TANGIBILITY AND TAINTED RELIANCE IN *DOBBS*

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In *Dobbs v. Jackson Women's Health Organization*,[1] the Supreme Court distinguished between different kinds of reliance interests — some that would support preserving a judicial precedent, and others that would not. According to the Court in *Dobbs*, "very concrete" reliance interests, such as those involving property or contract rights, are readily accepted as a basis to keep the law as it is.[2] By contrast, a "more intangible form of reliance" — consisting of expectations about women's status in society and the structure of personal relationships — does not fall within the judicial power to assess; therefore, the Supreme Court did not credit this form of reliance.[3]

Professor Nina Varsava's Article, *Precedent, Reliance, and* Dobbs,[4] compellingly argues that the *Dobbs* Court improperly gave short shrift to the reliance interests attaching to preservation of *Roe v. Wade*[5] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[6] Varsava explains that there were significant "concrete" reliance interests supporting the maintenance of *Roe* and *Casey*, and that the less "tangible" forms of reliance rejected in *Dobbs* were better grounded in the case law than *Dobbs* suggested.[7]

My Response aims to contextualize the *Dobbs* Court's discussion of "concrete" versus "intangible" reliance interests by drawing on a broader legal background. The categories of "concrete," "tangible," and "intangible" appear in other areas of American law, including constitutional standing doctrine, tort law, and federal fraud statutes. Examining the role of these categories in other doctrines highlights features of concreteness, tangibility, and intangibility that lay beneath the surface in the *Dobbs* opinion.

In particular, the line between "intangible" interests and the "concrete" ones involved in property and contract rights is far from clear cut. Indeed, the "intangible" characterization functions less as a description of empirical reality than as an expression of a normative point of view regarding the legal weight to be assigned to the interest in question.

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

[2] *Id.* at 2276.

[3] *Id.* at 2239.

[4] Nina Varsava, *Precedent, Reliance, and* Dobbs, 136 HARV. L. REV. 1845 (2023).

[5] 410 U.S. 113 (1973), *overruled by Dobbs*, 142 S. Ct. 2228.

[6] 505 U.S. 833 (1992), *overruled by Dobbs*, 142 S. Ct. 2228.

[7] Varsava, *supra* note 4, at 1847–48.

Therefore, these categories cannot be straightforwardly employed as benchmarks for the type of reliance interests that should count in the judicial calculus, and the type of reliance interests that should not.

The way is then paved to examine the normative judgments on which the Supreme Court's decision to reject "intangible" interests rested. One candidate is a view about the institution of the judiciary: federal judges may not be well positioned to ascertain the degree of women's reliance on the abortion right and its relationship to sex equality and constitutional liberty. Though this institutional concern should be considered seriously, it does not justify the Court's decision to discount "intangible" interests altogether. It is difficult to deny that the right to choose an abortion has had some meaningful impact on the lives of a substantial number of American women.[8] The question implicitly raised in *Dobbs* is whether that impact *ought* to have been relied on. The answer, for the *Dobbs* majority, appears to have been "no." In fact, the *Dobbs* Court's treatment of "intangible" and "concrete" interests is most intelligible as a reflection of contested normative perspectives on abortion and gender dynamics in modern American society.

Part I briefly summarizes the *Dobbs* Court's discussion of reliance interests. Part II explores other areas of law in which the distinction between "concrete" and "intangible" interests arises. Part III interrogates the nature and basis of the distinction, arguing that the line between "concrete" and "intangible" is not nearly as clear as it was presented in *Dobbs*. Part IV examines the normative considerations underlying the discussion in *Dobbs* of "concrete" and "intangible" reliance, including both the Court's stated institutional concerns and other social views. Finally, the Conclusion suggests that a Court committed to recognizing the multiplicity of perspectives on the abortion question should, at a minimum, have acknowledged the reality of the reliance interests it was turning aside.

All in all, my aim is to complement Professor Varsava's Article by using a broader legal context to illuminate and critique the Supreme Court's discussion of reliance in *Dobbs*.

I. RELIANCE INTERESTS IN *DOBBS*

Because the specific terms of the Supreme Court's analysis of reliance in *Dobbs* are significant to this Response, I briefly describe the *Dobbs* Court's approach to the subject. The Court faced the question whether the constitutional right to abortion enshrined in *Roe v. Wade* and *Planned Parenthood v. Casey* should be maintained for stare decisis reasons. A critical part of the stare decisis inquiry is the issue of

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[8] *See infra* notes 106–09 and accompanying text.

reliance.[9] As the Court put it in *Dobbs*, would "overruling *Roe* and *Casey* . . . upend substantial reliance interests"?[10]

The *Dobbs* Court's response quoted extensively from *Casey*. In *Casey*, the plurality — in a portion of the opinion joined by a majority of the Court — stated that "the classic case for weighing reliance heavily in favor of following the [Court's] earlier rule occurs in the commercial context, where advance planning of great precision is most obviously a necessity."[11] Further, one could "readily imagine an argument stressing the dissimilarity of this case to one involving property or contract," as "[a]bortion is customarily chosen as an unplanned response," and "reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions."[12] Nonetheless, the *Casey* plurality continued:

> To eliminate the issue of reliance that easily, . . . one would need to limit cognizable reliance to specific instances of sexual activity. But to do this would be simply to refuse to face the fact that for 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. The 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.[13]

The *Casey* plurality thus referred to two types of reliance interests: those in cases where "advance planning of great precision is most obviously a necessity," and those relating to the organization of "intimate relationships" and "choices that define [people's] views of themselves and their places in society."[14] The *Casey* plurality did not clearly *endorse* the position that the former type of reliance interest was absent in the abortion context.[15] In *Dobbs*, however, the Court picked up on the reliance discussion in *Casey* and embellished it.

In particular, the *Dobbs* Court distinguished between "traditional," "conventional," or "very concrete" reliance interests, on the one hand, and "intangible" reliance interests, on the other.[16] According to *Dobbs*: "Traditional reliance interests arise 'where advance planning of

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[9] *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1406 (2020); South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2098 (2018).

[10] *Dobbs*, 142 S. Ct. at 2276. The word "substantial" suggests a degree of equivocation as to whether the Supreme Court in *Dobbs* was analyzing the existence of *any* reliance interests, or only "substantial" ones. *Id.*

[11] *Casey*, 505 U.S. at 855–56 (citation omitted) (citing Payne v. Tennessee, 501 U.S. 808, 828 (1991)).

[12] *Id.* at 856.

[13] *Id.*

[14] *Id.*

[15] *See Dobbs*, 142 S. Ct. at 2344 n.23 (Breyer, Sotomayor & Kagan, JJ., dissenting).

[16] *Id.* at 2276 (majority opinion).

great precision is most obviously a necessity'";[17] examples of such "very concrete reliance interests" come from "cases involving property and contract rights."[18] Because reproductive planning could take account of the reversal of *Roe*, "concrete" reliance interests were not present.[19]

The *Dobbs* Court then turned to the "more intangible form of reliance" recognized in *Casey*, namely, the view that the abortion right had influenced the organization of society and had bolstered women's equality.[20] "[T]his Court," the *Dobbs* majority explained (quoting Chief Justice Rehnquist's dissent in *Casey*), "is ill-equipped to assess 'generalized assertions about the national psyche.'"[21] The *Dobbs* Court explained that the "novel and intangible form of reliance endorsed by the *Casey* plurality . . . 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."[22] The Court cited amicus briefs making "conflicting arguments about the effects of the abortion right on the lives of women," as well as "conflicting arguments about the status of the fetus."[23] "This Court," *Dobbs* concluded, "has neither the authority nor the expertise to adjudicate those disputes."[24]

To summarize: The Supreme Court in *Dobbs* distinguished between "very concrete" and "intangible" reliance interests. "Very concrete" interests were involved in disputes regarding property and contract rights; "intangible" interests were involved in the *Casey* plurality's description of the relationship between the abortion right and women's equality. Courts, in the view of the *Dobbs* majority, are not well positioned to assess "intangible" interests that are the subject of substantial societal conflict. Instead, the *Dobbs* Court cast itself as aspiring to neutrality: it would not enter the fray by evaluating the strength of societal interests in a controversial moral and political arena.

II. TANGIBILITY AND CONCRETENESS BEYOND *DOBBS*

The distinction between "intangible" and "very concrete" interests, invoked by the *Dobbs* Court, extends beyond the abortion context. This Part identifies other areas of law in which the distinction plays a role. The broader legal background helps to illuminate the approach the Court took in *Dobbs*.

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[17] *Id.* (quoting *Casey*, 505 U.S. at 856).

[18] *Id.* (quoting Payne v. Tennessee, 501 U.S. 808, 828 (1991)).

[19] *Id.*

[20] *Id.*

[21] *Id.* (quoting *Casey*, 505 U.S. at 957 (Rehnquist, J., concurring in the judgment in part and dissenting in part)).

[22] *Id.* at 2277.

[23] *Id.*

[24] *Id.*

An initial terminological point: the Supreme Court in *Dobbs* contrasted "intangible" with "very concrete" or "traditional" interests. In other areas of law, the distinction is between "tangible" and "intangible" interests. In fact, in the constitutional standing context, the Court has emphasized that an "intangible" harm may nevertheless be "concrete."[25] The Court's varying usage of "concrete" and "tangible" underscores the complexity and contingency of the distinctions that *Dobbs* drew, and I discuss the varying usage below.[26] First, I turn to areas of law outside *Dobbs* in which the ideas of "tangible," "intangible," and "concrete" appear.

A. Article III Standing Doctrine

One such area is constitutional standing doctrine.[27] To bring a lawsuit in federal court, the Supreme Court has held, plaintiffs must have Article III standing, understood to consist of injury in fact, causation, and redressability.[28] The injury must be "particularized," in the sense that the plaintiffs are personally affected by the defendant's alleged legal violation.[29] In what way, however, must the plaintiffs be affected?

In the 2016 case *Spokeo, Inc. v. Robins*,[30] the Court stated that injury in fact, in addition to being particularized, must also be "concrete."[31] According to the Court, "[a] 'concrete' injury must be '*de facto*'; that is, it must actually exist. When we have used the adjective 'concrete,' we have meant to convey the usual meaning of the term — 'real,' and not 'abstract.'"[32] The Court, in elaborating on which injuries were "concrete," distinguished between "tangible" and "intangible" harms. "[T]angible injuries," the Court indicated, "are perhaps easier to recognize."[33]

"Intangible injuries," the *Spokeo* Court stated, could "nevertheless be concrete."[34] In terms of how to gauge whether an intangible injury was concrete and therefore suitable for standing purposes, *Spokeo* provided

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[25] Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016).

[26] *See infra* Part III, pp. 393–97.

[27] For an analysis of tangibility in Supreme Court standing doctrine, see Rachel Bayefsky, *Constitutional Injury and Tangibility*, 59 WM. & MARY L. REV. 2285 (2018) [hereinafter Bayefsky, *Tangibility*]. *See also* Rachel Bayefsky, *Psychological Harm and Constitutional Standing*, 81 BROOK. L. REV. 1555 (2016) (evaluating the cognizability of psychological harm for constitutional standing purposes). For a discussion connecting "concrete injury" in Article III standing doctrine to the Court's reliance discussion in *Dobbs*, see Michael Gentithes, *Concrete Reliance on Stare Decisis in a Post-*Dobbs *World*, 14 CONLAWNOW 1, 8–10 (2022).

[28] Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).

[29] *See* Sierra Club v. Morton, 405 U.S. 727, 735 (1972).

[30] 136 S. Ct. 1540.

[31] *Id.* at 1548.

[32] *Id.* (citation omitted) (quoting *De Facto*, BLACK'S LAW DICTIONARY 479 (9th ed. 2009); *Concrete*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 472 (1971); *Concrete*, RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 305 (1967)).

[33] *Id.* at 1549.

[34] *Id.*

a two-pronged test. One prong was history: Did the "alleged intangible harm ha[ve] a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts"?[35] The other prong was the judgment of Congress: Had Congress "identif[ied] and elevat[ed] intangible harms" to the level of a legally protected injury?[36] The Supreme Court in *Spokeo* did not specifically explain which harms were "tangible" and which "intangible." The Court suggested that free speech and free exercise claims involved "intangible" yet "concrete" harms.[37] Overall, however, the Court seemed to disfavor intangible harms by conducting a more rigorous inquiry into whether they were real.[38]

In the 2021 case *TransUnion LLC v. Ramirez*,[39] the Supreme Court confirmed both that "intangible" harms could be "concrete" and that these harms face distinctive hurdles in the standing inquiry. The *TransUnion* Court reformulated the test for the concreteness of a plaintiff's asserted injury in the following way. Whereas the test for concreteness in *Spokeo* had consisted of two prongs — history *and* the judgment of Congress — the test in *TransUnion* focused centrally on history and tradition. The concreteness inquiry, according to *TransUnion*, is "whether [a plaintiff's] asserted harm has a 'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts."[40]

Which harms, then, fit the bill? "[C]ertain harms," the *TransUnion* Court observed, "readily qualify as concrete injuries under Article III. The most obvious are traditional tangible harms, such as physical harms and monetary harms."[41] The Court continued: "If a defendant has caused physical or monetary injury to the plaintiff, the plaintiff has suffered a concrete injury in fact under Article III."[42] This suggests that physical and monetary harms, as "traditional tangible harms," are automatically concrete.

Matters are more complicated with respect to "intangible" harm. The *TransUnion* Court recognized that "[v]arious intangible harms can

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[35] *Id.* (citing Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 775–77 (2000)).

[36] *Id.* Following *Spokeo*, considerable uncertainty remained about the extent to which congressional creation of a cause of action could affect the Article III standing inquiry. *See, e.g.*, William Baude, *Standing in the Shadow of Congress*, 2016 SUP. CT. REV. 197, 216–27 (2017). The Supreme Court's decision in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), can be viewed as an attempt to clear up the uncertainty by specifying that Article III injury and the existence of a cause of action are fundamentally separate inquiries. *See id.* at 2205.

[37] *See Spokeo*, 136 S. Ct. at 1549 (citing Pleasant Grove City v. Summum, 555 U.S. 460 (2009); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993)).

[38] *See* Craig Konnoth & Seth Kreimer, *Spelling Out* Spokeo, 165 U. PA. L. REV. ONLINE 47, 50–56 (2016).

[39] 141 S. Ct. 2190.

[40] *Id.* at 2200 (quoting *Spokeo*, 136 S. Ct. at 1549).

[41] *Id.* at 2204.

[42] *Id.*

also be concrete," and gave the examples of reputational harm and disclosure of private information.[43] Unlike the "traditional tangible harms" of physical and monetary harm, however, "intangible" harms are not necessarily concrete. Instead, courts must undertake a more involved inquiry into the similarity between the intangible harm and a "traditional" injury.[44] In *TransUnion* itself, for instance, the Court rejected standing for most plaintiffs because their asserted harm — credit reporting agencies' maintenance of internal credit files falsely identifying the plaintiffs as dangerous persons — did not bear a sufficiently close relationship to the historical tort of defamation.[45] If the plaintiffs' alleged harm had been physical or monetary, the *TransUnion* decision suggests, no detailed scrutiny would have been necessary. Instead, *TransUnion* appears to have endorsed a blanket presumption that physical and monetary harms are firmly rooted in history and tradition.

Article III standing doctrine, therefore, favors "tangible" harm, understood as "physical" or "monetary" harm. Physical and monetary harms seem to be self-evidently concrete. Intangible harm requires a more bespoke inquiry to find an anchor in the apparently objective reality of historical fact. At the same time, the Supreme Court has not denied that intangible harm, in the Article III standing context, can be "concrete."

B. Negligence and Property Insurance

Tort law also features distinctions between tangible and intangible interests.[46] For example, the economic loss doctrine in negligence law, which "has been adopted by a majority of jurisdictions in the United States[,] . . . exists to prohibit parties from recovering in tort when the negligence of others results in purely economic loss."[47] In applying the economic loss doctrine, courts have described economic loss as "intangible." As the Ohio Supreme Court put it: "[T]he general rule is 'there is no . . . duty to exercise reasonable care to avoid intangible economic loss or losses to others that do not arise from tangible physical harm to persons and tangible things.'"[48] Here, the label "intangible" is applied to

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[43] *Id.*

[44] *Id.*

[45] *Id.* at 2210 & n.6. For analysis and critique of the Supreme Court's decision in *TransUnion*, see Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 102 B.U. L. REV. 793 (2022).

[46] *See* Bayefsky, *Tangibility*, *supra* note 27, at 2331.

[47] Wajiha Rais & Lindy Stevens, *Economic Loss Doctrine*, AM. BAR ASS'N (Mar. 22, 2021), https://www.americanbar.org/groups/construction_industry/publications/under_construction/2021/spring2021/economic_loss_doctrine [https://perma.cc/L8JR-RJ98].

[48] Floor Craft Floor Covering, Inc. v. Parma Cmty. Gen. Hosp. Ass'n, 560 N.E.2d 206, 208 (Ohio 1990) (omission in original) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 92, at 657 (W. Page Keeton ed., 5th ed. 1984)); *see also, e.g.*, Walsh v. Cluba, 117 A.3d 798, 808 (Vt. 2015) ("Negligence law does not generally recognize a duty to exercise

certain forms of economic loss, namely, economic losses that are not connected to physical damage. For example, the economic loss rule could be applied to bar tort recovery if a defective product causes no personal injury or property damage, but deprives the product's buyer of profits that a properly functioning product would have generated.[49]

In the property insurance context, courts have been called upon to interpret the terms "tangible" and "intangible" in insurance policies.[50] As the California Supreme Court has explained: "Consistent with an insured's reasonable expectations, 'tangible property' refers to things that can be touched, seen, and smelled."[51] The result is that certain interests that would likely be deemed "economic" may not be "tangible," such as funds in a bank account and stock certificates.[52] The precise definition of "tangible property" depends on the specifics of the insurance contract and the applicable law. The overall point is that some forms of economic harm are considered "intangible," in contrast to physical damage.

In the negligence and property insurance settings, the distinction between tangible and intangible interests usually operates to the detriment of intangible interests. The economic loss doctrine posits that "intangible" economic losses resulting from negligence are not generally compensable. As to property insurance, the difference between "tangible" and "intangible" property damage often serves to exclude damage to "intangible" property from insurance coverage, as the insurance policy may define covered property damage as the "tangible" kind.[53] Thus, the line between tangible and intangible largely has the effect of downgrading legal protection for intangible forms of economic harm.

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reasonable care to avoid intangible economic loss to another unless one's conduct has inflicted some accompanying physical harm." (quoting O'Connell v. Killington, Ltd., 665 A.2d 39, 42 (Vt. 1995))). The economic loss rule is not absolute; the point here is that unrecoverable economic loss may be considered intangible in certain negligence settings.

[49] *See* Chemtrol Adhesives, Inc. v. Am. Mfrs. Mut. Ins. Co., 537 N.E.2d 624, 630–31 (Ohio 1989).

[50] *See* Bayefsky, *Tangibility*, *supra* note 27, at 2331.

[51] Kazi v. State Farm Fire & Cas. Co., 15 P.3d 223, 229 (Cal. 2001) (citing Warner v. Fire Ins. Exch., 281 Cal. Rptr. 635, 638 (Ct. App. 1991)).

[52] Johnson v. Amica Mut. Ins., 733 A.2d 977, 978–79 (Me. 1999) (per curiam); *see also* Cartwright v. Deposit Guar. Nat'l Bank, 675 So. 2d 847, 848 (Miss. 1996) ("[M]oney on deposit in a bank evidences a right of payment from the bank and is thus intangible in nature."); Traveler's Ins. Co. v. Eljer Mfg., Inc., 757 N.E.2d 481, 502 (Ill. 2001) (differentiating between "property damage" and "physical injury to tangible property" in insurance policy, and noting that "the phrase 'physical injury' does not include intangible damage to property, such as economic loss"); Waller v. Truck Ins. Exch., Inc., 900 P.2d 619, 633 (Cal. 1995) ("It is well established that [commercial general liability] policies do not provide coverage for intangible property losses, including economic losses." (citing Chatton v. Nat'l Union Fire Ins., 13 Cal. Rptr. 2d 318, 320 (Ct. App. 1992); Giddings v. Indus. Indem. Co., 169 Cal. Rptr. 278, 281 (Ct. App. 1980))).

[53] *See, e.g.*, *Kazi*, 15 P.3d at 229–30; *Waller*, 900 P.2d at 633. Nonetheless, one can purchase insurance against intangible losses, such as certain business interruption coverage. *See* Robert Muir-Wood, *The Intangibles Protection Gap*, MOODY'S: BLOG (Sept. 7, 2018), https://www.rms.com/blog/2018/09/07/the-intangibles-protection-gap [https://perma.cc/9CF6-TLYQ].

C. Federal Fraud Statutes

The concept of intangibility appears in legal doctrine concerning federal fraud statutes. The "honest services" fraud statute, 18 U.S.C. § 1346, defines a "scheme or artifice to defraud" — a phrase used in the federal mail and wire fraud statutes[54] — to include "a scheme or artifice to deprive another of the intangible right of honest services."[55] Congress passed § 1346 in response to the Supreme Court's 1987 decision *McNally v. United States*,[56] which held that "[t]he mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government."[57] In § 1346, Congress effectively overruled *McNally*, rendering actionable a scheme to deprive another of the "intangible" right of honest services.[58]

Yet the Supreme Court has interpreted the honest-services statute § 1346 narrowly. Notably, in the 2010 case *Skilling v. United States*,[59] the Supreme Court interpreted the honest-services statute to cover only bribery or kickback schemes[60] — and not "undisclosed self-dealing by a public official or private employee."[61] The Court has cited constitutional vagueness concerns to explain its narrowing constructions of statutes imposing criminal liability for violations of the "intangible" right of honest services.[62] Statutes that seem to provide for such liability, the Court explained, should be read in ways that do not "leav[e] [their] outer boundaries ambiguous."[63]

The pattern of skepticism about fraud directed at "intangible" interests has more broadly affected the Court's interpretation of the federal wire fraud statute. In the 2020 "Bridgegate" case *Kelly v. United States*,[64] the Supreme Court faced the question whether public officials' decision to change the traffic flow over the George Washington Bridge, causing a state-run institution to spend additional money to pay toll collectors, constituted actionable wire fraud.[65] Drawing on a 2000 case, the Court said no: "The State's 'intangible rights of allocation, exclusion, and control' — its prerogatives over who should get a benefit and who should not — do 'not create a property interest.'"[66]

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54 *See* 18 U.S.C. §§ 1341, 1343.

55 *Id.* § 1346.

56 483 U.S. 350 (1987); *see* Skilling v. United States, 561 U.S. 358, 402 (2010).

57 *McNally*, 483 U.S. at 356.

58 *See Skilling*, 561 U.S. at 402.

59 561 U.S. 358.

60 *Id.* at 408.

61 *Id.* at 409.

62 *See id.* at 408 & n.42; *McNally*, 483 U.S. at 360.

63 *McNally*, 483 U.S. at 360; *see also Skilling*, 561 U.S. at 408 (citing "the due process concerns underlying the vagueness doctrine").

64 140 S. Ct. 1565 (2020).

65 *See id.* at 1573–74.

66 *Id.* at 1572 (quoting Cleveland v. United States, 531 U.S. 12, 23 (2000)).

Again, the Supreme Court evinced great caution about rendering the violation of "intangible" rights criminal. The Court in federal fraud cases appears to be concerned about overbroad or ambiguously defined liability, especially when federal judges are asked to rule on the conduct of state or local public officials.[67]

The contexts just mentioned — constitutional standing doctrine, negligence and property insurance, and fraud statutes — are not the only settings in which the distinction between tangible and intangible interests appears. In tax law, for example, "Intangible Property is property that has value but cannot be seen or touched,"[68] such as "patents, copyrights, stocks, and the goodwill value of a business."[69] The survey above, however, demonstrates that the categories of concreteness, tangibility, and intangibility extend across several areas of law.

III. QUESTIONING THE TANGIBLE/INTANGIBLE DISTINCTION

Invocations of tangibility and concreteness in areas of law beyond *Dobbs* highlight the complexity of these concepts and provide grounds to question the way they were employed in *Dobbs*. My aim is to undermine a simple paradigm according to which (1) certain interests are "tangible" or "concrete," while other interests are "intangible"; and (2) the classification of an interest as "intangible" furnishes a basis for disfavored treatment in the law. Instead, I will suggest, the classification of an interest as "intangible" varies based on context and already reflects normative views about the appropriateness of assigning legal weight to the interest.

First, then, it is worth questioning the opposition between "very concrete" and "intangible" reliance interests that *Dobbs* posited.[70] In Article III standing doctrine, the Supreme Court has emphasized that intangible harms can be concrete.[71] The Court's examples of concrete intangible harms in that setting are "reputational harms," "disclosure of private information," "intrusion upon seclusion," and some "harms specified by the Constitution itself," notably "abridgment of free speech" and "infringement of free exercise."[72] The *Dobbs* Court, by contrast, appeared

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[67] *See id.* at 1574 ("Federal prosecutors may not use property fraud statutes to 'set[] standards of disclosure and good government for local and state officials.'" (alteration in original) (quoting *McNally*, 483 U.S. at 360)).

[68] *Operating a Business*, IRS, https://www.irs.gov/businesses/small-businesses-self-employed/operating-a-business [https://perma.cc/V5W3-6QFF].

[69] *Examining Process*, IRS, https://www.irs.gov/irm/part4/irm_04-048-003 [https://perma.cc/U72Z-PALN]; *see also* Delaware v. Pennsylvania, 143 S. Ct. 696, 700 (2023) (referring to "intangible property" as property that "has no physical location" and giving the example of a money order).

[70] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2276 (2022).

[71] Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016); TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2204 (2021).

[72] *TransUnion*, 141 S. Ct. at 2204 (citing *Spokeo*, 136 S. Ct. at 1548–49; Meese v. Keene, 481 U.S. 465, 473 (1987); Davis v. FEC, 554 U.S. 724, 733 (2008); Gadelhak v. AT&T Servs., Inc., 950 F.3d 458, 462 (7th Cir. 2020)).

to treat "concrete" and "intangible" as antonyms. According to *Dobbs*, if reliance is intangible, then it is not concrete.

The differential usage of "concrete" and "tangible" underscores the complexity of these concepts. The difference may in part reflect an ambiguity in the term "tangible": it can refer either to the reality of harm or to a particular type of harm.[73] One might say "Patricia was tangibly harmed" to convey that Patricia was genuinely harmed. Alternatively, one might use "tangible" in a sentence like "The burglary, in addition to frightening Patricia, caused her tangible harm — she lost a hundred dollars," to convey that Patricia suffered a certain kind of harm, namely, economic harm. At times, those inclined to dismiss a certain kind of interest as intangible might trade on the ambiguity between different understandings of "tangible." The statement "Don't be worried about Patricia; she didn't lose money, so she didn't suffer any tangible harm" may suggest that any noneconomic harm Patricia suffered was not quite real. That might be right, but the speaker should have to *argue* that Patricia's noneconomic harm was relatively unimportant — not merely rely on the audience's potential conflation of "intangible as noneconomic" with "intangible as unreal."

In constitutional standing doctrine, both "tangible" and "intangible" refer to specific (though different) types of harm. Both these types of harm may count as "concrete," understood as "real" or "actually exist[ing]."[74] The *Dobbs* Court, however, did not clearly differentiate tangibility from concreteness. Rather, the Court implied — without arguing — that intangible interests are not concrete.[75] *Dobbs* therefore papered over difficulties with the equation of tangibility and concreteness, and that approach may have made it easier for the Court to discount reliance on intangible interests.

A second and more fundamental problem with a stark distinction between tangible and intangible interests is as follows. The types of interests deemed tangible or intangible vary according to legal context. The treatment of economic harm provides a prime example. In the constitutional standing arena, "monetary" harm is viewed as a "traditional tangible harm[]."[76] For federal fraud statutes, a loss of "property" is contrasted with "intangible rights," suggesting that property is tangible.[77] Yet, in the negligence and property insurance contexts, economic loss may be deemed "intangible."[78]

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[73] *See* Bayefsky, *Tangibility*, *supra* note 27, at 2305. The discussion here of the tangible/intangible distinction draws on some of the material in the *Tangibility* article.

[74] *Spokeo*, 136 S. Ct. at 1548; *see also TransUnion*, 141 S. Ct. at 2204.

[75] *See Dobbs*, 142 S. Ct. at 2276.

[76] *TransUnion*, 141 S. Ct. at 2204.

[77] *See* Kelly v. United States, 140 S. Ct. 1565, 1572 (2020); McNally v. United States, 483 U.S. 350, 356 (1987).

[78] *See supra* section II.B, pp. 390–91.

Why the different approaches to the tangibility of economic loss? The answer lies not in a feature of empirical reality, but in legal actors' normative outlook.[79] When judges wish to say that economic harm carries weight from a legal perspective, they treat economic harm as "tangible." When judges wish to downplay the legal significance of economic harm, they treat it as "intangible." Interests are not "tangible" or "intangible" by virtue of their empirical characteristics, but by virtue of normative views concerning the types of harm that warrant legal redress.

It may be argued that courts are actually consistent in their treatment of economic harm as "tangible" or "intangible," because they distinguish among different types of economic harm. In the constitutional standing context, it is "monetary" harm that qualifies as tangible.[80] In the negligence context, not all economic loss is deemed intangible; only economic loss that does not arise from physical property damage is intangible.[81] And in the property insurance context, one might suggest, "intangible" property refers specifically to economic instruments with value that is speculative or difficult to measure, such as business goodwill[82] and investments.[83] Therefore, one might conclude, courts consistently treat certain varieties of economic harm as tangible and other varieties as intangible.

In response, certain types of economic interests may indeed be more likely to be deemed "intangible." Yet the fact remains that economic interests characterized as intangible in one legal context are viewed as tangible in others. For example, it is highly unlikely that the loss of funds in a bank account,[84] or "the cost of repair and replacement of [a] defective product,"[85] or "financial damages in the form of lost profits, cost overruns, and cancellation of contract" arising from a counterparty's defective manufacturing of a product[86] — all seen as intangible in certain negligence and property insurance settings — would be considered intangible harm in constitutional standing doctrine.[87]

The uneven treatment of economic loss has real-world legal implications. Monetary harm clearly counts as injury in fact for standing

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[79] *See* Bayefsky, *Tangibility*, *supra* note 27, at 2336.

[80] *TransUnion*, 141 S. Ct. at 2204.

[81] *See supra* note 48.

[82] *See* Kazi v. State Farm Fire & Cas. Co., 15 P.3d 223, 229 (Cal. 2001).

[83] *See* Waller v. Truck Ins. Exch., Inc., 900 P.2d 619, 626 (Cal. 1995).

[84] *See* Johnson v. Amica Mut. Ins. Co., 733 A.2d 977, 978 (Me. 1999) (per curiam).

[85] Terracon Consultants W., Inc. v. Mandalay Resort Grp., 206 P.3d 81, 83 (Nev. 2009) (alteration in original) (quoting Calloway v. City of Reno, 993 P.2d 1259, 1263 (Nev. 2000)).

[86] *See* CMP Coatings, Inc. v. Tokyo Marine & Nichido Fire Ins. Co., No. 10-4277, 2012 WL 3901625, at *2 (E.D. La. Sept. 6, 2012).

[87] Depending on the facts of a case, some of these interests might be deemed insufficient to support a claim of "imminent" injury in fact, or inadequate to meet the causation prong of Article III standing doctrine. *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203, 2212 (2021). In that event, the plaintiff would lack standing for reasons other than the concreteness of the asserted harm. But the harm in question could nevertheless be deemed "tangible."

purposes; monetary harm is not clearly compensable in negligence cases. True, "intangibility" might still be used as a proxy for interests that are difficult to measure or speculative, regardless of the legal setting. Below, I discuss the view that judgments regarding speculativeness appropriately motivated the *Dobbs* Court's rejection of "intangible" reliance. The point here is that different interests are viewed as speculative in different legal contexts. One cannot straightforwardly say that "*X* type of harm is tangible; *Y* type of harm is intangible" and use that distinction as the basis for divergent legal treatment.

The complications surrounding concreteness, tangibility, and intangibility have implications for the discussion of reliance in *Dobbs*. As noted, the *Dobbs* Court distinguished between "very concrete reliance interests, like those that develop in cases involving property and contract rights,"[88] and "the novel and intangible form of reliance endorsed by the *Casey* plurality."[89]

Do property and contract rights, however, necessarily generate "very concrete" reliance interests? The infringement of property and contract rights need not cause harm over and above the violation of the right itself. For example, trespass may impose no actual harm to the property; even if there is physical *contact* with the property, there may be no physical or economic damage. In such a case, nominal damages can be awarded, and an award of nominal damages may even support a punitive damages award.[90] But the core of the legal violation seems to be the breach of the property owner's right to maintain control over his or her property, independent of whether the trespasser causes actual harm.

Breach of contract, too, may not impose "concrete" harm, as Professor F. Andrew Hessick observes.[91] Here are a few of Hessick's examples. First, a contract may require one party to follow certain procedures to protect privacy, but the failure to follow these procedures may not actually cause private information to be disclosed; hence, no "concrete" harm results.[92] Second, "suppose Paul contracts with Dan to pay $1,000 for a share of stock, Dan breaches, and Jeff immediately offers to sell Paul a share of the same stock for $20."[93] Paul, by striking a better deal with Jeff, is better off financially as a result of Dan's breach and therefore seems not to have suffered concrete harm. Third, parties may contract for services that have only idiosyncratic value to the parties (say, "one party can agree to meow like a cat in exchange for the other party barking like a dog").[94] In all these cases, the violation of

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[88] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2276 (2022) (internal quotation marks omitted) (quoting Payne v. Tennessee, 501 U.S. 808, 828 (1991)).

[89] *Id.* at 2277.

[90] Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154, 159 (Wis. 1997).

[91] F. Andrew Hessick, *Standing and Contracts*, 89 GEO. WASH. L. REV. 298, 300 (2021).

[92] *Id.*

[93] *Id.*

[94] *Id.* at 313.

contract rights may not cause financial harm, or any other harm that would likely be deemed "concrete" or "tangible."[95] Rather, the gravamen of the legal violation appears to lie in the breach of the contract itself — the failure to meet the terms of one's bargain, or the breaking of one person's trust in another.

One might argue that violations of property and contract rights *usually* give rise to "concrete" harm, notably physical or economic harm. But nothing about property and contract rights guarantees that they will cause such harm. Moreover, key to the violation of these rights is the infringement of interests — such as the ability to control one's property, or to hold another to the benefit of a bargain — that may not best be described as "concrete" or "tangible." As a result, the harms and interests associated with property and contract rights need not be "very concrete."[96]

One might claim that, even if property or contract doctrines do not necessarily protect concrete interests, *reliance* on the stability of property or contract doctrines is "very concrete." But why would this be? People presumably rely on the constancy of contract principles, for instance, because they wish to enter into or enforce contracts to protect their interests. If these interests are themselves not "very concrete" or "tangible," it is unclear why people's concern about, or stake in, the stability of contract law is properly classified as concrete or tangible.

All in all, property and contract rights do not occupy a pristine world of concreteness, far removed from the messiness of "intangible" interests tied to abortion rights. More generally, the contrast between "intangible" reliance interests and "concrete" ones is not simply a feature of empirical reality. Instead, the contrast served in *Dobbs*, as in other legal contexts, to distinguish between interests that the law should recognize and interests that the law should not. By describing the reliance interests involved in property and contract rights as "concrete," the Supreme Court in *Dobbs* indicated that those reliance interests should be acknowledged and respected. Deeming "intangible" the reliance interests involved in the constitutional right to an abortion served to push these interests outside the bounds of legal significance. The concrete/intangible distinction, as in other areas of law, reflected — rather than independently justifying — normative judgments about which considerations the law should value.

IV. TANGIBILITY AND NORMATIVITY IN *DOBBS*

The next step is to examine the normative factors underlying the discussion in *Dobbs* of "concrete" and "intangible" reliance. I first discuss the institutional concerns that the Court cited as justification for

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[95] *See id.* at 329.

[96] *See* Varsava, *supra* note 4, at 1888–89.

discounting intangible reliance interests related to women's roles in American society. I then consider moral and social views concerning abortion and its relationship to women's equality and liberty.

A. Institutionalism and Neutrality in Dobbs

The *Dobbs* Court explained its decision to discount "intangible" reliance interests by stating that the "intangible form of reliance endorsed by the *Casey* plurality . . . 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."[97] After citing briefs making "impassioned and conflicting arguments about the effects of the abortion right on the lives of women" and "conflicting arguments about the status of the fetus," the Court concluded that it had "neither the authority nor the expertise to adjudicate those disputes," so that these issues were better left to the political process.[98]

Hence, the *Dobbs* majority cast its rejection of intangible reliance interests involving women's lives as an institutionally minded decision to extricate the federal judiciary from a contentious moral debate. The *Dobbs* Court spoke in the language of neutrality, and did the same in other parts of the ruling: "Our opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth."[99] "Our Nation's historical understanding of ordered liberty does not prevent the people's elected representatives from deciding how abortion should be regulated."[100] The Court's reliance analysis, one might therefore argue, was part of a broader determination to abstain from overextension of the judicial role.

Further, *Dobbs*'s institutional concerns might be thought to furnish the content of the normative views at issue in the distinction between "concrete" and "intangible" reliance. After all, concerns related to the judicial role inform the tangible/intangible distinction in several areas of law. In constitutional standing doctrine, for example, the Supreme Court has suggested that intangible harms are more difficult to identify or measure.[101] If plaintiffs could successfully allege concrete injury by saying "I feel stigmatized," then federal courts might be called upon to adjudicate a greater number of disputes, including politically fraught ones. The desire to maintain a limited federal judiciary may have fueled the *TransUnion* Court's demand for a historical fixed point in order for intangible harm to be deemed "real" or "actually exist[ing]."[102]

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97 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2277 (2022).

98 *Id.*

99 *Id.* at 2261.

100 *Id.* at 2257.

101 Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016).

102 TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2204 (2021); *see also Spokeo*, 136 S. Ct. at 1549.

In tort law, too, intangible losses are viewed as destabilizing elements that raise evidentiary issues or could lead to runaway liability. The Supreme Court of Utah explained that without the economic loss rule, "the extension of tort law would result in 'liability in an indeterminate amount for an indeterminate time to an indeterminate class.'"[103] Judges (and legislators) may shrink from assigning greater latitude to courts to determine the contours of intangible harm in the tort setting. In the federal fraud context, criminal liability for violation of "intangible" rights implicates worries about vagueness,[104] as well as about federal judicial involvement in state and local corruption scandals.[105] Thus, common themes operate across different legal contexts to contribute to the disfavoring of intangible harm: evidentiary issues, concerns about runaway liability, and queries about the proper judicial role.

Accordingly, if the tangible/intangible distinction is normative rather than empirical (as I have argued), then perhaps the normative views in question are institutional concerns about the function of the federal judiciary. And perhaps there is nothing wrong with reliance on those normative views. Applied to *Dobbs*, the Supreme Court may have distinguished between "very concrete" and "intangible" reliance interests because crediting the latter would embroil the federal judiciary in heated moral disputes over abortion, while crediting the former would not. In other words, it could be argued that institutionalism justified second-class citizenship for intangible reliance in *Dobbs*.

The institutional concerns that *Dobbs* cited should be considered carefully. In particular, the possibility that federal judges are not well equipped to read the social landscape to draw conclusions about American women ought not be dismissed out of hand. The question remains, however, which conclusions about reliance these institutional concerns justify. Can the Court's disclaimer of "expertise" to adjudicate disputes about the effects of *Roe* on women bear the weight it was assigned in *Dobbs*'s discussion of reliance? Put differently, do the challenges of capturing the specific impact of the abortion right on women's lives provide sufficient reason to reject "intangible" reliance?

The answer, in my view, is "no." It is difficult to deny that *Roe* had some meaningful impact on women's lives. As Professor Varsava observes: "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] This kind of reliance

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[103] Am. Towers Owners Ass'n, Inc. v. CCI Mech., Inc., 930 P.2d 1182, 1190 (Utah 1996) (quoting Ultramares Corp. v. Touche, 174 N.E. 441, 444 (N.Y. 1931)) (citing E. River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 871 (1986)), *abrogated on other grounds by* Davencourt at Pilgrims Landing Homeowners Ass'n v. Davencourt at Pilgrims Landing, LC, 221 P.3d 234 (Utah 2009).

[104] *See, e.g.*, Skilling v. United States, 561 U.S. 358, 408 (2010).

[105] *See, e.g.*, Kelly v. United States, 140 S. Ct. 1565, 1574 (2020).

[106] Varsava, *supra* note 4, at 1868.

might be perceived as "concrete" or "tangible,"[107] but *Roe* also had "intangible" consequences for women's conceptions of themselves in society. To be sure, the *Dobbs* Court cited amicus briefs "mak[ing] impassioned and conflicting arguments about the effects of the abortion right on the lives of women."[108] Yet disagreement about the impact of abortion rights on women's equality does not make "intangible" reliance interests disappear. As long as a considerable number of Americans understood *Roe* and *Casey* to be important bulwarks of women's equality — a proposition that is hard to contest — there were reliance interests supporting the maintenance of *Roe* and *Casey* as valuable from a women's rights perspective.[109]

These reliance interests might be cast in expressive terms: *Roe* and *Casey* expressed respect for women's ability to control their destinies, and a Supreme Court decision overruling these precedents signaled the opposite. Put differently, many women since *Roe* had internalized the idea that they would be able to have an abortion,[110] and this option had become part of their self-understanding as free and equal participants in society. Of course, not all women (or Americans) shared this view, and many deplored the availability of abortion. Yet unanimity is not a prerequisite for the identification of some relevant reliance interest. The same is true of the *Dobbs* Court's reference to the status of the fetus. The presence of a countervailing factor — the interest in preserving fetal life or potential life — should not nullify the reliance interest on the other side of the scale.[111]

Therefore, it is hard to deny that recognition of a constitutional right to abortion had some consequential impact on American women, and that withdrawal of the right would similarly have such an effect. The inability to measure the impact precisely does not negate its existence.[112] As a result, the institutional concern regarding judges' capacities to gauge the effect of *Roe* on women's lives does not justify the *Dobbs* Court's categorical rejection of intangible reliance interests. The real question was not whether the constitutional right to an abortion had a genuine impact on women, but whether that impact was salutary, or whether people properly relied on the right. The next section turns to those normative issues.

B. Dobbs *and Tainted Reliance*

Thus far, I have argued — drawing on areas of law beyond *Dobbs* — that the identification of an interest as "intangible" emerges

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107 *See id.* at 1847.

108 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2239 (2022).

109 *See* Varsava, *supra* note 4, at 1868.

110 *See Dobbs*, 142 S. Ct. at 2343 (Breyer, Sotomayor & Kagan, JJ., dissenting).

111 *See* Varsava, *supra* note 4, at 1864 n.83.

112 *See* Bayefsky, *Tangibility*, *supra* note 27, at 2347–51; Varsava, *supra* note 4, at 1871.

not from a straightforward empirical reckoning, but from normative understandings about the extent to which the interest should be credited. One such normative view involved institutional concerns regarding the proper judicial role. In its discussion of reliance in *Dobbs*, the Supreme Court characterized the relevant institutional concern in terms of the federal judiciary's ability to gauge the effect of the abortion right on women and to weigh that factor against the interests of the fetus. The Court employed the language of neutrality in invoking the institutional concern; the Court was not taking sides, but simply and suitably declining to assess phenomena it was not well equipped to analyze.

Yet the suggestion that many American women relied to a meaningful extent on the maintenance of *Roe* and *Casey* is fairly intuitive.[113] Endorsing that proposition did not require the Court to treat women as possessing monolithic views or to ignore the interests of the fetus. In other words, the institutional worry that federal judges are ill equipped to interpret social meanings did not justify the rejection of intangible reliance in *Dobbs*.

It is reasonable to look elsewhere, then, for the normative understandings that undergirded the *Dobbs* Court's dismissal of intangible reliance. Here, I draw on a suggestion by Professor Varsava toward the end of her Article,[114] as well as on related work by Professor Richard Re.[115] The Court's decision to discount "intangible" reliance interests appears most sensible when joined to the view that reliance on *Roe* was wrong, so that it would be morally troubling to assign weight to these reliance interests. Segregationists surely relied on *Plessy v. Ferguson*,[116] after all, but it would likely strike us as improper for a court to say that reliance interests provided a reason to keep *Plessy*. When reliance interests are tainted by moral injustice, that is, they should not count.

The analysis of reliance in *Dobbs* can plausibly be read in terms of the idea of moral taint, with the majority implicitly taking the view that the legal availability of abortion was wrong. One reason for this view could be the belief that abortion is murder, which should not be legalized. A second reason could be the belief that legalized abortion carries a broader societal connotation: it is emblematic, say, of a society that devalues childrearing, elevates self-gratification above self-restraint, and does away with traditional gender roles without stopping to think about whether anything has been lost. My aim here is not to take a position on those perspectives — except to say they suggest that American society has actually relied on the right to abortion, only to its

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[113] It is also plausible that many American men have relied on the availability of a right to abortion, as in making choices about intimacy.

[114] *See* Varsava, *supra* note 4, at 1909–11.

[115] *See* Richard M. Re, *Precedent as Permission*, 99 TEX. L. REV. 907, 938–41 (2021).

[116] *See* Varsava, *supra* note 4, at 1910; Re, *supra* note 115, at 940.

detriment. The point is that these views reflect deeply contestable normative understandings rather than institutional neutrality.

It might be argued that the *Dobbs* Court was declining to take a position on *whether* reliance on the abortion right was wrongful. Given continuing societal controversy about abortion, the argument would run, judges are not institutionally competent to decide whether reliance on *Roe* is sufficiently legitimate to enter into the stare decisis calculus. On this account, too, *Dobbs* appropriately recognized limitations on the judicial role.

First, however, treating a certain type of reliance interest as of *questionable* value, rather than of definitively negative value, is itself a value-laden position. Second, we must never forget that it was a stare decisis analysis in which the *Dobbs* Court was purporting to engage. The question was whether the burden of persuading a court to overrule precedent had been met. Why should uncertainty about the legitimacy of reliance on *Roe* have militated in favor of discounting the relevant reliance interests? Rather, such uncertainty favored acknowledging the reliance interests to some degree, even if the ultimate decision was still to overrule precedent.[117]

As in other areas of law, deeming the reliance interests in *Roe* "intangible" is meant to signal that crediting them would invite judges to exercise too much discretion in determining how these interests should count. The move to hive off the "intangible," however, does not extirpate judicial discretion. It simply displaces the moment of discretion onto the initial decision to call certain interests "intangible." Applied to *Dobbs*, rejecting "intangible" reliance on *Roe* does not relieve judges of the burden of normative decisionmaking. The difficult normative questions lie in determining why certain interests are intangible, and why certain forms of reliance are not to be credited. Declining to answer these questions explicitly does not mean avoiding them altogether.

CONCLUSION

This Response has sought to broaden Professor Varsava's analysis of reliance in *Dobbs* by exploring the distinction between tangible and intangible interests in other areas of law. There is no fixed category of interests that are considered "concrete," "tangible," or "intangible." Rather, these terms attach to various interests depending on underlying social and legal understandings.

The reliance analysis in *Dobbs* was no exception. Deeming "intangible" the reliance interests attached to women's societal roles was not a neutral form of categorization. Instead, the distinction between "very

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[117] *See* Varsava, *supra* note 4, at 1872 (noting that the Court "has explicitly announced that 'uncertainty' about reliance interests cuts in favor of standing by precedent" (quoting Kimble v. Marvel Ent., LLC, 135 S. Ct. 2401, 2410 (2015))).

concrete" and "intangible" itself depended on a normatively laden dismissal of many women's reliance on *Roe*. The *Dobbs* Court's reliance analysis therefore did not extricate the Court from a political thicket.

One might ask: What, then, should be done about the tangible/intangible distinction? In general, this distinction is not an especially helpful addition to legal doctrine, at least in several contexts. Of course, there is no reason why (say) contracting parties cannot include the term "tangible" in an agreement on property insurance. But in contexts such as constitutional standing, fraud statutes, or reliance interests, it seems more profitable for courts to identify the specific interests at stake rather than to sort them into the "tangible" or "intangible" varieties.

More generally, the analysis of reliance in *Dobbs* appears to reflect a view that, if *Roe* and *Casey* were to be overturned, the Supreme Court could not give any credit to the reliance interests supporting these cases' maintenance. All factors in the stare decisis analysis, including reliance, had to point in the same direction — that is, in favor of overruling. However much the *Dobbs* Court emphasized that it was recognizing the existence of competing moral arguments about abortion, its treatment of reliance did not truly account for that competition. Yet courts should be able to arrive at momentous decisions while acknowledging that there are important interests on the other side. Such an approach could advance the understanding that nuance is not weakness, that recognition of complexity is not surrender, and that acceptance of tension among normative principles can enrich our common life in a diverse society.