

PRECEDENT, RELIANCE, AND *DOBBS*

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Our system of stare decisis enables and encourages people to rely on judicial decisions to form expectations about their legal rights and duties into the future, and to structure their lives and mentalities based on those expectations. In following precedent, courts serve the reliance interests of those subject to the law and accordingly support their autonomy, self-governance, and dignity. Despite widespread reliance on the precedents protecting the right to abortion, in Dobbs v. Jackson Women’s Health Organization the Supreme Court declined to give any consideration to those interests. This move signals a notable shift in the Court’s stare decisis jurisprudence and would seem to overrule Planned Parenthood of Southeastern Pennsylvania v. Casey as a precedent about precedent. This Article illuminates the treatment of stare decisis in the Dobbs majority opinion, focusing on its approach to reliance. I explain why the Justices joining that opinion determined that whatever reliance interests had attached to the precedents protecting the right to abortion were irrelevant for the purposes of a stare decisis analysis. The Justices’ refusal to recognize the reliance interests at stake here, I argue, is inconsistent with the Court’s previously prevailing stare decisis jurisprudence and is also mistaken as a matter of first principles, undermining basic rule of law values that stare decisis is meant to protect.

INTRODUCTION

In reliance on judicial decisions, people form expectations about their legal rights and duties. And based on these expectations, they structure their lives and form their understandings of their society and their place in it. When precedent is overturned, people’s expectations might be upset and their lives disrupted in ways that undermine their autonomy and offend their dignity. Accordingly, when the United States Supreme Court engages in a stare decisis analysis to determine whether some precedent should be overruled, it treats reliance on the precedent as a reason against overruling it.

In *Dobbs v. Jackson Women’s Health Organization*,¹ the Justices joining the majority opinion claimed that no real reliance interests were at stake in the precedents protecting the right to abortion, most notably *Roe v. Wade*² and *Planned Parenthood of Southeastern Pennsylvania v.*

* Assistant Professor, University of Wisconsin Law School. For helpful comments on drafts and discussions of ideas, I’m grateful to Joshua Braver, Anuj Desai, Blake Emerson, Michael Gerhardt, Abner Greene, Tara Grove, Randy Kozel, George Letsas, Sebastian Lewis, Hillary Nye, Richard Re, Kate Redburn, Paul Rink, David Schwartz, Mitra Sharafi, Fred Smith, Nicos Stavropoulos, Maxwell Stearns, Rafi Stern, Jason Yackee, and participants of the American Association of Legal and Social Philosophy 2022 Conference and the *Wisconsin Law Review*’s 2022 Symposium. Thank you to Leigha Hildur Vilen for excellent research assistance. And thank you to the students at the *Harvard Law Review* for the excellent editorial work. Support for this research was provided by the Office of the Vice Chancellor for Research and Graduate Education at the University of Wisconsin-Madison with funding from the Wisconsin Alumni Research Foundation.

¹ 142 S. Ct. 2228 (2022).

² 410 U.S. 113 (1973), *overruled by Dobbs*, 142 S. Ct. 2228.

Casey.³ The Justices determined that only tangible or “concrete” reliance counts for the purposes of stare decisis and there was no such reliance on *Roe* and *Casey*.⁴ For the *Dobbs* Court, if any reliance interests existed, they were “intangible,” unlike commercial interests based in property or contract rules, and therefore had no place in a stare decisis analysis.⁵

In considering whether to overturn *Roe*, the Court in *Casey* had advanced a different, more expansive view of reliance that recognized widespread expectation interests in a continued right to abortion.⁶ From the point of view of a majority of the Justices in *Casey*, that reliance weighed in favor of upholding *Roe*.⁷

As the *Dobbs* dissent observed, *Casey* is not only a precedent about abortion but also “a precedent about precedent”⁸ — and “until today, one of the Court’s most important.”⁹ The *Dobbs* Court, however, found *Casey*’s stare decisis framework to be “exceptional” and indefensible.¹⁰ And it set out to overrule *Casey* on the matter of stare decisis itself.

The main differences between *Casey*’s stare decisis framework and *Dobbs*’s are (1) the different conceptions of reliance advanced in the two decisions, and (2) the emphasis on the nature of the error and in particular the notion of “egregious” error that *Dobbs* relies on.¹¹ In this Article, I mostly set aside the nature-of-error issue, which I plan to take up in future work. My aim here is to illuminate the *Dobbs* decision as a precedent about precedent on the matter of reliance interests. I unpack the Court’s conception of reliance and contrast it with reliance as conceived in *Casey* and various other cases. Examining the reliance interests that the *Dobbs* decision upsets, I suggest that people do have reliance interests in the right to abortion, both tangible interests of the type that should count even under the narrow conception of reliance

³ 505 U.S. 833 (1992), *overruled by Dobbs*, 142 S. Ct. 2228. In this Article, by a *right to abortion*, I mean the freedom to access abortion where it is offered, as well as to provide abortion care. This is how the term is generally used in the constitutional context. See, e.g., Aaron Tang, *After Dobbs: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban*, STAN. L. REV. (forthcoming) (manuscript at 6 n.39), <https://ssrn.com/abstract=4205139> [<https://perma.cc/W2N4-53YN>].

⁴ *Dobbs*, 142 S. Ct. at 2265, 2276–77.

⁵ *Id.* at 2276–77.

⁶ *Casey*, 505 U.S. at 856.

⁷ *Id.*

⁸ *Dobbs*, 142 S. Ct. at 2348 (Breyer, Sotomayor & Kagan, JJ., dissenting).

⁹ *Id.* at 2321; see also Melissa Murray, *The Supreme Court, 2019 Term — Comment: The Symbiosis of Abortion and Precedent*, 134 HARV. L. REV. 308, 330, 329 (2020) (observing that “*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,” *id.* at 330, and referring to *Casey* “as a critical ‘precedent on precedent’ — both in and outside of the abortion context,” *id.* at 329).

¹⁰ *Dobbs*, 142 S. Ct. at 2266.

¹¹ See *id.* at 2243, 2265, 2272 (characterizing *Roe* as “egregiously wrong,” *id.* at 2243, 2265, and asserting that *Casey*’s application of stare decisis “did not account for the profound wrongness of the decision in *Roe*, and placed great weight on an intangible form of reliance with little if any basis in prior case law,” *id.* at 2272); *Casey*, 505 U.S. at 855–56 (embracing a broad conception of reliance, not limited to commercial interests).

that the *Dobbs* Court favors and more abstract interests that count under the *Casey* conception of reliance but not the *Dobbs* one. Further, I argue that *Casey* was correct to insist that so-called “intangible” forms of reliance on precedent should factor into a stare decisis analysis, even if the Justices in that decision could have been clearer about the nature of this reliance and why it matters.

The Article proceeds as follows. In Part I, I explain how the protection of reliance interests features as a central purpose underlying the doctrine of stare decisis; this purpose is not intrinsically valuable but serves values that are. And I explain how, in a legal system that recognizes stare decisis, courts have a special responsibility to take reliance interests into consideration before overruling a precedent. Next, in Part II, I take up the *Dobbs* Court’s approach to reliance: first, I examine what exactly the Court meant by reliance of the “concrete” in contrast to the “intangible” variety, and I suggest that, despite the Court’s claims to the contrary, there were concrete reliance interests in the abortion precedents; second, I address the Court’s stated reasons for dismissing the kind of “intangible” reliance that *Casey* gave credence to and suggest that those reasons are specious. Then, in Part III, I explore in more detail the nature of intangible reliance; I defend its value and argue that the presence of intangible reliance places a weight on the scales against overruling precedent. Part IV delineates some limiting principles and responds to some objections to the view of reliance that I favor. And in the Conclusion, I consider what *Dobbs* as a precedent about precedent might mean for the Court’s stare decisis jurisprudence going forward.

I. STARE DECISIS AND RELIANCE INTERESTS

A. *Protecting Expectations*

Stare decisis¹² refers to the requirement on judges to treat like cases alike, which means treating past judicial decisions as sources of law. In this section, I first consider the reasons for having a doctrine of stare decisis to begin with, and I then turn to the reasons for courts to uphold precedent in a legal system with a doctrine of stare decisis in place. Professor Jeremy Waldron calls these two “layers” of stare decisis.¹³ Distinguishing these two layers will help set the stage for an analysis of the Supreme Court’s stare decisis jurisprudence and specifically of the *Dobbs* Court’s treatment of reliance interests and its decision to overrule the abortion precedents.

¹² “Stare decisis” is short for the Latin maxim *stare decisis et non quieta movere*, which means “stand by the thing decided and do not disturb the calm.” E.g., James C. Rehnquist, Note, *The Power that Shall Be Vested in a Precedent: Stare Decisis, The Constitution and the Supreme Court*, 66 B.U. L. REV. 345, 347 (1986).

¹³ Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 5 (2012).

Starting with the first layer of stare decisis, a primary purpose or goal of stare decisis — one of the main functions that the practice is meant to serve — is to make the law stable and predictable.¹⁴ Stability and predictability are integral to the rule of law.¹⁵ These properties are not valuable in their own right, but they support values that do have intrinsic worth, including autonomy, self-determination, liberty, and dignity.¹⁶ They do so by encouraging and enabling us to form reasonable and reliable expectations about our future legal rights and duties.¹⁷

¹⁴ See, e.g., *Walton v. Arizona*, 497 U.S. 639, 673 (1990) (Scalia, J., concurring in part and concurring in the judgment) (asserting that the doctrine of stare decisis “exists for the purpose of introducing certainty and stability into the law”); *Bendix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888, 897–98 (1988) (Scalia, J., concurring in the judgment) (indicating that “the ultimate objective of the rule of *stare decisis*” is enabling and protecting “confident expectations,” *id.* at 898); *Thomas v. Wash. Gas Light Co.*, 448 U.S. 261, 272 (1980) (plurality opinion) (“[Stare decisis] serves the broader societal interests in evenhanded, consistent, and predictable application of legal rules.”); Richard H. Fallon, Jr., *The Supreme Court, 1996 Term — Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 111–13 (1997) (explaining how stare decisis promotes settlement and stability); A.L. Goodhart, *Precedent in English and Continental Law*, 50 L.Q. REV. 40, 58 (1934) (asserting that “the most important reason for following precedent is that it gives us certainty in the law”); David Lyons, *Formal Justice and Judicial Precedent*, 38 VAND. L. REV. 495, 496 (1985) (“The reason most often given for the practice of precedent is that it increases the predictability of judicial decisions.”); Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 368 (1988) (“The most commonly heard justification for the doctrine of stare decisis rests on the need for certainty in the law.”); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 750 (1988) (suggesting that “the stability of our legal system depends on the doctrine of stare decisis”); David L. Shapiro, *The Role of Precedent in Constitutional Adjudication: An Introspection*, 86 TEX. L. REV. 929, 946–47 (2008) (arguing that stare decisis is justified in part by the “conviction that the judiciary plays a vital role in serving as a protector of continuity in the context of incremental change,” *id.* at 947). See generally Nina Varsava, *How to Realize the Value of Stare Decisis: Options for Following Precedent*, 30 YALE J.L. & HUMANS. 62 (2018) (discussing this and other purposes of stare decisis).

¹⁵ See, e.g., *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 419–20 (1983) (asserting that “the doctrine of *stare decisis* . . . demands respect in a society governed by the rule of law”); JOSEPH RAZ, *The Rule of Law and Its Virtue*, in *THE AUTHORITY OF LAW* 210, 215 (2d ed. 2009) (“Stability is essential if people are to be guided by law in their long-term decisions.”); Sebastian Lewis, *Precedent and the Rule of Law*, 41 OXFORD J. LEGAL STUD., 873, 874 (2021) (taking stability and reliability as “part and parcel of the rule of law ideal”); Hillary Nye, *Predictability and Precedent*, in *PHILOSOPHICAL FOUNDATIONS OF PRECEDENT* (Timothy Endicott et al. eds., forthcoming 2023) (manuscript at 442) (on file with author) (“The rule of law demands that law be made and applied in a way that is predictable, thereby enabling people to plan their lives in accordance with it.”); Waldron, *supra* note 13, at 9 (“There is a cluster of considerations commonly cited in support of the system of precedent that seems to invoke rule-of-law values. These include the importance of certainty, predictability, and respect for established expectations.”).

¹⁶ See Nye, *supra* note 15 (manuscript at 441, 443) (explaining how predictability in law “does not seem to be a value in its own right,” but “might instead be seen as an instrumental value,” “important because it promotes other values,” *id.* (manuscript at 441), in particular “liberty, dignity, or autonomy,” *id.* (manuscript at 443)).

¹⁷ BRYAN A. GARNER ET AL., *THE LAW OF JUDICIAL PRECEDENT* 408 (2016) (“Indeed, one reason that the doctrine of stare decisis exists is to ‘foster[] reliance on judicial decisions.’” (alteration in original) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997))); Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1921 (2017) (“Stare decisis is a sensible rule

These expectations in turn allow us to plan our lives and organize our affairs confidently, efficiently, and successfully, because we can make decisions and take actions with a good sense of the legal consequences and the kinds of protection that the law will afford us going forward.¹⁸ We can thus exercise our agency more effectively and lead more autonomous and self-determined lives.

Further, through the practice of *stare decisis*, the legal system respects our dignity by supporting our ability to control our lives and form stable understandings of our society and place within it.¹⁹ As Professor Joseph Raz explained, “[r]especting human dignity entails treating humans as persons capable of planning and plotting their future,” and so “respecting people’s dignity includes respecting their autonomy, their right to control their future.”²⁰ One’s ability to exercise this kind of control “depends on the existence of stable, secure frameworks for one’s life and actions,” which a legal system can provide through “a policy of self-restraint designed to make the law itself a stable and safe basis for

because, among other things, it protects the reliance interests of those who have structured their affairs in accordance with the Court’s existing cases.”); Waldron, *supra* note 13, at 9 (“The predictability that [*stare decisis*] fosters is supposed to make it easier for people to exercise their liberty (i.e., their autonomous powers of planning and action).”).

¹⁸ See *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970) (observing that “the desirability that the law furnish a clear guide for the conduct of individuals” is “often considered the mainstay of *stare decisis*” and explaining that “[t]he confidence of people in their ability to predict the legal consequences of their actions is vitally necessary to facilitate the planning of primary activity and to encourage the settlement of disputes without resort to the courts”); *Lighting Ballast Control LLC v. Philips Elecs. N. Am. Corp.*, 744 F.3d 1272, 1281 (Fed. Cir. 2014) (en banc), *vacated sub nom.* *Lighting Ballast Control LLC v. Universal Lighting Techs., Inc.*, 574 U.S. 1133 (2015) (“The doctrine of *stare decisis* enhances predictability and efficiency in dispute resolution and legal proceedings, by enabling and fostering reliance on prior rulings.” (citing *CSX Transp. Inc. v. McBride*, 564 U.S. 685, 699 (2011))); RICHARD A. WASSERSTROM, *THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION* 61 (1961) (explaining how *stare decisis* makes judicial decisions predictable and thereby enables us “to exercise a greater degree of control over [our] environment and to alter and shape the course of future events”); Lewis, *supra* note 15, at 881–87 (arguing that precedent-following is a “distinctive means,” *id.* at 885, of achieving the legal stability necessary for people to “shape their lives, anticipate events and be psychologically confident,” *id.* at 881); Nye, *supra* note 15 (manuscript at 443) (“Predictability enables people to know what will happen to them, plan their lives, and confidently execute those plans. Knowing that precedents will be upheld contributes to that predictability.”).

¹⁹ See WASSERSTROM, *supra* note 18, at 61 (discussing the idea that *stare decisis* “introduce[s] an element of stability and coherence into the social order which guarantees internal peace and lays the groundwork for a fair and impartial administration of justice” (quoting Edgar Bodenheimer, *Law as Order and Justice*, 6 J. PUB. L. 194, 199 (1957))); see also, e.g., *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 166 (1964) (Goldberg, J., dissenting in part) (“The very point of *stare decisis* is to produce a sense of security in the working of the legal system by requiring the satisfaction of reasonable expectations.”).

²⁰ RAZ, *supra* note 15, at 221.

individual planning.”²¹ This kind of stability is an achievement of stare decisis.

Let’s now turn to the second layer of stare decisis, which concerns the reasons for upholding precedent in a legal system that features a doctrine of stare decisis. When a court overturns precedent, it can undermine the foundational values underlying stare decisis just discussed, including liberty, autonomy, and dignity. But there may be a further cost as well, which takes the form of unfair surprise to those adversely affected.

Professors Henry Hart and Albert Sacks’s highly influential legal process textbook describes the judicial decision rule that precedents should generally be upheld as “the policy against unfair surprise.”²² The Supreme Court has recognized that “[v]ery weighty considerations underlie the principle that courts should not lightly overrule past decisions,” including that people be able “to plan their affairs with assurance against *untoward* surprise.”²³ If we did not have stare decisis to begin with, then there may be no legitimate basis for a complaint of unfair or untoward surprise if a court departs from its past decisions. In a legal system committed to stare decisis, though, expectations that courts will generally follow previous decisions are justified.²⁴

The reason that it may be *unfairly* surprising for a court that recognizes stare decisis to overturn a precedent is that the court itself, and the legal system to which it belongs, have led people to rely on the constancy of judicial decisions by following a doctrine of stare decisis and expounding its virtues.²⁵ In legal systems like ours, where courts have

²¹ *Id.* at 220; see also *Lighting Ballast Control*, 744 F.3d at 1281 (“By providing stability of law that has been decided, *stare decisis* is the foundation of a nation governed by law.”); LON L. FULLER, *THE MORALITY OF LAW* 210 (Yale Univ. Press rev. ed. 1969) (arguing that law “is basically a matter of providing the citizenry with a *sound and stable framework* for their interactions with one another, the role of government being that of standing as a guardian of the integrity of this system” (emphasis added)).

²² HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 465 (William N. Eskridge, Jr. & Philip P. Frickey eds., Foundation Press 1st ed. 1994).

²³ *Moragne*, 398 U.S. at 403 (emphasis added).

²⁴ See, e.g., Nye, *supra* note 15 (manuscript at 441 n.3) (“Expectations must, of course, be distinguished from legitimate expectations.”); Grant Lamond, *Precedent and Analogy in Legal Reasoning*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., Summer 2016 ed.), <https://plato.stanford.edu/entries/legal-reas-prec> [<https://perma.cc/DBK6-EM2Z>] (explaining that, in a system with “an institutional practice of following past decisions, . . . the reliance of those subject to future decisions may ground legitimate expectations”). The two layers of stare decisis I discuss here can, as Waldron puts it, “collapse into one another”: if precedent is too frequently or lightly overruled, judicial decisions might not establish reasonable expectations to begin with and we might cease to have a system of stare decisis in a meaningful sense. Waldron, *supra* note 13, at 28; see *id.* at 29.

²⁵ See, e.g., *Moragne*, 398 U.S. at 403; Hillel Y. Levin, *A Reliance Approach to Precedent*, 47 *GA. L. REV.* 1035, 1055 (2013) (suggesting that, when a court overturns precedent and in doing so frustrates reliance interests, it “commit[s] a sort of fraud”); Emily Sherwin, *A Defense of Analogical*

followed a doctrine of stare decisis throughout history and have continually and publicly announced an ongoing commitment to that doctrine, people have come to reasonably and legitimately expect substantial consistency in judicial decisions across time and to rely on that consistency. The judiciary, then, is responsible for people's reliance. As Justice O'Connor explained in her dissent in the case of *James B. Beam Distilling Co. v. Georgia*,²⁶ "[a]t its core, *stare decisis* allows those affected by the law to order their affairs without fear that the established law upon which they rely will suddenly be pulled out from under them."²⁷ When a court does pull the law that people have relied on out from under them, the court may cause them unjust surprise. Hart and Sacks refer to this as the "injustice of disappointing expectations fairly generated."²⁸

There is an important conceptual difference, then, between reliance costs and general policy costs; when the cost at issue is a reliance one, the harm that is imposed has a shadow of unfairness and disrespect. And people who might suffer this kind of harm thus have a claim against its imposition that warrants special judicial consideration aside from other costs and benefits that a decision might have on individuals or society.²⁹ For example, if a court is deciding some environmental dispute, it might take into account the possible adverse effects of a pro-business decision on the availability of clean air. That would be a general policy cost of such a decision. But it is not a reliance cost in the stare decisis sense, provided that there was no previous decision recognizing a right to the benefit that the decision would undermine. If there was such a decision, then the cost would become a reliance one. And if the court overturned its precedent, it would do an injustice to those who, in reliance on that precedent, had an ongoing expectation of clean air and who might have relied on that expectation when taking actions, making plans, and forming hopes and dreams for the future. The Court's description of the reliance inquiry in *Casey*, as one that

Reasoning in Law, 66 U. CHI. L. REV. 1179, 1190 (1999) ("Few would deny that, if people have relied on prior judicial decisions, this is a morally important fact that should play a part in a judge's reasoning.").

²⁶ 501 U.S. 529 (1991).

²⁷ *Id.* at 551–52 (O'Connor, J., dissenting).

²⁸ HART & SACKS, *supra* note 22, at 569; *see also* RAZ, *supra* note 15, at 222 ("The law in such cases encourages autonomous action only in order to frustrate its purpose.").

²⁹ *See* William Michael Treanor & Gene B. Sperling, *Prospective Overruling and the Revival of "Unconstitutional" Statutes*, 93 COLUM. L. REV. 1902, 1924 (1993) (explaining that "courts recognize that individuals who order their affairs in reliance on judicial decisions have a claim to protection"). *But see* Steven G. Calabresi, *Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling Planned Parenthood of Southeastern Pennsylvania v. Casey*, 22 CONST. COMMENT. 311, 340 (2005) (claiming that upset reliance interests constitute a policy cost like any other that a judicial decision might impose).

asks “whether the [precedent] is subject to a kind of reliance that would . . . add *inequity* to the cost of repudiation,” was apt.³⁰

Appropriately, then, the Court has traditionally treated *reliance interests* as one of the main factors in its stare decisis jurisprudence.³¹ To sum up the discussion so far, the reasons that the Court considers reliance interests when deciding whether to overrule a precedent are two-fold. First, because one of the main purposes of stare decisis is to enable and protect reasonable expectations, the Court should be wary of making exceptions to the doctrine that would thwart such expectations; on the other hand, if overruling a particular case would not upset expectations, then the stare decisis reasons for upholding the precedent are that much weaker. Second, the Court has a special responsibility to address possible reliance costs when deciding whether to overrule a precedent because the Court itself has induced reliance on its precedent. None of this is to deny, however, that overturning precedent will sometimes be justified even if there is reliance at stake. In a given case, factors favoring overruling might outweigh reliance interests or the character of the reliance interests might make them unworthy of protection.³²

Some commentators contend that people are not actually justified in relying on precedent, since courts do in fact overrule their own decisions and the Supreme Court has never suggested that it is strictly bound to follow precedent but rather maintains that “[s]tare decisis is *not* an inexorable command.”³³ The latter claim was first made in *Payne v. Tennessee*³⁴ and has been repeated many times since, including in

³⁰ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992) (emphasis added) (citing *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924)), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

³¹ See, e.g., *Hilton v. S.C. Pub. Rys. Comm’n*, 502 U.S. 197, 202 (1991) (“*Stare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.”); see also Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1730 (2013) (“Reliance interests are one of the classic concerns of stare decisis. Indeed, while the doctrine serves many goals, the protection of reliance interests is paramount.” (footnote omitted)); Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 418 (2010) (“When the Court is deciding whether to overrule a precedent, one of the issues it must confront is the extent to which stakeholders have relied on the precedent in organizing their behaviors and understandings.”). The term “reliance” might not be ideal as a matter of semantics, given the narrow meaning of “reliance” interests in contract law. See *infra* notes 211–13 and accompanying text. But the term is commonly used in the stare decisis context and does seem appropriate given its nontechnical meaning, so I stick with it here.

³² For more on this, see *infra* section IV.C, pp. 1908–11.

³³ *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (second emphasis added).

³⁴ 501 U.S. 808.

Dobbs.³⁵ According to Professor Michael Paulsen, people should thus be on notice that the law may change at any time by judicial decision just as it may by legislation.³⁶ On this view, people have no right to rely on the Court's constancy and the Court has no duty to protect whatever expectations people might have that a precedent will be maintained.³⁷

Even though the Court has never claimed that *stare decisis* represents an absolute rule of adjudication, it nevertheless does follow the doctrine. It also continually reaffirms, in official, public pronouncements, and often vigorously, its commitment to abide by precedent. This does not mean that people would be justified in believing that precedents will not be overruled under any circumstances — indeed, it would be silly to think so. But meaningful and justified reliance might exist even if it is not absolute in that way. Compare to promises: it seems that forming expectations based on promises is justified even though promises are not always kept.

Further, some commentators have suggested that we are not responsible for foreseeing the Court's departures from precedent, perhaps because it is often beyond our capabilities to do so, but also for rule of law reasons.³⁸ Justice Scalia, for example, maintained that “reliance upon a square, unabandoned holding of the Supreme Court is *always* justifiable reliance.”³⁹ Note that reliance on a decision may be justifiable even if there are signs in the air that the Court may be interested in overruling the decision. Compare again to promises: If someone promises that they will do something for you, you are justified in relying on their promise even if there are signs that they might break it. If the promisor is in a position of authority over you, you may be especially justified in so relying because your ability to function may depend on it.

³⁵ *Dobbs*, 142 S. Ct. at 2262 (2022); see also Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1554 n.49 (2000) [hereinafter Paulsen, *Abrogating Stare Decisis*] (arguing that, because “American courts have never represented the doctrine of *stare decisis* to be an absolute rule of adherence to precedent, there is scarcely more reason to assume that a judicial doctrine will remain the same than there is to assume that the legislature will not change a statute” and that “[t]he two [types of change] should be regarded as similar, in terms of reliance interests”); Michael Stokes Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, 86 N.C. L. REV. 1165, 1179 (2008) [hereinafter Paulsen, *Supreme Court's Current Doctrine of Stare Decisis*] (claiming that “there is not much more reason to expect that any given judicial interpretation will not change than there is to expect that a legislature will not enact a new statute”).

³⁶ See Paulsen, *Abrogating Stare Decisis*, *supra* note 35, at 1554 n.49.

³⁷ *Id.* at 1554 (“The fact of reliance does not create a vested right in the prior legal regime; nor does it supply a basis for a court to refuse to apply a new rule of law, if that is what is otherwise required.”).

³⁸ I discuss this point in more detail below. See *infra* notes 309–10 and accompanying text.

³⁹ *Quill Corp. v. North Dakota*, 504 U.S. 298, 321 (1992) (Scalia, J., concurring in part and concurring in the judgment) (arguing that a precedent at issue should be upheld at least in part because of the reliance interests at stake).

In contrast, the legislature has made no commitment to precedent in legislative decisions or to some other kind of constancy in statutory law. Statutory rights and duties are subject to the political process, and we cannot reasonably expect that the preferences and policy judgments that inform legislation will remain constant or that differently composed legislatures will favor similar legislation. That said, any major legal change, regardless of the source, may be disruptive and may upset reasonable expectations. Legislative change, though, can more readily be justified and legitimated on democratic grounds than can change caused by judicial decision.⁴⁰

Further, the legislative branch is in a better position than the judicial to assess and mitigate the reliance harms that might come with changes to the law.⁴¹ Compared to life-tenured judges, elected officials receive stronger and more direct signals about the costs of upsetting expectations as well as measures that would compensate for those costs, and they have a clear incentive to be responsive to those signals. So even from a cost-benefit perspective, we have reason to be less concerned about legislative changes to the law than about judicial ones. Further still, there are legal doctrines that protect individuals against the revocation of rights at the hands of legislative and regulative bodies.⁴²

⁴⁰ See Randy J. Kozel, *Precedent and Reliance*, 62 EMORY L.J. 1459, 1503 (2013) (“The desire to promote stability and minimize tumult . . . might be viewed as creating a general preference for legal continuity across all branches of government,” but “[w]ith respect to legislative and executive actors,” there is “a competing interest in political responsiveness”: “[t]he people enact their policy preferences through their elected representatives, and the effectuation of the democratic will serves as a counterweight against the pull of constancy.”). Further, Waldron points out that “[t]he need for constancy is perhaps particularly important in regard to judge-made law” in contrast to legislation, because the legislative “processes are cumbersome and hard to mobilize,” whereas “judicial decisions are made every day, each one with the potential to change the law.” Waldron, *supra* note 13, at 28.

⁴¹ See Jill E. Fisch, *The Implications of Transition Theory for Stare Decisis*, 13 J. CONTEMP. LEGAL ISSUES 93, 105 (2003) (pointing out that courts are not well suited to assess the costs of legal change and “the essentially policy driven nature of this analysis is well removed from the methodology that most members of the Court purport to employ in interpreting statutes or the Constitution”); Levin, *supra* note 25, at 1060 (arguing that “the legislature is unlikely to wholly upset reliance interests, and [unlike courts] it has the tools necessary to craft policies that mitigate the costs of radical policy changes”).

⁴² See Edward B. Foley, *Due Process, Fair Play, and Excessive Partisanship: A New Principle for Judicial Review of Election Laws*, 84 U. CHI. L. REV. 655, 731–36 (2017) (“The Due Process Clauses of the Fifth and Fourteenth Amendments have long been understood to protect persons against laws that improperly unsettle ‘vested rights’ or other reasonable reliance interests that persons may have in existing legal arrangements.” *Id.* at 731.); see also Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 423–24 (2010). Some scholars suggest that the reliance costs that come with overturning precedent are more troubling than those associated with legislative change because legislation, in contrast to precedent, generally does not have retroactive effect. See, e.g., Fisch, *supra* note 41, at 98. But this difference between legislation and precedent cannot fully explain the difference in reliance concerns because expectations can be thwarted even if legal change is only prospective, and moreover the judiciary can and sometimes does change the law in an exclusively prospective way.

It is no response to those who claim reliance interests in the maintenance of precedent to say, as Paulsen does, that “[l]egislatures are constantly creating new legal rules[,] . . . [y]et, no one thinks that this somehow gives those aggrieved by the new rule some vested legal right in the continuation of the prior legal regime.”⁴³ Paulsen neglects to appreciate that the legislature and the judiciary have different roles, which give rise to different kinds of legitimate expectations on the part of those subject to the law as well as different duties regarding the respect and protection owed to expectations.⁴⁴

Even though the Supreme Court does not take itself to be strictly bound by precedent, then, it is reasonable and legitimate for people to make predictions about the content of their rights and duties in the future based on expectations that the Court will abide by its previous decisions.⁴⁵ And the Court has good reason to consider such expectations in its stare decisis analysis; doing so is a critical part of upholding the rule of law.

Moreover, in *Casey*, the Court went above and beyond its typical commitment to stare decisis: it referred to precedent as a kind of “promise of constancy,” which, “once given, binds its maker for as long as the power to stand by the decision survives and the understanding of the issue has not changed so fundamentally as to render the commitment obsolete.”⁴⁶ In keeping with the notion of a precedent as a kind of promise, the Court asserted that overruling *Roe* “would be nothing less than a breach of faith.”⁴⁷ This stated commitment to uphold *Roe*, made publicly and intentionally, can be seen as lending additional weight to the precedent, beyond the baseline weight that all precedents have. And the commitment gave people a reason to put more reliance on the precedent than they otherwise would have done on the basis of stare decisis alone. Stare decisis is an institutional practice that provides a basis for reliance. An explicit promise to uphold a particular line of precedents provides a

⁴³ Paulsen, *Supreme Court's Current Doctrine of Stare Decisis*, *supra* note 35, at 1178.

⁴⁴ As Professor Henry M. Hart Jr. observed, in law “questions about the action to be taken do not present themselves for decision in an institutional vacuum,” and each decisionmaking body in a legal system “must take account always of its own place in the institutional system and of what is necessary to maintain the integrity and workability of the system as a whole.” Henry M. Hart, Jr., *The Aims of the Criminal Law*, LAW & CONTEMP. PROBS., Summer 1958, at 401, 402 (1958). “It is axiomatic that each agency of decision ought to make those decisions which its position in the institutional structure best fits it to make.” *Id.* at 426.

⁴⁵ See WASSERSTROM, *supra* note 18, at 69 (observing that reliance on judicial decisions “would surely be justifiable if the legal system were openly committed to the doctrine of precedent”).

⁴⁶ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 868 (1992), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022); see also Kozel, *supra* note 40, at 1461 n.6 (discussing the Court’s “promise of constancy” in *Casey* and noting that “its statement was related to those exceptional situations in which the Court ‘calls the contending sides of a national controversy to end their national division’” (quoting *Casey*, 505 U.S. at 867–68)).

⁴⁷ *Casey*, 505 U.S. at 868.

further basis.⁴⁸ The overruling of *Roe* and *Casey* might thus represent an especially egregious violation of public trust.

B. Constitutional Precedent

The weight of constitutional precedent compared to other types of precedent is controversial, but in this section I suggest that the Court should take constitutional precedent just as seriously as — or even more seriously than — other types of precedent, especially constitutional precedent that protects personal liberties.

Under the Court's prevailing practice of stare decisis, constitutional cases are generally afforded weaker precedential effect than statutory ones. The justification typically given for the differential treatment is that Congress can overturn erroneous statutory cases whereas erroneous constitutional ones can be corrected only by the Court's action or by constitutional amendment, the latter of which "is generally considered far too onerous to serve as a meaningful corrective force."⁴⁹ And indeed, in the majority opinion in *Dobbs*, the Justices asserted that stare decisis

⁴⁸ One might contend that the Court does not have the power to determine the degree of precedential weight that decisions are to have in the future and that it overreached when it tried to do so in *Casey*. However, while this kind of promise is not part of the Court's typical practice (and even if it was inappropriate for the Court to make the promise), that does not mean that the promise didn't create any kind of obligation.

⁴⁹ Lawrence C. Marshall, "*Let Congress Do It': The Case for an Absolute Rule of Statutory Stare Decisis*," 88 MICH. L. REV. 177, 184, 197 & n.101 (1989) (explaining how "[t]he conventional explanation for the heightened role of stare decisis in statutory cases is that congressional failure to enact legislation reversing a judicial decision indicates Congress' approval of the Court's interpretation of an earlier statute," *id.* at 184, and how, "[i]n contrast, a relatively weak form of constitutional stare decisis is appropriate, the argument goes, since the Court is the only body practically able to remedy its own mistakes in interpreting the Constitution," *id.* at 197); see also *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2478 (2018) (stating that stare decisis "is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions" (quoting *Agostini v. Felton*, 521 U.S. 203, 235 (1997))); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406–07 (1932) (Brandeis, J., dissenting) ("[I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions." (footnotes omitted) (listing cases)); Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 322–27 (2005) (describing the two rationales that explain statutory stare decisis as the "congressional acquiescence," *id.* at 322, and the "separation-of-powers," *id.* at 323, theories). *But see Johnson v. Transp. Agency*, 480 U.S. 616, 671–72 (1987) (Scalia, J., dissenting) (arguing that the assumption of congressional acquiescence in statutory precedents, which is used to support the extra-strong deference given to them, is fallacious); Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 427–29 (1988) (arguing that it should not be harder to overrule statutory precedent than other types of precedent); William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362–63 (1988) (questioning the heightened precedential weight afforded to statutory precedents). Professor Thomas R. Lee points out that the distinction between the weight owed to statutory versus constitutional precedent does not have a deep historical basis: "The notion of an enhanced standard of deference to statutory decisions apparently had not occurred to the founding generation — treatises and other commentary are silent on the issue[— and] while some commentators considered the notion of diminished deference to constitutional decisions, they generally rejected it." Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 708 (1999).

“is at its weakest when [the Court] interpret[s] the Constitution,” since “when it comes to the interpretation of the Constitution . . . we place a high value on having the matter ‘settled right,’” and “when one of our constitutional decisions goes astray, the country is usually stuck with the bad decision unless we correct our own mistake.”⁵⁰ “Therefore,” they concluded, “in appropriate circumstances we must be willing to reconsider and, if necessary, overrule constitutional decisions.”⁵¹ Nevertheless, the Court regularly affirms its commitment to *stare decisis* even in the constitutional realm, emphasizing that even there, “any departure from the doctrine of *stare decisis* demands special justification.”⁵²

As a normative matter, the case for affording weaker precedential effect to constitutional decisions is questionable. The *Dobbs* Court emphasized the value of having constitutional liberties “settled right.”⁵³ But the matter won’t be settled at all if constitutional precedents carry little weight. Instead, constitutional rights will be vulnerable and precarious.⁵⁴ As Justice Marshall noted in his dissenting opinion in *Payne v. Tennessee*, where he criticized the weak form of *stare decisis* embraced by the majority, it is not a satisfying response to this concern to say “that Justices owe fidelity to the text of the Constitution rather than to the case law of this Court interpreting the Constitution.”⁵⁵ This is because “[t]he text of the Constitution is rarely so plain as to be self-executing” and “invariably, [the] Court must develop mediating principles and doctrines in order to bring the text of constitutional provisions to bear on particular facts.”⁵⁶

⁵⁰ *Dobbs*, 142 S. Ct. at 2262 (quoting *Agostini*, 521 U.S. at 235). The opinion elaborated that “[a]n erroneous constitutional decision can be fixed by amending the Constitution, but our Constitution is notoriously hard to amend.” *Id.* (citing U.S. CONST. art. V; *Kimble v. Marvel Ent., LLC*, 135 S. Ct. 2401, 2409 (2015)).

⁵¹ *Id.* The *Dobbs* majority observed that “[o]n many other occasions, this Court has overruled important constitutional decisions,” and it included a long list of cases that overruled constitutional precedent to support the claim. *Id.* at 2263 & n.48. Almost the exact same list appeared in Justice Kavanaugh’s concurrence in the 2020 case of *Ramos v. Louisiana*. 140 S. Ct. 1390, 1411–12 (2020) (Kavanaugh, J., concurring in part). For a discussion of *Ramos*, and Justice Kavanaugh’s analysis of *stare decisis* in his concurring opinion, see generally Nina Varsava, Essay, *Precedent on Precedent*, 169 U. PA. L. REV. ONLINE 118 (2020).

⁵² *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984); see also *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (“[E]ven in constitutional cases, the doctrine [of *stare decisis*] carries such persuasive force that we have always required a departure from precedent to be supported by some ‘special justification.’” (quoting *United States v. Int’l Bus. Machs. Corp.*, 517 U.S. 843, 856 (1996))).

⁵³ *Dobbs*, 142 S. Ct. at 2262 (quoting *Kimble*, 135 S. Ct. at 2409).

⁵⁴ See *Payne v. Tennessee*, 501 U.S. 808, 853 (1991) (Marshall, J., dissenting) (arguing that the weak version of *stare decisis* embraced by the majority, “[c]arried to its logical conclusion, . . . would destroy the Court’s very capacity to resolve authoritatively the abiding conflicts between those with power and those without”).

⁵⁵ *Id.* at 853 n.3.

⁵⁶ *Id.* Justice Marshall added that “to rebut the charge of personal lawmaking, Justices who would [overrule a precedent] must . . . explain why they are entitled to substitute *their* mediating

In a compelling treatment of the topic, Judge Easterbrook turns on its head the kind of argument we see in *Dobbs* against giving strong precedential effect to constitutional decisions. The very reasons that constitutional amendment is difficult, observes Easterbrook, suggest that the Court's practice of affording less precedential weight to constitutional decisions is misguided:

One reason [amendment is difficult] is to ensure that a super-majority of the people supports any constitutional rule — whether a grant of power to the national government, or a constraint on the exercise of power by government — at the time of its inception. Another is to ensure stability in the structure of government. The political branches and the people can plan against the background of known rules Ready overruling of constitutional cases interferes with both objectives. It reduces the stability of governmental institutions, denying the polity the benefit (if such it is) of continuity. Not coincidentally, it saps the drive for change in the constitutional text.⁵⁷

Easterbrook concludes that constitutional precedents should be more, rather than less, difficult to overrule than statutory ones. This view is contrary to the one expressed in *Dobbs*.⁵⁸

The Court does have an established practice of giving enhanced precedential weight to a subset of constitutional decisions — those protecting individual liberties and implicating “individual or societal reliance.”⁵⁹ Given this expressed commitment, reliance on decisions protecting personal liberties may be stronger and better justified than reliance on other kinds of decisions. In *Webster v. Reproductive Health Services*,⁶⁰ Justice Blackmun observed that the Court's duty to provide a special justification for overruling a precedent represents a “heavy burden” and “applies with unique force where . . . the Court's

principles for those that are already settled in the law[, a]nd such an explanation will be sufficient to legitimize the departure from precedent only if it measures up to the extraordinary standard necessary to justify overruling one of this Court's precedents.” *Id.*; see also MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* 147–48 (2008) (“[I]t is practically impossible to find any modern Court decision that fails to cite at least some precedents in support.”); Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 *GEO. WASH. L. REV.* 68, 73 (1991) (“Precedents are commonly regarded as a traditional source of constitutional decisionmaking”).

⁵⁷ Easterbrook, *supra* note 49, at 430.

⁵⁸ *Id.* at 431; see also Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 *MINN. L. REV.* 1173, 1180 (2006) (“At least in certain kinds of cases, precedent gains added importance in the constitutional area. One purpose of having a written constitution is to create a stable framework for government. This goal would be undermined if the Court failed to give special credence to bedrock precedents — precedents that have become the foundation for large areas of important doctrine.”).

⁵⁹ See *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (“In *Casey* we noted that when a court is asked to overrule a precedent recognizing a constitutional liberty interest, individual or societal reliance on the existence of that liberty cautions with particular strength against reversing course.” (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855–56 (1992), *overruled by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022))).

⁶⁰ 492 U.S. 490 (1989).

abrogation of precedent would destroy people's firm belief, based on past decisions of this Court, that they possess an unbridgeable right to undertake certain conduct."⁶¹

There is a significant asymmetry between precedents granting and those denying protection of individual rights. Accordingly, when the Court departs from a precedent that protects "a fundamental personal freedom," Justice Blackmun emphasized, as it would if it were to overturn *Roe*, the Court has a "greater burden" than otherwise to justify the departure.⁶² In keeping with this idea, just a few years ago in *Ramos v. Louisiana*,⁶³ Justice Gorsuch suggested that "the reliance the American people place in their constitutionally protected liberties" is one of the most important kinds of reliance interests for the Court to take into account.⁶⁴ Along similar lines, former Justice Goldberg maintained that, "when the Supreme Court seeks to overrule in order to cut back the individual's fundamental, constitutional protections against governmental interference, the commands of stare decisis are all but absolute," whereas "when a court overrules to expand personal liberties, the doctrine interposes a markedly less restrictive caution."⁶⁵ Although the stare decisis force that the Court affords to constitutional precedent is generally understood to be weaker than the force afforded to other types of precedent, constitutional precedents that protect personal liberties

⁶¹ *Id.* at 558–59 (Blackmun, J., concurring in part and dissenting in part). Some have suggested that, until *Dobbs*, the Court had never, or almost never, overturned precedent protecting personal constitutional rights. See, e.g., Megan Messerly & Alice Miranda Ollstein, *The Possible Post-Roe Roadmap*, POLITICO (May 4, 2022, 8:00 PM), <https://www.politico.com/newsletters/politico-nightly/2022/05/04/the-possible-post-roe-roadmap-00029834> [<https://perma.cc/T6UC-JYUQ>] (quoting Professors Sonia Suter and Naomi Cahn's assertion that "[the *Dobbs*] decision would mark the first time the Court overturned precedent to eliminate, as opposed to recognize a new, right"); David Cole, Opinion, *The Alito Opinion Would Be Like Plessy Overturning Brown v. Board of Education*, WASH. POST (May 5, 2022, 7:00 AM), <https://www.washingtonpost.com/opinions/2022/05/05/reversals-usually-expand-rights-alitos-ruling-would-deny-them> [<https://perma.cc/VG8Z-UKM8>] (asserting that "reversals that deprive people entirely of constitutional rights" are extremely rare). Others claim, to the contrary, that "the Supreme Court has gutted rights-protective precedents on multiple occasions — including some of its most prominent rulings." Ilya Somin, *Reversing Roe v. Wade Wouldn't Be the First Time the Supreme Court Gutted Precedents that Protect Individual Rights — Far From It*, REASON: VOLOKH CONSPIRACY (May 6, 2022, 12:44 AM), <https://reason.com/volokh/2022/05/06/reversing-roe-v-wade-wouldnt-be-the-first-time-the-supreme-court-gutted-precedents-that-protect-individual-rights-far-from-it> [<https://perma.cc/P5W9-VE7F>].

⁶² *Webster*, 492 U.S. at 559 (Blackmun, J., concurring in part and dissenting in part).

⁶³ 140 S. Ct. 1390 (2020).

⁶⁴ *Id.* at 1408 (plurality opinion).

⁶⁵ ARTHUR J. GOLDBERG, EQUAL JUSTICE: THE WARREN ERA OF THE SUPREME COURT 74–75 (1971). Former Justice Goldberg argues that constitutional precedents denying individual rights have less weight than those protecting individual rights because "under our constitutional scheme these rights do and should expand." *Id.* at 85; see also Treanor & Sperling, *supra* note 29, at 1906, 1954 (emphasizing "our constitutional system's commitment to the promotion of liberty," *id.* at 1954, and suggesting that "given the essentially libertarian bias of our constitutional system of governance, a statute that has once been unconstitutional under governing case law should not be revived if it constrains individual liberty (as do, for example, the abortion regulations sanctioned by *Casey*)," *id.* at 1906).

would seem to be an exception.⁶⁶ Former Justice Goldberg maintained that this “pattern has generated a substantial public expectation of continued growth of constitutional liberties.”⁶⁷

This exception to the otherwise lesser precedential weight afforded to constitutional cases may be normatively justified. The revocation of an individual liberty right that one had relied on represents a particularly grave harm, at least or especially where the right implicates “highly personal” and private choices⁶⁸ — as it does, for example, in the contexts of abortion, romantic and sexual relations, and contraception.⁶⁹ People have conceptualized and structured their lives in highly self-defining ways based on the liberty rights that the Court has recognized in these areas — “rights giving individuals control over their bodies and their most personal and intimate associations”⁷⁰ — and overturning precedents that guaranteed these rights thus comes with extra-weighty reliance costs.⁷¹ These costs include psychological harms, but they also take the form of offenses to dignity and autonomy.

⁶⁶ See Mortimer N.S. Sellers, *The Doctrine of Precedent in the United States of America*, 54 AM. J. COMPAR. L. (SUPPLEMENT) 67, 82 (2006) (“In the tradition of common-law courts since the beginning of the republic, the United States Supreme Court has always been extremely solicitous of personal liberty.”).

⁶⁷ GOLDBERG, *supra* note 65, at 90–91; see also Joseph Landau, *Rescinding Rights*, 106 MINN. L. REV. 1681, 1748 (2022) (discussing the Court’s concern for people’s “reliance on progressivism’s onward march”).

⁶⁸ *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 420 n.1 (1983) (describing the right to abortion as protecting a woman’s “highly personal choice whether or not to terminate her pregnancy”), *overruled by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

⁶⁹ See *id.*; *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2328 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) (describing the Court’s precedents protecting the right to abortion as part of the line of “cases protecting ‘bodily integrity,’” and observing that “[n]o right, in this Court’s time-honored view, ‘is held more sacred, or is more carefully guarded,’ than ‘the right of every individual to the possession and control of his own person’” (quoting *Casey*, 505 U.S. at 849; *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891))); *id.* (“There are few greater incursions on a body than forcing a woman to complete a pregnancy and give birth.”); *id.* at 2330 (“When an unplanned pregnancy is involved — because either contraception or abortion is outlawed — ‘the liberty of the woman is at stake in a sense unique to the human condition.’” (quoting *Casey*, 505 U.S. at 852)); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015) (holding that the Due Process Clause protects “certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs”); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.”); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (“We deal with a right of privacy older than the Bill of Rights Marriage is . . . intimate to the degree of being sacred.”).

⁷⁰ *Dobbs*, 142 S. Ct. at 2320 (Breyer, Sotomayor & Kagan, JJ., dissenting).

⁷¹ See Note, *Constitutional Stare Decisis*, 103 HARV. L. REV. 1344, 1361 (1990) (“People place their firmest expectations upon personal rights guaranteed by the Constitution, and such rights often become part of the political and moral thought of the country. Once such a right has become part of an individual’s daily life, a declaration by the Court that it does not exist may well be rejected.”); see also Levin, *supra* note 25, at 1071 (“[W]hen precedents are restrictive, as in *Miller*, *Bowers*, and *Baker*, they are not likely the sort upon which people organize their lives. In contrast, opinions that expand protections of liberty, like a case requiring recognition of same-sex marriage, are much less easily undone because of the reliance — and consequent investment — they induce.”).

The loss of a previously protected personal liberty right compels people to question their positions and statuses in society, as individuals and as members of identity groups.⁷² As the dissent in *Dobbs* observed, “the expectation of reproductive control is integral to many women’s identity and their place in the Nation”: “That expectation helps define a woman as an ‘equal citizen[,]’” “reflect[ing] that she is an autonomous person[] and that society and the law recognize her as such,” and “situat[ing] [her] in relationship to others and to the government.”⁷³ Professor Craig Konnoth describes the “long history of judicial hostility to rights revocation” and argues that “this hostility is based on an understanding that already endowed rights are embedded in, connected to, and constitute individuals or entities — their personhood and identities — in a way that rights that have yet to be granted are not.”⁷⁴ This idea can help explain, and justify, extra-strong stare decisis effect for precedents that protect personal liberties. One’s very identity and sense of self may be partially constituted by the rights that these precedents recognize.⁷⁵

Because the reliance on a precedent that protects a constitutional personal liberty may be especially significant, the Court should (as it purported to do before *Dobbs*) give that reliance careful consideration in its stare decisis analysis.⁷⁶ So why did five Justices in *Dobbs* dismiss

⁷² See *Dobbs*, 142 S. Ct. at 2346 (Breyer, Sotomayor & Kagan, JJ., dissenting) (“When *Roe* and *Casey* disappear, the loss of power, control, and dignity [for women] will be immense.”). This is true for all people who can become pregnant, and not only those who identify as women. In this Article, I sometimes refer to the group with the greatest reliance interests on the line as “women,” but some individuals with other gender identities can also become pregnant and so also have substantial reliance interests at stake, and I do not mean to suggest otherwise.

⁷³ *Id.* at 2345 (quoting *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting)).

⁷⁴ Craig J. Konnoth, *Revoking Rights*, 66 HASTINGS L.J. 1365, 1368 (2015); see also *id.* at 1442; Landau, *supra* note 67, at 1721–24 (suggesting that the Court uses stare decisis to “advance[] non-retrogression principles,” *id.* at 1721, and that in both *Casey* and *Dickerson v. United States*, 530 U.S. 428 (2000), the Court’s stare decisis (and in particular reliance) analysis recognized “rights revocation as a kind of independent harm,” *id.* at 1723).

⁷⁵ See *Dobbs*, 142 S. Ct. at 2329 (Breyer, Sotomayor & Kagan, JJ., dissenting) (observing that *Casey* and related decisions protect “‘the most intimate and personal’ [choices] a person can make,” which “reflect fundamental aspects of personal identity,” and “define the very ‘attributes of personhood’” (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992), *overruled by Dobbs*, 142 S. Ct. 2228)).

⁷⁶ The situation is more complicated if a precedent protects some individual right at the expense of another individual right in a zero-sum way, but that’s not true of the precedents that protected a right to abortion, and I set aside that type of case here. While some people might contend that zygotes, embryos, or fetuses have constitutional rights, the Court has not adopted that position and I think it is ultimately indefensible, but it is beyond my scope here to argue the point. See *id.* at 2331 (“[T]he majority takes pride in not expressing a view about ‘the status of the fetus.’” (quoting *id.* at 2277 (majority opinion))); Seana Valentine Shiffrin, *Reliance Arguments and Democratic Law: On Abortion, Sexuality, Guns, and Freedom of Contract* 30 (Feb. 28, 2023) (unpublished manuscript) (on file with the Harvard Law School Library) (“The Court in *Dobbs* did refer to the life of the fetus, but only in the register of something the state may value, not as the source of independent claims.”); see also Michele Goodwin, *If Embryos and Fetuses Have Rights*, 11 LAW & ETHICS HUM. RTS. 189, 197 (2017) (“The arguments made in favor of embryo and fetal rights

any reliance on the precedents protecting the right to abortion as utterly irrelevant for stare decisis purposes?⁷⁷ In the next Part, I analyze the Court's reasoning on this front.

II. *DOBBS* ON RELIANCE

The *Dobbs* majority's reliance argument runs, roughly, as follows: (1) there is no "concrete" reliance at issue here; (2) although there are other conceivable kinds of reliance interests at play, those are irrelevant for the purposes of stare decisis because (a) the Court hasn't considered them in other cases and (b) the Court is not competent to assess them.⁷⁸ In section II.A, I take up the matter of concrete or tangible reliance interests. I begin by explaining what the Court must have meant by this kind of reliance. I then point to some of the many kinds of tangible reliance on the abortion precedents, showing that, even if we accept the Justices' narrow conception of reliance, the reliance costs of overturning *Roe* and *Casey* were substantial. In section II.B, I turn to the matter of "intangible" reliance, analyzing the Court's stated reasons for excluding any such reliance from the stare decisis calculus and arguing that those reasons are specious.

A. *Tangible Reliance*

The *Dobbs* majority acknowledged that overturning a precedent may upset reliance interests; it also acknowledged that upsetting reliance interests was a cost that would weigh against overturning the precedent.⁷⁹ But for these five Justices, only "concrete" and not "intangible" reliance interests counted for stare decisis purposes.⁸⁰ They named "the absence of concrete reliance" as one of the "five factors [that] weigh[ed] strongly in favor of overruling *Roe* and *Casey*."⁸¹

overwhelmingly and problematically root in religious belief rather than medical knowledge, scientific evidence, or legal precedent."). *But see* Khiara M. Bridges, "Life" in the Balance: *Judicial Review of Abortion Regulations*, 46 U.C. DAVIS L. REV. 1285, 1309 (2013) (arguing that *Gonzales v. Carhart*, 550 U.S. 124 (2007), which upheld a federal statute restricting partial-birth abortions, represented a major shift in the Supreme Court's abortion jurisprudence, since there the Court "[took] the fetus to be an entity deserving of the most profound respect — a 'life'" (and criticizing the decision on this ground)).

⁷⁷ While *Dobbs* was a 6–3 decision, Chief Justice Roberts did not join the majority opinion and did not endorse its view of reliance. *Dobbs*, 142 S. Ct. at 2316–17 (Roberts, C.J., concurring in the judgment).

⁷⁸ *See id.* at 2276–77 (majority opinion). The Court did not use the language of "tangible" reliance, but rather used "concrete" to refer to the kind of reliance that it would credit for stare decisis purposes. It used "intangible" to refer to other kinds of reliance, which it would dismiss. When I refer to "tangible" reliance I mean the kind of reliance that the *Dobbs* Court called "concrete" and that it contrasted to "intangible" reliance.

⁷⁹ *See id.* at 2276, 2281.

⁸⁰ *Id.* at 2276–77.

⁸¹ *Id.* at 2265.

Concrete reliance, according to the majority opinion, “‘arise[s] where advance planning of great precision is most obviously a necessity.’”⁸² The Justices claimed that the joint opinion in *Casey* “conceded that . . . traditional reliance interests were not implicated [here] because getting an abortion is generally ‘unplanned activity,’ and ‘reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions.’”⁸³

By *concrete* reliance, the Justices seemed to mean that individuals would be in a less desirable position or materially worse off with the precedent overruled than they would have been had the precedent never existed at all; and the reason that they would be worse off is that they took decisive action in reliance on the precedent that they would not have taken otherwise. Note that, although the Justices invoked “cases involving property and contract rights” to exemplify the kind of precedent that gives rise to the right kind of reliance interests — “very concrete” ones — they did not go so far as to claim that only such cases implicate cognizable reliance.⁸⁴ They seemed to implicitly recognize, as scholars have, that other kinds of cases can also give rise to reliance and even that reliance may take noneconomic forms.⁸⁵

⁸² *Id.* at 2276 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992), *overruled by Dobbs*, 142 S. Ct. 2228).

⁸³ *Id.* (quoting *Casey*, 505 U.S. at 856). As the dissent in *Dobbs* noted, *Casey* did not *concede* that traditional reliance interests were not at stake, but rather recognized that some people might not perceive such interests as implicated in the right to abortion and then went on to explain how that perception was mistaken. *Id.* at 2344 n.23 (Breyer, Sotomayor & Kagan, JJ., dissenting); *see also Casey*, 505 U.S. at 856 (“To eliminate the issue of reliance that easily . . . would be simply to refuse to face the fact that for two decades of economic and social developments, people have organized intimate relationships . . . in reliance on the availability of abortion in the event that contraception should fail.”). Oddly, the majority opinion in *Dobbs* addressed “the status of the fetus” in its section on reliance interests, observing that “[t]he contending sides . . . make conflicting arguments about [the matter]” and criticizing *Casey*’s “speculations and weighing of the relative importance of the fetus and the mother.” *Dobbs*, 142 S. Ct. at 2277. But the status of the fetus is irrelevant to a *stare decisis* analysis of reliance interests. When addressing reliance interests, the Court typically considers the interests of those who have reasonably relied on the precedent at issue and not those who might be harmed in whatever way by it. *See, e.g., id.* at 2347 (Breyer, Sotomayor & Kagan, JJ., dissenting) (“*Stare decisis* requires that the Court calculate the costs of a decision’s repudiation on those who have relied on the decision . . .” (citing *Casey*, 505 U.S. at 855)); *Rasul v. Bush*, 542 U.S. 466, 497–98 (2004) (Scalia, J., dissenting) (“Normally, we consider the interests of those who have relied on our decisions.”); *Casey*, 505 U.S. at 855 (“The inquiry into reliance counts the cost of a rule’s repudiation as it would fall on those who have relied reasonably on the rule’s continued application.”).

⁸⁴ *Dobbs*, 142 S. Ct. at 2276.

⁸⁵ *See* Michael J. Gerhardt, *The Pressure of Precedent: A Critique of the Conservative Approaches to Stare Decisis in Abortion Cases*, 10 CONST. COMMENT. 67, 78 (1993) (asserting that “the autonomy to make [reproductive] choices without governmental regulation means at least as much (if not more) to women as the expectation of the Court’s continued adherence to its property and contract decisions means to commercial enterprises”); Treanor & Sperling, *supra* note 29, at 1925 (suggesting that noneconomic decisions made in reliance on precedent “are at least as deserving of protection as [economic ones]”). Perhaps, though, the Justices’ conception of tangibility includes

The view of reliance seen in *Dobbs* echoes the one that Justice Rehnquist advanced in his partial dissent in *Casey*, where he argued in favor of overruling *Roe*.⁸⁶ He explained that anyone who did not want to have a child and who lost access to abortion as a result of *Roe*'s overruling could just plan accordingly, making sure they do not get pregnant in the first place.⁸⁷ No reliance interests, then, would “be diminished were the Court to . . . acknowledge the full error of *Roe*.”⁸⁸ Some of the amicus briefs in *Dobbs* in support of overruling *Roe* and *Casey* adopted the same view. One asserted, for example, that “reliance on [the abortion cases] is unique in that it cannot be planned for and pregnancy lasts a temporal duration.”⁸⁹ The implication, I think, is that reliance on precedent is not a legitimate concern here, because once the abortion precedents were overruled any reliance on them would dissolve within six months, after which no one could have gotten pregnant as a result of relying on a legal right to abortion. The reasoning relies on the fact that there was no right to abortion after viability under *Casey*,⁹⁰ and so anyone who was already pregnant at the time that the abortion precedents were overruled could have a plausible reliance claim only up to about six months into their pregnancy. This idea can also be found in Justice Scalia's dissent in *Lawrence v. Texas*,⁹¹ where he wrote that, if the Court were to overturn the abortion precedents, “within six months” of the decision “the most significant reliance interests would have expired.”⁹²

Applied to the abortion context, people could legitimately claim to have relied on the abortion precedents only if they would be worse off in a world where those decisions occurred but were now overruled than one where those precedents had never been established. They would be worse off in that way only if, in reliance on the right to abortion, they

only economic harm and physical harm; that would be consistent with their analysis — since, as I discuss below in this section, the only reliance interest they gave any attention to is that of people who were already pregnant at the time of the *Dobbs* decision — but they did not explicitly articulate such a qualification. This conception of tangible harm as comprising just economic harm and physical harm is familiar from the context of constitutional standing, where, as Professor Rachel Bayefsky points out, “‘tangible’ harm . . . is frequently understood by courts and commentators to refer to physical or economic harm.” Rachel Bayefsky, *Constitutional Injury and Tangibility*, 59 WM. & MARY L. REV. 2285, 2291 (2018). Bayefsky challenges this conception, however; she persuasively argues that “[t]he categorization of economic and physical harm as tangible in the standing context does not . . . follow inevitably from the nature of tangibility” and that this narrow conception “results in a highly contestable portrayal of essential human interests and detracts from the legitimacy of judicial decisions about cognizability.” *Id.* at 2292.

⁸⁶ *Casey*, 505 U.S. at 956 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Amicus Brief of Human Coalition Action and Students for Life of America in Support of Petitioners at 27, *Dobbs* (No. 19-1392).

⁹⁰ *Casey*, 505 U.S. at 846.

⁹¹ 539 U.S. 558 (2003).

⁹² *Id.* at 592 (Scalia, J., dissenting).

were less careful to avoid pregnancy than they otherwise would have been and had an unintended pregnancy as a result. Anyone who became pregnant after the precedents were overruled could not plausibly claim that their pregnancy was a result of relying on the precedents. And so the group of individuals who could plausibly claim to have relied in the proper sense is discrete and relatively small.⁹³

But what about this group? Justice Alito acknowledged its existence, but only subtly and in passing, when he wrote that “reproductive planning could take *virtually* immediate account of any sudden restoration of state authority to ban abortions.”⁹⁴ The qualification *virtually* here is doing a lot of work, because it implicitly acknowledges but at the same time glosses over the fact that there was a right to abortion of substantial duration (up to the point of viability, around twenty-four weeks) under the pre-*Dobbs* precedents.⁹⁵ Anyone who was less than twenty-four weeks pregnant at the time that those precedents were overruled could reasonably claim to have relied on them in a tangible way. And yet the Justices swiftly waved away these reliance interests, concluding that “conventional, concrete reliance interests are *not* present here,” which contradicts the implicit acknowledgment in the very same paragraph that such interests plausibly do exist.⁹⁶ Anyone who was already pregnant at the time of the *Dobbs* decision might have reasonably relied on the abortion precedents and could not have taken account of *Dobbs* in the reproductive planning associated with that pregnancy, given that any such planning occurred prior to the *Dobbs* decision. That is why, even under Justice Alito’s conception of reliance, people could not take immediate but only *virtually* immediate account of a change in abortion rights. He meant, I think, that people who were not pregnant at the time of the decision could adjust their sexual behavior in response to the change and thereby avoid detrimental reliance costs.

Why did the Justices refuse to put any weight on the tangible reliance that they all but acknowledged did exist? It cannot be because they were assuming that states would wait to impose increased restrictions

⁹³ See Paulsen, *Abrogating Stare Decisis*, *supra* note 35, at 1554 (“While many people may have strong ideological or personal stakes in the issue being decided one way or another, there is relatively little ‘reliance’ in the sense of the existing rule having tended to create its own reliance — having caused people to ‘sink costs,’ so to speak.”); Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419, 483 (2006) (“A more traditional understanding of reliance would recognize that those women who are pregnant (and those by whom they became pregnant) *may* have acted in reliance on *Roe*. It is questionable whether there are many such persons.” (citation omitted)).

⁹⁴ *Dobbs*, 142 S. Ct. at 2276 (emphasis added) (quoting *Casey*, 505 U.S. at 856). Here, Justice Alito quoted the *Casey* joint opinion, which reported (without endorsing) the view that “any reliance interest [on *Roe*] would be *de minimis*” because “reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions.” *Casey*, 505 U.S. at 856.

⁹⁵ *Dobbs*, 142 S. Ct. at 2308 (Kavanaugh, J., concurring).

⁹⁶ *Id.* at 2276 (majority opinion) (emphasis added).

on abortion, mitigating the reliance harms.⁹⁷ At the time of the decision, several states had already enacted increased restrictions with the effect of drastically limiting access to abortion to a far greater degree than was permissible under the Court's pre-*Dobbs* precedents; others had "trigger" laws in place that would impose bans or new restrictions on abortion automatically once the Court overruled *Roe*; and some had severe abortion bans still on the books that were unenforceable under *Roe* and *Casey* but that would go back into effect if those cases were overruled.⁹⁸ It was apparent at the time of the *Dobbs* decision that access to abortion would swiftly and drastically decrease across the country. Further, although transition schemes that would alleviate reliance costs had been proposed, the Justices did not consider, let alone implement, any such scheme or make any effort to temper the reliance costs of their decision.⁹⁹

The *Dobbs* Justices may have obfuscated here. It was impossible to deny that people might have relied on the abortion precedents such that they are now tangibly worse off than they would have been had those precedents never existed at all.¹⁰⁰ And so the Justices acknowledged as much, stating that people could only "virtually immediate[ly]" update

⁹⁷ Some Justices in the past had assumed that, if the Court overruled its abortion precedents, there would be a delay between its decision doing so and major state restrictions on abortion coming into effect, which would mitigate reliance costs. See, e.g., *Lawrence*, 539 U.S. at 592 (Scalia, J., dissenting) (stating that, if the Court overruled *Roe*, "[m]any States would unquestionably have declined to prohibit abortion, and others would not have prohibited it within six months (after which the most significant reliance interests would have expired)").

⁹⁸ Caroline Kitchener, Kevin Schaul & Daniela Santamariña, *The Latest Action on Abortion Legislation Across the States*, WASH. POST (May 2, 2022, 9:48 PM), <https://www.washingtonpost.com/nation/interactive/2022/abortion-rights-protections-restrictions-tracker> [<https://perma.cc/2DUL-BCM3>] (reporting on abortion restrictions enacted before *Dobbs* that blatantly violate the pre-*Dobbs* constitutional protections); Caroline Kitchener, Kevin Schaul, N. Kirkpatrick, Daniela Santamariña & Lauren Tierney, *Abortion Is Now Banned or Under Threat in These States*, WASH. POST (Mar. 9, 2023, 10:42 AM), <https://www.washingtonpost.com/politics/2022/06/24/abortion-state-laws-criminalization-roe> [<https://perma.cc/4SUT-AD69>] ("Over a dozen states have banned most abortions since June Some of these laws activated immediately or as soon as a designated state official certified the court's decision. Others were set to take effect 30 days after the June 24 decision was announced, or in a set period after the decision was certified."); see also Amy Davidson Sorkin, *How Alito's Draft Opinion on Abortion Rights Would Change America*, NEW YORKER (May 8, 2022), <https://www.newyorker.com/magazine/2022/05/16/how-alitos-draft-opinion-on-abortion-rights-would-change-america> [<https://perma.cc/J3A2-WGC2>] (reporting that "[t]he most immediate effect of *Dobbs*, if the draft opinion holds, will be that tens of millions of women will abruptly lose access to abortion," and that "[m]ore than twenty states already have measures in place that would severely curtail access: 'trigger laws,' designed to go into effect once *Roe* is overturned; restrictions in state constitutions; or laws that predate *Roe* but were left on the books").

⁹⁹ For example, Paulsen has suggested that, if we are "genuinely concerned with individual reliance interests in the abortion context, a rule could be fashioned that would 'grandfather' in a change only after a nine-month gestation period." Paulsen, *Supreme Court's Current Doctrine of Stare Decisis*, *supra* note 35, at 1181 n.54 (quoting Paulsen, *Abrogating Stare Decisis*, *supra* note 35, at 1555 n.53).

¹⁰⁰ See Levin, *supra* note 25, at 1057 n.87 ("[W]omen who became pregnant before the Court overturned *Roe* and *Casey* could reasonably argue that their sexual practices and birth control choices were made with the assumption that abortion services would be available to them.").

their reproductive planning based on the Court's decision overturning *Roe*.¹⁰¹ But the Justices did not want to put any weight whatsoever on this reliance — perhaps because they viewed it as morally objectionable and thus unworthy of respect.¹⁰² At the same time, they didn't want to reveal that their reliance analysis rested on moral grounds, so they instead concluded by fiat that “reliance interests are *not* present.”¹⁰³

In brushing aside the tangible reliance interests of people who were pregnant at the time of the decision, the *Dobbs* majority failed to abide by its own express commitments about the role of reliance in a stare decisis analysis.

Further, the possible reliance on the abortion precedents of individuals who were already pregnant at the time that *Dobbs* was decided is far from the only form of tangible reliance at stake here. The majority opinion does not even allude, however, to other possible ways in which people have tangibly relied on the right to abortion. Individuals have structured their affairs based on the expectation of a constitutionally protected right to abortion, an expectation created by the Court's previous decisions. In the absence of those decisions, people might well have structured their affairs differently, and in such a way that they would now, after *Dobbs*, be better off under the alternative structure. The relevant activity to consider here is not sexual activity or abortion itself, but rather other decisions and plans made with an expectation that the right to abortion would persist.¹⁰⁴ The dissenting Justices put the point as follows:

The interests women have in *Roe* and *Casey* are perfectly, viscerally concrete. Countless women will now make different decisions about careers, education, relationships, and whether to try to become pregnant than they would have when *Roe* served as a backstop To recognize that people have relied on [rights like that to abortion] is not to dabble in abstractions, but to acknowledge some of the most “concrete” and familiar aspects of human life and liberty.¹⁰⁵

People have made both minor and major decisions about their educations, careers, relationships, families, and political activities that may be less desirable in a post-*Roe* regime.¹⁰⁶ For instance, some people

¹⁰¹ *Dobbs*, 142 S. Ct. at 2276 (emphasis added) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992), *overruled by Dobbs*, 142 S. Ct. 2228).

¹⁰² For more on this, see *infra* section IV.C, pp. 1908–11.

¹⁰³ *Dobbs*, 142 S. Ct. at 2276 (emphasis added).

¹⁰⁴ See Levin, *supra* note 25, at 1057 n.87 (observing that, to evaluate possible reliance on the abortion precedents, “we would need to consider the extent to which [people] have organized their lives and livelihood around the assumption that access to abortion would be available to them” — “have they invested in their education, relationships, and careers in ways that would have been different had *Roe* been decided differently[?]”).

¹⁰⁵ *Dobbs*, 142 S. Ct. at 2346–47 (Breyer, Sotomayor & Kagan, JJ., dissenting).

¹⁰⁶ See Brief for Constitutional Law Scholars Lee C. Bollinger et al. as Amici Curiae Supporting Respondents at 27, *Dobbs* (No. 19-1392) (arguing that overturning *Roe* and *Casey* “would upend

might have chosen to pursue their educations or careers in California instead of Texas if they had not relied on the abortion precedents; now that access to abortion is extremely limited in Texas and adjacent states,¹⁰⁷ they might be worse off than they would have been if they hadn't made decisions in reliance on the right to abortion to begin with.

Further, some career paths are more compatible than others with unexpected pregnancy, childbirth, and parenting. And people might have chosen to pursue certain careers over others based partly on the expectation that abortion would be accessible to them. Those careers might be less appealing and riskier given limited access to abortion, and some people might now wish they had made different decisions about their education and career paths.

People have also immigrated to the United States with the understanding that reproductive rights, including the right to abortion, were (and would continue to be) protected in this country. People have pursued educations, careers, relationships, and families here in light of that expectation, and it may be difficult or utterly infeasible at this point to reverse course and leave the country. For some people in this position, it may have been better never to have moved to the United States at all than to have done so with the expectation of an ongoing right to abortion and then have that expectation upended.

Health care professionals and others who serve abortion patients have also relied on *Roe* and *Casey* to structure their lives, possibly now to their detriment.¹⁰⁸ Those individuals might have been better off choosing different specialties or pursuing their careers in different

lives across the country" and would affect "life decisions about professional pursuits and how to structure one's family and divide labor between spouses"); Alexander Lazaro Mills, *Reliance by Whom? The False Promise of Societal Reliance in Stare Decisis Analysis*, 92 N.Y.U. L. REV. 2094, 2125–26 (2017) (showing how couples might have relied on the right to abortion to make division-of-labor decisions and how, if the right were to be taken away, the couple's expected joint income might be lower than it would be if they had not relied on the right to begin with); Treanor & Sperling, *supra* note 29, at 1917 (explaining how people make political decisions in reliance on precedent).

¹⁰⁷ See Eleanor Klibanoff, *Texans Who Perform Abortions Now Face up to Life in Prison, \$100,000 Fine*, TEX. TRIB. (Aug. 25, 2022, 5:00 AM), <https://www.texastribune.org/2022/08/25/texas-trigger-law-abortion> [<https://perma.cc/E9DV-JGC7>].

¹⁰⁸ See Levin, *supra* note 25, at 1057 n.87 (observing that, if *Roe* and *Casey* were overturned, "those medical professionals who have devoted their medical practices to providing access to safe and legal abortions would find their reliance interests undermined"). Even in states with permissive abortion laws, the professional realities of health care providers have changed because of the drastically increased demand for abortion in those states. See, e.g., *Texas Women Drive Hours for Abortions After New Law*, AP NEWS (Oct. 14, 2021), <https://apnews.com/article/abortion-texas-louisiana-occ666fde471fofe2ce8a5f28977ad28> [<https://perma.cc/G2EV-K53K>] (stating that, once the Texas six-week abortion ban went into effect, "clinics in nearby states report[ed] being overwhelmed"); Caroline Kitchener, *Empty Clinics, No Calls: The Fallout of Oklahoma's Abortion Ban*, WASH. POST (June 4, 2022, 6:00 AM), <https://www.washingtonpost.com/nation/2022/06/04/oklahoma-abortion-roe> [<https://perma.cc/K34Q-9AUJ>] (reporting that, when an Oklahoma law banning almost all abortions went into effect, "Texas patients who had flocked to Oklahoma now had to drive to New Mexico, Colorado or Kansas, where clinics were already swamped, . . . scheduling appointments two to three weeks out").

locations. And they might have done so to begin with if the Court had never recognized a constitutional right to abortion.

Citizens might also rely on federal precedent in directing their political efforts and voting behavior.¹⁰⁹ As Professor William Treanor and former Deputy Assistant to the President for Economic Policy Gene Sperling explain, a Supreme Court decision striking down state legislation as unconstitutional can “have a transformative effect on majoritarian decision-making,” because “[p]eople generally assume that a judicial decision is final or unlikely to be reversed and act accordingly.”¹¹⁰ State statutes that are unconstitutional under federal precedent might thus remain on the books or even be passed although they do not enjoy majoritarian support and, without the existence of the precedent, “would have been repealed or defeated.”¹¹¹

Perhaps in part as a result of citizens’ reliance on *Roe*, some states have neglected to develop or reform their abortion laws. Treanor and Sperling report that many states stopped working to reform their abortion laws once *Roe* was decided and consequently are home to “unenforced but unrepealed pre-*Roe* criminal abortion statutes.”¹¹² In Wisconsin, for example, there is an 1849 statute that criminalizes the provision of abortion, with an exception only “to save the life of the mother,” which does not have majority support and which has apparently sprung back into effect with the *Dobbs* decision.¹¹³ As a result,

¹⁰⁹ For a judicial decision recognizing this kind of reliance, see, for example, *Harris v. United States*, 536 U.S. 545, 567–68 (2002) (plurality opinion) (“Legislatures and their constituents have relied upon [the precedent at issue, *McMillan v. Pennsylvania*, 477 U.S. 79 (1986),] to exercise control over sentencing through dozens of statutes.”).

¹¹⁰ Treanor & Sperling, *supra* note 29, at 1917.

¹¹¹ *Id.* at 1930.

¹¹² *Id.* at 1922.

¹¹³ WIS. STAT. § 940.04(5)(b) (2023); *New Marquette Law School Poll of Wisconsin Voters Finds Johnson and Evers Holding Slim Leads as Races for Senator and Governor Tighten*, MARQ. UNIV. NEWS CTR. (Sept. 14, 2022), <https://www.marquette.edu/news-center/2022/new-marquette-law-poll-of-wisconsin-voters-finds-johnson-and-evers-holding-slim-leads.php> [<https://perma.cc/4E3M-WZR8>] (finding, through a poll of Wisconsin voters, that 60–63% oppose the *Dobbs* decision and 83–88% believe that abortion should be allowed at least in cases of rape or incest); Kate Zernike, *Medical Impact of Roe Reversal Goes Well Beyond Abortion Clinics, Doctors Say*, N.Y. TIMES (Sept. 10, 2022), <https://www.nytimes.com/2022/09/10/us/abortion-bans-medical-care-women.html> [<https://perma.cc/SAW9-J9MM>] (“In Wisconsin, an abortion ban on the books since 1849 was blocked while *Roe* was in effect. Now, the governor and attorney general, who do not support the law, have asked a court to determine whether it can be enforced. In the meantime, prosecutors say they intend to enforce it, so providers have stopped abortions.”). Wisconsin Governor Tony Evers attempted to have the law repealed, but the majority Republican legislature blocked that action. Veronica Stracqualursi, *Wisconsin GOP Abruptly Ends Special Session Called by Democratic Governor to Repeal 19th Century Abortion Law*, CNN (June 22, 2022, 3:23 PM), <https://www.cnn.com/2022/06/22/politics/wisconsin-special-session-abortion/index.html> [<https://perma.cc/T474-Q5EU>]. A legal challenge brought by Wisconsin Attorney General Josh Kaul is now working its way through the state court system. Alexander Shur & Mitchell Schmidt, *AG Josh Kaul Asks Judge Not to Dismiss Case Challenging Abortion Ban in Wisconsin*, WIS. ST. J. (Jan. 18, 2023), <https://www.wisconsinstatejournal.com/news/2023/01/18/ag-josh-kaul-asks-judge-not-to-dismiss-case-challenging-abortion-ban-in-wisconsin/>

clinics stopped providing abortion around the time of the decision.¹¹⁴ If the people of Wisconsin had not relied on *Roe*, it is possible that they would have pushed for state reform to abortion law and that Wisconsin would now have state constitutional or legislative protection for abortion.

To be sure, the tangible reliance interests in the abortion precedents are hard to measure. But the Court is rarely well equipped to measure even the kind of reliance that it considers to be the most squarely tangible and thus most clearly pertinent to a stare decisis analysis — economic reliance on contract and property cases. The Court has to rely on the factual record developed at the district court level, but at the same time, lower courts do not have the power to overrule Supreme Court precedent and those courts typically do not gather or assess facts with the stare decisis analysis in mind. In the case of *Dobbs*, the district court limited discovery to the question of whether Mississippi’s abortion statute violated existing federal precedent and denied Mississippi’s request to engage in discovery that might have been relevant to the Supreme Court’s stare decisis analysis.¹¹⁵ While parties and amici might attempt to present research to the Court bearing on reliance interests, as they did in the *Dobbs* case, and the Justices might engage in their own first-hand research of legislative facts, these avenues do not typically (if ever) yield any precise or reliable accounting of the reliance costs of overruling a case.¹¹⁶

The Court does not require evidentiary proof of reliance on precedent even in the commercial context. Nor does it treat the challenge of measuring reliance interests in that context as a reason to refrain from

madison.com/news/local/govt-and-politics/ag-josh-kaul-asks-judge-not-to-dismiss-case-challenging-abortion-ban-in-wisconsin/article_2755c3d3-befb-5156-9927-a86ab52dc63d.html [https://perma.cc/F3SJ-S277] (“The final say on abortion rights in Wisconsin is expected to come from the Wisconsin Supreme Court . . .”).

¹¹⁴ *No Wisconsin Clinics Are Providing Abortions as of Friday After SCOTUS Struck Down Roe v. Wade*, WIS. PUB. RADIO (June 24, 2022, 3:45 PM), <https://www.wpr.org/no-wisconsin-clinics-are-providing-abortions-friday-after-scotus-struck-down-roe-v-wade> [https://perma.cc/3ST9-MZ4A].

¹¹⁵ *Jackson Women’s Health Org. v. Currier*, No. 18-CV-00171, 2018 WL 2219089, at *1 (S.D. Miss. May 15, 2018) (discovery order) (determining that, “[g]iven the Supreme Court’s viability framework, [the Mississippi] ban’s lawfulness hinges on a single question: whether the 15-week mark is before or after viability,” and thus allowing discovery only of facts bearing on that question). *But see* *Jackson Women’s Health Org. v. Dobbs*, 945 F.3d 265, 281 (5th Cir. 2019) (Ho, J., concurring in the judgment) (“[N]othing in the Federal Rules of Civil Procedure forecloses discovery based on a good faith expectation of legal change. To the contrary, the Rules expressly envision that parties may need to litigate in anticipation of such change So nothing prevented the district court from allowing Mississippi to pursue discovery and to develop facts necessary to its defense — including for the purpose of arguing for a change in precedent on appeal.” (citing FED. R. CIV. P. 11(b)(2), 26(g)(1)(B)(i))), *rev’d and remanded*, 142 S. Ct. 2228 (2022).

¹¹⁶ Further, the practice of factfinding at the Supreme Court in our digital age is problematic for a variety of reasons, including “the systematic introduction of bias, the possibility of mistake, and concerns about notice and legitimacy.” Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1291 (2012).

addressing them. Instead, it has explicitly announced that “uncertainty” about reliance interests cuts in favor of standing by precedent.¹¹⁷ In that sense, the Court’s stare decisis jurisprudence has been conservative. It considers whether people *might* have arranged their affairs in reliance on the precedent at issue and if it finds they might have, then that constitutes a reliance interest weighing against overruling. For example, in the recent case of *Kimble v. Marvel Entertainment, LLC*,¹¹⁸ Justice Kagan, writing for the Court, asserted that the Justices simply “[did] not know” whether people had relied on the rule at issue (which concerned patent royalties) and then explained how “uncertainty on this score” weighed *in favor* of upholding the precedent (which it did uphold), since to admit doubt was to acknowledge that people had possibly relied on the precedent.¹¹⁹ “So long as we see a reasonable possibility that parties have structured their business transactions in light of [the precedent at issue],” Justice Kagan wrote, “we have one more reason to let it stand.”¹²⁰ Assessing the potential tangible reliance harms of overruling a precedent typically requires delicate counterfactual reasoning, even when those harms take what the Court views as the most concrete and cognizable of forms.¹²¹ Accordingly, the Court’s evaluation of reliance interests — whether they exist and their magnitude — is almost inevitably speculative.

Even if we accept the narrow conception of reliance that the *Dobbs* majority favors, according to which cognizable reliance is necessarily “concrete,” the opinion is far too quick to dismiss the possibility that there were such reliance interests at stake here. According to the majority’s own stare decisis framework, those interests should have counted against overruling the abortion precedents.

¹¹⁷ *Kimble v. Marvel Ent., LLC*, 135 S. Ct. 2401, 2410 (2015). Other courts, for example in the United Kingdom, have treated reliance with this same kind of humility and conservatism. *See, e.g.*, *Indyka v. Indyka* [1969] 1 AC 33 (HL) 69 (appeal taken from Eng.) (“[I]t is well recognised that we ought not to alter what is presently understood to be the law if that involves *any real likelihood* of injustice to people who have relied on the present position in arranging their affairs.” (emphasis added)); *Ross Smith v. Ross Smith* [1963] AC 280 (HL) 303 (appeal taken from Eng.) (“It would have been a compelling reason against overruling that decision *if it could reasonably be supposed* that anyone has regulated his affairs in reliance on its validity, but it would be fantastic to suppose that anyone has.” (emphasis added)).

¹¹⁸ 135 S. Ct. 2401.

¹¹⁹ *Id.* at 2410.

¹²⁰ *Id.* Professor Randy Kozel notes that “the Court’s analyses [of stare decisis] usually rest on abstract conclusions about reliance considerations rather than rigorous, case-specific examinations.” Kozel, *supra* note 31, at 450.

¹²¹ The same kind of difficulty has drawn attention in the context of contract law, even though there the problem of proof would seem to be more tractable, given that the relevant interests are more discrete and the party with those interests is a litigant in the case. Contracts scholars have argued that proof of tangible reliance should not be required for a plaintiff to recover in a contract dispute, because otherwise the law would fail to adequately encourage reliance on contracts. L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 *YALE L.J.* 52, 62 (1936). And indeed, the standard form of recovery in American contract law (expectation damages) does not depend on proof of tangible reliance. *See infra* note 213 and accompanying text.

B. Intangible Reliance

The *Dobbs* Court acknowledged that there might be other kinds of reliance interests riding on the abortion precedents — ones it calls “intangible” — but it insisted that those interests have no place in a stare decisis analysis.¹²² *Intangible* reliance refers, roughly, to thwarted expectations at both the individual and societal level. For intangible reliance to exist it is not necessary that anyone would be materially worse off with the precedent overruled than they would have been had the precedent never been established at all. In that sense, intangible reliance is “abstract.”¹²³

The *Dobbs* majority made two main points in an attempt to justify its exclusion of intangible reliance. First, it claimed that the Court typically does not take this kind of reliance into account and that *Casey* was anomalous in doing so.¹²⁴ Second, it claimed that the Court is not competent to assess intangible reliance.¹²⁵ In this section, I examine each of these points in turn. Then, in Part III, I take up the matter of intangible reliance directly, exploring in more detail the interests that it comprises and arguing that it ought to count for stare decisis purposes.

I. *Anomalousness*. — In *Casey*, the matter of reliance figured prominently in the Court’s stare decisis analysis.¹²⁶ The Court asked whether the precedent at issue “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.”¹²⁷ Elaborating on this factor, the Justices considered whether the “limitation on state power” imposed by *Roe* “could be removed without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it.”¹²⁸ The Justices acknowledged that the “classic case for weighing reliance heavily in favor of following the earlier rule occurs in the commercial context,”¹²⁹ but they went on to determine that the reliance interests at stake in protection of the right to abortion nevertheless warranted recognition and weighed against overruling *Roe*.¹³⁰

¹²² See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2272, 2276–77 (2022).

¹²³ See *id.* at 2276–77 (contrasting “intangible” reliance interests with “concrete” ones). *But see id.* at 2347 (Breyer, Sotomayor & Kagan, JJ., dissenting) (“To recognize that people have relied on these rights is not to dabble in abstractions.”).

¹²⁴ See *id.* at 2272 (majority opinion).

¹²⁵ See *id.* at 2276.

¹²⁶ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–61 (1992), *overruled by Dobbs*, 142 S. Ct. 2228. The lead opinion in *Casey* is typically referred to as the plurality or “joint” opinion because parts of it were not joined by a majority of the Justices, but the part that I focus on here (Part III) was expressly joined by five Justices (Blackmun, Stevens, O’Connor, Kennedy, and Souter), and so represents the view of the Court. See *id.* at 841.

¹²⁷ *Id.* at 854.

¹²⁸ *Id.* at 855.

¹²⁹ *Id.* (citing *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)).

¹³⁰ See *id.* at 869.

The Court in *Casey* described these reliance interests in terms of people organizing their lives — their relationships, self-conceptions, and “places in society” — in reliance on the ability to access abortion.¹³¹ After all, the Justices in *Casey* explained, the Constitution protects not just economic values but broadly “human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed.”¹³²

Despite their recognition of intangible reliance interests, the Justices in *Casey* saw themselves as engaging in a “normal *stare decisis* analysis.”¹³³ Flatly rejecting this characterization, the *Dobbs* majority called *Casey*’s version of *stare decisis* “exceptional”¹³⁴ and “novel,”¹³⁵ claiming that the Court “had never before applied [it] and has never invoked [it] since.”¹³⁶ Yet *Casey* represents one of the Court’s most thorough and explicit efforts to articulate a *stare decisis* framework, and it is one of the most influential and well-known examples of the Court’s *stare decisis* jurisprudence.¹³⁷ Contrary to the claims in *Dobbs*, *Casey*’s approach to *stare decisis* was not wholly novel and it has been embraced in various subsequent cases.

The Court has long maintained that “[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights” — given the tangible economic reliance interests involved there — and at their nadir in cases “involving procedural and

¹³¹ *Id.* at 856.

¹³² *Id.*

¹³³ *Id.* at 861.

¹³⁴ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2266 (2022).

¹³⁵ *Id.* at 2272, 2277.

¹³⁶ *Id.* at 2266.

¹³⁷ In their treatise on judicial precedent, Professor Bryan Garner and twelve appellate judges (including then-Judges Gorsuch and Kavanaugh) assert that “[p]erhaps the most famous recent example of the application of *stare decisis* in constitutional interpretation is the Supreme Court’s 1992 plurality decision in [*Casey*]”; the authors summarize the *Casey* factors and imply that they are standard. GARNER ET AL., *supra* note 17, at 360; *see also* Murray, *supra* note 9, at 312, 328, 329 (explaining “how *Casey* has informed much of the Court’s jurisprudence on *stare decisis*,” *id.* at 312, “both in and outside of the abortion context,” *id.* at 329, and elaborating that, “[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,” *id.* at 328, “chief among [them] *Planned Parenthood v. Casey*,” *id.*); RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT 108 (2017) (describing *Casey*’s approach to *stare decisis* as the “most prominent” one); Waldron, *supra* note 13, at 5 (observing that *Casey* represents “one of [the Court’s] most sustained discussions of *stare decisis*”); Farber, *supra* note 58, at 1194 & n.80 (asserting that *Casey* “is notable because of its very self-conscious application of *stare decisis*” and suggesting that its *stare decisis* framework is standard); Paulsen, *Supreme Court’s Current Doctrine of Stare Decisis*, *supra* note 35, at 1168–69 (suggesting that *Casey* represents, “somewhat surprisingly, the Supreme Court’s first systematic attempt to set forth a general theory of the role of precedent and ‘*stare decisis*’ in constitutional adjudication”). *But see* Frederick Schauer, *Stare Decisis — Rhetoric and Reality in the Supreme Court*, 2018 SUP. CT. REV. 121, 139 n.98 (2019) (suggesting that “the *stare decisis* discussion [in *Casey*] is far more controversial and far less iconic than the discussions of *stare decisis* [in other cases]”).

evidentiary rules” — which generally do not give rise to reliance.¹³⁸ Nevertheless, before *Dobbs* the Court had not adopted the position that only individualized reliance interests or only economic ones count for the purposes of stare decisis.¹³⁹ To the contrary, even before *Casey* the Court had announced that stare decisis, in fostering “continuity in law,” serves “the *psychologic* need to satisfy reasonable expectations.”¹⁴⁰ The Court had also proclaimed that the purpose of adhering to previous decisions was to protect “the general sense of security” of the people whose rights and duties are bound up with the precedent.¹⁴¹

The Court had also recognized societal reliance, if only implicitly, even before *Casey*. In the 1972 case of *Flood v. Kuhn*,¹⁴² for example, which concerned the applicability of an antitrust statute to professional baseball, the Court seemed concerned that if it departed from its baseball precedent the game might change, upsetting societal expectations. The majority opinion starts with a part entitled “The Game,” where the Court described the sport of baseball as a central and deeply embedded fixture of American culture.¹⁴³ The opinion quotes approvingly from the district court opinion, which observed that “[m]ajor league professional baseball is avidly followed by millions of fans, looked upon with fervor and pride,” has “a unique place in our American heritage,” and enjoys a “status in the life of the nation [that] is so pervasive that it

¹³⁸ *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (citing *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965)); *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 381 (1977); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405–11 (1932) (Brandeis, J., dissenting); *United States v. Title Ins. & Tr. Co.*, 265 U.S. 472, 486 (1924); *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 458 (1851); see also Lee, *supra* note 49, at 699 (“By the founding era, English courts and American commentators had embraced the notion of an enhanced rule of stare decisis in cases involving rules of property.”).

¹³⁹ See Lee, *supra* note 49, at 653 (“[T]he Court has sometimes suggested that the goal of stability encompasses reliance interests that extend beyond the commercial context, including the preservation of ‘the psychologic need to satisfy reasonable expectations,’ or even the retention of governmental action undertaken in reliance on precedent.” (footnote omitted) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940))); Michael J. Gerhardt, Essay, *Super Precedent*, 90 MINN. L. REV. 1204, 1206 (2006) (listing “social reliance” among “the institutional values promoted by fidelity to precedent” at the Supreme Court); *Dobbs*, 142 S. Ct. at 2346 (Breyer, Sotomayor & Kagan, JJ., dissenting) (“While many of this Court’s cases addressing reliance have been in the ‘commercial context,’ none holds that interests must be analogous to commercial ones to warrant *stare decisis* protection.” (citation omitted) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992), *overruled by Dobbs*, 142 S. Ct. 2228)).

¹⁴⁰ *Helvering*, 309 U.S. at 119 (emphasis added); see also *Ramos v. Louisiana*, 140 S. Ct. 1390, 1415 (2020) (Kavanaugh, J., concurring in part) (asserting that one of the main factors that the Court considers in a stare decisis analysis is whether “overruling the prior decision [would] unduly upset reliance interests” and explaining that, “[i]n conducting that inquiry, the Court may examine a *variety of reliance interests* and the age of the precedent, among other factors” (emphasis added)).

¹⁴¹ *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 404 (1970) (quoting HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 577 (tent. ed. 1958)).

¹⁴² 407 U.S. 258 (1972). This case and the precedents it followed were overridden by Congress in 1998. For a discussion, see Edmund P. Edmonds, *The Curt Flood Act of 1998: A Hollow Gesture After All These Years?*, 9 MARQ. SPORTS L.J. 315 (1999).

¹⁴³ *Flood*, 407 U.S. at 260–64 (describing baseball as the “national pastime,” *id.* at 264).

would not strain credulity to say the Court can take judicial notice that baseball is everybody's business."¹⁴⁴ The Court had exempted baseball from the antitrust statute in previous decisions,¹⁴⁵ and the question for the Court in *Flood* was whether to follow or overturn those decisions. The Court expressed concern not only for the reliance interests of the business of baseball, but also for the more abstract societal reliance at stake — the millions of people who enjoyed professional baseball in its current form and had expectations that it would continue in that form.¹⁴⁶ The idea seems to be that the public had come to expect a certain type of game which had been built around the Court's precedents, and if the Court were to change course, it would upset widespread societal expectations.¹⁴⁷ As now-attorney Tom Hardy observes, the Court's reasoning in *Flood* "demonstrates that societal reliance [was] not a new tool in the Court's kit [at the time *Casey* was decided]."¹⁴⁸

In the past thirty years since *Casey*, the Court has invoked abstract societal reliance in its stare decisis analysis on multiple occasions. Notably, it did so in *Dickerson v. United States*¹⁴⁹ when it considered the precedential status of *Miranda v. Arizona*.¹⁵⁰ That precedent, the Court said, "has become embedded in routine police practice to the point where the [*Miranda*] warnings have become part of our national culture."¹⁵¹ Citing Justice Scalia's dissent in *Mitchell v. United States*,¹⁵² the Court stated that "the fact that a rule has found 'wide acceptance in the legal culture' is 'adequate reason not to overrule' it."¹⁵³

¹⁴⁴ *Id.* at 266 (quoting *Flood v. Kuhn*, 309 F. Supp. 793, 797 (S.D.N.Y. 1970)).

¹⁴⁵ See *Fed. Baseball Club of Balt., Inc. v. Nat'l League of Pro. Baseball Clubs*, 259 U.S. 200, 209 (1922); *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356, 357 (1953) (per curiam).

¹⁴⁶ See *Flood*, 407 U.S. at 263 n.4, 266, 273–74.

¹⁴⁷ Tom Hardy, Note, *Has Mighty Casey Struck Out?: Societal Reliance and the Supreme Court's Modern Stare Decisis Analysis*, 34 HASTINGS CONST. L.Q. 591, 620 (2007) (discussing "the role that societal reliance plays in *Flood*" and suggesting that the majority "can be seen as arguing that the tradition of baseball should not be disrupted, for the sake of the fans").

¹⁴⁸ *Id.* at 621. But see William S. Consovoy, *The Rehnquist Court and the End of Constitutional Stare Decisis: Casey, Dickerson and the Consequences of Pragmatic Adjudication*, 2002 UTAH L. REV. 53, 77 (suggesting that, in *Casey*, the Court expanded its typical "reliance inquiry into a consideration of not only specific reliance, but a generalized societal reliance as well").

¹⁴⁹ 530 U.S. 428 (2000).

¹⁵⁰ 384 U.S. 436 (1966); see Kozel, *supra* note 31, at 451 (pointing out that the Court's approach to reliance in *Dickerson* is similar to that in *Casey*); Paulsen, *Supreme Court's Current Doctrine of Stare Decisis*, *supra* note 35, at 1181 (observing that *Casey*'s notion of societal reliance "appears in *Dickerson*"); Hardy, *supra* note 147, at 599 (suggesting that the "invocation of 'national culture' [in *Dickerson*] indicates the Court takes societal reliance seriously"); see also *Ramos v. Louisiana*, 140 S. Ct. 1390, 1438 (2020) (Alito, J., dissenting) (citing *Dickerson* for the proposition that "reliance weighed heavily in favor of precedent simply because the [*Miranda* warnings] had become 'part of our national culture'" (quoting *Dickerson*, 530 U.S. at 443)).

¹⁵¹ *Dickerson*, 530 U.S. at 443 (citing *Mitchell v. United States*, 526 U.S. 314, 331–32 (1999) (Scalia, J., dissenting)). Kozel explains how the *Dickerson* Court seemed to focus on "*Miranda*'s 'network effects' within the law enforcement community, the political sector, and the public at large." Kozel, *supra* note 40, at 1494 (quoting GERHARDT, *supra* note 56, at 185).

¹⁵² 526 U.S. 314.

¹⁵³ *Dickerson*, 530 U.S. at 443 (quoting *Mitchell*, 526 U.S. at 331–32 (Scalia, J., dissenting)).

Subsequently, in *Arizona v. Gant*,¹⁵⁴ the Court clarified that in *Dickerson* it was not concerned about “police reliance on a rule requiring them to provide warnings but [rather about] the broader societal reliance on that individual right.”¹⁵⁵ The *Dickerson* Court, then, was not concerned, at least not primarily, with tangible reliance, but rather with thwarted expectations: people expect that criminal suspects will receive *Miranda* warnings and that judges and jurors will be prohibited from drawing adverse inferences from the silence of defendants; those expectations warrant respect even though they would not qualify as “concrete” from the point of view of the *Dobbs* Court.¹⁵⁶ Further, claims of widespread societal reliance might be implausible with respect to many precedents because relatively few cases have significant visibility outside the legal field. But both *Miranda* and *Roe* are unusual for their high public salience — the public is aware of the cases and, at least roughly, the rights that they protect — making claims of societal reliance compelling.¹⁵⁷

For a different kind of example of the role that intangible reliance interests play in the Supreme Court’s jurisprudence, consider the recent case of *Ramos v. Louisiana*. Here the Court rejected *Apodaca v. Oregon*,¹⁵⁸ which held that criminal defendants do not have a constitutional right to unanimous jury verdicts in state court.¹⁵⁹ Justice Gorsuch wrote the lead opinion in the case, where he criticized the dissent for focusing on the state governmental reliance interests and neglecting “maybe the most important” reliance interest at stake, which he identified as that “of the American people” — “the interest we all share in the preservation of our constitutionally promised liberties.”¹⁶⁰ Justice Gorsuch’s conception of reliance interests here is strongly reminiscent of the Court’s in *Casey*.

¹⁵⁴ 556 U.S. 332 (2009).

¹⁵⁵ *Id.* at 350; see also *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (drawing on *Casey*’s reliance analysis and determining that “there has been no individual or societal reliance on [Bowers v. Hardwick, 478 U.S. 186 (1986), which upheld a state statute criminalizing sodomy,] of the sort that could counsel against overturning its holding once there are compelling reasons to do so”); *Montejo v. Louisiana*, 556 U.S. 778, 809 (2009) (Stevens, J., dissenting) (noting that the public had relied on a precedent that afforded rights to criminal defendants).

¹⁵⁶ Oddly, the *Dickerson* Court did not cite *Casey* on the matter of reliance or stare decisis, perhaps because Justice Rehnquist, who wrote the majority opinion in *Dickerson* but had rejected *Casey*’s joint opinion in his separate opinion in that case, did not want to indicate approval of its reasoning. See Emery G. Lee III, *Overruling Rhetoric: The Court’s New Approach to Stare Decisis in Constitutional Cases*, 33 U. TOL. L. REV. 581, 614–16 (2002) (pointing out that *Dickerson* followed, in large part, *Casey*’s stare decisis framework but did not cite the case, and suggesting that Justice Rehnquist wanted to avoid associating the *Dickerson* decision with *Casey*).

¹⁵⁷ Kozel makes a similar point with respect to First Amendment precedent, suggesting that stability in Supreme Court doctrine is especially important in that context “due to the prominence of expressive liberty in legal and political culture” and “widespread interest in the ground rules of expressive freedom.” Randy J. Kozel, *Precedent and Speech*, 115 MICH. L. REV. 439, 471 (2017).

¹⁵⁸ 406 U.S. 404 (1972) (plurality opinion).

¹⁵⁹ *Id.* at 406.

¹⁶⁰ *Ramos v. Louisiana*, 140 S. Ct. 1390, 1408 (2020).

Justice Gorsuch's point — that society had relied more on the Sixth Amendment rights guaranteed by the Constitution itself than on the case of *Apodaca*, which was inconsistent with those rights — is striking in light of the Court's reliance analysis in *Dobbs*. I doubt that people rely, in the tangible sense, on the rights granted under the Sixth Amendment; it is hard to imagine people taking decisive action based on their expectations regarding these rights, such that they would be materially worse off if their expectations were upset than they would have been had they never held those expectations at all. Nevertheless, people do rely in the intangible sense on the rights that the Constitution guarantees to criminal defendants; that reliance enables them to rest assured that, if they were to be prosecuted, they would be afforded certain protections.

Contrary to Justice Alito's assertion that the Court has “never invoked” *Casey*'s version of stare decisis,¹⁶¹ the Court has done so not only implicitly but also, and on multiple occasions, explicitly. Indeed, Justice Breyer has referred to *Casey*'s stare decisis factors as the “ordinary criteria for overruling an earlier case.”¹⁶² In *Lawrence v. Texas*, for example, in which the Court overruled *Bowers v. Hardwick*¹⁶³ and recognized a constitutional right to same-sex relations within the privacy of the home, the Court followed *Casey*'s approach to stare decisis and declared, citing *Casey*, that if a precedent protects a constitutional liberty, then “individual or societal reliance on the existence of that liberty cautions with particular strength against reversing course.”¹⁶⁴ The Court went on to determine, though, that “there ha[d] been no individual or societal reliance on *Bowers* of the sort that could counsel against overturning [it] once there [were] compelling reasons to do so.”¹⁶⁵

For another example, consider *Adarand Constructors, Inc. v. Peña*,¹⁶⁶ which partially overruled the affirmative action case of *Metro*

¹⁶¹ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2266 (2022).

¹⁶² *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 918 (2007) (Breyer, J., dissenting) (emphasis added).

¹⁶³ 478 U.S. 186 (1986).

¹⁶⁴ *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854, 855–56 (1992), overruled by *Dobbs*, 142 S. Ct. 2228); see also Hardy, *supra* note 147, at 599 (“*Lawrence*, in overruling *Bowers*, did not explicitly employ *Casey*'s four special justifications, but its analysis tacitly relies on them.”); Julie E. Payne, Comment, *Abundant Dulcibus Vitiis, Justice Kennedy: In Lawrence v. Texas, An Eloquent and Overdue Vindication of Civil Rights Inadvertently Reveals What Is Wrong with the Way the Rehnquist Court Discusses Stare Decisis*, 78 TUL. L. REV. 969, 1008 (2004) (explaining that “*Casey* and *Lawrence* are actually consistent in their reasons for overruling” despite some claims to the contrary “in the national media”).

¹⁶⁵ *Lawrence*, 539 U.S. at 577; see also Koziel, *supra* note 40, at 1494–95 (discussing the treatment of reliance in *Lawrence*). Koziel also highlights *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), as an example of a decision in which some of the Justices recognized intangible reliance interests; Justice Breyer's dissent in that case “ventured into the realm of psychological expectations and understandings by citing the effects on producers, distributors, and consumers who had come to view the bar on resale price maintenance as a ‘legally guaranteed way of life.’” Koziel, *supra* note 40, at 1495 (quoting *Leegin*, 551 U.S. at 926 (Breyer, J., dissenting)).

¹⁶⁶ 515 U.S. 200 (1995).

Broadcasting, Inc. v. FCC;¹⁶⁷ the *Adarand* Court explained how, under the prevailing stare decisis framework advanced in *Casey*, overruling *Metro Broadcasting* was justified even though overruling a precedent like *Roe* would not be.¹⁶⁸ Endorsing *Casey*'s treatment of stare decisis and reliance interests in particular, the Court in *Adarand* distinguished *Metro Broadcasting* as a recent and anomalous decision in contrast to *Roe*, which was “long-established” and had “become integrated into the fabric of the law”: “Overruling precedent of [the latter] kind,” said the Court, “naturally may have consequences for ‘the ideal of the rule of law.’ In addition, such precedent is likely to have engendered substantial reliance, as was true in *Casey* itself.”¹⁶⁹ The Court then quoted a key passage from the *Casey* joint opinion on reliance.¹⁷⁰ As Dean Vikram Amar (who favors the narrow, tangible conception of reliance interests) observes, the term *detrimental reliance* is “missing from much of the Court’s stare decisis analyses.”¹⁷¹ This omission would make sense if the Court embraced a more capacious view of reliance for stare decisis purposes — one concerned broadly with disappointed expectations and understandings, even in the absence of concrete, detrimental reliance costs — which is exactly what it seems to have done.

Given the Court’s approach to stare decisis across numerous cases and its treatment of *Casey* as an authority on the matter, its characterization of *Casey*’s approach to stare decisis as “novel”¹⁷² and “exceptional”¹⁷³ in *Dobbs* not only is descriptively incorrect but even seems disingenuous.¹⁷⁴ Justice Alito must have been aware of *Casey*’s status as an authority on stare decisis itself, as he was on the Court while it

¹⁶⁷ 497 U.S. 547 (1990).

¹⁶⁸ *Adarand*, 515 U.S. at 233.

¹⁶⁹ *Id.* at 233 (citation omitted) (quoting *Casey*, 505 U.S. at 854, 856).

¹⁷⁰ *Id.* (“[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail.” (alteration in original) (quoting *Casey*, 505 U.S. at 856)); see also *Hubbard v. United States*, 514 U.S. 695, 714 (1995) (plurality opinion) (“*Stare decisis* has special force when legislators or citizens ‘have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.’” (quoting *Hilton v. S.C. Pub. Rys. Comm’n*, 502 U.S. 197, 202 (1991)) (citing *Casey*, 505 U.S. at 854–56)); *S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 166 (1999) (citing *Casey*, 505 U.S. at 854–55); John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 846 n.153 (2009) (“The precedent analysis of *Casey* has been relied upon subsequently by the Court.” (citing *S. Cent. Bell Tel. Co.*, 526 U.S. at 166; *Adarand*, 515 U.S. at 233)).

¹⁷¹ Vikram David Amar, *Justice Kagan’s Unusual and Dubious Approach to “Reliance” Interests Relating to Stare Decisis*, JUSTIA: VERDICT (June 1, 2021), <https://verdict.justia.com/2021/06/01/justice-kagans-unusual-and-dubious-approach-to-reliance-interests-relating-to-stare-decisis> [<https://perma.cc/YZV5-HGLL>].

¹⁷² *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2272 (2022).

¹⁷³ *Id.* at 2266.

¹⁷⁴ The dissent refers to the majority’s conception of reliance as “unprecedented” and “at bottom, a radical claim to power.” *Id.* at 2346 (Breyer, Sotomayor & Kagan, JJ., dissenting).

issued opinions approvingly citing *Casey*'s stare decisis analysis, and he has even joined opinions that do so.¹⁷⁵

Perhaps foreseeing the need to characterize *Casey*'s approach to stare decisis as aberrant and cobble together a pedigree for their desired approach in the decision that would overrule *Roe*, the Justices had laid some groundwork for the approach in recent Terms. In a 2018 *New York Times* article, Adam Liptak explained that *Casey* "included a detailed framework for what courts must consider when they are asked to overrule a precedent."¹⁷⁶ He pointed out how then-Judge Kavanaugh, at his Supreme Court confirmation hearings, repeatedly described *Casey* as a "precedent on precedent."¹⁷⁷ As Liptak noted, "Judge Kavanaugh's understanding of *Casey*" was not unusual; other Supreme Court nominees had "also said that *Casey* [was] a key decision about when precedents may be overruled."¹⁷⁸ But Liptak pointed out how, in two 2018 decisions that overturned precedent, the Court had conspicuously omitted any citations to *Casey* in its discussions of stare decisis, although the factors that the Court relied on did overlap with *Casey*'s.¹⁷⁹ Liptak quoted Professor Justin Driver's statement that the Court's "repeated refusals to cite *Casey* in recent opinions overturning precedents . . . strongly suggest that some justices view the decision as tainted and illegitimate."¹⁸⁰

In its decision in *Ramos* in 2020, the Court again overturned precedent without citing *Casey*'s stare decisis framework.¹⁸¹ Justice Kavanaugh wrote a concurring opinion just to express his views on stare decisis and to articulate a "structured methodology and roadmap for determining whether to overrule an erroneous constitutional

¹⁷⁵ See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 841–42 (2008) (Scalia, J., dissenting, joined by Roberts, C.J., and Thomas & Alito, JJ.) (criticizing the majority for overruling a case without justification and especially for failing to consider reliance interests, and citing *Casey* for the "stare decisis factors," *id.* at 842).

¹⁷⁶ 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/Y7YA-PC7Z>].

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* (citing Adam Liptak, *Roberts Drops Hints in "Precedent" Remarks*, N.Y. TIMES (Sept. 18, 2005), <https://www.nytimes.com/2005/09/18/politics/politicsspecial1/roberts-drops-hints-in-precedent-remarks.html> [<https://perma.cc/X98F-XLN4>] (reporting on now-Justice Roberts's characterization of *Casey* as "important not only for its substantive ruling but also for its explanation of how to analyze whether given cases should be overruled"))).

¹⁷⁹ *Id.* (citing *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018) (overruling *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)); *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018) (overruling *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992))).

¹⁸⁰ *Id.*; see also Schauer, *supra* note 137, at 139 n.98 (suggesting that the Justices' "failure to discuss" *Casey* in recent decisions concerning stare decisis "seems best explainable by the conclusion that [they] believe that [*Casey*] is at best a fragile precedent on the subject of precedent").

¹⁸¹ See generally *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020). Professor Melissa Murray notes that Justice Gorsuch's lead opinion nevertheless "gestured to the *Casey* factors." Murray, *supra* note 9, at 332.

precedent.”¹⁸² Justice Kavanaugh purported to rely on the Court’s “precedents on precedent” to support his stare decisis framework,¹⁸³ citing several cases in that regard but omitting *Casey*.¹⁸⁴ Notably, the *Dobbs* majority cited Justice Kavanaugh’s concurring opinion five times in its own discussion of stare decisis, as though it were a primary authority on the topic.¹⁸⁵

Across multiple opinions, including a special concurrence in *Ramos*, Justice Thomas has insisted that the only factor that matters for the purposes of stare decisis is the nature of the error made in the precedent.¹⁸⁶ For Justice Thomas, if the precedent is “demonstrably erroneous,”¹⁸⁷ then the Court is not even permitted, let alone required, to stand by it.¹⁸⁸ As he has explained, “under [his] approach to *stare decisis*, there is no need to decide which reliance interests are important enough to save an incorrect precedent,” a question that he “doubt[s] . . . is susceptible of principled resolution.”¹⁸⁹ Professor Richard Re has described Justice Thomas’s position on stare decisis as “distinctive — and perhaps shocking.”¹⁹⁰ But the *Dobbs* decision, casting aside reliance interests and focusing on the nature of the error, suggests that the Court may be coming around to Justice Thomas’s view.

The *Dobbs* Court’s stark rejection of *Casey*’s stare decisis approach, then, did not come out of the blue but was the culmination of efforts already underway in previous Terms.

2. *Measurability*. — What about the concern expressed in the *Dobbs* majority opinion that the Court is not competent to assess intangible reliance interests? Appealing to Chief Justice Rehnquist’s partial dissent in *Casey*, the Court in *Dobbs* maintained that whatever “intangible” reliance may have been at issue here was irrelevant for the purposes of a stare decisis analysis because the Court is “ill-equipped to assess ‘generalized assertions about the national psyche.’”¹⁹¹ “That form of reliance,”

¹⁸² *Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring in part).

¹⁸³ *Id.* at 1412.

¹⁸⁴ See *id.* at 1412–15; see also Varsava, *supra* note 51, at 130–31 (2020) (analyzing Justice Kavanaugh’s discussion of stare decisis in *Ramos* and considering whether Justice Kavanaugh was trying to set the stage “for future decisions in which he plan[ne]d to vote to overrule precedent,” *id.* at 131).

¹⁸⁵ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2264–66, 2275–76 (2022).

¹⁸⁶ See *Ramos*, 140 S. Ct. at 1421 (Thomas, J., concurring in the judgment) (quoting *Gamble v. United States*, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring)); *Gamble*, 139 S. Ct. at 1984 (Thomas, J., concurring) (“[I]f the Court encounters a decision that is demonstrably erroneous — *i.e.*, one that is not a permissible interpretation of the [constitutional or statutory] text — the Court should correct the error [by overruling the precedent].”).

¹⁸⁷ *Ramos*, 140 S. Ct. at 1421 (Thomas, J., concurring in the judgment).

¹⁸⁸ See *id.* at 1421–22.

¹⁸⁹ *Id.* at 1425 n.1.

¹⁹⁰ Richard M. Re, *Precedent as Permission*, 99 TEX. L. REV. 907, 915 (2021).

¹⁹¹ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2276 (2022) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 957 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part), *overruled by Dobbs*, 142 S. Ct. 2228).

wrote Justice Alito, “depends on an empirical question that is hard for anyone — and in particular, for a court — to assess, namely, the effect of the abortion right on society and in particular on the lives of women.”¹⁹² The *Dobbs* Court thus dismissed the idea — embraced by a majority of the Court in *Casey* and, as we have seen, in many other decisions too — that cognizable reliance interests may take an abstract form and may accrue at the societal level.

First, as other scholars point out, “the fact that systemic effects are ‘inchoate’ does not make them any ‘less real.’”¹⁹³ And we can be confident that certain interests exist without necessarily having the ability to quantify them. As the Court emphasized already in *Casey*, “[a]n entire generation has come of age free to assume *Roe*’s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions.”¹⁹⁴ In the thirty years since *Casey*, even greater reliance on the right to abortion has accrued.¹⁹⁵ The reliance of individuals

¹⁹² *Id.* at 2277; see also Mills, *supra* note 106, at 2110–11 (criticizing the idea of societal reliance and arguing that it is distinct from other, legitimate, forms of reliance because “it cannot be measured or concretely weighed by the judiciary,” *id.* at 2110).

¹⁹³ Kozel, *supra* note 40, at 1497 (quoting Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 266 (2005); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 63 (2001)); see also Bayefsky, *supra* note 85, at 2345 (discussing constitutional standing doctrine and arguing that a “harm does not become more likely to ‘actually exist’ simply because it is more easily broken down into numbers” and that “[h]arms whose magnitude can be measured only approximately, such as emotional distress, reputational harm, and stigma, are familiar to us as genuine and consequential from everyday life” (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016))); Gerhardt, *supra* note 85, at 78 (“The idea that because commercial interests can arguably be defined more precisely than personal, noneconomic ones, the former somehow require more respect than the latter for purposes of *stare decisis*, trivializes the degree to which the Court’s noncommercial, civil liberties decisions inalterably shape the ways in which many people live and even die.”).

¹⁹⁴ *Casey*, 505 U.S. at 860.

¹⁹⁵ See *Dobbs*, 142 S. Ct. at 2343 (Breyer, Sotomayor & Kagan, JJ., dissenting) (“Over another 30 years [since *Casey*], that reliance [on the right to abortion] has solidified. For half a century now, in *Casey*’s words, ‘[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.’ . . . Indeed, all women now of childbearing age have grown up expecting that they would be able to avail themselves of *Roe*’s and *Casey*’s protections.” (third alteration in original) (quoting *Casey*, 505 U.S. at 856)); Brief for 236 Members of Congress as Amici Curiae in Support of Respondents at 7, *Dobbs* (No. 19-1392) (arguing that “reliance interests have only strengthened — and the costs of overruling *Roe* have only grown — in the three decades since *Casey* was decided”); *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019) (asserting that “the strength of the case for adhering to [precedents] grows in proportion to their ‘antiquity’” (quoting *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009))); *South Carolina v. Gathers*, 490 U.S. 805, 824 (1989) (Scalia, J., dissenting) (“[T]he respect accorded prior decisions increases, rather than decreases, with their antiquity, as the society adjusts itself to their existence, and the surrounding law becomes premised upon their validity.”); Richard J. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 GEO. L.J. 2225, 2245 (1997) (“A decision to overrule or to reverse a long-standing precedent usually causes much greater harm to reliance interests than does a decision to overrule or to reverse a recently announced rule.”); Sellers, *supra* note 66, at 82 (noting “the Supreme Court’s desire to correct ‘the freshness of error’ before it gained the respect of a long-established practice” (quoting *Gathers*, 490 U.S. at 824 (Scalia, J., dissenting))). Further,

and society here is undeniable, despite the difficulty of measuring it in economic terms.¹⁹⁶

Further, the fact that millions of people have obtained abortions in response to unintended pregnancies or pregnancy complications suggests that abortion has played a major part in planning activity.¹⁹⁷ For many people, access to abortion plays a critical role in contingency planning (regardless of whether one ends up needing to obtain an abortion or not), and it thus makes the thought of an unplanned pregnancy or pregnancy complication less threatening. In this sense, millions of people nationwide were relying on the Court's decisions protecting the right to abortion, and the withdrawal of that protection upsets their planning activity, peace of mind, and sense of security and stability.¹⁹⁸ After *Dobbs*, if an individual becomes pregnant and has reason to obtain an abortion, they might not be able to follow through on their contingency plan and have the life they imagined and designed for themselves in reliance on the Court's pre-*Dobbs* decisions. For people who do still have access to abortion, there is now more uncertainty around whether they will continue to have that access in the future and so their confidence in their life plans may be shaken.

Second, as I discussed in the previous section, the Court is not well equipped to measure even tangible reliance interests; nor does it pretend

series of decisions have traditionally been given greater precedential weight than single decisions, see McGinnis & Rappaport, *supra* note 170, at 809, perhaps in part because when a principle has been repeatedly reaffirmed in a variety of contexts it seems more deeply entrenched and people are more inclined to rely on it. The central holdings of *Roe* and *Casey* have been applied in numerous cases concerning a variety of abortion restrictions. See, e.g., *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020) (invalidating a state statute requiring abortion providers to have admitting privileges at nearby hospitals), *abrogated by Dobbs*, 142 S. Ct. 2228; *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (same), *abrogated by Dobbs*, 142 S. Ct. 2228; *Stenberg v. Carhart*, 530 U.S. 914 (2000) (holding unconstitutional a state statute that banned "partial birth abortion"), *abrogated by Dobbs*, 142 S. Ct. 2228; *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976) (invalidating various abortion restrictions, including spousal and parental consent requirements and a ban on a particular method of abortion), *abrogated by Dobbs*, 142 S. Ct. 2228; see also *Dobbs*, 142 S. Ct. at 2271 (listing decisions in which the Supreme Court struck down abortion regulations following *Roe*); *id.* at 2321 (Breyer, Sotomayor & Kagan, JJ., dissenting) (observing that, following *Roe*, "the Court expressly reaffirmed *Roe* on two occasions, and applied it on many more," and "[t]hen, in *Casey*, the Court considered the matter anew, and again upheld *Roe*'s core precepts"); *Casey*, 505 U.S. at 857–58 (observing that *Roe*'s "original holding" had been reaffirmed multiple times); Mark A. Lemley, Essay, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 112 (2022) (emphasizing that in *Dobbs* the Court "expressly overruled fifty years of precedent").

¹⁹⁶ I elaborate more on the intangible reliance at stake in Part III below.

¹⁹⁷ See Jeff Diamant & Besheer Mohamed, *What the Data Says About Abortion in the U.S.*, PEW RSCH. CTR. (Jan. 11, 2023), <https://www.pewresearch.org/fact-tank/2022/06/24/what-the-data-says-about-abortion-in-the-u-s-2> [<https://perma.cc/X9A7-CNP2>] (reporting that the data on abortion indicates that in recent years in the United States there were between 620,327 and 930,160 abortions per year).

¹⁹⁸ Further, as Bayefsky points out, "federal courts have substantial experience adjudicating cases involving harms with components that are difficult to quantify, such as those stemming from constitutional rights violations and discrimination." Bayefsky, *supra* note 85, at 2346.

to have competence in this regard.¹⁹⁹ Further, as Professor Rachel Bayefsky shows, not all kinds of physical and economic harms are susceptible to measurement.²⁰⁰ Further still, even where reliance interests are individualized and theoretically quantifiable, the Court does not require evidentiary proof and does not attempt to measure them. The Court's leap, then, from the claim that it is unable to measure or verify intangible reliance interests to the conclusion that those interests do not count at all for *stare decisis* purposes is inconsistent with its treatment of tangible reliance, which the Court counts despite being no better able to measure it.

Third, the society-wide reliance costs of overturning precedent might actually be more readily identifiable than reliance of the individualized tangible type.²⁰¹ To address societal reliance, a court need not identify specific individuals who would suffer reliance injuries. In the abortion context, at the time of the *Dobbs* decision, it was readily apparent that women's roles in society had been informed by the right to abortion, that protection of the right was seen by many as central to gender equality, and that terminating that protection would upset expectations regarding women's future status in this society.²⁰² In some cases, we can be confident that substantial reliance exists without necessarily being able to attribute it to specific individuals or to measure it.

Fourth and finally, while the counterfactual world in which the Supreme Court had never recognized a right to abortion is hard to imagine and contrast to the present one, this is at least in part because so many people across all swaths of society have responded in countless ways — in terms of their actions, beliefs, attitudes, and understandings — to the Court's protection of that right. In contrast, when considering some specific contract or property rule, the counterfactual world might be easier to envision and compare to the actual one because the effect of the rule is likely to be much more confined and attenuated. And so, on the one hand, the *Dobbs* Court is correct that it is impossible to perform a thorough or precise accounting of the reliance interests at stake here. Those interests are amorphous. But on the other hand, the difficulty exists in part because the reliance is so massive and widespread.²⁰³ Perversely, the Court in *Dobbs* decided to treat an interest so pervasive that it defied calculation as if it did not exist at all.

¹⁹⁹ See *supra* pp. 1871–72.

²⁰⁰ Bayefsky, *supra* note 85, at 2338–43.

²⁰¹ See Kozel, *supra* note 40, at 1506–07; Bayefsky, *supra* note 85, at 2347–52 (calling into question “the link between tangibility and evidentiary proof,” *id.* at 2347).

²⁰² Sonia M. Suter & Naomi Cahn, *More than Abortion Rides on SCOTUS in Dobbs*, BLOOMBERG L. (May 10, 2022, 4:00 AM), <https://news.bloomberglaw.com/us-law-week/more-than-abortion-rides-on-scotus-in-dobbs> [<https://perma.cc/QZM3-82FZ>] (discussing “the great inequalities that arise when women lose the ability to control their reproductive lives”).

²⁰³ See Ederlina Co, *Abortion Privilege*, 74 RUTGERS U. L. REV. 1, 28–35 (2021) (describing abortion as “common and ordinary,” *id.* at 35, and suggesting that the true magnitude of reliance on abortion is masked because of the stigma, secrecy, and privacy around abortion).

III. THE VALUE OF “INTANGIBLE” RELIANCE

Is it possible for our expectations based on precedent to be unjustly thwarted even if we have not relied on the precedent in the tangible sense? And should courts take these expectations into account when deciding whether to overrule precedent? In this Part, I examine the type of reliance interests that the *Dobbs* majority opinion would dismiss as *intangible*, and I show how these interests warrant consideration in a *stare decisis* analysis. Returning to the reasons for having a doctrine of *stare decisis* in the first place as well as the reasons for upholding precedent in a system that has the doctrine (as discussed above in Part I), I suggest that even when reliance on precedent is purely intangible, upsetting that reliance can undermine individuals’ autonomy and offend their dignity, and I argue that courts have a responsibility to recognize and mitigate these harms.

A. *Grounding Intangible Reliance*

For many of us, abortion figures into our life plans as a kind of insurance — we plan to have an abortion in case we unexpectedly and unwantedly become pregnant, or in case we intentionally become pregnant but a complication arises or life circumstances change and the pregnancy is no longer wanted. We have accordingly formed our beliefs, attitudes, intentions, hopes, and dreams around an imagined future with that right.²⁰⁴ This can be the case even if we have not detrimentally relied on the expectation — that is, taken decisive action based on it such that we are now worse off than we would have otherwise been.

Let me start by setting out two hypothetical scenarios, which I use as analogies to illustrate judicial duties related to *stare decisis*. The first is modeled on the English case of *Regina v. Secretary of State for the Home Department*.²⁰⁵ Imagine that a convicted defendant is sentenced to prison with the expectation that he will qualify for home leave after serving a third of his sentence, provided he obeys certain rules, like refraining from violent behavior. He has this expectation because prison officials presented him with the home-leave policy when his sentence began.

The individual might well take decisive actions based on the expectation that he will be granted home leave once he has served a third of his sentence that he would not have taken otherwise. But suppose he does not take any such actions. He might (and likely would)

²⁰⁴ See Brief of Amicus Curiae American Bar Ass’n in Support of Respondents at 6–7, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2021) (No. 19-1392) (“[R]eliance interests weigh particularly strongly in favor of adhering to precedent here. . . . American women and men have conceived their futures, and the futures of their families, based on the understanding that they will be able to decide whether and when to have children, and how many.”).

²⁰⁵ [1997] 1 WLR 906 (AC). This case and the issue of thwarted expectations are discussed in NEIL DUXBURY, *THE NATURE AND AUTHORITY OF PRECEDENT* 164 (2008).

nevertheless imagine his future differently based on his expectation. Suppose he formed beliefs, attitudes, and hopes about his future based on the reasonable expectation of home leave. Now suppose the individual has served a third of his sentence and qualifies for home leave according to the policy presented to him when his prison term began. He requests home leave, but the officials inform him that he does not qualify, as the policy has changed. Imagine his disappointment. Do the officials have any responsibility to take that disappointment into account when deciding how to treat the prisoner? It would seem that he has been wronged because the officials led him to develop certain expectations and then dashed those expectations. Even if he took no concrete action in reliance on the policy, he did form mental plans based on it, which are now destroyed. And his mental effort has been wasted.

Consider another kind of scenario. Suppose a law school dean presents the school's professors with a policy that involves a very attractive bonus — say, a year of paid research leave — provided that a professor meets some productivity objectives, like publishing two major articles a year for a three-year period. Now suppose a professor meets that objective and requests her bonus only to find that the policy has changed without notice. Suppose, though, that this professor would have been just as productive even if she had not been offered the bonus and that she didn't take any other concrete action based on her expectation. There's no detrimental reliance, then, because she isn't materially worse off than she would have been had her employer never issued the policy. But the professor had been operating under the expectation that she would enjoy a year of leave because of her employer's guarantee, and she formed attitudes and beliefs accordingly. She may have even developed an elaborate mental plan for her research leave and shaped her consciousness to some extent around it. It seems that, in retracting the policy, the dean has thwarted the professor's reasonable expectations and that she has a legitimate ground of complaint.

The ground of complaint for the prisoner is not that he would be better off were he granted home leave, and for the academic it is not that she would be better off were she granted the research leave. Absent the commitment from the prison officials in the first case and the dean in the second, there may be no moral problem with denying the benefit. It is the commitment together with the reasonable expectation it creates that grounds the moral problem.

Why is it a moral problem? Because individuals organized their thoughts — formed beliefs, intentions, attitudes, and understandings — based on statements that authorities, acting in their official capacities, made to those individuals. Because of intentional action on the part of the officials, the individuals were forced to abandon their intentions and reimagine their futures, with inevitably destabilizing and

disorienting effects.²⁰⁶ The harm here may not have a physical or economic dimension, but that doesn't mean it is not real or is any less important.²⁰⁷ The officials thwarted the expectations of the affected individuals, which undermined the autonomy and self-determination of those individuals by making it impossible for them to follow through on their plans and realize their visions of the future. And, to the extent the officials failed to attend to those individuals' expectations in their decisions to change the policies, the officials indicated a lack of concern for the thought processes and psyches of those affected, offending their dignity. Moreover, the policy changes may be unfair because the officials themselves led the individuals to form the expectations at issue and those reasonable expectations were then upset at the hands of the officials.

The appropriate solution, however, is not for authorities to refrain from making commitments or for people to stop relying on such commitments, but rather for authorities to give due consideration to the reliance costs of breaking their commitments. This goes to the first layer of *stare decisis* discussed above (Part I): Why have a system in which people may legitimately rely on judicial decisions? Effective self-government and self-determination depend on our ability to form reliable beliefs about key aspects of our future. Only then can we develop and carry out our life plans effectively and confidently. And that means that we have to be able to rely on commitments from those in positions of legitimate power over us. When that reliance works, it can enhance our autonomy, but when it fails, it does the opposite.

When we have a system in which people can justifiably rely on the official statements of authorities, it becomes unfair for authorities to disregard people's reliance when considering a policy change that would diminish people's rights. This goes to the second layer of *stare decisis* discussed above in section I.A. When precedents are overturned and expectations thwarted, it comes with costs to the kind of autonomy and self-governance that *stare decisis*, when followed, serves to protect. And, it may be unfair for the Court to frustrate expectations based on

²⁰⁶ This harm might have a significant psychological component. Indeed, in the real case that the prisoner hypothetical is based on, the Court acknowledged "a considerable body of evidence . . . demonstrat[ing] (as [was] not in any way in dispute) the severely traumatic effect upon [the prisoners] of the change of policy." *Sec'y of State for the Home Dep't*, 1 WLR at 917. But the psychological cost is not the totality of the problem. Even if those affected are not psychologically damaged, their autonomy and dignity may be offended.

²⁰⁷ See Bayefsky, *supra* note 85, at 2320–21, 2326 (arguing, in the context of constitutional standing doctrine, that the identification of cognizable harm "with physical and economic harm reflects a misguided effort to identify uncontroversially legitimate human interests that would support judicial redress," *id.* at 2320–21, and observing that "individuals have many other interests fundamental to their ability to live, form relationships, and contribute to society in a constitutional democracy," *id.* at 2326).

precedent because the Court itself induced those expectations.²⁰⁸ Even if the Court ultimately determines that the advantages of overruling a precedent outweigh the disadvantages, the reliance costs are relevant to the analysis; the Court ought to take them into consideration.

Some commentators agree with the *Dobbs* Court that only tangible reliance warrants consideration for stare decisis purposes. Professor Earl Maltz and Dean Amar each separately insist that relevant reliance exists only if it can be shown that an individual's decisionmaking was materially affected by the individual's reliance on the precedent.²⁰⁹ Amar adds that the actions people have taken in reliance on the precedent must be such that those people would be worse off with the precedent overruled than they would have been had the precedent never existed at all.²¹⁰ But neither Maltz nor Amar offers any compelling reason to think that reliance interests, for the purposes of a stare decisis analysis, should be limited in this way.

Amar points out that in the domain of contract law, reliance interests are defined in terms of tangible, detrimental reliance.²¹¹ But he does not explain why a reliance analysis in the context of stare decisis should necessarily take the same form as it does in contract law.²¹² Further,

²⁰⁸ See Gerhardt, *supra* note 85, at 78 (asserting that the Court should not “easily abdicate its responsibility for having made reliance [on the right to abortion] possible in the first place”).

²⁰⁹ Earl M. Maltz, *Abortion, Precedent, and the Constitution: A Comment on Planned Parenthood of Southeastern Pennsylvania v. Casey*, 68 NOTRE DAME L. REV. 11, 20 (1992) (“One must . . . show that some relevant decision was *decisively influenced* by the belief that the specific rule would remain unchanged.”); Amar, *supra* note 171 (“[T]he reliance that must be protected via stare decisis . . . is not reliance that leaves you surprised or disappointed, but reliance *that leaves you worse off than you would have been had the earlier event — in this setting the mistaken earlier ruling — never occurred.*”); see also McGinnis & Rappaport, *supra* note 170 at 844 (“Reliance occurs when someone takes an action he would not otherwise have taken based on the assumption that a precedent will be followed.”). Professor Abner Greene argues similarly, but in a more qualified fashion, that “if the Court overrules a rights-based constitutional precedent — say, a speech right or a substantive due process right — although such a ruling might change the balance of power between government and citizens . . . a weaker sense of reliance is in play here,” compared to precedents in reliance on which people made investment decisions that “cannot be undone, or cannot be undone without substantial cost.” ABNER GREENE, *AGAINST OBLIGATION* 191 (2012) (footnote omitted).

²¹⁰ Amar, *supra* note 171.

²¹¹ *Id.*

²¹² *Id.* Moreover, there are other contexts in which courts take a broader conception of reliance akin to the one that Amar and the *Dobbs* Court reject. Professor Blake Emerson explains how the duty on the part of administrative agencies to present “‘reasoned explanation’ for a change in policy” includes a duty to address broad reliance interests, including intangible ones, on the policy that the agency seeks to change. Blake Emerson, *The Claims of Official Reason: Administrative Guidance on Social Inclusion*, 128 YALE L.J. 2122, 2201–02 (2019) (quoting *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 1000 (2005)) (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016)). For example, federal court decisions reviewing the Department of Homeland Security’s rescission of Deferred Action for Childhood Arrivals relied on “a broad understanding of reliance interests,”

even in contract law, a plaintiff need not necessarily prove or even claim reliance damages to recover; indeed, the more common type of recovery, known as the “expectation interest,” measures damages according to “the value of the promised performance” for the promisee.²¹³

With the overruling of *Roe*, the Court has forced us to abandon intentions, to change our attitudes, and to reimagine our identities and positions in society. Our careers, our relationships, our lives, are suddenly not what we thought they would be based on what the Court had previously determined.²¹⁴ The effect is destabilizing and disorienting, undermining our autonomy and setting back our self-determination, because we are unable to carry out the lives that we had imagined for ourselves. The Court’s decision to overrule its precedent here without even taking reliance costs into account also offends our dignity because it expresses a complete disregard for our expectations and the thinking that rested on them. People who benefitted from having the right to abortion protected against governmental interference expected the protection to continue to exist at least in part because of the Court’s decisions, and the Court now upsets the expectation that it created, bringing

which “require[s] only that people have reasonably ‘changed [their] position’ in response to the government’s action and that the withdrawal of that action would now work a harm on them in their new situation.” *Id.* at 2204. Emerson explains that “[t]he inquiry turns on whether the administration of the program, to date, has created a situation where its discontinuation would upend many people’s lives and institutions’ functioning.” *Id.* And the relevant costs are not limited to economic or tangible ones, but extend to the “way in which individuals’ normative judgments shift in [response] to the guidance.” *Id.* at 2208. As Emerson suggests, this recognition makes sense because “[w]hen the state fails to adhere to its policies, without regard for the personal judgments and interests attached to them, it conveys disrespect, or at least indifference, to these choices and commitments.” *Id.*

²¹³ RESTATEMENT (SECOND) OF CONTS. § 344 (AM. L. INST. 1981); Fuller & Perdue, *supra* note 121, at 57 (“[T]he normal rule of contract recovery . . . measures damages by the value of the promised performance.”). Professor Thomas Scanlon argues for a moral principle that requires a promisor to keep their promise even if the promisee has not detrimentally relied on the promise, and he argues that contract law should follow suit, allowing plaintiffs to recover for breach of contract even in the absence of detrimental reliance. Thomas Scanlon, *Promises and Practices*, 19 PHIL. & PUB. AFFS. 199, 206 (1990); T.M. Scanlon, *Promises and Contracts*, in *THE THEORY OF CONTRACT LAW* 86, 95 (Peter Benson ed., 2009) (referring to the value thus protected as “the value of assurance”); see also Matthew Noah Smith, *Reliance*, 44 NOÛS 135, 135–36 (2010) (developing a general philosophical account of reliance that does not include a detrimental reliance condition, and noting that in the domain of contract law, “[a] subject of debate is whether the appropriate remedy for breach of contract is payment of reliance damages, or payment of expectations damages, or specific performance,” *id.* at 135 n.7). Amar acknowledges that expectation damages as opposed to reliance damages may be awarded in contract disputes, but on his view this is only because in contract law “expectation of the benefit of a bargain may often converge with reliance on the deal,” such that protecting the expectation interest is just a convenient way of protecting the reliance interest. Amar, *supra* note 171.

²¹⁴ See, e.g., Marin Cogan, *What “Choice” Means for Millions of Women Post-Roe*, VOX (Jan. 20, 2023, 6:00 AM), <https://www.vox.com/culture/23559583/roe-abortion-dobbs-reproductive-rights> [<https://perma.cc/QF74-3NSH>]; Dobbs *Decision: Reactions to the End of Roe v. Wade*, CHI. SUN-TIMES (June 24, 2022, 9:53 PM), <https://chicago.suntimes.com/2022/6/24/23181663/dobbs-decision-roe-v-wade-reaction-supreme-court-2022> [<https://perma.cc/4W4K-MDY7>].

about all kinds of unfair surprises.²¹⁵ We are left with the sense of having been fooled by an institution that has tremendous power and influence over the course of our lives and the shape of our society.

Further, the Court has forced us into a new and unexpected relationship with our fellow citizens and state and federal politicians. We had been led to believe that we would not need to rely on the political process for a critical subset of reproductive rights.²¹⁶ Professor Randy J. Kozel explains:

Our foundational legal norms are part of what we use to understand the relationships between and among citizens and governments. When those norms are revised in important ways, our belief system can be affected. This is true even if no individual citizen can point to specific behaviors he undertook on the assumption that a precedent would remain in force.²¹⁷

And so even if one lives in a state where abortion is permitted or protected, the change in legal landscape is palpable. The right may feel fragile, as we now have to depend on our fellow state citizens and our state politicians to protect it. We have lost the sense of assurance and peace of mind that comes with having a right protected by the Federal Constitution²¹⁸ — a protection that is especially meaningful for historically subordinated groups.²¹⁹

Bear with me for one final analogy. An individual, call her Mary, embarks on a legal education and career without planning to be sued for malpractice. But she nevertheless relies on the assurance that if she is sued for malpractice, she will not suffer disastrous economic and personal consequences. Mary the law student and then lawyer conducts her affairs and makes plans with the background expectation that, if she accidentally commits malpractice or is found to have done so, she will be able to rely on her malpractice insurance and will not have to bear the full burden of the costs.

Now imagine that a binding judicial decision holds that malpractice insurance contracts are void as a matter of public policy. The practice of law is suddenly and dramatically changed, and Mary, who studied law and built her career with the expectation that she would have the benefit of practicing law with malpractice insurance, suffers a major

²¹⁵ See sources cited *supra* note 214.

²¹⁶ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2347 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) (observing that the right to abortion has “a societal dimension, because of the role constitutional liberties play in our structure of government,” and that the Court’s rescission of the right “affects all who have relied on our constitutional system of government and its structure of individual liberties protected from state oversight”).

²¹⁷ Kozel, *supra* note 31, at 462 (footnote omitted).

²¹⁸ See Amy Littlefield, Opinion, *Democrats Need to Realize How Much Dobbs Mattered*, N.Y. TIMES (Nov. 19, 2022), <https://www.nytimes.com/2022/11/19/opinion/midterm-election-abortion-roe-dobbs-democrats.html> [<https://perma.cc/NDS6-GZEC>].

²¹⁹ See Erwin Chemerinsky & Michele Goodwin, *Abortion: A Woman's Private Choice*, 95 TEX. L. REV. 1189, 1197 (2017) (arguing that the legality of abortion should not be left to legislatures “precisely because of women’s marginalized status in society”).

loss. The loss is material because Mary is now exposed to a greater chance of substantial economic damages, and it is also psychic or psychological because Mary has lost the sense of security that comes with knowing that she is insured against unexpected lawsuits. In these ways, the lack of malpractice insurance is itself a bad thing. But these sorts of psychic and economic costs do not constitute the only ways that Mary is harmed. The change in life circumstances from practicing law with insurance to practicing without it is another, distinct harm. Mary has grown accustomed to conducting her affairs with the security of an insurance policy and now has to rethink and reweigh the consequences of decisions she has made and will make going forward.

And if Mary were led to believe, through judicial decisions upholding the validity of insurance contracts, that she would enjoy malpractice insurance for the duration of her career, then the loss is also unfair to her. It is unfair to her even if she was better off having had insurance for a short period of time than she would have been never having had insurance at all. And it is unfair even if she would not have taken different decisive actions had she never been guaranteed access to insurance. The termination of a protected right to access abortion comes with the same forms of harm.

One might object that the Court's decision in *Dobbs* did not actually take away access to abortion but only the guarantee that access to abortion would be protected against governmental interference. I would make two points in response. First, for many people, the Court's decision did have the effect of withdrawing access to abortion or at least making access much more difficult. Although some people in antiabortion states can and will obtain abortions anyway, by crossing state lines or obtaining abortion pills by mail, many people may not be able to do so.²²⁰ Second, for many people who are still able to obtain abortions, access has become more costly and less certain.²²¹ The Court has upset

²²⁰ See David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 9, 12 (2023) (observing that, “[w]ithout *Roe*, roughly half the country is expected to eventually make almost all abortion services illegal,” *id.* at 9; that “many abortion seekers will not be able to afford the costs” of obtaining an abortion; and that “there are some people who will struggle to leave the state for other reasons — those who are institutionalized or hospitalized, those on parole, those who are undocumented, and those with disabilities that make travel challenging,” *id.* at 12).

²²¹ See *supra* note 108; *infra* note 250; Cohen, Donley & Rebouché, *supra* note 220, at 2–4, 25 (explaining that “[a]nti-abortion activists have made clear that overturning *Roe* is the first step toward their goal of making abortion illegal nationwide,” *id.* at 4, and they “will attempt to impose their local abortion policies as widely as possible, even across state lines,” *id.* at 2–3; that “anti-abortion states . . . will . . . not only pass laws that criminalize in-state abortion but also attempt to impose civil or criminal liability on those who travel out of state for abortion care or on those who provide such care or facilitate its access,” *id.* at 4; and that such bills “could become a reality in coming legislative sessions,” *id.* at 25); see also Michele Goodwin, Book Review, 19 PERSPS. ON POL. 998, 999 (2021) (reviewing MARY ZIEGLER, *ABORTION AND THE LAW IN AMERICA: ROE V. WADE TO THE PRESENT* (2020)) (“[T]he anti-abortion movement has not been satisfied with efforts to limit abortion access.”).

our reliance on the constitutional right as it existed under the pre-*Dobbs* regime; even individuals who still have access to abortion no longer have that right.

Waldron explains how, when citizens reasonably rely on the law being one way, organizing their lives accordingly, and then the law changes unexpectedly, the law “show[s] contempt for the dignity of ordinary agency and the ability of people to be guided by the law, to internalize it, and to self-apply it to their conduct.”²²² “Upholding dignity in this sense,” says Waldron, “is one of the things that the rule of law requires.”²²³ Laws protecting personal liberties are especially weighty in this regard in contrast to, for example, laws that protect the power of states to regulate some area as they see fit, because we cannot enjoy the full benefit of a personal liberty — confidently organizing our lives and thinking around it — if we are in serious doubt of its longevity.²²⁴

Raz observed that a drastic change to the law “affects people’s ability to function” because, “[w]hile it is possible to predict the direct consequences of small changes in legal and social practices, changes that take place within existing frameworks and do not upset them, it is impossible to predict the effect of radical, large-scale changes.”²²⁵ The *Dobbs* decision, with its massive disruptive effects on the doctrine of stare decisis, the landscape of abortion law, and abortion care and miscarriage treatment, has certainly affected our ability to function.²²⁶ People now face uncertainty about not only access to abortion but also access to miscarriage management, which can be an urgent medical matter.²²⁷ So even if residents of states with abortion bans might be able to travel to other states to obtain abortions, their lives have become less predictable and

²²² Waldron, *supra* note 13, at 28.

²²³ *Id.*

²²⁴ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992) (“Liberty finds no refuge in a jurisprudence of doubt.”), *overruled by Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

²²⁵ JOSEPH RAZ, *BETWEEN AUTHORITY AND INTERPRETATION* 350–51 (2009); see also Nye, *supra* note 15 (manuscript at 442) (“The aim of the rule of law is to avoid this kind of unpredictable projection of power against the legal subject and ensure that any governmental interference they may experience can be expected and worked into their life plans.”).

²²⁶ See Richard M. Re, *Should Gradualism Have Prevailed in Dobbs?*, in *ROE V. DOBBS* (Lee Bollinger & Geoffrey Stone eds., forthcoming 2023) (manuscript at 6), <https://papers.ssrn.com/abstract=4278625> [<https://perma.cc/M8XS-RVE8>] (discussing the widespread “gratuitous confusion and harm” that have resulted from the decision); see also Cohen, Donley & Rebouché, *supra* note 220, at 4 (explaining how “[o]verturning *Roe* and *Casey* will create a complicated world of novel interjurisdictional legal conflicts over abortion” and “will lead to profound confusion because advocates on both sides of the abortion controversy will not stop at state borders in their efforts to apply their policies as broadly as possible”).

²²⁷ See, e.g., Hope Kirwan, “*Emotional Turmoil*”: *Wisconsin Mother Shares Her Struggle in Getting Care for Her Miscarriage*, WIS. PUB. RADIO (July 28, 2022, 5:30 AM), <https://www.wpr.org/emotional-turmoil-wisconsin-mother-shares-her-struggle-getting-care-her-miscarriage> [<https://perma.cc/8QE6-JVAB>].

more precarious.²²⁸ Because of the uncertainty that drastic legal change can bring about, “in relatively stable and decent societies there is a presumption in favour of continuity against which all proposals for change should be judged.”²²⁹ The current Court appears to reject that presumption.

Further, as Raz explained, the uncertainty caused by a major legal change “is made worse if it generates fear of continuous change, leading to a sense of dislocation and loss of orientation.”²³⁰ The *Dobbs* decision has generated that fear, in two senses. First, abortion regulation across the country is in a state of uncertainty and flux. A federal ban on abortion, even, is no longer out of the question.²³¹ Second, *Dobbs* unsettled not only the law of abortion but also related areas of constitutional law and in particular decisions protecting personal liberties aside from abortion, raising systemic concerns, which I take up in section III.C below.

With the *Dobbs* decision, the Court precipitated disruptive and frightening changes to abortion law and thus health care practice across the country: women are being denied not only abortion care but also critical types of contraception and treatment for miscarriage.²³² And

²²⁸ Further, some individuals in states with abortion bans or severe restrictions will have a harder time seeking out-of-state care than others because of differences in life circumstances, backgrounds, and resources. See Cohen, Donley & Rebouché, *supra* note 220, at 12 (pointing out that “poor people and women of color are more likely to be left with the options of continuing an unwanted pregnancy or self-managing an abortion in a hostile state with the corresponding legal risks,” as are people “who are institutionalized or hospitalized, those on parole, those who are undocumented, and those with disabilities”); see also Co, *supra* note 203, at 17–22 (explaining how, even before *Dobbs*, one’s ability to access abortion was associated with one’s race, health insurance status, geographical location, and socioeconomic status); Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025, 2089, 2092 (2021) (drawing attention to “the systemic inequities that constrain reproductive decisionmaking,” *id.* at 2089, and explaining how “the burdens of abortion restrictions are borne disproportionately by low-income women of color,” *id.* at 2092); Goodwin, *supra* note 221, at 999 (noting (before *Dobbs*) that “even as abortion remains legal and supported by the majority of Americans, it is also out of reach for many of the people who need or want the medical service”); Michele Goodwin & Erwin Chemerinsky, *Pregnancy, Poverty, and the State*, 127 YALE L.J. 1270, 1280, 1329 (2018) (reviewing KHIARA BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* (2017)) (observing that low-income “women of color bear the overwhelming brunt of the state’s hostility and deprivations related to reproductive health,” *id.* at 1329, and that, as legal restrictions on abortion increase, the associated burdens “will affect broader segments of the population, placing greater numbers of women at risk,” *id.* at 1280).

²²⁹ RAZ, *supra* note 225, at 351. Re argues that, if the Court wished to depart from its abortion precedent, it should have done so more gradually, allowing “individuals, the public, and legislators to become more informed and then to update or refine the law.” Re, *supra* note 226 (manuscript at 6).

²³⁰ RAZ, *supra* note 225, at 351.

²³¹ See Tang, *supra* note 3 (manuscript at 1) (explaining how, for many supporters of the decision, *Dobbs* is only a first step toward a total nationwide ban on abortion at all stages of pregnancy); Lemley, *supra* note 195, at 110 n.79 (suggesting that the Court “may well ultimately conclude that states too have no power to permit abortion”); Cohen, Donley & Rebouché, *supra* note 220, at 4 (explaining that, for antiabortion activists, “overturning *Roe* is the first step toward their goal of making abortion illegal nationwide”).

²³² See Zernike, *supra* note 113.

the majority exhibited no concern whatsoever for these effects.²³³ The law's affront to human agency and dignity here is staggering.

B. Societal Reliance

In *Casey*, the Court rejected the narrow view of reliance that the *Dobbs* Court would impose: on that narrow view, “cognizable reliance [is limited] to specific instances of sexual activity.”²³⁴ The Justices in *Casey* declined to limit reliance in this fashion, because that “would be simply to refuse to face the fact that for two decades . . . people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion.”²³⁵ *Casey* thus took a broad conception of reliance, focusing not on discrete individual actions but rather on widespread behaviors, attitudes, and understandings. Commentators have referred to this as “societal” reliance.²³⁶ That a decision overturning *Roe* would have massive societal consequences, many of them negative, is undeniable. But in what sense do these effects constitute *reliance* costs? Here I suggest two different ways in which we might make sense of societal reliance and justify its inclusion in a *stare decisis* analysis.

The most obvious way to understand societal reliance is in terms of individual reliance interests in the aggregate. When individual reliance is common and widespread, it can take on a societal dimension. A huge swath of society would need to have individual reliance interests at stake, which was easily the case with the precedents protecting a right to abortion. As Kozel observes, a precedent might “become ingrained in the American consciousness,” and if it does, then the Court ought to “consider the societal effects of overruling that precedent”²³⁷ and “whether widely held understandings about fundamental legal norms might be shaken.”²³⁸ The reliance on *Roe* and *Casey* was not limited to a few individuals or to small segments of society. This is unlike, for example, the reliance interests that might be at issue with respect to some commercial law precedent that affects a niche industry. The individual interests that together constitute societal reliance could take a tangible or intangible form, but the interests that concerned the Court in *Casey* seem to be at least in part intangible ones.²³⁹

²³³ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2343 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) (asserting that the majority opinion “reveals how little [the Justices] know[] or care[] about women's lives or about the suffering [their] decision will cause”).

²³⁴ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992), *overruled by Dobbs*, 142 S. Ct. 2228.

²³⁵ *Id.*

²³⁶ See, e.g., Consovoy, *supra* note 148, at 77 (asserting that “the reliance inquiry” in *Casey* involved consideration of “a generalized societal reliance”).

²³⁷ Kozel, *supra* note 31, at 462.

²³⁸ *Id.* at 466.

²³⁹ See *supra* text accompanying notes 234–35.

When we have reliance of a societal scope, it might make little sense for a court to try to count or measure the reliance costs of overruling. The clear presence of societal reliance makes it unnecessary to identify specific instances of reliance and add them up. As the Court wrote in *Casey*, “while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed.”²⁴⁰ This is, of course, not how the *Dobbs* majority opinion saw things. The Justices claimed that there were no identifiable individual reliance interests to be counted and that the reliance inquiry need not go any further than that.²⁴¹

The second sense in which we can understand societal reliance, which is often jumbled up with the first in discussions of reliance interests, including in both *Casey* and the *Dobbs* dissent, is reliance on a collective good or value. The values here are women’s liberty and gender equality, and more broadly a free and equal social order, which the pre-*Dobbs* abortion precedents helped to establish and protect. As the Court in *Casey* observed, *Roe* supported “[t]he ability of women to participate equally in the economic and social life of the Nation.”²⁴² Access to abortion is widely seen and felt as integral to women’s liberty and to gender equality,²⁴³ and so *Roe* and *Casey* created an expectation that we would have some fundamental protection for women’s liberty and gender equality going forward.²⁴⁴ The good that people had expectations in is societal or collective in the sense that one person cannot enjoy it unless everyone does (or most people do).²⁴⁵

The reliance interest here can be put in individual terms: it is the interest that individuals have in expectations about the kind of society they, and their children and grandchildren, would have in the future. The *Dobbs* dissent explained how the right that the pre-*Dobbs* abortion

²⁴⁰ *Casey*, 505 U.S. at 856.

²⁴¹ See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2276–77 (2022).

²⁴² *Casey*, 505 U.S. at 856; see also Brief of Amicus Curiae American Bar Ass’n in Support of Respondents, *supra* note 204, at 7 (explaining how the right to abortion “has allowed women . . . to strive for economic stability and a fulfilling career,” and how “[a]llowing states to ban abortion would undermine much of the progress toward gender and racial equality made over the past several decades in the legal profession, as well as in society more broadly”).

²⁴³ See, e.g., *Dobbs*, 142 S. Ct. at 2317 (Breyer, Sotomayor & Kagan, JJ., dissenting) (“Respecting a woman as an autonomous being, and granting her full equality, meant giving her substantial choice over this most personal and most consequential of all life decisions.”).

²⁴⁴ See Kozel, *supra* note 31, at 460 (“Sometimes the reliance a precedent has generated . . . owes . . . to the effect of the precedent on shaping societal perceptions about our country, our government, and our rights.” (footnote omitted)).

²⁴⁵ See Leslie Green, *Two Views of Collective Rights*, 4 CAN. J.L. & JURIS. 315, 320–24 (1991) (describing this conception of collective interests as “shared goods, which . . . [have a] public aspect [that] is not merely a contingent feature of their production but partly constitutes what is valuable about them,” *id.* at 321, and arguing that it makes sense to call rights to this kind of good *collective* rights because “it is not the individual interest that grounds these rights, but rather the set of linked collective interests that does so,” *id.* at 323).

precedents “conferred and reaffirmed is part of society’s understanding of constitutional law and of how the Court has defined the liberty and equality that women are entitled to claim.”²⁴⁶ The right to abortion thus has “a societal dimension.”²⁴⁷ Professor Michael Dorf observes that some cases — and I think this is easily true of *Roe* — have come to “symbolize the association in the public imagination of the Constitution with core ideals of liberty and equality.”²⁴⁸ As Kozel argues, “[o]verruling such cases would carry intellectual and psychological consequences as well as tangible ones, creating the need for forward-looking adjustments to behaviors and mentalities.”²⁴⁹

Because of the societal reliance on *Roe*, individuals who continue to have local access to abortion after *Dobbs* also suffer reliance harms as a result of the decision. They suffer not only because people must now travel to their states to obtain abortions (straining clinics and making abortion less accessible)²⁵⁰ or because future access to abortion has become less certain, but also because individuals residing in states with permissive abortion laws belong to a country that has declined to afford constitutional protection to a right that is critical to the autonomy and dignity of women. They are not sheltered from the reality that women’s place in American society has changed for the worse. And so their expectations in women’s liberty and gender equality have also been thwarted.

C. Systemic Reliance

Given that the constitutional right to abortion is part of a constellation of fundamental liberty rights that the Court has recognized, overturning the right unsettles related rights too,²⁵¹ despite the protestations

²⁴⁶ *Dobbs*, 142 S. Ct. at 2347 (Breyer, Sotomayor & Kagan, JJ., dissenting); see also MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* 84 (2004) (describing the *Casey* joint opinion’s view of *Roe* as “so embedded in the nation’s culture that overruling it would disrupt understandings not about abortion alone, but about the role of women in society”).

²⁴⁷ *Dobbs*, 142 S. Ct. at 2347 (Breyer, Sotomayor & Kagan, JJ., dissenting).

²⁴⁸ Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011, 2030 (2012) (reviewing JACK M. BALKIN, *LIVING ORIGINALISM* (2011); DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010)).

²⁴⁹ Kozel, *supra* note 40, at 1493.

²⁵⁰ See Brief for the States of California et al. as Amici Curiae in Support of Respondents at 14, *Dobbs* (No. 19-1392) (pointing out that states “have structured and budgeted for their healthcare systems without the prospect of providing care for a sudden influx of out-of-state patients”); Cohen, Donley & Rebouché, *supra* note 220, at 12 (“Clinics that remain open in this new era will be inundated with out-of-state patients, delaying care for in- and out-of-state patients alike. Already, clinics in certain areas are booking over three weeks out or are not scheduling new patients due to the surge in demand.” (footnote omitted)).

²⁵¹ See Kozel, *supra* note 40, at 1496 (observing, with respect to the possible overturning of *Roe*, that besides “the obvious effects on individual behaviors and the likelihood of extensive administrative and legislative responses, widespread understandings about the content of the legal backdrop would need to adapt”); Note, *supra* note 71, at 1350, 1358 (observing that, in constitutional

of the *Dobbs* majority to the contrary. “[T]o ensure that our decision is not misunderstood or mischaracterized,” Justice Alito wrote, “we emphasize that our decision concerns the constitutional right to abortion and no other right.”²⁵² He stressed that “[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion.”²⁵³ But the majority failed to muster a compelling legal argument that would distinguish the abortion precedents from other substantive due process precedents where the recognized right was likewise not manifestly grounded in history and tradition,²⁵⁴ including *Griswold v. Connecticut*²⁵⁵ (recognizing the right to contraception) and *Obergefell v. Hodges*²⁵⁶ (recognizing the right to same-sex marriage). Well-informed observers thus reasonably question, in the wake of *Dobbs*, the status of other precedents that protect basic personal rights.²⁵⁷

law, “overruling opinions may ‘transform’ entire areas of the law as well as fundamental social relationships,” *id.* at 1350, and suggesting that, if the Court were to overrule “the right to sexual autonomy announced in *Eisenstadt*, [it] would bring into question the security of other rights as well,” *id.* at 1358). Further, “because few if any personal rights have ever been overruled, an overruling of one personal right may bring into doubt other rights secured by the Constitution.” *Id.* at 1361 (footnotes omitted).

²⁵² *Dobbs*, 142 S. Ct. at 2277.

²⁵³ *Id.* at 2277–78.

²⁵⁴ As the *Dobbs* dissent noted, the majority opinion “briefly (very briefly) gestures at the idea that some *stare decisis* factors might play out differently with respect to these other constitutional rights.” *Id.* at 2332 n.8 (Breyer, Sotomayor & Kagan, JJ., dissenting). “But,” continued the dissent, “the majority gives no hint as to why. And the majority’s (mis)treatment of *stare decisis* in this case provides little reason to think that the doctrine would stand as a barrier to the majority’s redoing any other decision it considered egregiously wrong.” *Id.*

²⁵⁵ 381 U.S. 479 (1965).

²⁵⁶ 135 S. Ct. 2584 (2015).

²⁵⁷ See, e.g., Leah Litman & Steve Vladeck, *The Biggest Lie Conservative Defenders of Alito’s Leaked Opinion Are Telling*, SLATE (May 5, 2022, 5:31 PM), <https://slate.com/news-and-politics/2022/05/conservatives-lying-impact-samuel-alito-leaked-draft-opinion-roe.html> [<https://perma.cc/3TY2-XVLP>] (“The leaked draft opinion seemingly puts several other constitutional rights squarely in the court’s crosshairs.”); David Litt, *A Court Without Precedent*, THE ATLANTIC (July 24, 2022), <https://www.theatlantic.com/ideas/archive/2022/07/supreme-court-stare-decisis-roe-v-wade/670576> [<https://perma.cc/SH3E-3DCG>] (“In the aftermath of *Dobbs*, businesses and governments are trying to figure out which rights the Court will un-guarantee next. Same-sex marriage? Same-sex intimacy? Birth control? Free and fair elections? . . . We have only begun to reckon with what it means to live in a country whose most powerful judicial body no longer believes in judicial restraint.”); Sorkin, *supra* note 98 (reporting that “Roe and Casey are part of a long series of cases in which the Court, relying in large part on the Fourteenth Amendment, has recognized certain unenumerated rights that derive from the Constitution, even if they are not spelled out there” and that Justice Alito’s “opinion, despite its claim to be limited to abortion, thus casts doubt on *Obergefell* and even on *Griswold v. Connecticut*, the 1965 case that recognized the right of married couples to obtain contraception”); Suter & Cahn, *supra* note 202 (asserting that “[t]he cases underpinning [*Roe* and *Casey*] can be traced back to opinions in the early 1920s that recognized the right to intimate associations and life determinations without undue state interference,” naming six rights-protecting precedents that *Dobbs* would seem to undermine, and concluding that “most rights recognized under the Due Process Clause are at risk”); Robert L. Tsai, *What Rights Could Unravel Next*, POLITICO (May 3, 2022, 12:52 PM), <https://www.politico.com/news/magazine/2022/05/03/supreme-court-abortion-draft-other-precedents-00029625> [<https://perma.cc/ZWH8-XXQ2>] (“[T]he draft opinion overturning *Roe* suggests that other precedents could be vulnerable, despite Justice Alito’s assurances otherwise.”).

The Court in *Casey* pointed out that *Roe*'s recognition of women's constitutional right to liberty "fits comfortably within the framework of the Court's prior decisions, including *Skinner v. Oklahoma ex rel. Williamson*, *Griswold*, *Loving v. Virginia*, and *Eisenstadt v. Baird*, the holdings of which are 'not a series of isolated points,' but mark a 'rational continuum.'"²⁵⁸ The Court added:

As we described in *Carey v. Population Services International*, the liberty which encompasses those decisions "includes 'the interest in independence in making certain kinds of important decisions.' While the outer limits of this aspect of [protected liberty] have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions 'relating to marriage, procreation, contraception, family relationships, and child rearing and education.'"²⁵⁹

Dobbs implicitly cast this whole constellation of decisions into doubt, as the dissent emphasized.²⁶⁰ The dissenting Justices pointed out that "[t]he right *Roe* and *Casey* recognized does not stand alone" but rather is "linked . . . to other settled freedoms involving bodily integrity, familial relationships, and procreation," as well as "same-sex intimacy and marriage": all of these rights, the dissent asserted, are "part of the same constitutional fabric, protecting autonomous decisionmaking over the most personal of life decisions."²⁶¹

As the majority in *Lawrence v. Texas* remarked, "[t]he opinions in *Griswold* and *Eisenstadt* were part of the background for the decision in *Roe v. Wade*."²⁶² To support its recognition of a constitutional right to same-sex relations, the *Lawrence* Court appealed to *Roe*'s affirmation "that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person."²⁶³ The Court observed that *Casey* "again confirmed" the

²⁵⁸ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 858 (1992) (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)) (citations omitted), *overruled by Dobbs*, 142 S. Ct. 2228.

²⁵⁹ *Id.* at 858–59 (quoting *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684–85 (1977) (citations omitted)), *overruled by Dobbs*, 142 S. Ct. 2228.

²⁶⁰ *See Dobbs*, 142 S. Ct. at 2319–20 (Breyer, Sotomayor & Kagan, JJ., dissenting); Kozel, *supra* note 31, at 459 ("If a foundational precedent . . . were to be overruled, an entire structure could waver or topple, upsetting settled expectations and creating widespread uncertainty about the state of the law.")

²⁶¹ *Dobbs*, 142 S. Ct. at 2319 (Breyer, Sotomayor & Kagan, JJ., dissenting); *see also id.* at 2327 ("The Court's precedents about bodily autonomy, sexual and familial relations, and procreation are all interwoven — all part of the fabric of our constitutional law . . ."); *id.* at 2329 ("*Roe* and *Casey* fit neatly into a long line of decisions protecting from government intrusion a wealth of private choices about family matters, child rearing, intimate relationships, and procreation." (citations omitted)); *id.* at 2330 (questioning the majority's claim that it can "neatly extract the right to choose from the constitutional edifice without affecting any associated rights" and comparing the situation to a "Jenga tower" about to collapse); *Carey*, 431 U.S. at 685 ("The decision whether or not to beget or bear a child is at the very heart of [a] cluster of constitutionally protected choices."); *supra* note 259 and accompanying text.

²⁶² *Lawrence v. Texas*, 539 U.S. 558, 565 (2003).

²⁶³ *Id.*

constitutional right to make “personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education” as matters that involve “the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy” and “central to the liberty protected by the Fourteenth Amendment.”²⁶⁴ In his dissenting opinion in *McDonald v. City of Chicago*,²⁶⁵ Justice Stevens observed that *Lawrence* is incompatible with *Washington v. Glucksberg*’s²⁶⁶ “history and tradition” test for substantive due process rights.²⁶⁷ The *Dobbs* majority enthusiastically relied on the *Glucksberg* test, indirectly undermining the foundations of *Lawrence*.²⁶⁸

In previous decisions about whether to overturn a precedent, the Justices have considered the relationship of the precedent to others and whether overruling it might destabilize other doctrines.²⁶⁹ Just a few years ago, when the Court was asked to overrule a precedent in the case of *Kimble v. Marvel Entertainment, LLC*, it observed that the precedent at issue “is not the kind of doctrinal dinosaur or legal last-man-standing for which we sometimes depart from *stare decisis*.”²⁷⁰ “To the contrary,” the Court asserted, “the decision’s close relation to a whole web of precedents means that reversing it could threaten others.”²⁷¹ And the Court took that fact as a weighty reason against overruling the precedent at issue.²⁷²

When a decision overturning a precedent might undermine the foundations of other precedents, the decision has ripple reliance costs because

²⁶⁴ *Id.* at 573–74 (quoting *Casey*, 505 U.S. at 851).

²⁶⁵ 561 U.S. 742 (2010).

²⁶⁶ 521 U.S. 702 (1997).

²⁶⁷ *McDonald*, 561 U.S. at 873 n.16 (2010) (Stevens, J., dissenting).

²⁶⁸ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2260 (2022) (“We have held that the ‘established method of substantive-due-process analysis’ requires that an unenumerated right be ‘deeply rooted in this Nation’s history and tradition’ before it can be recognized as a component of the ‘liberty’ protected in the Due Process Clause.” (quoting *Glucksberg*, 521 U.S. at 721)).

²⁶⁹ See, e.g., *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 34–35 (1989) (Scalia, J., concurring in part and dissenting in part) (observing that reversing the precedent at issue would implicitly overrule many other cases and would also “cast doubt on” related lines of cases, and maintaining that these are good reasons not to overrule it), *overruled by Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); see also Easterbrook, *supra* note 49, at 431 (observing that even Justices who believe that *Miranda v. Arizona* was incorrectly decided vote to reaffirm it because it “has become a structural decision on which other doctrines and institutions depend”).

²⁷⁰ *Kimble v. Marvel Ent., LLC*, 135 S. Ct. 2401, 2411 (2015).

²⁷¹ *Id.*; see also *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm’n*, 461 U.S. 375, 391 (1983) (“[T]he same respect for the rule of law that requires us to seek consistency over time also requires us, if with somewhat more caution and deliberation, to seek consistency in the interpretation of an area of law at any given time.”); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 573 (1993) (Souter, J., concurring in part and concurring in the judgment) (“Over time, [a precedent] may become ‘part of the tissue of the law,’ and may be subject to reliance in a way that new and unexpected decisions are not.” (citation omitted) (quoting *Radovich v. Nat’l Football League*, 352 U.S. 445, 455 (1957) (Frankfurter, J., dissenting))).

²⁷² *Kimble*, 135 S. Ct. at 2411.

it unsettles our expectations that those other precedents will last.²⁷³ These costs might be substantial when the overruling is a highly public matter as it is in *Dobbs*. Not only are people aware of the Court's decision, they are also aware of its possible implications for other cases — implications that the media (and Justice Thomas in his *Dobbs* concurrence²⁷⁴) have been keen to highlight.²⁷⁵ By overruling *Roe* and *Casey*, then, the Court not only has upset reliance interests in the right those decisions protected but also has disturbed society-wide reliance on other personal liberties, diminishing the benefit that we get from being able to rely on judicially protected constitutional rights.²⁷⁶

When it overrules well-established precedent, the Court might give rise to doubts and anxieties about the entire legal order.²⁷⁷ While it remains to be seen whether other cases will topple in the wake of *Dobbs*, the decision has already created widespread uncertainty about the status of liberty and equality rights well beyond the abortion context, with commentators raising questions about, for example, the vitality of the right to same-sex marriage recognized in *Obergefell* and the right to contraception recognized in *Griswold*.²⁷⁸ And indeed, the Court has a

²⁷³ See Lewis, *supra* note 15, at 881 (“[I]n some cases one specific change in the content of the law may have a much more systemic impact than changes in other, less sensitive areas.”); McGinnis & Rappaport, *supra* note 170, at 844 (“Not only does overturning a precedent that has been relied upon upset expectations and impose costs, it also weakens people’s willingness to rely on future precedent and thus to plan for the future.”).

²⁷⁴ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2300 (2022) (Thomas, J., concurring) (“[I]n future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.”).

²⁷⁵ See sources cited *supra* note 257.

²⁷⁶ See GOLDBERG, *supra* note 65, at 94 (“Any overruling acts as an admission that some right the Court had formerly called ‘fundamental’ was not so fundamental after all; that admission will undermine the public belief that the other rights labeled fundamental in the past still retain their status. For any contraction by overruling, the Court must pay a huge premium in lost force of those decisions that it wishes to retain as ‘good constitutional law.’”).

²⁷⁷ See Kozel, *supra* note 40, at 1496; see also Lemley, *supra* note 195, at 112 (suggesting that *Dobbs* shows that the Court is no “longer constrained by the principle of fidelity to past precedent”); *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1506 (2019) (Breyer, J., dissenting) (asserting that, when the Court overrules a case, it may “cause the public to become increasingly uncertain about which cases the Court will overrule and which cases are here to stay”); *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008) (majority opinion joined by Thomas & Alito, JJ., among others) (suggesting that reexamining “well-settled precedent could . . . prove harmful” even in the absence of direct reliance on that precedent, because “[t]o overturn a decision settling one . . . matter simply because we might believe that decision is no longer ‘right’ would inevitably reflect a willingness to reconsider others,” which “could itself threaten to substitute disruption, confusion, and uncertainty for necessary legal stability”).

²⁷⁸ See, e.g., Litman & Vladeck, *supra* note 257 (“Alito’s stated reasons for overruling *Roe* could seemingly be applied to overrule other precedents ranging from *Obergefell v. Hodges*, which recognized a right to marriage equality, to *Lawrence v. Texas*, which recognized a fundamental right for intimate relationships between consenting adults including adults of the same sex, to *Griswold v. Connecticut*, which recognized a fundamental right to contraception.”). Professor Akhil Reed Amar argues that *Dobbs* destabilized *Obergefell* but not *Griswold*. Akhil Reed Amar, Opinion, *The End of Roe v. Wade*, WALL ST. J. (May 14, 2022, 12:01 AM), <https://www.wsj.com/articles/the-end-of-roe-v-wade-11652453609> [<https://perma.cc/7CGH-LLWH>].

history of overruling decisions with foundations that have “sustained serious erosion” as a result of developments in adjacent areas of constitutional law.²⁷⁹

The *Dobbs* majority claimed that the abortion precedents themselves have had, and if upheld would continue to have, a “disruptive effect on other areas of the law.”²⁸⁰ “*Roe* and *Casey* have led to the distortion of many important but unrelated legal doctrines,” the majority said, “and that effect provides further support for overruling those decisions.”²⁸¹ The Justices had in mind transsubstantive doctrines such as standing, res judicata, severability, and constitutional avoidance, which they charged the Court with continually violating in the course of applying the abortion precedents.²⁸² For example, the Justices cited *June Medical Services L.L.C. v. Russo*²⁸³ as a case in which the Court violated third-party standing rules by permitting abortion providers to challenge abortion restrictions.²⁸⁴ And they cited *Whole Woman’s Health v. Hellerstedt*²⁸⁵ as a case in which the Court subverted principles of res judicata.²⁸⁶

These claims are questionable, but even if they had merit, they would not supply a compelling reason to do away with the constitutional right that *Roe* and *Casey* protected. Imagine the Justices declaring that they will no longer protect free speech rights because when the Court protects those rights it tends to make procedural errors. The disruptive effects on other legal areas that the *Dobbs* Court attributed to the maintenance of *Roe* and *Casey* are not comparable to the disruptive effects that come with overturning those cases. The former disruption is not integral to the maintenance of the abortion precedents, whereas the latter disruption is inextricable from the demise of those precedents since they share jurisprudential foundations with several other decisions that protect individual rights.

In this Part, I have argued that upsetting intangible reliance interests constitutes a harm that the Court ought to weigh in the stare decisis balance, and that people were relying in a variety of intangible ways on the precedents protecting a right to abortion. On the view I have defended in this Article, which is consistent with the one that the Court had embraced before *Dobbs*, both tangible and intangible reliance interests are relevant for the purposes of stare decisis, and cognizable reliance may be individual or societal in nature. In the next Part, I

²⁷⁹ *Lawrence v. Texas*, 539 U.S. 558, 576 (2003) (overruling *Bowers* and citing *Casey* and *Romer v. Evans*, 517 U.S. 620 (1996), as decisions that had eroded the precedential standing of *Bowers*).

²⁸⁰ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2265 (2022).

²⁸¹ *Id.* at 2275.

²⁸² *Id.* at 2275–76.

²⁸³ 140 S. Ct. 2103 (2020), abrogated by *Dobbs*, 142 S. Ct. 2228.

²⁸⁴ *Dobbs*, 142 S. Ct. at 2275 n.61.

²⁸⁵ 136 S. Ct. 2292 (2016), abrogated by *Dobbs*, 142 S. Ct. 2228.

²⁸⁶ *Dobbs*, 142 S. Ct. at 2276 n.62.

specify some qualifications and address some possible objections to this view of reliance.

IV. OBJECTIONS AND QUALIFICATIONS

A. *Parameters*

One might wonder about the exact parameters of the right to abortion that people have relied on: Is it a right to access abortion before the time of viability without an “undue burden” imposed by the state, as *Casey* held, or the somewhat different articulation of that right in the more recent case of *Whole Woman’s Health*,²⁸⁷ or some more general right to access abortion?²⁸⁸ In this section I take up this issue, arguing that the relevant right, for the purposes of analyzing reliance, is some meaningful opportunity to choose to obtain an abortion once one realizes one is pregnant or once one learns about a serious complication later in one’s pregnancy.

I doubt that many people are familiar with the details of the abortion doctrine delineated in Supreme Court cases, even the most well-known ones, and so I don’t think that we can plausibly say that people were relying on the doctrinal nuances detailed in those decisions.²⁸⁹ Instead, people understood those cases to protect some nonabsolute right to abortion. In this regard, Chief Justice Roberts’s description of the right in his concurrence in the judgment in *Dobbs* seems apt: “a reasonable opportunity to choose.”²⁹⁰ This means that people have a “real choice,” which would require a reasonable amount of time after one could reasonably be expected to know one is pregnant, to choose whether to obtain an abortion.²⁹¹ As other courts have put it, “for more than forty years, it has been settled constitutional law that the Fourteenth Amendment protects a woman’s basic right to choose an abortion.”²⁹² I share the Chief Justice’s view that widespread reliance on the viability

²⁸⁷ 136 S. Ct. at 2309 (determining that the undue burden standard requires courts to weigh the “burdens a law imposes on abortion access *together with the benefits those laws confer*” (emphasis added)), *abrogated by Dobbs*, 142 S. Ct. 2228.

²⁸⁸ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992), *overruled by Dobbs*, 142 S. Ct. 2228.

²⁸⁹ *See Citizens United v. FEC*, 558 U.S. 310, 410 (2010) (Stevens, J., concurring in part and dissenting in part) (“Members of the public . . . often rely on our bottom-line holdings far more than our precise legal arguments . . .”).

²⁹⁰ *Dobbs*, 142 S. Ct. at 2310 (Roberts, C.J., concurring in the judgment).

²⁹¹ *Id.* at 2314.

²⁹² *Jackson Women’s Health Org. v. Currier*, 349 F. Supp. 3d 536, 539 (S.D. Miss. 2018) (quoting *Jackson Women’s Health Org. v. Currier*, 760 F.3d 448, 453 (5th Cir. 2014)), *aff’d sub nom. Jackson Women’s Health Org. v. Dobbs*, 945 F.3d 265 (5th Cir. 2019), *rev’d and remanded*, 142 S. Ct. 2228 (2022); *see also Webster v. Reprod. Health Servs.*, 492 U.S. 490, 555 (1989) (Blackmun, J., concurring in part and dissenting in part) (defining “the irreducible minimum of *Roe*” as the “recognition that a woman has a limited fundamental constitutional right to decide whether to terminate a pregnancy”).

line is implausible.²⁹³ For Chief Justice Roberts, the crux of the pre-*Dobbs* abortion precedents was their recognition of “a considerable right to choose.”²⁹⁴ In any event, that form of right most plausibly captures what people were relying on. That’s to say not that viability is an indefensible standard but only that it probably cannot be defended on grounds of reliance.

People have likely also relied on the expectation that they could choose to terminate a pregnancy even after the early weeks if a serious, unexpected medical issue arose, whether affecting the fetus or the pregnant person. It seems highly intuitive that limitations on the right to abortion later in pregnancy would have that kind of exception. And public reactions of surprise and outrage to post-*Dobbs* abortion restrictions that do not make exceptions for the health of the pregnant person or for fetal anomalies suggest that people took those exceptions for granted when the right to abortion was constitutionally protected.²⁹⁵

Given that the right to abortion was curtailed after *Roe*, including in *Casey*, one might wonder whether reasonable reliance on the right had decreased over time.²⁹⁶ One could just as well, however, see the cases that affirmed the core holding of *Roe* while narrowing the protection granted as solidifying protection for the core right.²⁹⁷

²⁹³ *Dobbs*, 142 S. Ct. at 2316 (Roberts, C.J., concurring in the judgment) (“It cannot reasonably be argued that women have shaped their lives in part on the assumption that they would be able to abort up to viability, as opposed to fifteen weeks.”).

²⁹⁴ See *Re*, *supra* note 226 (manuscript at 8) (arguing that the Chief Justice’s position can reasonably be understood this way and adding that “the Chief adduced a number of decisions, including *Roe* itself, where the Court discussed a right to choose without tying it to the viability line”). Even those vehemently opposed to *Roe* acknowledge that its core holding has been reaffirmed “again and again.” *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2151 (2020) (Thomas, J., dissenting) (“Despite the readily apparent illegitimacy of *Roe*, ‘the Court has doggedly adhered to [its core holding] again and again, often to disastrous ends.’” (alteration in original) (quoting *Gamble v. United States*, 139 S. Ct. 1960, 1989 (2019) (Thomas, J., concurring))), *abrogated by Dobbs*, 142 S. Ct. 2228.

²⁹⁵ See, e.g., Christine Vestal, *Some Abortion Bans Put Patients, Doctors at Risk in Emergencies*, PEW CHARITABLE TRS.: STATELINE (Sept. 1, 2022), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/09/01/some-abortion-bans-put-patients-doctors-at-risk-in-emergencies> [<https://perma.cc/L2BE-U97N>] (reporting on reactions to abortion bans without exceptions for the health of the pregnant person, or with unclear and highly limited health exceptions); Anita Wadhvani & Dulce Torres Guzman, *Amid Uncertainty and Anger, Tennessee’s Abortion Ban Takes Effect*, TENN. LOOKOUT (Aug. 25, 2022, 7:01 AM), <https://tennesseelookout.com/2022/08/25/amid-uncertainty-and-anger-tennessees-abortion-ban-takes-effect> [<https://perma.cc/H7SS-ERCP>] (reporting on reactions to Tennessee’s abortion ban, which does not have exceptions for fatal fetal anomalies).

²⁹⁶ Levin, *supra* note 25, at 1057 n.87 (“[I]t is possible that as the Supreme Court’s protection of abortion rights appears to erode, and as states impose increasingly restrictive laws on the availability of abortion services, we may experience a shift in the public’s reliance-based investment on the continued vitality of *Roe* and *Casey*.”).

²⁹⁷ See Murray, *supra* note 9, at 348 (“[E]ven as the Court’s interpretive moves have narrowed the abortion right, the right has stubbornly survived, becoming solidly embedded in the firmament of constitutional law.” (footnote omitted)).

First, some former Justices have suggested that “[t]he case for *stare decisis* may be bolstered . . . when subsequent rulings ‘have reduced the impact’ of a precedent ‘while reaffirming the decision’s core ruling.’”²⁹⁸ This is exactly what happened in the abortion cases following *Roe*, which served to reduce *Roe*’s restrictive impact on the ability of states to regulate abortion while reaffirming its core holding.²⁹⁹ Those cases might be seen, then, as solidifying that core holding and making it less susceptible to future attack.

Second, many people saw *Casey* as a major test of *Roe*, and when *Roe* survived that decision (to the extent that it did), the constitutional protection for abortion, while narrower, seemed more robust. According to Professor Michael Gerhardt, “[t]he last thing one would have expected the Rehnquist Court to do was to reaffirm *Roe v. Wade*,” given that “Presidents Reagan and Bush had each campaigned in part on the ground that they would appoint Justices who would overturn *Roe*” and the Justices those Presidents appointed replaced five of the seven Justices in the majority in *Roe*.³⁰⁰ When protection for abortion survived not only *Casey* but numerous other decisions as well, some even claimed that *Roe* had attained “‘super-stare decisis’ [status] in constitutional law because of its repeated re-affirmation by the Court.”³⁰¹ As the Court declared in *Stenberg v. Carhart*,³⁰² “this Court, in the course of a generation, has determined and then redetermined that the Constitution offers basic protection to the woman’s right to choose.”³⁰³ And so, even though President Trump had also promised to appoint antiabortion Justices and managed to do so, people might have reasonably expected *Roe* to survive in some meaningful form.³⁰⁴ It had

²⁹⁸ *Citizens United v. FEC*, 558 U.S. 310, 413–14 (2010) (Stevens, J., concurring in part) (quoting *Dickerson v. United States*, 530 U.S. 428, 443 (2000)). The *Dickerson* Court, reaffirming *Miranda*, observed: “If anything, our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision’s core ruling that unwarned statements may not be used as evidence in the prosecution’s case in chief.” *Dickerson*, 530 U.S. at 443–44.

²⁹⁹ Murray explains how *Roe* “survived” the Court’s decision in *Casey* “in the face of a constitutional inquiry that refused to denounce [*Roe*’s] reasoning as erroneous, emphasizing instead its entrenchment as a right that many had come to rely upon”; “[i]n this regard,” she asserts, “in reaffirming *Roe*, *Casey* further entrenched the view that the Constitution properly recognizes and protects a right to choose an abortion.” Murray, *supra* note 228, at 2074–75.

³⁰⁰ Gerhardt, *supra* note 85, at 67.

³⁰¹ Gerhardt, *supra* note 139, at 1204 (quoting *Richmond Med. Ctr. for Women v. Gilmore*, 219 F.3d 376, 376 (4th Cir. 2000)). *But see id.* at 1206 (noting that in the author’s opinion, *Roe* had not actually achieved such status).

³⁰² 530 U.S. 914 (2000).

³⁰³ *Id.* at 921 (citing *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), *overruled by Dobbs*, 142 S. Ct. 2228) (concluding that “[w]e shall not revisit those legal principles”).

³⁰⁴ *See* Murray, *supra* note 9, at 308 (“During his 2016 presidential campaign, Donald Trump repeatedly described himself as ‘pro-life’ and vowed, if elected, to appoint Supreme Court Justices who would be reliable votes to overturn *Roe v. Wade*.” (citing Emily Crockett, *Donald Trump Is*

survived similar political circumstances in the past. Further, in their confirmation hearings, the Trump nominees publicly expressed respect for *Roe* as settled precedent.³⁰⁵

Moreover, poll results suggest that even after the Court had decided to hear *Dobbs*, people did not in fact expect *Roe* to be overruled. An *Economist/YouGov* poll conducted after the Court granted certiorari but before oral argument found that only fifteen percent of Americans believed that *Roe* would very likely or definitely be overruled.³⁰⁶ After the oral argument, which was both highly publicized and highly revealing of the Justices' views, this number increased, but only to twenty-five percent.³⁰⁷ For many in the legal community, and certainly for many outside it, the total withdrawal of the constitutional right to abortion did come as a surprise, upending entrenched expectations that the right would continue to exist in some meaningful form.³⁰⁸

In any event, the right to abortion was deeply rooted in constitutional jurisprudence and common understandings of it. And, regardless of political events that might presage judicial departures from past decisions, one might think that people should be able to continue to rely on those decisions for rule-of-law reasons. The judiciary is supposed to have some independence from politics and to provide a source of legal stability in the face of political change. And the Court has a duty to protect people's reliance on the law regardless of the predictions that they might have made based on political events or other extralegal circumstances. Waldron explains: "It is a particular sort of predictability that the rule of law demands and that following precedent is thought to provide: namely, principled predictability — predictability that results from

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>]).

³⁰⁵ Becky Sullivan, *What Conservative Justices Said — And Didn't Say — About Roe at Their Confirmations*, NPR (June 24, 2022, 3:44 PM), <https://www.npr.org/2022/05/03/1096108319/roe-v-wade-alito-conservative-justices-confirmation-hearings> [<https://perma.cc/54WP-YD39>]. And even informed people, including some senators, apparently believed them. Aaron Blake, *How Collins and Murkowski Got the Trump Justices' Roe Positions Wrong*, WASH. POST (May 3, 2022, 11:24 AM), <https://www.washingtonpost.com/politics/2022/05/03/trump-justices-roe-collins> [<https://perma.cc/P5LE-K26Z>] (reporting that Senators Susan Collins (R-ME) and Lisa Murkowski (R-AK) believed that President Trump's appointees would not overturn *Roe*).

³⁰⁶ Kathy Frankovic, *A Growing Share of Americans Expect the Supreme Court to Overturn Roe v. Wade*, YOUNGOVAMERICA (Dec. 9, 2021, 6:06 PM), <https://today.yougov.com/topics/politics/articles-reports/2021/12/09/growing-share-americans-expect-overturn-roe> [<https://perma.cc/KC54-T9MK>].

³⁰⁷ *Id.*

³⁰⁸ See Louis Jacobson, *Can States Punish Women for Traveling Out of State to Get an Abortion?*, POYNTER. (July 6, 2022), <https://www.poynter.org/fact-checking/2022/can-states-punish-women-for-traveling-out-of-state-to-get-an-abortion> [<https://perma.cc/AE4T-8TTL>] ("[U]ntil recently, 'few observers thought that the Supreme Court would overrule the constitutional right to abortion that *Roe* granted.'" (quoting Professor Carl Tobias)).

mapping an official and publicly disseminated understanding of the various sources of law onto the factual situations that people confront.”³⁰⁹ This idea might help to explain Justice Scalia’s assertion that “reliance upon a square, unabandoned holding of the Supreme Court is *always* justifiable reliance” and necessarily warrants the Court’s respect.³¹⁰

Could the Court mitigate possible reliance harms by gradually narrowing a right over time until it no longer existed at all?³¹¹ Maybe so, but that is not what the Court did here. Despite the limitations that the Court had added to the right to abortion after recognizing a capacious right in *Roe*, *Dobbs* was a radical and shocking decision, terminating the right entirely with no regard for reliance costs.³¹²

B. Limiting Principles

First, not all precedents involve reliance interests. For example, there are many precedents regarding procedural rules — about jurisdiction, pleading, and standards of review — that do not affect how people conduct their affairs, plan their lives, or understand themselves and their place in society. This is why, as the Court has announced,³¹³ reliance interests do not have much of a role to play in determinations about whether to overrule procedural precedents (although there are

³⁰⁹ Waldron, *supra* note 13, at 13–14.

³¹⁰ *Quill Corp. v. North Dakota*, 504 U.S. 298, 321 (1992) (Scalia, J., concurring in part and concurring in the judgment).

³¹¹ Another option, endorsed by Re, is the “one last chance” approach, whereby the Court announces in a decision that it plans to overrule a precedent, giving people official notice so that they can adjust their expectations accordingly. Re, *supra* note 190, at 941–42 (citing Richard M. Re, *The Doctrine of One Last Chance*, 17 GREEN BAG 2D 173, 174 (2014)). This is supposed to “mitigate reliance costs” when the Court overrules the precedent in a subsequent decision. *Id.* at 942; *see also* Re, *supra* note 226 (manuscript at 1–2) (discussing “one last chance” in relation to *Dobbs* and arguing that “the majority’s approach was incautious, self-contradictory, and harmful,” *id.* (manuscript at 2), and that reliance harms would have been mitigated if Chief Justice Roberts’s approach had prevailed instead, *id.* (manuscript at 1)).

³¹² *See* Re, *supra* note 226 (manuscript at 3) (explaining how, even after the Court had granted certiorari in *Dobbs*, “[t]he case’s evolving character misled the public, with many commentators initially expecting only an incremental change”). Even a gradual retraction of a right that culminates in its termination, however, could seriously implicate reliance interests. For one, many of the plans formed and decisions made in reliance on the precedents protecting a right to abortion cannot be reversed in a matter of months or even years; some such decisions, like to have children when one is older (when risks of miscarriage, genetic anomalies, and health complications for the pregnant person are greater), may not be reversible at all.

³¹³ *See* *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (“Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved; the opposite is true in cases such as the present one involving procedural and evidentiary rules.” (citations omitted)).

exceptions³¹⁴). There are also precedents concerning substantive areas of law on which people have not conceivably relied.³¹⁵

Second, the idea that any favorable impact a precedent has had on people amounts to a reliance interest for the purposes of stare decisis stretches the concept of reliance too far. The fact that people have benefited from receiving abortions does not mean that those people are necessarily worse off in any way in the wake of the Court's decision to overrule *Roe* and *Casey*.³¹⁶ And so the benefits they have gained from abortion do not represent reliance interests against overturning the right — although those benefits are undoubtedly an important consideration for moral and policy arguments about access to abortion. For the purposes of assessing reliance interests, the Court should set aside the benefits and burdens that the precedent in question has brought about; the Court should focus instead on the interests of people who are currently relying on the extant regime and may have expectations about its maintenance.

The general cost-benefit policy analysis that would entail consideration of any and all consequences of overruling a precedent is generally not seen as fitting within the Court's institutional competence or role.³¹⁷ It is certainly beyond the role that the Court has conceived and claimed for itself.³¹⁸ Although the Court of course does (and probably should) engage in some consequentialist reasoning, it does so within various constraints. The stare decisis framework represents one of those constraints.³¹⁹ And the reliance factor becomes meaningless as a parameter if it is construed as imposing on the Court a responsibility to weigh the overall costs and benefits of alternative legal regimes.³²⁰

³¹⁴ See, e.g., Kozel, *supra* note 31, at 447 (characterizing attorney-client privilege as a procedural standard that “engender[s] enormous reliance every day”); see also *Hohn v. United States*, 524 U.S. 236, 259 (1998) (Scalia, J., dissenting).

³¹⁵ See, e.g., Kozel, *supra* note 31, at 431 (giving the hypothetical example of “[a] hundred-year-old decision interpreting the Constitution’s Emoluments Clause,” which “might not have garnered any appreciable reliance because few Americans have had occasion to rely on the Court’s treatment of that provision”).

³¹⁶ Consider, for example, an individual who obtained an abortion in the past but can no longer get pregnant and is against abortion.

³¹⁷ See generally Edmund B. Spaeth, Jr., *Where Is the High Court Heading (A Critique of the New Cost-Benefit Analysis)*, JUDGES’ J., Summer 1985, at 10.

³¹⁸ See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2248 (2022) (noting that the Court “ignore[s] the ‘[a]ppropriate limits’” on its power when it “fall[s] into . . . freewheeling judicial policymaking” (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977))).

³¹⁹ See, e.g., Maltz, *supra* note 14, at 367.

³²⁰ See Kozel, *supra* note 157, at 475, 482 (arguing that stare decisis would not provide meaningful constraint if the Justices engaged in “inquiries into the perceived harmfulness of a precedent’s substantive effects,” *id.* at 475, and that “in all but the most exceptional cases, the best approach is to disregard a precedent’s substantive effects in deciding whether to overrule it,” *id.* at 482).

C. Countervailing Reasons and Ill-Gotten Gains

A common argument made against the broad and robust conception of reliance that we see in *Casey* goes like this: (1) on multiple occasions, the Supreme Court has overruled undeniably bad decisions even though doing so would thwart substantial and widespread expectations; (2) we approve of those decisions to overrule precedent despite the upset expectations and societal disruption implicated; (3) therefore, this kind of reliance must not represent an obstacle to overruling.

Dean Vikram Amar, for example, suggests that if cognizable reliance interests are not limited to the individualized tangible variety, “then the Court couldn’t easily overrule (or at least justify overruling) very wrong-headed cases like *Plessy v. Ferguson* (that upheld racial caste) or *Bowers v. Hardwick* (that permitted criminalization of same-sex sexual activity) to name just a few of dozens if not hundreds of celebrated overrulings.”³²¹ Paulsen makes the same point³²² (and so does Justice Kavanaugh in his concurring opinion in *Dobbs*³²³). Amar and Paulsen both conclude that the kind of reliance interests that people might have in *Roe* and *Casey* should not factor into the Court’s stare decisis analysis.³²⁴

This argument engages in a sleight of hand. No one claims that the existence of even very substantial reliance interests necessarily constitutes a dispositive reason against overruling. So we can accept that the Court has sometimes properly overruled precedent despite considerable intangible reliance without having to concede that this type of reliance does not count for anything. In some cases, the reasons in favor of overruling a precedent may be so strong that no amount of reliance,

³²¹ Amar, *supra* note 171; see also Levin, *supra* note 25, at 1090 (“One could argue that *Plessy* generated substantial reliance on the part of the public, and that *Brown* imposed precisely the kinds of costs associated with reordering society that the doctrine of precedent is meant to protect against.”).

³²² Paulsen, *Supreme Court’s Current Doctrine of Stare Decisis*, *supra* note 35, at 1183 (“On certain issues, it would be virtually unthinkable to allow social reliance to override a conclusion that a prior decision was wrong.”); see also Paulsen, *Abrogating Stare Decisis*, *supra* note 35, at 1554–55 (claiming that there is “less investment-backed social expectation in a particular legal regime concerning abortion than there was for continuation of ‘separate but equal’ under *Plessy v. Ferguson*,” *id.* at 1554–55, and concluding that the “reliance’ argument for retaining *Roe* is far weaker than the reliance argument for keeping *Plessy*,” *id.* at 1555).

³²³ *Dobbs*, 142 S. Ct. at 2308 n.3 (Kavanaugh, J., concurring) (stating that societal reliance does not support upholding *Roe*, because there was major societal reliance on *Lochner v. New York*, 198 U.S. 45 (1905), *Adkins v. Child’s Hosp. of D.C.*, 261 U.S. 525 (1923), *Plessy v. Ferguson*, 163 U.S. 537 (1896), and *Baker v. Nelson*, 409 U.S. 810 (1972), and the Court nevertheless overruled those cases).

³²⁴ See Amar, *supra* note 171; Paulsen, *Abrogating Stare Decisis*, *supra* note 35, at 1555–56.

regardless of the type, would justify upholding the precedent.³²⁵ We might understand *Brown*'s overruling of *Plessy* in this way.

Just what degree and type of error are necessary to justify overruling precedent regardless of reliance interests presents a difficult question, and so does the matter of how the severity of error should be assessed. These issues warrant separate treatment.³²⁶ In any event, though, the *Dobbs* Court did not claim (let alone justify the claim) that the error of *Roe* and *Casey* meant that the cases had to be overruled despite any reliance on those cases.³²⁷ The Justices claimed to deny consideration of reliance interests not because of the nature of the error in the precedents at issue, but rather because the nature of the reliance at stake meant that it was irrelevant for stare decisis purposes.³²⁸

Another analytical possibility is that the Justices in *Dobbs* refused to credit the reliance here as a weight against overruling because they disapproved of it — that is, they disapproved of people having formed intentions and plans based on the expectation that they would obtain an abortion if necessary. Professor Lewis Kornhauser suggests that reliance-based arguments for upholding precedent “are only as strong as the value of the planned conduct.”³²⁹ Professor Scott Hershovitz likewise writes that “if one appeals to certainty to justify following precedents irrespective of merit, then one must be prepared to defend the value of the conduct planned in reliance on the rules entrenched.”³³⁰ I'm not sure about that. Judges need not make any value judgments

³²⁵ See Nye, *supra* note 15 (manuscript at 444) (“[T]he value of predictability — or, rather, the value of autonomy or liberty that appears to underpin calls for predictability — must be weighed against other values.”). Even when the Court justifiably overrules a decision, however, it might still have some duty to consider reliance costs when determining the appropriate form for the relief to take (including whether the judgment ought to come into effect with some delay), which it did not do in *Dobbs*.

³²⁶ I hope to take up these issues, and in particular the concept of “egregious[]” error on which the *Dobbs* Court relies heavily, see *Dobbs*, 142 S. Ct. at 2243, 2265, 2279–80, in future work.

³²⁷ Even if the majority Justices took that view, consideration of reliance interests might have benefited the decision because, as Justice Barrett has pointed out in her academic writing, such consideration can have a disciplining function on judges who are eager to overrule: “The need to take account of reliance interests” when “[j]ustifying a decision to overrule precedent . . . forces a justice to think carefully about whether she is sure enough about her rationale for overruling to pay the cost of upsetting institutional investment in the prior approach.” Barrett, *supra* note 31, at 1722. Then-Professor Barrett cited *Casey* here for the proposition that, “even when justification [for overruling precedent] is furnished by apposite legal principle, something more is required.” *Id.* at 1722 n.73 (alteration in original) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865 (1992), overruled by *Dobbs*, 142 S. Ct. 2228); see also Kozel, *supra* note 157, at 475 (explaining how, “[t]o be effective, the doctrine of stare decisis needs to evolve in a way that can emphasize areas of agreement and minimize considerations that are bound up with contested issues of interpretive methodology,” and arguing that “the doctrine would benefit if the justices focused on factors such as a precedent’s . . . reliance implications”).

³²⁸ *Dobbs*, 142 S. Ct. at 2276–77.

³²⁹ Lewis A. Kornhauser, *An Economic Perspective on Stare Decisis*, 65 CHI.-KENT L. REV. 63, 78 (1989).

³³⁰ Scott Hershovitz, *Integrity and Stare Decisis*, in *EXPLORING LAW'S EMPIRE: THE JURISPRUDENCE OF RONALD DWORCKIN* 103, 111 (Scott Hershovitz ed., 2008).

about the content of the plans or understandings formed in reliance on a precedent to determine whether the reliance interests warrant weight in a stare decisis analysis. We might think that reliance interests ought to be protected not because we value the particular expectations formed or plans made in reliance on the precedent but rather because organizational activity and planning facilitate autonomy and self-government, which have intrinsic value. Even if we do not value the content of someone's plan, then, we might think there is value in the person's being able to carry it out.

Some plans and expectations, however, would seem to be undeserving of any respect or protection, even if facilitating planning activity generally promotes autonomy and related values. Re explains how, when it comes to cases like *Plessy*, "deliberate reliance can easily be recast as ill-gotten gains" that have no claim to protection.³³¹ Because we do not want to credit reliance on evil precedent whatsoever, undermining that reliance may be no cost at all; it may even be a benefit.³³² Perhaps the most plausible way to make sense of the majority opinion's treatment of reliance in *Dobbs* is along these lines. If the Justices viewed reliance on *Roe* as an evil, then it would make sense for them to give no credit to that reliance in their stare decisis analysis. It's not that the reliance interests would be outweighed by reasons that push in favor of overruling the precedents; instead, those reliance interests would be illegitimate and would not count in the balance at all.³³³

If the Justices believe that abortion is morally equivalent or similar to murder, then they may view reliance on the precedents protecting a right to abortion as utterly undeserving of recognition.³³⁴ On this theory,

³³¹ Re, *supra* note 190, at 941; see also Konnoth, *supra* note 74, at 1435 ("[C]ourts will not recognize a 'vested right to do wrong' — such as an interest in discrimination." (footnote omitted) (quoting *Freeborn v. Smith*, 69 U.S. (2 Wall.) 160, 175 (1864))).

³³² See Sebastian Lewis, *Towards a General Practice of Precedent*, JURISPRUDENCE (forthcoming 2023) (manuscript at 10–11), <https://ssrn.com/abstract=4269652> [<https://perma.cc/T8RM-TD2P>] (arguing that evil precedents do not supply any reason for action); see also JOHN GARDNER, *The Virtue of Justice and the Character of Law*, in *LAW AS A LEAP OF FAITH* 238, 258 (2012) (pointing out "the mistake of thinking that justice would always be in favour of *minimizing* frustrated expectations . . . when in fact, were the expectations morally abhorrent ones, justice might be in favour of *maximizing* frustrated expectations").

³³³ See Re, *supra* note 190, at 940 ("What counts as cognizable reliance . . . is inextricably linked to what interests are legally recognized and condemned. . . . Segregationists' reliance on *Plessy*, no matter how vast, cannot possibly 'count' — perhaps not at all, but certainly not in a way that might override the interests of persons legally entitled to equality in basic aspects of life."); Hershovitz, *supra* note 330, at 111 (discussing reliance on *Plessy* and observing that "it seems inappropriate to weigh the 'benefit' of segregation-based plans against the cost of segregation-caused harms at all"); Shiffrin, *supra* note 76, at 5 n.13 (noting that, for some cases, such as *Plessy*, "it is difficult to articulate a reasonable reliance interest in the first place because what reliance interests there were in *Plessy* were inextricably bound up with white supremacy").

³³⁴ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2308 n.3 (2022) (Kavanaugh, J., concurring) (asserting that he "agree[s] with the Court's conclusion today with respect to reliance,"

the majority's belief that abortion is immoral drove its refusal to count reliance interests in *Dobbs*. The Justices were not prepared to come out and defend the ill-gotten-gains position, however, which would have required them to assert their moral views on abortion and acknowledge the critical role of those views in their legal analysis. That would have been inconsistent with their claims to neutrality on the moral question.³³⁵ People who disagree with the majority's implicit moral position on abortion should reject its reliance analysis because the soundness of that analysis depends on the moral premise.

In any event, the existence of reliance interests, regardless of the type, is not necessarily a dispositive reason against overruling. So one can reject the *Dobbs* majority's narrow conception of reliance in favor of the broader one I endorse in this Article without suggesting that a precedent like *Plessy* should have been preserved. In some cases, the reasons in favor of legal change may be so weighty that no amount of reliance would justify maintaining the precedent. And, in some cases, the reliance might be ill-gotten such that it does not warrant recognition at all. The *Dobbs* majority, however, excluded all reliance interests from consideration without offering any plausible justification for doing so.

CONCLUSION

The *Dobbs* dissent observed that *Casey* was "one of [the] Court's most important precedents about precedent."³³⁶ Discarding *Casey*'s set of stare decisis factors, and in particular its conception of reliance interests, the *Dobbs* Court appears to have overruled *Casey* not just as a precedent about abortion, but as a precedent about precedent too. On *Casey*'s conception of reliance interests, the reliance on *Roe* was substantial and significant and weighed heavily against overruling the decision. According to the majority in *Dobbs*, though, whatever reliance is at stake in the constitutional right to abortion is not the sort that registers in a stare decisis analysis.

In this Article, I have argued that even under the narrow, tangible conception of reliance that we see in *Dobbs*, people were relying on *Roe*. Further, I have argued that the *Dobbs* conception of reliance is unduly narrow, excluding interests of the type that the Court has previously considered and should consider when deciding whether to overrule precedent. When it overrules precedent, the Court might thwart our

and supporting the point with the observation that "the Court overruled *Plessy* [in *Brown*]" even though "[a]n entire region of the country [was relying on *Plessy*] to enforce a system of racial segregation").

³³⁵ The *Dobbs* majority opinion opens as follows: "Abortion presents a profound moral issue on which Americans hold sharply conflicting views. Some believe fervently that a human person comes into being at conception and that abortion ends an innocent life. Others feel just as strongly that any regulation of abortion invades a woman's right to control her own body and prevents women from achieving full equality." *Id.* at 2240 (majority opinion).

³³⁶ *Id.* at 2334 (Breyer, Sotomayor & Kagan, JJ., dissenting).

legitimate expectations, and accordingly undermine our autonomy and self-governance and offend our dignity, even if tangible reliance is not present.

Whether the Court will treat *Dobbs* as a precedent on precedent going forward, such that it will take itself to be bound by *Dobbs*'s approach to stare decisis, including the unduly narrow conception of reliance interests advanced there, remains to be seen. This kind of methodological framework has uncertain precedential status, but several of the current Justices have indicated that they take the Court's precedent on precedent to have transsubstantive legal force.³³⁷ With its decision in *Dobbs*, then, the Justices have given themselves less reason going forward to refrain from overruling constitutional decisions that they object to on the merits.³³⁸

³³⁷ See, e.g., *Ramos v. Louisiana*, 140 S. Ct. 1390, 1440 (2020) (Alito, J., dissenting) (“By striking down a precedent upon which there has been massive and entirely reasonable reliance, the majority sets an important precedent about *stare decisis*. I assume that those in the majority will apply the same standard in future cases.”); *id.* at 1413 (Kavanaugh, J., concurring in part) (suggesting that the Court ought to follow its “precedents on precedent”); *Alleyn v. United States*, 570 U.S. 99, 134 (2013) (Alito, J., dissenting) (“[This] decision creates a precedent about precedent that may have greater precedential effect than the dubious decisions on which it relies.”). *But see* *Kisor v. Wilkie*, 139 S. Ct. 2400, 2444 (2019) (Gorsuch, J., concurring in the judgment) (suggesting that the Court’s determinations of transsubstantive methodological issues like how to interpret statutes and regulations might not “bind[] future Justices with the full force of horizontal *stare decisis*” and might “exceed the limits of *stare decisis*” (quoting Randy J. Kozel, *Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis*, 97 TEX. L. REV. 1125, 1158 (2019))); Colin Starger, *The Dialectic of Stare Decisis Doctrine, in PRECEDENT IN THE UNITED STATES SUPREME COURT* 19, 44 (Christopher J. Peters ed., 2013) (“The widespread inconsistency of Justices towards the proper *stare decisis* test suggests that the Court’s ‘precedent about precedent’ itself has little precedential value.”). The *Dobbs* dissent described *Casey* as “in significant measure a precedent about the doctrine of precedent — until today, one of the Court’s most important,” *Dobbs*, 142 S. Ct. at 2321 (Breyer, Sotomayor & Kagan, JJ., dissenting), whereas the *Dobbs* majority opinion relied heavily on the *stare decisis* factors articulated in the majority opinion in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), and Justice Kavanaugh’s concurrence in *Ramos, Dobbs*, 142 S. Ct. at 2264–65, 2274–76. Even if rules about precedent are not themselves precedential, however, the Court may coalesce around a particular approach to *stare decisis* as a matter of practice. The upshot would be much the same, but the Justices’ reasons for following the approach would be different. See Rupert Cross, *The House of Lords and the Rules of Precedent, in LAW, MORALITY, AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART* 145, 156–57 (P.M.S. Hacker & J. Raz eds., 1977) (maintaining that rules about *stare decisis* are a matter of judicial practice and not themselves precedential).

³³⁸ See Kozel, *supra* note 157, at 462, 476 (discussing precedent in the context of the First Amendment and warning that under a weakened doctrine of *stare decisis*, “the constitutional protection of speech will depend on the justices’ individual interpretive conclusions,” *id.* at 462, and “*stare decisis* loses much of its ability to transform the work of individual jurists into the work of an enduring court,” *id.* at 476).