, the outcome in *Janus* not only reflects a blueprint articulated in earlier abortion cases, but also may serve as a roadmap to a future in which the scaffolding of empty precedents that support *Roe* and its progeny is ultimately — and formally — dismantled.

And with this dynamic in mind, perhaps what distinguishes *Janus* from the abortion cases is not simply that the Court successfully overruled an earlier precedent but that the conditions were more favorable for doing so. Unlike *Abood*, which had only recently been questioned, *Roe* had weathered over four decades of challenges. And critically, these challenges to *Roe* amplified, rather than settled, political contestation over abortion rights.

On this account, the difference between *Janus* and *June Medical Services* is not only the fact of an embattled but resilient precedent, but also the particularly pitched climate that surrounds *Roe* and abortion rights. Members of the Court have admitted as much. As Justice Scalia observed, with each abortion case, the Court is besieged with "carts full of mail from the public, and streets full of demonstrators" on both sides of the debate.²¹¹ Likewise, the *Casey* Court frankly acknowledged the fraught political climate in which it reached its decision to uphold *Roe*.²¹² And although public sector unions arouse strong feelings, the

²¹⁰ See *supra* pp. 326–27.

²¹¹ *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 535 (1989) (Scalia, J., concurring in part and concurring in the judgment); see also Dahlia Lithwick, *Foreword: Roe v. Wade at Forty*, 74 OHIO ST. L.J. 5, 11 (2013) ("Day after day, week after week, and year after year, regardless of the case being argued and the case being handed down, the issue that brings protesters to the plaza of the Supreme Court building is abortion.")

²¹² See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 866–67 (1992) ("Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a

issue is unlikely to prompt the kind of deeply divided and highly publicized political responses that attend the abortion debate. In this regard, abortion is a blueprint that provides a template for undermining — and overruling — precedent. And critically, as a means of overruling past precedent, this template, though informed by abortion, may have more force outside of it. For abortion is the Court’s third rail, and as such it is the context in which the Court’s treatment of precedent has evolved to be both an act of interpretive principle and a “political and social compromise[.]”²¹³

D. Abortion as Shadow

Janus — and indeed, other recent cases involving overruled precedents from within the Court — underscores another important insight: abortion shadows the Court’s stare decisis jurisprudence. On this account, it is not just that abortion cases are among the “precedents on precedent”; it is that whenever the Court thinks about stare decisis and precedent, it is, whether expressly or not, thinking about abortion.

The shadow and pull of abortion can be glimpsed in the anxieties raised in response to *Janus*. In a stinging dissent in *Janus*, Justice Kagan lamented the Court’s “6-year campaign to reverse *Abood*”²¹⁴ and the majority’s disregard for the “usual principles of *stare decisis*,” which demand “special justifications for reversing” an extant precedent.²¹⁵ Regardless of the majority’s particular views of *Abood*, stare decisis “means sticking to some wrong decisions” or providing “a special justification [for departure] — over and above the belief that the precedent was wrongly decided.”²¹⁶ *Abood*, she maintained, was “entrenched in this Nation’s law — and in its economic life,”²¹⁷ engendering “massive reliance interests” that counseled in favor of its preservation.²¹⁸

Justice Kagan was speaking of *Abood*, but she just as easily could have been referring to *Roe*. Her laser focus on reliance interests recalls the joint opinion in *Casey*, in which the Court linked its fidelity to *Roe* to a frank acknowledgment that “people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the

dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court’s interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.”)

²¹³ *Id.* at 958 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

²¹⁴ *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2487 (2018) (Kagan, J., dissenting).

²¹⁵ *Id.*

²¹⁶ *Id.* at 2497 (first quoting *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455 (2015); and then quoting *id.* at 456 (internal quotation marks omitted)).

²¹⁷ *Id.* at 2501.

²¹⁸ *Id.* at 2497.

event that contraception should fail.”²¹⁹ On this account, her fears that *Abood*, a decision that was embedded in the legal landscape “beyond even the normal precedent,”²²⁰ could be easily jettisoned by five willing members of the Court also speaks to an anxiety that *Casey* and *Roe* are similarly vulnerable.²²¹

In fact, Justice Kagan was not alone in her sense that *Roe* and abortion were in the crosshairs. In response to the Court’s decision to overrule a longstanding sovereign immunity precedent in *Franchise Tax Board of California v. Hyatt*,²²² Justice Breyer reiterated Justice Kagan’s warning that a majority’s mere disagreement with a past decision did not suffice as the “special justification” necessary to overrule it.²²³ Although Justice Breyer “wonder[ed] which cases the Court [would] overrule next,”²²⁴ the answer was clear. Throughout his dissent, he twice referenced *Casey*,²²⁵ suggesting that the majority’s casual approach to precedent made *Casey*, and by implication, *Roe*, ever more vulnerable.

To be sure, it is not only liberal-leaning Justices who conflate discussions of stare decisis with the abortion right. Only a few days before it announced its decision in *Hyatt*, the Court decided *Gamble v. United States*,²²⁶ where it considered overruling the separate sovereigns exception to the Fifth Amendment’s prohibition against double jeopardy.²²⁷ Although the Court declined to do so, concluding that “a departure from precedent ‘demands special justification,’”²²⁸ Justice Thomas wrote separately “to address the proper role of the doctrine of *stare decisis*.”²²⁹ As Justice Thomas explained, the Court’s current approach to stare decisis, which demanded fidelity to past decisions even if they were “demonstrably erroneous,”²³⁰ was out of step with the Constitution’s structure of divided government.²³¹ Slavishly adhering to past decisions made sense in a purely common law tradition, where “judges were tasked with identifying and applying objective principles of law — discerned from natural reason, custom, and other external sources — to

²¹⁹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992).

²²⁰ *Janus*, 138 S. Ct. at 2497 (Kagan, J., dissenting).

²²¹ See Liptak, *supra* note 188 (arguing that the Court’s disposition of *Janus* suggests an effort to discredit *Casey* and lay a path for overruling *Roe*).

²²² 139 S. Ct. 1485 (2019).

²²³ *Id.* at 1505 (Breyer, J., dissenting) (quoting *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015)).

²²⁴ *Id.* at 1506.

²²⁵ See *id.* at 1504, 1506.

²²⁶ 139 S. Ct. 1960 (2019).

²²⁷ *Id.* at 1963–64.

²²⁸ *Id.* at 1969 (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)).

²²⁹ *Id.* at 1981 (Thomas, J., concurring).

²³⁰ *Id.*

²³¹ See *id.*

particular cases.”²³² But in a constitutional republic, where “[t]he Constitution, federal statutes, and treaties *are* the law, and the systematic development of the law is accomplished democratically,” the judicial role is more cabined than that of common law courts.²³³ Rather than discovering the law, Article III judges need only “interpret and apply written law to the facts of particular cases.”²³⁴ On this account, to follow and uphold a precedent that is “demonstrably incorrect . . . is tantamount to *making* law, and adhering to it both disregards the supremacy of the Constitution and perpetuates a usurpation of the legislative power.”²³⁵ Accordingly, Justice Thomas declared that, “[w]hen faced with a demonstrably erroneous precedent,” federal courts are duty-bound to “not follow it.”²³⁶

Although Justice Thomas was writing in the context of a criminal procedure case, his underlying message was understood to go beyond the four corners of *Gamble*. In *requiring* the overruling of precedents that are not rooted in a permissible interpretation or application of constitutional or statutory text, Justice Thomas’s muscular approach to stare decisis was viewed by many as pointing directly to the Court’s abortion jurisprudence,²³⁷ which Justice Thomas has repeatedly dismissed as having “no basis in the Constitution.”²³⁸

And meaningfully, although Justice Thomas wrote for himself alone, voices on both sides of the issue in *Gamble* echoed his concern about following “demonstrably erroneous”²³⁹ constitutional precedents. Writing for the *Gamble* majority, Justice Alito noted that although stare

²³² *Id.* at 1983.

²³³ *Id.* at 1984.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ See, e.g., Rebecca Falconer, *Justice Thomas: Supreme Court Shouldn't Follow Erroneous Precedent*, AXIOS (June 18, 2019), <https://www.axios.com/justice-thomas-supreme-court-erroneous-precedent-d3754206-a7a5-4612-8932-762b3a78bf8c.html> [https://perma.cc/K64Q-8M38]; Lawrence Hurley, *U.S. Supreme Court Declines to Expand “Double Jeopardy” Protections*, REUTERS (June 17, 2019, 10:34 AM), <https://www.reuters.com/article/us-usa-court-doublejeopardy/us-supreme-court-declines-to-expand-double-jeopardy-protections-idUSKCN1T1rTC> [https://perma.cc/8RX2-NWES]; Murray, *supra* note 90 (“[I]n offering this muscular vision of stare decisis and the judicial role, Thomas takes direct aim at *Casey*, the 1992 case that not only upheld the right to an abortion first recognized in *Roe*, but also identified a series of factors that courts must weigh in determining whether overruling an extant precedent is warranted.”).

²³⁸ *Gonzales v. Carhart*, 550 U.S. 124, 169 (2007) (Thomas, J., concurring). Indeed, in his concurrence in *Gamble*, Justice Thomas specifically identified as “[p]erhaps the most egregious example of [an] illegitimate use of *stare decisis*” the Court’s substantive due process jurisprudence, *Gamble*, 139 S. Ct. at 1988 (Thomas, J., concurring), which includes (although it is not limited to) its abortion jurisprudence, see *id.* at 1989 (citing *Stenberg v. Carhart*, 530 U.S. 914, 982 (2000) (Thomas, J., dissenting)).

²³⁹ *Gamble*, 139 S. Ct. at 1984 (Thomas, J., concurring).

decisis has its virtues, “it is also important to be right, especially on constitutional matters.”²⁴⁰ Although he disagreed with both the majority’s judgment and reasoning, Justice Gorsuch agreed that “while we rightly pay heed to the considered views of those who have come before us,”²⁴¹ stare decisis is “at its weakest when we interpret the Constitution.”²⁴²

Certainly, both Justices Alito and Gorsuch could have been referring to a more generalized desire to get constitutional interpretation right. But in the pitched climate in which the Court operates, the prospect of abandoning stare decisis looked to many like a gesture toward *Roe* and abortion. In this regard, though *Gamble* was nominally about the scope and substance of the Fifth Amendment’s Double Jeopardy Clause, its confrontation with stare decisis and the weight of past precedent implicitly implicated *Roe* and the abortion right.²⁴³ And indeed, whenever the Court discusses stare decisis or articulates an approach to precedent, it is understood to, whether expressly or implicitly, gesture toward the future of abortion rights.

IV. ABORTION-STARE DECISIS SYMBIOSIS

What are we to make of the symbiotic relationship between the Court’s abortion jurisprudence and its approach to stare decisis? As this Part explains, understanding the relationship between the Court’s abortion jurisprudence and its approach to stare decisis helps to illuminate other dynamics that surround the Court and adjacent institutions. First, understanding the relationship between abortion and stare decisis renders legible the interpretive pluralism that characterizes the Justices’ various approaches to stare decisis. On this account, the relationship between abortion and stare decisis helps to explain why different members of the Court adopt different strategies and methodologies for dealing with precedent. Relatedly, the relationship between abortion rights and precedent also makes sense of our collective interest in and commitment to stasis within the judiciary as an institution. That is, comfort — or indeed, discomfort — with the prospect of changes within the Court, or even in other branches whose work implicates the Court, is directly related to our understanding of the degree to which stare decisis and abortion rights are inextricably intertwined. Finally, and perhaps more importantly, understanding this symbiotic relationship helps to clarify why the abortion right is both deeply entrenched and highly circumscribed in our constitutional landscape.

²⁴⁰ *Id.* at 1969 (majority opinion).

²⁴¹ *Id.* at 2005 (Gorsuch, J., dissenting).

²⁴² *Id.* at 2006 (quoting *Agostini v. Felton*, 521 U.S. 203, 235 (1997)).

²⁴³ See Michael Conway, *Legal Abortion Wasn’t on the Supreme Court Docket This Week. But Justices Revealed How They’ll End It*, NBC NEWS (June 18, 2019, 10:52 AM), <https://www.nbcnews.com/think/opinion/legal-abortion-wasn-t-supreme-court-docket-week-justices-revealed-ncna1018526> [<https://perma.cc/W9S9-KRVA>].

A. Interpretive Pluralism

Recognizing the role that abortion plays in anchoring, however implicitly, the Court's discussions of stare decisis renders more comprehensible the interpretive pluralism that pervades the Court's approach to precedent. As Professor Randy Kozel has observed, in multimember courts, like the Supreme Court, the prospect of consensus is elusive, if not illusory.²⁴⁴ No single interpretive methodology prevails on the Court, and indeed, even among those who profess allegiance to a particular methodological approach, there may nonetheless be variations in the way they choose to deploy their favored methodology.²⁴⁵ In Kozel's view, the fact of interpretive pluralism helps to explain why the Court's members often differ in their approaches to precedent and stare decisis.²⁴⁶ Originalists may view the obligation "to stand by what has been decided" differently from those who profess to be living constitutionalists or pragmatists.

Kozel is surely correct in gauging the impact of diverse interpretive methodologies on individual approaches to stare decisis. That said, what goes undiscussed is the degree to which interpretive methodologies, and thus approaches to precedent, may also be shaped in turn by other factors, including abortion. For example, as a number of commentators have observed, originalism emerged in the 1970s as a means of counteracting the "judicial activism" of the Warren and Burger Courts, including *Roe v. Wade*.²⁴⁷ As originalism became the intellectual lingua franca of the conservative legal movement, it took aim at the Court's substantive due process jurisprudence, and *Roe v. Wade* particularly, as unrooted in history or constitutional text.²⁴⁸ By the same token, as other interpretive methodologies emerged to challenge

²⁴⁴ See Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 TEX. L. REV. 1843, 1879–80 (2013) ("The prevalence of pluralism owes in part to the Court's composition of different individuals appointed by different presidents and espousing different judicial philosophies. The institutional dynamics of the Court as a multimember body reduce the probability of methodological consensus." *Id.* at 1879 (footnote omitted)).

²⁴⁵ Kozel argues that the essence of interpretive pluralism is the lack of "an overarching theory of interpretation" to guide how the Justices invoke their preferred methods of interpretation. *Id.* at 1879.

²⁴⁶ See *id.* at 1879–80.

²⁴⁷ See Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 554–55 (2006) ("[T]he Reagan Administration's use of originalism marked, and was meant to mark, a set of distinctively conservative objections to the liberal precedents of the Warren Court." *Id.* at 555.); Mary Ziegler, *Originalism Talk: A Legal History*, 2014 BYU L. REV. 869, 907–12 (noting that in the early 1980s, originalism was seen as a realistic compromise for abortion opponents, who shifted their focus from fighting for a constitutionally recognized "right to life" to appointing judges who would overturn *Roe*).

²⁴⁸ Prominent antiabortion leaders pointed to *Roe* as a particularly egregious form of judicial activism that lacked any constitutional basis. See Ziegler, *supra* note 247, at 910.

originalism, they often did so by explaining how these competing approaches provided strong justifications for *Roe* and abortion rights.²⁴⁹

Abortion and *Roe* have informed not only methods of constitutional interpretation, but also the diversity of approaches to stare decisis among the Court's members. Even among the conservative Justices, who have evinced skepticism of abortion rights, there is variation as to whether and in what circumstances the Court should depart from past precedent.

The flurry of separate writings in *Ramos v. Louisiana* is exemplary on this point. In the majority opinion in *Ramos*, Justice Gorsuch insisted that stare decisis is not “an inexorable command,”²⁵⁰ particularly in constitutional cases, and there may be special justifications that militate in favor of departing from an earlier decision.²⁵¹ Like Justice Gorsuch, Justice Kavanaugh agreed that stare decisis is not absolute but argued for an approach to stare decisis in which courts balance a set of considerations to determine whether and in what circumstances to overrule an extant precedent.²⁵² For both Justices, fidelity to precedent is not always required, but rather should be exercised flexibly given the circumstances. The intensity of the commitment to following precedent likely tracks the intensity of their interest in maintaining *Roe*.

This account helps render legible Justice Thomas's strong views of stare decisis. In his separate concurrence in *Ramos*, Justice Thomas reiterated the point made a year earlier in his *Gamble* concurrence: “[T]he Court's typical formulation of the *stare decisis* standard does not comport with our judicial duty under Article III because it elevates demonstrably erroneous decisions — meaning decisions outside the realm of permissible interpretation — over the text of the Constitution and other duly enacted federal law.”²⁵³ Justice Thomas has repeatedly made clear that he views the Court's substantive due process jurisprudence, and abortion jurisprudence in particular, as unmoored from constitutional text and history.²⁵⁴ In this regard, his approach to precedent is

²⁴⁹ See, e.g., JACK M. BALKIN, LIVING ORIGINALISM 214–18 (2011).

²⁵⁰ *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020) (quoting *Pearson v. Callahan*, 555 U.S. 223, 233 (2009)).

²⁵¹ *Id.* at 1405–07.

²⁵² *Id.* at 1414–15 (Kavanaugh, J., concurring in part).

²⁵³ *Id.* at 1421 (Thomas, J., concurring in the judgment) (quoting *Gamble v. United States*, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring)).

²⁵⁴ See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2631 (2015) (Thomas, J., dissenting) (“By straying from the text of the Constitution, substantive due process exalts judges at the expense of the People from whom they derive their authority.”); *McDonald v. City of Chicago*, 561 U.S. 742, 811–12 (2010) (Thomas, J., concurring in part and concurring in the judgment) (casting doubt on the Fourteenth Amendment's Due Process Clause as a source of substantive rights); *Gonzales v. Carhart*, 550 U.S. 124, 169 (2007) (Thomas, J., concurring) (“I write separately to reiterate my view that the Court's abortion jurisprudence, including *Casey* and *Roe v. Wade*, has no basis in the Constitution.” (citation omitted)); *Stenberg v. Carhart*, 530 U.S. 914, 980–82 (2000) (Thomas, J.,

commensurate with the intensity of his disagreement with the Court's abortion jurisprudence.

Among the remaining Justices in *Ramos*, their visions of stare decisis also are likely consistent with the strength of their commitment to maintaining *Roe*. For example, although Justice Sotomayor concurred in the Court's judgment in *Ramos*, she wrote separately to distinguish the circumstances in *Ramos* from future circumstances in which a majority might be inclined to "cast aside precedent 'simply because [the majority] now disagrees with' it."²⁵⁵ As she explained, "overruling precedent here is not only warranted, but compelled"²⁵⁶ — both by *Apodaca*'s disjunction with extant Sixth Amendment doctrine²⁵⁷ and by the "legacy of racism" that undergirded the challenged law.²⁵⁸

In a similar vein, though Justice Kagan did not write separately in *Ramos*, she nonetheless joined most of Justice Alito's dissenting opinion, which maintained that the majority had not identified special justifications that would warrant overruling a precedent in which there were "enormous reliance interests."²⁵⁹ No doubt recognizing *Ramos*'s import for another troublesome precedent from the 1970s, Justice Kagan declined to join the part of Justice Alito's opinion in which he confidently asserted that, "[b]y striking down a precedent upon which there has been massive and entirely reasonable reliance, the majority sets an important precedent about *stare decisis*" — one that he "assume[d] . . . will apply . . . in future cases."²⁶⁰

This is all to say that although *Roe* and abortion were not at issue in *Ramos*, the diversity of approaches to precedent among the Justices highlights the degree to which *Roe* and the abortion right not only shadow *all* discussions of precedent, but also may produce a wide diversity of views about whether and how to maintain fidelity to past decisions. Although the opinions in *Ramos* focused on whether to follow *Apodaca*, all of the Justices were scanning the jurisprudential horizon, reading the tea leaves for what overruling — or maintaining — *Apodaca* would likely mean for another embattled precedent.

B. Investment in Institutional Stasis

Recognizing the degree to which abortion shapes the Court's understanding of stare decisis also renders legible the investment in institutional stasis that pervades the Court and institutions that impact the

dissenting) (referring to *Roe* as "grievously wrong," *id.* at 980, and casting doubt on *Casey* and the Court's abortion jurisprudence).

²⁵⁵ *Ramos*, 140 S. Ct. at 1409 (Sotomayor, J., concurring in part) (quoting *Alleyn v. United States*, 570 U.S. 99, 133 (2013) (Alito, J., dissenting)).

²⁵⁶ *Id.* at 1408.

²⁵⁷ *Id.* at 1409–10.

²⁵⁸ *Id.* at 1410.

²⁵⁹ *Id.* at 1436 (Alito, J., dissenting).

²⁶⁰ *Id.* at 1440.

Court. By “investment in institutional stasis,” I mean the strong interest in maintaining the Court’s status quo and, perhaps more profoundly, avoiding the collective discomfort that the prospect of change within and around the Court inevitably prompts. The most obvious example of commitment to maintaining the Court’s status quo is the hand-wringing and teeth-gnashing that accompanies a vacancy — or even the prospect of a vacancy — on the Court. As Professor Michael Gerhardt has documented, “[a] change in personnel on the Supreme Court is unquestionably the main trigger to a shift in precedent.”²⁶¹ On this account, the departure of a Justice — and the arrival of her successor — is often a necessary precondition for a reassessment of past precedents.²⁶²

Recall the tumult that occurred in 2018 when Justice Kennedy announced his retirement from the Court.²⁶³ Instantaneously, there were questions about what Justice Kennedy’s retirement would mean for the balance of power on the Court²⁶⁴ — and not surprisingly, much of the discussion focused on what Justice Kennedy’s departure would mean for the future of abortion rights and the continued vitality of *Roe*.²⁶⁵ When then-Judge Kavanaugh was nominated to fill the vacant seat, the commentary shifted into overdrive, as his record — on many issues, but especially abortion — was probed for telltale clues about his likely

²⁶¹ Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 U. PA. J. CONST. L. 903, 952 (2005).

²⁶² *Id.* As Gerhardt explains:

[O]f the more than 130 cases overruled by the Court, seven involved a Court with one new Justice, seven involved a Court with two new Justices, nine involved a Court with three new Justices, fourteen involved a Court with four new Justices, seven involved a Court with five new Justices, fifteen involved a Court with six new Justices, eighteen involved a Court with seven new Justices, eleven involved a Court with eight new Justices, and seventy involved a Court with nine different Justices.

Id.

²⁶³ See, e.g., Michael D. Shear, *Supreme Court Justice Anthony Kennedy Will Retire*, N.Y. TIMES (June 27, 2018), <https://www.nytimes.com/2018/06/27/us/politics/anthony-kennedy-retire-supreme-court.html> [<https://perma.cc/7N29-FM4X>].

²⁶⁴ See *id.* (noting that Justice Kennedy’s retirement would give Republicans the opportunity to secure a conservative majority on the Court); cf. Alicia Parlapiano & Jugal K. Patel, *With Kennedy’s Retirement, the Supreme Court Loses Its Center*, N.Y. TIMES (June 27, 2018), <https://www.nytimes.com/interactive/2018/06/27/us/politics/kennedy-retirement-supreme-court-median.html> [<https://perma.cc/9SGA-B7AX>] (noting that Justice Kennedy held the Court’s ideological center for a significant number of years and was a particularly influential median Justice in key decisions).

²⁶⁵ See Sarah McCammon, *What Justice Kennedy’s Retirement Means for Abortion Rights*, NPR (June 28, 2018, 3:02 PM), <https://www.npr.org/2018/06/28/624319208/what-justice-kennedy-s-retirement-means-for-abortion-rights> [<https://perma.cc/8YL5-R9TD>] (observing that abortion would be a central issue in the nomination of Justice Kennedy’s replacement); see also Mary Ziegler, *What Does the Future of Abortion Rights Look Like?*, THE ATLANTIC (July 2, 2018), <https://www.theatlantic.com/politics/archive/2018/07/kennedy-abortion-supreme-court/564191> [<https://perma.cc/68VT-2QQ7>] (speculating on the future of abortion rights and how they might be overturned or further narrowed following Justice Kennedy’s retirement).

future inclinations as a Justice.²⁶⁶ And indeed, the public opposition to then-Judge Kavanaugh's nomination was, at least initially,²⁶⁷ framed in terms of support for abortion rights.²⁶⁸

With this dynamic in mind, even a Justice's personal decision about whether and when to withdraw from the Court is often navigated in the shadow of *Roe* and abortion rights.²⁶⁹ When Justice Ginsburg declined to retire during President Obama's second term, critics argued that, given her past health crises, her decision risked the seat's falling into the hands of a Republican President eager to appoint a pro-life Justice, imperiling the balance of power on the Court and, in particular, imperiling *Roe*.²⁷⁰ In this regard, the prospect of a liberal Justice being replaced by a Republican President was viewed as presaging the disruption of the Court's status quo and the precarious equipoise of abortion rights.

²⁶⁶ See, e.g., Josh Gerstein, *Teenage Immigrant Abortion Case Could Be Hurdle for Kavanaugh's Supreme Court Bid*, POLITICO (July 6, 2018, 5:42 PM), <https://www.politico.com/story/2018/07/06/trump-supreme-court-pick-kavanaugh-immigrant-abortion-teen-700856> [<https://perma.cc/LUE5-LS9E>] (noting then-Judge Kavanaugh's dissent in a D.C. Circuit Court of Appeals case that allowed a teenage immigrant in custody to receive an abortion).

²⁶⁷ As the confirmation hearings progressed, concerns about then-Judge Kavanaugh's views on abortion and precedent were overshadowed by allegations that he, as a high school student, had sexually assaulted Christine Blasey Ford. See Sheryl Gay Stolberg & Nicholas Fandos, *Brett Kavanaugh and Christine Blasey Ford Duel with Tears and Fury*, N.Y. TIMES (Sept. 27, 2018), <https://www.nytimes.com/2018/09/27/us/politics/brett-kavanaugh-confirmation-hearings.html> [<https://perma.cc/EFN7-QWGA>]; see also Melissa Murray, *Sex and the Schoolhouse*, 132 HARV. L. REV. 1445, 1445–46 (2019) (book review) (discussing briefly these allegations).

²⁶⁸ See Michelle Goldberg, Opinion, *The Handmaid's Court*, N.Y. TIMES (Sept. 10, 2018), <https://www.nytimes.com/2018/09/10/opinion/columnists/kavanaugh-abortion-roe-v-wade-trump.html> [<https://perma.cc/N2LC-VKS3>] (describing a Supreme Court with the addition of then-Judge Kavanaugh as a "Handmaid's Court" and suggesting that if he were confirmed, *Roe* would "either fall or be eviscerated"); Lynn M. Paltrow, Opinion, *Life After Roe*, N.Y. TIMES (Sept. 1, 2018), <https://www.nytimes.com/2018/09/01/opinion/sunday/brett-kavanaugh-roe-abortion.html> [<https://perma.cc/3WKE-473D>] (highlighting the stakes of then-Judge Kavanaugh's nomination for the future of *Roe*).

²⁶⁹ See, e.g., Mark Helm, *Potomac Watch: Rehnquist Replacement Unlikely to Change Court*, SEATTLE POST-INTELLIGENCER (Nov. 12, 2004, 10:00 PM), <https://www.seattlepi.com/national/article/Potomac-Watch-Rehnquist-replacement-unlikely-to-1159393.php> [<https://perma.cc/GK2S-8CLV>] (noting that the potential retirement of Chief Justice Rehnquist was unlikely to substantially change the Court's abortion jurisprudence but that the retirement of Justice O'Connor or one of the liberal Justices could result in a "hard turn in the conservative direction"); Billy House, *Roe's Fate Could Soon Be in O'Connor's Hands: Swing-Vote Justice Possibly in Line as Chief*, ARIZ. REPUBLIC (Jan. 22, 2003), <http://web1.nusd.k12.az.us/schools/nhs/gthomson.class/articles/judicial/occonnor.swing.roe.htm> [<https://perma.cc/4P4U-TKGH>] (speculating on the future of *Roe* if Chief Justice Rehnquist retired and Justice O'Connor were elevated to replace him).

²⁷⁰ See Erwin Chemerinsky, Opinion, *Much Depends on Ginsburg*, L.A. TIMES (Mar. 15, 2014, 1:44 PM), <https://www.latimes.com/opinion/op-ed/la-oe-chemerinsky-ginsburg-should-resign-20140316-story.html> [<https://perma.cc/D8YG-NDRC>] (noting that if a Republican President had the opportunity to select Justice Ginsburg's replacement, then there would likely be five votes to overturn *Roe*).

Later, in a candid interview, Justice Ginsburg suggested that her decision to remain on the bench was informed, at least in part, by an interest in maintaining the fragile status quo. As she explained, “given the [ideological] boundaries that we have [in the Senate],” it was unlikely that President Obama would have been able to replace her with a Justice who was similarly minded on key issues, like women’s rights.²⁷¹ Although Justice Ginsburg did not name *Roe* explicitly, it was surely part of her calculus. In a polarized political climate in which a supermajority of Senators was required to confirm a Supreme Court nominee, President Obama might have been pressed to nominate a candidate whose views on women’s rights and abortion rights were considerably more moderate than those of Justice Ginsburg. And the appointment of a moderate to occupy Justice Ginsburg’s seat would likely have left *Roe* and abortion rights exposed and vulnerable.

The political firestorm that erupted in the wake of Justice Ginsburg’s passing suggests that these anxieties are not unfounded. Justice Ginsburg’s death created not only a vacancy on the Court, but also an opportunity for the President to cement a 6–3 conservative majority, disrupting the Court’s delicate ideological balance. And as commentators noted, any disruption of the Court’s ideological tilt portends a pitched battle over *Roe* and the future of abortion rights.²⁷²

If the prospect of disruption and change on the Court can prompt anxieties about Court vacancies (or even a Justice’s decision to retire), it also may help explain the anxieties that surround rule and policy changes in institutions whose work influences the Court and its composition. Consider the efforts to revise the Senate rules regarding judicial nominations. Ordinarily, the arcane rules of the upper chamber of Congress would not even register for most Americans. However, because the Senate is tasked with providing “Advice and Consent” for

²⁷¹ Jonathan Topaz, *Ginsburg: Why I Can’t Resign Now*, POLITICO (Sept. 24, 2014, 6:37 AM), <https://www.politico.com/story/2014/09/ruth-bader-ginsburg-elle-interview-111281> [<https://perma.cc/Q58U-K77F>].

²⁷² See, e.g., Sarah McCammon, *Ginsburg’s Death a “Pivot Point” for Abortion Rights*, *Advocates Say*, NPR (Sept. 19, 2020, 8:56 PM), <https://www.npr.org/sections/death-of-ruth-bader-ginsburg/2020/09/19/914864867/ginsburgs-death-a-pivot-point-for-abortion-rights-advocates-say> [<https://perma.cc/RP7E-FZFX>] (“Ginsburg’s death sets up a divisive nomination fight in the midst of a presidential campaign. And advocates on opposing sides of the issue agree that it could be a turning point in the long-running debate over one of the most divisive issues for the court: abortion rights.”); Anna North, *What Ruth Bader Ginsburg’s Death Means for the Future of Abortion Rights*, VOX (Sept. 19, 2020, 2:50 PM), <https://www.vox.com/21446616/ruth-bader-ginsburg-and-abortion-roe-wade> [<https://perma.cc/683K-9CVM>] (“If President Trump is able to appoint Ginsburg’s replacement, he will likely give conservatives on the Court the votes they need to overturn *Roe*, or at least to weaken it beyond recognition.”); Bridget Read, *We Could Lose Roe v. Wade Next Year. What Now?*, THE CUT (Sept. 19, 2020), <https://www.thecut.com/2020/09/ruth-bader-ginsburg-roe-v-wade-overturned-what-to-do.html> [<https://perma.cc/KY3Y-8SAU>] (“As Trump moves to nominate a conservative replacement, the fate of *Roe v. Wade*, the landmark case that made abortion legal throughout the U.S., has never been so tenuous.”).

Supreme Court nominations,²⁷³ changes in the Senate rules — whether to the number of votes required to appoint a Justice or to end debate on a nominee — have become a topic of public interest.²⁷⁴ Some of this interest obviously stems from the pitched political climate in which the Court and Congress operate. But quite a lot of the interest in these rules reflects their likely impact on judicial nominations, which in turn reflects the understanding that the nature of the candidates nominated, and ultimately appointed, to the Court will irrevocably affect the Court's status quo.²⁷⁵

C. *The Stickiness and Scope of the Abortion Right*

Finally, and perhaps most obviously and importantly, understanding the way that abortion operates as a shadow and pull, shaping the Court's approach to stare decisis, helps us to better understand why the abortion right is at once deeply entrenched and yet stubbornly narrow in breadth and scope. Because the continued vitality of *Roe v. Wade* and the abortion right shadows the Court's efforts to interpret and apply past precedent in all contexts, and especially in the abortion context, the interpretive moves that are available are limited. As *Casey* makes clear, the Court has been wary of expressly overruling *Roe* because doing so would likely unleash backlash that would compromise the Court's legitimacy and public standing.²⁷⁶

Rather than overturning the abortion right by overruling *Roe*, the Court has instead, through its interpretation of precedent, focused on limiting the right and curtailing its breadth. *Casey* and *Gonzales* both reflected this impulse. In *Casey*, the Court winnowed the scope of the right first articulated in *Roe*, widening the State's legislative authority

²⁷³ U.S. CONST. art. II, § 2, cl. 2.

²⁷⁴ See, e.g., Steve Benen, *On the Future of the Senate Filibuster, Obama Changes the Game*, MSNBC: MADDOWBLOG (July 31, 2020, 8:00 AM), www.msnbc.com/rachel-maddow-show/future-senate-filibuster-obama-changes-game-n1235444 [<https://perma.cc/Z5XK-AULW>]; Drew DeSilver, *Scalia's Supreme Court Vacancy Draws Much Public Interest, Unlike Past Open Seats*, PEW RSCH. CTR. (Feb. 24, 2016), <https://www.pewresearch.org/fact-tank/2016/02/24/scalias-supreme-court-vacancy-draws-much-public-interest-unlike-past-open-seats> [<https://perma.cc/EG42-9QJQ>] (finding that there was unusually high public interest in the debate over whether the Senate should consider a nominee to fill Justice Scalia's seat prior to the 2016 election). Indeed, the outsized interest in filling Justice Scalia's seat was likely because Justice Scalia was a staunch conservative and his seat would be filled by a Democratic President — thereby presenting an opportunity to tilt the Court's balance toward the liberal wing.

²⁷⁵ See Charles Tiefer & Kathleen Clark, *Deliberation's Demise: The Rise of One-Party Rule in the Senate*, 24 ROGER WILLIAMS U. L. REV. 46, 57–59 (2019) (observing that Majority Leader Mitch McConnell's use of the “nuclear option” in confirming Justice Gorsuch will likely reduce deliberation on future Supreme Court nominees and may result in nominees with more extreme views, since the minority party now has less ability to resist them).

²⁷⁶ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 867 (1992) (“[T]o overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question.”).

over abortion and prescribing a less rigorous standard of review for courts to deploy in reviewing abortion regulations.²⁷⁷ Likewise, in *Gonzales*, the Court again widened the State's authority to limit the abortion right by upholding a regulation enacted without the benefit of a health exception and by broadly deferring to the legislature's stated purpose in enacting the challenged law.²⁷⁸ *June Medical Services* was also consistent with this impulse. Rather than expressly overruling *Whole Woman's Health*, Chief Justice Roberts's concurrence narrowed the scope of that decision by relieving states of the obligation to ensure that the benefits of a proposed abortion restriction outweigh the burdens it imposes on the right itself.²⁷⁹

Yet even as the Court's interpretive moves have narrowed the abortion right, the right has stubbornly survived,²⁸⁰ becoming solidly embedded in the firmament of constitutional law.²⁸¹ *Roe*'s entrenchment was evident in the 2005 confirmation hearings for then-Judge Roberts. In a colloquy with then-Judge Roberts, Senator Specter, then the chair of the Judiciary Committee, asked whether then-Judge Roberts agreed that *Roe* had become a "superprecedent" or even a "super-duper precedent" — that is, a decision "so deeply embedded in the fabric of law [it] should be especially hard to overturn."²⁸² Senator Specter was reiterating a view of *stare decisis* initially articulated by Judge Luttig, who, in the context of a challenge to an abortion restriction, referred to *Roe v. Wade*'s "super-*stare decisis*" status due to the Court's continual refusal to overrule it.²⁸³

Although then-Judge Roberts avoided giving a direct answer,²⁸⁴ the question of *Roe*'s "superprecedent" status has surfaced at subsequent confirmation hearings, including at those of the two most recent Court appointees. Regardless of what one thinks of a theory of "super-*stare decisis*" and "superprecedent," the fact of its discussion suggests the

²⁷⁷ See *id.* at 869–70, 872–74 (plurality opinion).

²⁷⁸ *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007).

²⁷⁹ See *June Med. Servs.*, 140 S. Ct. at 2138–39 (Roberts, C.J., concurring in the judgment).

²⁸⁰ See Caitlin E. Borgmann, *Roe v. Wade's 40th Anniversary: A Moment of Truth for the Anti-Abortion-Rights Movement?*, 24 STAN. L. & POL'Y REV. 245, 268–70 (2013) (suggesting that, after over forty years of advocacy, antiabortion activists have failed to overturn *Roe*'s essential holding); Nina Totenberg & Brian Naylor, *Supreme Court Hands Abortion-Rights Advocates a Victory in Louisiana Case*, NPR (June 29, 2020, 10:23 AM), <https://www.npr.org/2020/06/29/874458692/supreme-court-hands-abortion-rights-a-victory-in-louisiana-case> [<https://perma.cc/HHH9-BGDJ>] (observing that Chief Justice Roberts's concurrence in *June Medical Services* would likely stall attempts to overrule *Roe* and the subsequent decisions affirming the right to an abortion).

²⁸¹ See cases cited *supra* note 32.

²⁸² Jeffrey Rosen, *So, Do You Believe in "Superprecedent"?*, N.Y. TIMES (Oct. 30, 2005), <https://www.nytimes.com/2005/10/30/weekinreview/so-do-you-believe-in-superprecedent.html> [<https://perma.cc/6YAM-GG7G>].

²⁸³ *Richmond Med. Ctr. for Women v. Gilmore*, 219 F.3d 376, 376 (4th Cir. 2000); see also Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1204 (2006).

²⁸⁴ See Rosen, *supra* note 282.

inherent difficulty of overruling *Roe*. If *Roe* is understood as a super-precedent, fixed in the constitutional landscape, then overruling it would invariably expose the Court to claims of partisanship and political opportunism. And this, in turn, helps explain why the abortion right has, over time, become increasingly narrow. Because the abortion right is “sticky,” having been repeatedly reaffirmed, it cannot be overruled without a fight. Accordingly, in order to curb the right while avoiding the conflict that its overruling would prompt, the Court has instead interpreted and distinguished abortion precedents in ways that preserve the right while simultaneously cabining it. *Casey*’s revision of *Roe* is the most obvious example of this dynamic, but Chief Justice Roberts’s treatment of *Whole Woman’s Health* is the most recent.

The dichotomy of a right that is at once stubbornly durable and startlingly narrow reflects the symbiotic dynamic of abortion and precedent. *Stare decisis* has shaped abortion jurisprudence, entrenching the abortion right while narrowing its scope. And in turn abortion has informed the doctrine of *stare decisis* such that any discussion of precedent necessarily implicates the future of abortion, whether abortion is at issue or not.

CONCLUSION

Stepping forward to argue on behalf of the abortion providers in *June Medical Services v. Russo*, Julie Rikelman reminded the Court and all assembled that “[t]his case is about respect for the Court’s precedent.”²⁸⁵ Rikelman, of course, was referring to the fact that the Court, just four years earlier, had invalidated a Texas admitting privileges law that was virtually identical to the Louisiana law challenged in *June Medical Services*. But Rikelman’s opening statement was correct on yet another level. *June Medical Services*, like every other case concerning the abortion right, “is about respect for the Court’s precedent.”²⁸⁶

It was not surprising that Rikelman framed her argument in terms of *stare decisis*. In the years since *Roe* was decided, those who have stepped forward to defend the embattled precedent have also emphasized *stare decisis* and the Court’s duty to respect precedent.²⁸⁷ The

²⁸⁵ Transcript of Oral Argument at 4, *June Med. Servs.*, 140 S. Ct. 2103 (2020) (No. 18-1323), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-1323_d18e.pdf [<https://perma.cc/ZA5J-JJN4>].

²⁸⁶ *Id.*

²⁸⁷ See, e.g., Transcript of Oral Argument at 28, *Gonzales v. Carhart*, 550 U.S. 124 (2007) (No. 05-380), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2006/05-380.pdf [<https://perma.cc/S42L-5HDG>] (“The only course here that preserves the independence of the judiciary, that exemplifies the importance of *stare decisis*, not to mention the only course that will protect women from needless risks of uterine perforation, infertility, sepsis and hemorrhage, is to hold this act unconstitutional.”); Transcript of Oral Argument at 6, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (No. 91-744), https://www.supremecourt.gov/pdfs/transcripts/1991/91-744_91-902_04-22-

appeal to stare decisis in abortion cases serves dual purposes. It connects the case at bar to an unbroken line of precedent in which a woman's right to choose an abortion has consistently been upheld. But more profoundly, it is an effort to strip the Court's decisionmaking of the vexed political climate that cloaks the abortion right. It is an appeal to individual Justices to put aside their particular views of abortion and *Roe* in favor of the broader principles on which the rule of law is based. On this account, the invocation of stare decisis is an appeal to the "neutral principles" that, we are told, should guide jurists instead of their own political sensibilities.²⁸⁸

The fact that so many lawyers intent on defending *Roe* have appealed to stare decisis underscores the mutually constitutive relationship between abortion and precedent. Precedent has shaped the Court's abortion jurisprudence, but the Court's abortion jurisprudence has also shaped its approach to precedent. In this regard, the relationship between the Court's understanding of the abortion right and its understanding of stare decisis and precedent is inextricably intertwined and mutually dependent. But the symbiosis between abortion and precedent is not simply about jurisprudence. The symbiotic relationship between abortion and precedent has also shaped our public discourse about the Court as an institution. The association of stare decisis with abortion has amplified the Court's importance in political disputes and heightened anxiety about the prospect of institutional change.

And perhaps most importantly, it has shaped our understanding of stare decisis. Chief Justice Roberts's concurrence in *June Medical Services* is illustrative on this point. There, the Chief Justice extravagantly embraced stare decisis, noting that although he had dissented from the majority's decision in *Whole Woman's Health*, the fact of the Court's decision in that case compelled his vote to invalidate the Louisiana admitting privileges law. In so doing, Chief Justice Roberts was appealing to the neutral principles that Rikelman alluded to in her opening statement to the Court. Precedent, not politics, had commanded his vote in the instant case.

In many ways, Chief Justice Roberts's concurrence recalled his statements at his 2005 confirmation hearing. There, he famously analogized the judicial role to that of a baseball umpire, whose job it is "to call balls and strikes."²⁸⁹ What then-Judge Roberts failed to say was that it is

1992.pdf [https://perma.cc/PH87-BZAP] ("This Court has repeatedly held that the doctrine of stare decisis is of fundamental importance to the rule of law.")

²⁸⁸ Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 16 (1959).

²⁸⁹ *Roberts Confirmation Hearing*, *supra* note 1, at 56.

also the umpire's job to determine — indeed, to judge — where the strike zone lies.²⁹⁰

Just as the seemingly neutral exercise of calling balls and strikes is undergirded by the exercise of judgment, so too is stare decisis. The act of following precedent may yield a range of interpretive choices that may admit politicized and ideological judgment. Again, the Chief Justice's concurrence in *June Medical Services* is instructive. Despite his professed allegiance to following precedent, the Chief Justice's approach to stare decisis was contingent and selective, undermining *Whole Woman's Health*, the very precedent it purported to follow. And in so doing, it yielded an outcome that was hardly value-neutral — it effaced the profound impact of *Whole Woman's Health* for future abortion challenges, returning the law to the pre-2016 status quo.

On this account, *June Medical Services* is a decision about abortion *and* precedent — and the relationship between the two. But more profoundly, it is a decision that speaks to the relationship between the Court, its institutional identity, and its efforts to respect both abortion rights and precedent at the same time.

²⁹⁰ Mark A. Graber, *Law and Sports Officiating: A Misunderstood and Justly Neglected Relationship*, 16 CONST. COMMENT. 293, 295 (1999) (noting that “baseball umpires ‘interpret’ the strike zone and other rules”); *see also id.* at 300 (“Major league umpires . . . do not engage in mere fact-finding when calling balls and strikes. Pitchers and hitters know that the strike zone in the National League is different than the strike zone in the American League. . . . These different interpretations of the strike zone reflect different understandings of baseball, not different understandings of the precise location of those parts of the body set out in the definition of strike.”).