CONCRETE RELIANCE ON STARE DECISIS IN A POST-*DOBBS* WORLD

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I. INTRODUCTION

The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* will be remembered primarily for its destabilizing effect on abortion rights across the country; in its wake, the legality of abortions performed in various states and at various stages of pregnancy was thrown into turmoil that will take years to resolve. In *Dobbs*'s immediate aftermath, substantive due process jurisprudence has been at least destabilized, if not prepared for greater limitation in the terms to come. But the Court's approach to that line of cases has also turned *stare decisis* doctrine into an unclear jumble that may be considered too unworkable to stand. The uncertainty that will now surround any Supreme Court decision may be an equally important legacy of the *Dobbs* opinion.

This Article will describe two ways in which *Dobbs* has muddied the Supreme Court's precedent on precedent. First, it will examine how the Court's decision to overrule *Planned Parenthood of Southeastern Pennsylvania v. Casey*[1] undermines not only its substantive due process holding, but also its status as a precedent on precedent. Without *Casey* in place, *Dobbs* further elevates a weakened version of *stare decisis* that has been ascendant on the Court in recent decades, one which threatens to undermine legal stability in all areas of constitutional law. Second, the Article will examine the *Dobbs* majority's effort to minimize the reliance prong of *stare decisis* analysis by asserting that only "very concrete" interests in property or contract are relevant. That move towards concretizing reliance is similar to the Court's recent efforts to concretize its requirements for Article III standing, an area where the Court's

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1. 505 U.S. 833 (1992).

seemingly neutral principles has deep, and largely conservative, policy implications. It also elevated corporate interests in such concrete property and contractual arrangements over individual liberties, fitting into a broader trend of the Court's recent jurisprudence.

II. WHAT IS THE SUPREME COURT'S PRECEDENT ON PRECEDENT?

The Justices of the Supreme Court have engaged in a largely unseen battle over the contours of *stare decisis* in the past decade. As the latest foray in that battle, *Dobbs* accelerated the Court's path towards a new precedent on precedent, one which allows Justices to overrule decisions based upon a substantive disagreement with the reasoning in that decision rather than any special justifications outside of a substantive critique.

A. Strands of Stare Decisis

The doctrine of *stare decisis*—which presumes that courts generally should uphold their prior decisions—has deep historical roots,[2] though it did not rise to prominence on the Supreme Court until Justice Louis Brandeis's 1932 dissent in *Burnet v. Coronado Oil & Gas Co.*[3] In that case, Brandeis famously noted that "[*s*]*tare decisis* is not . . . a universal, inexorable command,"[4] adding that the "Court must, in order to reach sound conclusions, feel free to bring its opinions into agreement with experience and with facts newly ascertained."[5] These passages seemed to augur greater flexibility for Justices operating under a relatively weak *stare decisis* doctrine. However, Brandeis also argued that "in most

2. *See, e.g.*, W. F. Kuzenski, *Stare Decisis*, 6 MARQ. L. REV. 65, 66 (1922) ("The origin of the doctrine of *stare decisis* is lost in antiquity. It is known to have been in effect long before the days of Hale and Blackstone. Some theorize that it originated in the Witenagemote, where all the men both made the laws and adjusted them, and that power of judging was afterwards assumed by the advisors who became the earliest judges. Others, like Spence, contend that the rule of precedent had its origin in the *jus praetorium* of the Roman Law, where the praetor issued irrevocable edicts having the effect of laws." (citations omitted)). THE FEDERALIST NO. 78, at 383 (Alexander Hamilton) (Terence Ball ed., 2003) ("To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them."). The Constitution itself, however, contains no express reference to the concept, or any specific rules of judicial adjudication. Colin Starger, *The Dialectic of Stare Decisis Doctrine*, in PRECEDENT IN THE UNITED STATES SUPREME COURT 19, 22 (Christopher J. Peters ed., 2013)

3. 285 U.S. 393, 405-06 (1932) (Brandeis, J., dissenting).

4. *Id.*

5. *Id.* at 412-13 (internal quotations omitted).

matters it is more important that the applicable rule of law be settled than that it be settled right."[6] This seemingly contradictory admonition appears to support a stronger version of *stare decisis*.

Brandeis's opinion provided fodder for two competing strands of *stare decisis* that emerged prior to *Dobbs*. The weak strand emphasizes that Justices should overrule cases that are poorly reasoned, whether or not external factors outside of the decision's substantive accuracy favor overruling the decision.[7] For instance, Justice Reed suggested in 1944's *Smith v. Allwright* that "when convinced of former error, this Court has never felt constrained to follow precedent" in constitutional cases.[8] Chief Justice Rehnquist similarly suggested that reversals are appropriate whenever a prior decision is "badly reasoned" in his 1991 opinion in *Payne v. Tennessee*.[9] In contrast, a "strong" strand of *stare decisis* argues that precedents can only be overturned based upon objective factors, not including the current Justices' disagreement with prior Justices' reasoning. For instance, Justice O'Connor's majority opinion in *Arizona v. Rumsey* claimed that prior decisions, no matter how substantively incorrect, could only be overturned when some "special justification" was present.[10] That claim found purchase again in *Payne v. Tennessee*, in which a dissenting Justice Marshall claimed that the Court had never departed from precedent without "special justification."[11]

Casey played a critical role in defining *stare decisis* doctrine in the modern era—at least prior to *Dobbs*. Prior precedents on precedent like *Rumsey* suggested that special justifications were necessary to overturn prior decisions, without naming those justifications. But *Casey* created a formal list of four such "practical and pragmatic" justifications to overrule:

> [W]e may ask whether the rule has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of

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6. *Id.* at 406.

7. *See* Michael Gentithes, Janus-*Faced Judging: How the Supreme Court Is Radically Weakening Stare Decisis*,62 WM. & MARY L. REV. 83, 93-98 (2020).

8. 321 U.S. 649, 665 (1944) (citing *Coronado Oil*, 285 U.S. at 410 (Brandeis, J., dissenting)).

9. 501 U.S. 808, 827 (1991) ("[W]hen governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" (quoting *Smith*, 321 U.S. at 665)).

10. 467 U.S. 203, 212 (1984). "As scholars have previously acknowledged, Justice O'Connor introduced the phrase 'special justification' into Court discourse in 1984's *Rumsey*." Starger, *supra* note 2, at 35 (citing Emery G. Lee III, *Overruling Rhetoric: The Court's New Approach to Stare Decisis in Constitutional Cases*, 33 U. TOL. L. REV. 581 (2001)).

11. *Payne*, 501 U.S. at 849 (Marshall, J., dissenting (quoting *Rumsey*, 467 U.S. at 212)); *see also* Starger, *supra* note 2, at 37.

> overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.[12]

Casey formalized what other precedents in the strong *stare decisis* tradition had only alluded to, marking an important growth in that tradition.[13]

In the decades that followed, many Justices made efforts to weaken those factors listed in *Casey* and promote the weaker *stare decisis* strand outlined above. Justice Alito was at the forefront of this campaign. In 2009's *Pearson v. Callahan*, Alito argued that in constitutional cases, overruling may be appropriate where "experience has pointed up the precedent's shortcomings," including that the precedent was "poorly reasoned."[14] After other conservative Justices similarly supported overruling decisions that are poorly reasoned,[15] Alito brought the weak version of *stare decisis* to a new zenith in 2018's *Janus v. AFSCME*—a case the Court heavily relied upon in *Dobbs*.[16] In *Janus*, Alito presented a list of "factors" to consider when overruling precedent, but stated that "the quality of [the precedent's] reasoning" should be the very first factor the Court considers.[17] Alito then spent the bulk of his *Janus* opinion focusing on the quality of the precedent's reasoning; that factor was not only the first he analyzed, it also seeped into his consideration of some *Casey* factors, such as workability and reliance.[18] *Janus* thus significantly weakened *Casey*'s status as a precedent on precedent four years before *Dobbs* was decided. But the question remained open as to whether *Casey*'s *stare decisis* precedent would be formally overruled.

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12. *Id.* at 854-55 (citations omitted).

13. To be sure, *Casey* also included fodder for supporters of the weak *stare decisis* tradition, especially in the partial dissents from Chief Justice Rehnquist and Justice Scalia. *See Casey*, 505 U.S. at 955 (Rehnquist, C.J., concurring in part and dissenting in part) (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-08 (1932) (Brandeis, J., dissenting)); *Id.* at 983 (Scalia, J., concurring in part and dissenting in part) (suggesting that a proper *stare decisis* inquiry must ask "how wrong was the [original] decision on its face?").

14. 555 U.S. 223, 233-34 (2009).

15. *See, e.g.*, Montejo v. Louisiana, 556 U.S. 778, 793-97 (2009) (overruling Michigan v. Jackson, 475 U.S. 625 (1986)); Citizens United v. FEC, 558 U.S. 310, 363-64 (overruling Austin v. Mich. Chamber of Com., 494 U.S. 652 (1990)); *see also* Gentithes, Janus-*Faced Judging*, *supra* note 7, at 99-101.

16. *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2264-65 (2022).

17. *Janus*, 138 S. Ct. at 2478-79.

18. *Id.* at 2479-86; *see also* Gentithes, Janus-*Faced Judging*, *supra* note 7, at 101-04.

B. Is Casey Still a Precedent on Precedent?

Writing for the majority in *Dobbs*, Alito doubled down on the weakened conception of *stare decisis* offered in *Janus* in two important ways. First, he confirmed that the substantive accuracy of a prior decision is the primary—and perhaps only—factor the Court should consider in its *stare decisis* discussion. Second, Alito destabilized *Casey*'s *stare decisis* precedent so severely that it is now a kind of zombie precedent that future Courts can freely ignore.[19]

First, the way Alito lists factors to consider in a *stare decisis* analysis reinforces the primacy of a prior decision's substantive accuracy. Alito provides five factors that weigh in favor of overruling *Roe v. Wade* and *Casey*: "the nature of their error, the quality of their reasoning, the 'workability' of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance."[20] That list starts with two factors absent from *Casey* that focus on the substantive accuracy of the precedents—the "nature of the Court's error" and the "quality of the reasoning." Alito's opinion then spends eleven pages decrying the reasoning of *Roe* and *Casey*, saving far shorter passages for discussions of *Casey* factors like workability and reliance. Poor reasoning in a prior decision is thus more than just a reason to turn to *stare decisis* analysis; it is instead a sufficient condition to overturn decisions.

As I have argued previously, poor reasoning provides an ever-present justification for overturning decisions; if poor reasoning alone justifies reversal, almost no Supreme Court opinion is truly stable.[21] Conversations about *stare decisis* only arise when current Justices believe that a prior decision was substantively incorrect and might warrant a change of direction. *Janus* and *Dobbs*, however, cement a version of *stare decisis* that cannot settle disputes independent of the Justices' views about the substantive correctness of a decision. This significantly undermines doctrinal stability, making it harder for the public to know and understand the law. It also undermines judicial legitimacy in a hyper-polarized

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19. The Court has sometimes claimed that it was not overruling a precedent, all while acknowledging its disagreement with that precedent's holding and suggesting that courts ignore it in future cases—a process I've referred to as creating a zombie precedent that is neither dead nor living. *See* Michael Gentithes, *Zombie Precedents?* Stare Decisis *and the New Footnote Four in* Jones v. Mississippi, APPELLATE ADVOCACY BLOG, May 11, 2021, https://lawprofessors.typepad.com/appellate_advocacy/2021/05/zombie-precedents-stare-decisis-and-the-new-footnote-fourt-in-jones-v-mississippi.html.

20. *Dobbs*, 142 S. Ct. at 2265.

21. Gentithes, Janus-*Faced Judging*, *supra* note 7, at 113-27.

society. And it may also undermine legal consistency as lower courts freely deviate from Supreme Court precedent that appears substantively incorrect, assuming that the Court will follow suit shortly and formally overrule that "incorrect" precedent.

Second, *Dobbs* destabilizes *Casey* as a whole, suggesting that the Court can ignore *stare decisis*'s strong tradition. As noted above, the Court listed only two of *Casey*'s *stare decisis* factors, workability and reliance. It then demoted those factors behind others that focus on the substantive accuracy of a prior decision. In so doing, the Court never clearly stated whether it is overruling *Casey*'s holding on *stare decisis*, as well as its ruling on substantive due process.

If that holding is not already overruled, it certainly seems ripe for overruling now under either the strong or weak form of *stare decisis*. Under the strong form, *Casey* seems more and more like a remnant of abandoned doctrine after the weak version of *stare decisis* has ascended in *Janus* and *Dobbs*. Furthermore, *Casey*'s list of *stare decisis* factors, now seemingly reduced to only two considerations that have little value after a court has assessed the substantive accuracy of a prior decision, might be so incoherent and unworkable that it could hardly be considered a doctrine worth preserving. *Dobbs* has reduced *Casey*'s *stare decisis* holding to a precedential purgatory from which it seems unlikely to be released.

II. A NOVEL CONCRETENESS REQUIREMENT

Alito's opinion in *Dobbs* referenced possible reliance interests that society has placed upon *Roe* and *Casey*, but quickly discounted any value those interests might have. To do so, Alito redefined the reliance factor of *stare decisis* analysis, suggesting that only "very concrete" interests count. While that position is novel in *stare decisis* jurisprudence, it bears the hallmarks of the Court's recent jurisprudence on Article III standing, implying a new and significant limitation on "reliance" as a check upon Justices seeking to overrule precedents.

A. Concrete Reliance

In his *Dobbs* opinion, Justice Alito claimed *Casey* was a "novel version of the doctrine of *stare decisis*" because it protected societal reliance interests in family planning and the role of women in society.[22] According to Alito, *stare decisis* only protects reliance interests that arise

22. *Dobbs*, 142 S. Ct. at 2272, 2276.

"where advance planning of great precision is most obviously a necessity"—not reliance interests that come from the kind of "unplanned activity" that may lead to an abortion.[23] Thus, "conventional, concrete reliance interests" simply are not present when abortion is at issue.[24] To drive his point home, Alito suggested that *stare decisis* protects only "very concrete reliance interests, like those that develop in 'cases involving property and contract rights.'"[25] According to Alito, courts are only equipped to protect such very concrete reliance interests; more intangible forms of reliance that involve the organization of intimate relationships and decisions about a woman's position in her family and community "depend on an empirical question that is hard for anyone—and in particular, for a court—to assess."[26]

At first blush, *Dobbs*'s limitation on the scope of reliance interests appears content neutral; Alito described a constraint that will ease the application of *stare decisis* doctrine in future cases, irrespective of the subject matter. But in effect, *Dobbs*'s limitation of reliance interests will significantly weaken precedents that protect individual rights, subjecting them to more ready overrule in the future. Many such precedents address the kind of interpersonal social relationships and ongoing evolution of the role of individuals of different backgrounds within society that were at issue in *Dobbs* and *Casey*. Those precedents are unlikely to produce "concrete" reliance interests based in property or contract; the rights at issue are inherently less economic in nature. *Dobbs*'s "very concrete" requirement for reliance interests dismisses associational interests or life planning decisions, labeling them unimportant in the *stare decisis* calculus. In so doing, *Dobbs* precludes consideration of the many non-economic interests that are amongst the most important choices an individual can make in their lives.

Alito also claimed incorrectly that the *Casey* definition of reliance was novel. In fact, the *Dobbs* concreteness requirement is novel, even within the weak *stare decisis* tradition to which Alito ascribes. Many of the seminal cases in that tradition have relied upon more intangible forms of reliance interests than pure property or contract relationships. For

23. *Id*.
24. *Id*.
25. *Id*. (citing *Payne*, 501 U.S. at 828).
26. *Id*. at 2272, 2277. Alito also briefly suggests that women have sufficient electoral power to influence the direction of abortion regulation, thereby reducing the need for courts to intervene to protect their more ephemeral reliance interests. *Id.* ("Our decision returns the issue of abortion to those legislative bodies, and it allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office. Women are not without electoral or political power.").

instance, in his opinion in *Janus*, Alito discounted the reliance value of contract provisions in collective bargaining agreements, largely because those provisions might "permit free speech rights to be abridged in perpetuity."[27] Alito thus protected a different form of intangible reliance—that of citizens relying upon the protection of their free speech rights—over purely economic arrangements struck in reliance upon Supreme Court precedent. The Court also offered support for intangible reliance interests in *Ramos v. Louisiana*, another important decision in the weak *stare decisis* tradition that emphasized the substantive inaccuracy of a prior decision as grounds for overruling.[28] When the Court did address reliance interests in *Ramos*, it quickly noted that overruling the precedent at issue would not cause any "economic, regulatory, *or social disruption*."[29] The Court felt free to overrule the precedent in part because nobody had "signed a contract [or] entered a marriage" based upon reliance in that case.[30] *Ramos* thus suggested that social interests such as marriage are appropriate forms of reliance that *stare decisis* ought to protect. Both *Ramos* and *Janus* support the very kinds of intangible reliance interests that Alito claimed were novel in *Dobbs*.

B. Concrete Injury

The Court has similarly emphasized the importance of concreteness in the context of establishing Article III standing. In its traditional form, Article III standing doctrine requires a plaintiff to show that: (1) they have suffered a concrete and particularized injury in fact; (2) the injury was caused by the challenged conduct; and (3) the injury can be redressed by a favorable decision.[31] Standing doctrine thus implicitly assumes that

27. 138 S. Ct. at 2484.

28. 140 S. Ct. 1390, 1406 (2020).

29. *Id.* (emphasis added).

30. *Id.*

31. *See, e.g.*, Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 461, 472 (1982) (the plaintiff must show that they "personally . . . suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision.") (quotations omitted); *see also* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) ("First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.) (citations and quotations omitted). The redressability requirement itself has two requirements: (1) that the relief sought is substantially likely to redress the plaintiff's injuries; and (2) that that relief is within the district court's power to award."

some injuries are spread so broadly amongst citizens that is difficult, if not impossible, to define them in concrete terms. Without such concretely defined injuries, the courts cannot provide relief because they cannot connect the challenged conduct to any harm an individual litigant has suffered.

Recent Supreme Court analyses have required greater concreteness in the injuries alleged by would-be plaintiffs, potentially precluding a growing number of litigants from the courthouse. In *Spokeo v. Robins*, the Court suggested that Congress cannot create concrete injuries by fiat simply by including a statutory damages remedy in legislation.[32] This shifted the focus of standing jurisprudence from the connection between challenged conduct and an individual plaintiff to the nature of the injury itself.[33] *Spokeo* suggests that even if an injury is sufficiently particularized (in that it can be causally related to a specific plaintiff), it may not be sufficiently concrete (in that it has enough demonstrable consequences in the real world to support a lawsuit).[34] Five years later in *Transunion LLC v. Ramirez*, the Court again noted that an injury does not become concrete simply because Congress creates a statutory cause of action to redress it—although such Congressional action might be instructive.[35] In a holding likely to reduce the federal judiciary's role in class action lawsuits based upon a private rights of action,[36] the Court emphasized that it would only resolve "a real controversy with real impact on real persons."[37]

The Court's recent expansion of the concrete injury requirement within standing doctrine mirrors its emphasis on concrete reliance interests in *Dobbs*. Both trends appear content-neutral: they limit judicial discretion to intervene in ways that protect the intangible interests of litigants that are difficult for courts to identify clearly and consistently. But these trends will both prioritize economic interests over social, interpersonal, and even familial interests, suggesting that the latter are not worthy of judicial protection simply because they are more difficult to quantify. The net result is either the protection of a *status quo* that favors

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Juliana v. United States, 947 F.3d 1159, 1170 (9th Cir. 2020) (citing *M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018)).

32. 578 U.S. 330, 339-40 (2016); Richard L. Heppner Jr., *Statutory Damages and Standing After* Spokeo v. Robins, 9 CONLAWNOW 125, 125 (2018).

33. "With *Spokeo*, the emphasis shifted to [deciding] when is an injury real and personal—not abstract or attenuated—enough to grant standing?" Heppner, *supra* note 32, at 128.

34. 578 U.S. at 339-41.

35. 141 S. Ct. 2190, 2204-05 (2021).

36. *Article III Standing—Separation of Powers—Class Actions*—Transunion v. Ramirez, 135 HARV. L. REV. 333, 340 (2021).

37. *Transunion*, 141 S. Ct. at 2203 (quoting *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2103 (2019) (Gorsuch, J., concurring)).

economic interests (in the case of Article III standing) or a new freedom to change Supreme Court doctrine more rapidly in a direction that likewise favors economic interests (in the case of *stare decisis*).

These emphases on concreteness claim fealty to traditional strands of jurisprudence. But in fact, they create new barriers to the protection of individual rights in constitutional cases. They make it easier for the Justices to claim they are following neutral principles in their decision-making while the principles that they actually follow are novel methods to justify decisions limiting individual rights. And because these trends will escape most public attention, they are perhaps an even greater threat to individual rights than a decision that forthrightly admits it is designed to curb those rights.

III. CONCLUSION

The reverberations of *Dobbs* will echo in constitutional jurisprudence for decades to come. But as this Article notes, that change is likely to emanate beyond substantive due process litigation. *Dobbs* has fundamentally altered *stare decisis* principles, both by further entrenching the weak strand of *stare decisis* and by creating new concreteness demands for any reliance interests protected by that doctrine. In so doing, it has rendered almost any decision the Court reaches far more malleable in future litigation. The actual change effected by *Dobbs* was drastic; the changes it may permit in future years of litigation may be catastrophic.