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Something to Hold On To: Judicial Independence as an Antidote to the Dissent's Institutional Integrity Concerns in *Dobbs v. Jackson Women's Health Organization*

Teddy Breece Paisley III
Liberty University

TEDDY BREECE PAISLEY III

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ABSTRACT

Today's legal and political landscape places heavy emphasis on the decisions handed down by nine illustrious jurists—the sitting Justices of the Supreme Court of the United States. These decisions, like the Justices themselves, are often characterized as purely political. From left and right, accusations of partisanship and judicial activism hurtle toward the Court with increasing velocity and regularity. On June 6, 2022, the Court released one of the most significant and controversial decisions in its history when it overruled *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* in *Dobbs v. Jackson Women's Health Organization*, holding that the Constitution does not recognize a right for a woman to obtain an abortion. Because of the heated political debate surrounding the subject of abortion, the Court's decision poses a question about its own role and authority: To what extent should the Court consider the impact that overruling precedent has on its perceived legitimacy?

Within the context of the divide between the *Dobbs* majority and dissent, this Note explores the Court's present stare decisis doctrine and the relevant principles of judicial integrity and judicial independence. Recognizing the importance of both to a functioning judiciary—and, by extension, a functioning constitutional system—this Note locates the source of the Court's actual integrity in its constitutionally defined role. Because the Framers established the Court to interpret and apply the laws of the nation and serve as a check on the political branches of government, that role is the necessary origin of a truly legitimate judiciary. This Note then proposes the

beginnings of an approach to stare decisis that builds upon the principles undergirding the *Dobbs* majority's stare decisis analysis and incorporates valid concerns raised by the dissent. Such an approach may offer a chance for the weakest branch of government to wed the actual integrity found in principled adjudication with the public perception of integrity necessary for a functioning Court. Without seeking to protect both actual and perceived integrity, the judiciary risks forsaking its purpose in the American system of government and endangering the constitutional structure itself.

AUTHOR

Notes and Comments Editor, LIBERTY UNIVERSITY LAW REVIEW, Volume 18. J.D. Candidate, 2024, Liberty University School of Law; B.A., English, University of Virginia (2020). The author would like to thank the staff and Editorial Board of Volume 17, especially Notes and Comments Editor Jake Bryant, for helping him grow as a writer, editor, and man. Likewise, he is grateful for his fellow members of Volume 18 and their commitment to glorifying the Lord through legal scholarship. He gives thanks for the faculty and staff of Liberty University School of Law and their faithfulness in challenging him to be an outstanding Christian attorney. He also thanks his parents, Ted and Elisabeth; his brother, Worth; and Volume 18 Articles and Book Reviews Editor Arielle Leake for their steadfast love and support. Above all, the author thanks his Author, Jesus Christ, for His unfathomable grace and love. All errors are the author's; all merit, the Lord's.

NOTE

SOMETHING TO HOLD ON TO: JUDICIAL INDEPENDENCE AS AN ANTIDOTE TO THE DISSENT'S INSTITUTIONAL INTEGRITY CONCERNS IN *DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION*

Teddy Breece Paisley III[†]

"Sometimes even if he has to do it alone, and his conduct seems to be crazy, a man must set an example, and so draw men's souls out of their solitude . . . that the great idea may not die."

- Fyodor Dostoevsky, *The Brothers Karamazov*[1]

ABSTRACT

Today's legal and political landscape places heavy emphasis on the decisions handed down by nine illustrious jurists—the sitting Justices of the Supreme Court of the United States. These decisions, like the Justices themselves, are often characterized as purely political. From left and right, accusations of partisanship and judicial activism hurtle toward the Court with increasing velocity and regularity. On June 6, 2022, the Court released one of the most significant and controversial decisions in its history when it overruled Roe v. Wade *and* Planned Parenthood of Southeastern Pennsylvania v. Casey *in*

[†] *Notes and Comments Editor*, LIBERTY UNIVERSITY LAW REVIEW, Volume 18. J.D. Candidate, 2024, Liberty University School of Law; B.A., English, University of Virginia (2020). The author would like to thank the staff and Editorial Board of Volume 17, especially Notes and Comments Editor Jake Bryant, for helping him grow as a writer, editor, and man. Likewise, he is grateful for his fellow members of Volume 18 and their commitment to glorifying the Lord through legal scholarship. He gives thanks for the faculty and staff of Liberty University School of Law and their faithfulness in challenging him to be an outstanding Christian attorney. He also thanks his parents, Ted and Elisabeth; his brother, Worth; and Volume 18 Articles and Book Reviews Editor Arielle Leake for their steadfast love and support. Above all, the author thanks his Author, Jesus Christ, for His unfathomable grace and love. All errors are the author's; all merit, the Lord's.

[1] FYODOR DOSTOEVSKY, THE BROTHERS KARAMAZOV 280 (Constance Garrett trans., George Stade ed., 2004) (c. 1880).

Dobbs v. Jackson Women's Health Organization, *holding that the Constitution does not recognize a right for a woman to obtain an abortion. Because of the heated political debate surrounding the subject of abortion, the Court's decision poses a question about its own role and authority: To what extent should the Court consider the impact that overruling precedent has on its perceived legitimacy?*

Within the context of the divide between the Dobbs *majority and dissent, this Note explores the Court's present stare decisis doctrine and the relevant principles of judicial integrity and judicial independence. Recognizing the importance of both to a functioning judiciary—and, by extension, a functioning constitutional system—this Note locates the source of the Court's actual integrity in its constitutionally defined role. Because the Framers established the Court to interpret and apply the laws of the nation and serve as a check on the political branches of government, that role is the necessary origin of a truly legitimate judiciary. This Note then proposes the beginnings of an approach to stare decisis that builds upon the principles undergirding the* Dobbs *majority's stare decisis analysis and incorporates valid concerns raised by the dissent. Such an approach may offer a chance for the weakest branch of government to wed the actual integrity found in principled adjudication with the public perception of integrity necessary for a functioning Court. Without seeking to protect both actual and perceived integrity, the judiciary risks forsaking its purpose in the American system of government and endangering the constitutional structure itself.*

CONTENTS

I. INTRODUCTION

The loftiest institutions of our republic are often inseparable from their physical structures. Towering white columns, imperial domes, and intricate pediments elevate the gaze of citizens and tourists alike, serving as outward illustrations of America's constitutional promises. More than mere supports, such features communicate the implicit grandeur of the bodies for which they were made, enhancing the public's perception of those institutions' legitimacy.

The Supreme Court of the United States is one such institution. Its own building, constructed in the 1930s, was meant to be "a building of dignity and importance" equal to the gravity of the Court itself.[2] The grand courthouse, like other traditional spaces of government, emphasizes the judiciary's position as an independent, coequal government branch and a symbol of American justice.[3] That status indicates the ideological integrity the Court is meant to exemplify.

On June 24, 2022, the Supreme Court released a decision of generational significance and controversy.[4] In *Dobbs v. Jackson Women's Health Organization*, six Justices upheld Mississippi's Gestational Age Act, which generally prohibits abortion after fifteen weeks of pregnancy.[5] In doing so, five Justices overruled *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, undoing nearly fifty years of abortion precedent.[6] Debate over the correctness of this decision, still in its infancy, encompasses a suite of complex moral and philosophical questions. Nestled among them is an inquiry that threatens to chip away at the Court's foundation: How can the Court present itself as an institution of integrity when it changes the law by overruling a prior decision?

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[2] *Building History*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/buildinghistory.aspx (last visited Feb. 15, 2024). Prior to the construction of the current building, the Court never had its own dedicated location; it occupied various spaces in the Capitol building for over 100 years. *Id.*

[3] *See id.*

[4] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

[5] *Id.* at 232, 301.

[6] *Id.* at 302.

The *Dobbs* dissent argued that the Court, by overruling *Roe* and *Casey*, invited negative public perception, thus undermining its own integrity.[7] Should the Court follow that reasoning to its logical end, it must base its holdings, at least in part, on anticipated public perception. Ironically, such a practice would actually erode institutional integrity—the Court might ultimately cease to be a court at all, instead becoming merely a third representative branch of the federal government.[8] The dissent correctly recognized the need for the public to perceive the Court's decisions as principled.[9] What it failed to confront is the fact that retaining precedent to promote perceptions of legitimacy is no more consistent with the Court's role than is discarding precedent without sufficient justification (and ignoring public outcry in the process).[10] In contrast, overruling erroneous precedent *despite* such negative perceptions is a principled, proper exercise of judicial power, so long as the Court grounds its decision in faithful analysis rather than the desired outcomes of the Justices themselves. The purpose of the judiciary is to interpret and apply the law;[11] it must remain independent to preserve the rule of law—unlike the executive and legislative branches, which the people are meant to directly control.[12]

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[7] *Id.* at 413–14 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

[8] *See* THE FEDERALIST NO. 78, at 355–57 (Alexander Hamilton) (Fall River Press 2017); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864 (1992) (plurality opinion) (quoting Mitchell v. W. T. Grant Co., 416 U.S. 600, 636 (1974) (Stewart, J., dissenting)), *overruled by Dobbs*, 597 U.S. 215.

[9] *See Dobbs*, 597 U.S. at 416–17 (Breyer, Sotomayor, & Kagan, JJ., dissenting); *accord Dobbs*, 597 U.S. at 290; *Casey*, 505 U.S. at 865–66.

[10] *Casey*, 505 U.S. at 963 (Rehnquist, C.J., concurring in part and dissenting in part) (quoting *Casey*, 505 U.S. at 867 (plurality opinion)) ("In assuming that the Court is perceived as 'surrendering to political pressure' when it overrules a controversial decision, the joint opinion . . . asserts that, in order to protect its legitimacy, the Court must refrain from overruling a controversial decision lest it be viewed as favoring those who oppose the decision. But a decision to adhere to prior precedent is subject to the same criticism, for in such a case one can easily argue that the Court is responding to those who have demonstrated in favor of the original decision." (emphasis omitted)).

[11] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

[12] *See* U.S. CONST. art. III, § 1 (establishing appointment for federal judges during good behavior); THE FEDERALIST NO. 78, at 356 (Alexander Hamilton) (Fall River Press 2017).

The principle of judicial independence may preclude following public opinion in response to concerns of integrity, but it does not invalidate the concerns themselves. The Court, an institution with the power of neither purse nor sword, draws much of its efficacy from its perceived legitimacy, both among the public and within the political branches.[13] Respect for the Court's decisions is critical for our entire system of government.[14] In light of increasing attacks on both the Supreme Court as an institution[15] and the Justices themselves,[16] it is not difficult to recognize the grave implications of poor public perception.[17] If the Court appears unprincipled, merely deciding cases based on the Justices' whims, onlookers may become eager to disregard Supreme Court holdings or modify the Court's structure to effect different outcomes.[18] Rather than creating an unsolvable dilemma, judicial independence provides the foundation for an approach that could allow the

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[13] THE FEDERALIST NO. 78, at 355–56 (Alexander Hamilton) (Fall River Press 2017).

[14] Miller v. Davis, 123 F. Supp. 3d 924, 937 (E.D. Ky. 2015) ("Our form of government will not survive unless we, as a society, agree to respect the U.S. Supreme Court's decisions, regardless of our personal opinions.").

[15] *See* Conor Friedersdorf, *Ignore the Histrionic Attacks on the Supreme Court*, THE ATLANTIC (Aug. 1, 2023), https://www.theatlantic.com/ideas/archive/2023/08/defense-supreme-court/674874/.

[16] *See, e.g.*, Maria Cramer & Jesus Jiménez, *Armed Man Traveled to Justice Kavanaugh's Home to Kill Him, Officials Say*, N.Y. TIMES (June 8, 2022), https://www.nytimes.com/2022/06/08/us/brett-kavanaugh-threat-arrest.html.

[17] *See generally* Raymond J. Lohier, Jr., et al., *Losing Faith: Why Public Trust in the Judiciary Matters*, 106 JUDICATURE 70 (2022) (discussing the recent decline in public trust in the Court from the perspectives of United States circuit court of appeals judges Raymond J. Lohier, Jr., Jeffrey S. Sutton, and Diane P. Wood).

[18] *See, e.g.*, Kermit Roosevelt III, *I Spent 7 Months Studying Supreme Court Reform. We Need to Pack the Court Now*, TIME (Dec. 10, 2021, 7:00 AM), https://time.com/6127193/supreme-court-reform-expansion/; Nick Robertson, *Democratic Senators Introduce Bill Establishing Supreme Court Term Limits*, THE HILL (Oct. 19, 2023, 3:16 PM), https://thehill.com/homenews/senate/4265176-democratic-senators-introduce-bill-establishing-supreme-court-term-limits/. These efforts to reform the judiciary implicitly contend that it is time to "call a spade a spade": courts are effectively just another political branch, the argument goes, so they should be treated and structured accordingly. *See* TURNPIKE TROUBADOURS, *Call A Spade a Spade*, *on* GOODBYE NORMAL STREET (Bossier City Records 2012).

Court to ameliorate integrity concerns by promoting a role distinct from its sister branches of government.

From the outset, this Note approaches the role of the judiciary as different from that of the legislative and executive branches. According to that view, the Court wields an independent judicial power, the purpose of which is to interpret the law.[19] Similarly, this Note assumes that, particularly in the constitutional context, the Court should execute that power by discerning and applying the fixed original meaning of the Constitution as understood by the American people who ratified it.[20] In making these assumptions, this Note does not seek to dismiss continuing disagreement about the Court's role and the methods it should employ in fulfilling that role. Debate on those topics ought to continue, and ideological differences will ensure that it does, even at the Court.[21] This Note, however, does not seek to resolve underlying

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[19] *See* U.S. CONST. art. III, § 1; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); *see also* VA. DECLARATION OF RIGHTS OF 1776, § 5 (providing that the legislative and executive powers should be separate from that of the judiciary); AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 208–11 (2012) (identifying five components of the Article III judicial power, including constitutional interpretation and exposition, implementation, adjudication, creation of precedent, and remediation).

[20] *See* ANTONIN SCALIA, THE ESSENTIAL SCALIA: ON THE CONSTITUTION, THE COURTS, AND THE RULE OF LAW 12 (Jeffrey S. Sutton & Edward Whelan, eds., 2020) (defining originalism).

[21] *See, e.g.*, Arnold H. Loewy, *A Tale of Two Justices (Scalia and Breyer)*, 43 TEX. TECH L. REV. 1203 (2011) (discussing the ideological differences between Justices Scalia and Breyer). Ideological differences like these frequently lead to division among the Justices. *See* Adam Feldman, *6–3 is the New SCOTUS 5–4*, EMPIRICAL SCOTUS (July 11, 2022), https://empiricalscotus.com/2022/07/11/new-scotus-5-4/ (observing the frequency of the 6–3 decision during the 2021–2022 term and the consistent divide along ideological lines). The current Court's division on the role of public perception in stare decisis can largely be traced along that ideological divide. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022). However, it is worth noting that ideological fractures among the Justices are not always clear-cut—nor do the Court's decisions always reflect them. *See* Adam Feldman, *Charting the Justices' Decisions Cutting Across Ideological Lines*, EMPIRICAL SCOTUS (April 1, 2024), https://empiricalscotus.com/2024/04/01/charting-the-justices-decisions-cutting-across-ideological-lines/. In the 2022–2023 term, for example, ideological splits continued but were less common than in the 2021–2022 term, even in some of the highest-profile decisions. Adam Feldman & Jake Truscott, *Another One Bites the Dust: End of 2022/2023 Supreme Court Term Statistics*, EMPIRICAL SCOTUS (June 30, 2023), https://empiricalscotus.com/2023/06/30/anot

questions about the nature of the American judiciary or its interpretive approach.[22] Rather, based on the prevailing constitutional understanding of the Court, it discusses how the Court's independent exercise of its power to overturn its prior decisions is appropriate for an institution of actual integrity. Further, this Note contends that, particularly after *Dobbs*, the Court cannot afford to ignore its perceived integrity entirely, though perception should not form the basis of judicial determinations.

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her-one-bites-2022/. Judicial actors like the Justices often resist political categories, despite efforts to characterize them as merely "conservative" or "liberal." John A. Tures, *Supreme Court Justices' Ideologies Don't Always Fit 'Liberal' and 'Conservative' Labels*, THE CONVERSATION (Sept. 29, 2023, 9:40 AM), https://theconversation.com/supreme-court-justices-ideologies-dont-always-fit-liberal-and-conservative-labels-210954. *But see* Gerald F. Seib, *How Much Politics in a Supreme Court Justice?*, WALL ST. J. (Oct. 1, 2018, 10:54 AM), https://www.wsj.com/articles/how-much-politics-in-a-supreme-court-justice-1538405660 ("[J]udges aren't quite as divorced from the messy world of politics as it might seem.").

[22] Defending a narrow view of the Court as an institution with a limited and distinct judicial purpose exceeds the scope of this Note, as does a defense of an originalist approach to constitutional interpretation. However, such assumptions are pragmatic in that they reflect the apparent view of the current Court, particularly in the stare decisis context. *See, e.g.*, *Dobbs*, 597 U.S. at 235 (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824)) ("Constitutional analysis must begin with 'the language of the instrument.'") (approaching the purported existence of the right to abortion in the Fourteenth Amendment from a typical originalist framework); *see also* discussion *infra* Section II.A.2. (discussing the Court's recent return to overruling erroneous constitutional precedent based primarily on error itself). Likewise, textualism and originalism are now considered fundamental by judges across the ideological spectrum. *See The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 62 (2010) (statement of Elena Kagan, Solicitor General of the United States) ("[W]e are all originalists."); Harvard Law School, *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes* 8:28, YOUTUBE, (Nov. 17, 2015), https://youtu.be/dpEtszFT0Tg ("I think we are all textualists now in a way that just was not remotely true when Justice Scalia joined the bench."). *Contra* West Virginia v. EPA, 597 U.S. 697, 779 (2022) (Kagan, J., dissenting) ("Some years ago, I remarked that 'we're all textualists now.' It seems I was wrong. The current Court is textualist only when being so suits it. When that method would frustrate broader goals, special canons . . . magically appear as get-out-of-text-free cards." (citation omitted)). Therefore, at least in the immediate future, the cases in which the tension between public perception and judicial independence will reappear are likely to be analyzed from a relatively originalist, error-focused perspective—regardless of those approaches' merits. For a more comprehensive defense of these underlying philosophies, the author commends to the reader ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012) and similar resources.

Part II of this Note will discuss the Supreme Court's general approach to stare decisis—from longstanding factors to more novel considerations—before introducing the concepts of judicial integrity and independence and explaining their relevance in the context of *Dobbs* and its own stare decisis analysis.[23] Part III will explore the rift between the *Dobbs* majority and dissenting opinions, examining the merits and shortcomings of each, and touch on relevant aspects of the concurring opinions of Chief Justice Roberts and Justice Kavanaugh.[24] Part IV will propose an approach to this division in which the Court supplements its own predominant view by embracing the need for perceived legitimacy and advocating for judicial independence as the source of the Court's integrity.[25] To understand the interaction between judicial independence and the dissent's integrity concerns, it is first necessary to examine how judicial integrity considerations fit into the Court's stare decisis framework.

II. PRECEDENT, PERCEPTION, AND AUTONOMY: THE UNDERLYING SCHEMATIC

The considerations of judicial integrity at play in *Dobbs* arose in the context of stare decisis, a longstanding doctrine governing the requirements that must exist for the Court to depart from one of its prior decisions. Several preliminaries will assist in understanding the relationship between stare decisis, judicial integrity, and judicial independence: first, an overview of stare decisis, including its development and its nature as a policy judgment; second, an exploration of judicial integrity and its roots in the American system; and third, a conception of judicial independence consistent with that of the Framers.

A. The Supreme Court's Stare Decisis Doctrine

The doctrine finds its common name in the Latin maxim, *stare decisis et non quieta movere*,[26] which means "to stand by the decided and not disturb

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[23] *See* discussion *infra* Section II.

[24] *See* discussion *infra* Section III.

[25] *See* discussion *infra* Section IV.

[26] Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1016 (2003).

the settled."[27] Stare decisis commands deference to precedent, essentially requiring the Court to either follow or distinguish the decisions of its predecessors on questions of law.[28] In the words of sitting Supreme Court Justice Neil M. Gorsuch, "Precedent is a way of accumulating and passing down the learning of past generations, a font of established wisdom richer than what can be found in any single judge or panel of judges."[29] Following past decisions as a default rule allows the judiciary to transcend eras with a breadth and efficiency it could not otherwise attain.[30] Adherence to precedent also furthers other valuable ends.[31] These ends include protecting the interests of those who have relied on a past decision, conserving litigation resources, "foster[ing] 'evenhanded' decisionmaking," "restrain[ing] judicial hubris," and promoting "*the actual and perceived integrity of the judicial process*."[32]

But when is it proper to overturn precedent? The broad, and perhaps obvious, consensus is that it is not always proper, but that a court's judgment may properly compel overruling precedent in some cases.[33] The Court has said that it should follow its precedent unless convincing reasons indicate

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[27] This phrasing is the author's translation. *See also* Barrett, *supra* note 26, at 1016 (quoting James C. Rehnquist, *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)).

[28] NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 215 (2019). It is important to distinguish *horizontal* stare decisis, which describes the weight of the United States Supreme Court's own precedent in its later decisions, from *vertical* stare decisis, which refers to the binding effect of precedent on lower Courts. Ramos v. Louisiana, 140 S. Ct. 1390, 1416 n.84 (2020) (Kavanaugh, J., concurring). The latter is an implied requirement of the Constitution's prescription for a single Supreme Court over the judiciary. *Id.*; *see* U.S. CONST. art. III, § 1. This Note's discussion of stare decisis deals with horizontal stare decisis and some implications of the Court's approach to overturning its own precedent.

[29] GORSUCH, *supra* note 28, at 217.

[30] *Id.*

[31] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 263–64 (2022).

[32] *Id.* (emphasis added) (citing Payne v. Tennessee, 501 U.S. 808, 827 (1991)). Stare decisis counsels against the "hubris" that may cause a judge to prefer his reasoning over that of his predecessors merely because it is his own, not because the prior decision was particularly wrong. *See id.* at 264.

[33] GORSUCH, *supra* note 28, at 211; *see also Ramos*, 140 S. Ct. at 1412 (Kavanaugh, J., concurring).

that doing so would lead the Court on a path to inevitable error.[34] Blackstone described overruling precedent as proper only when the prior decision is "manifestly absurd or unjust."[35] The value of the ends that stare decisis serves means that, in some cases, it may be more important to allow law to remain settled than to ensure that it is correct.[36] It might matter more, for example, that everyone drive on the same side of the road than which side that happens to be.[37] But despite the multitude of important objectives that the doctrine furthers, it is not an "inexorable command."[38] Indeed, when it comes to constitutional interpretation, stare decisis is less compelling than in any other type of case.[39] In such cases, the Court frequently emphasizes the importance of correctly settling the law.[40] This increased willingness to overturn constitutional precedent is due to both the Constitution's crucial role as the "great charter of our liberties"[41] and the difficulty of correcting an erroneous constitutional decision by other means.[42]

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[34] Citizens United v. FEC, 558 U.S. 310, 362 (2010).

[35] 1 WILLIAM BLACKSTONE, COMMENTARIES *70. This language represents the origins of overruling precedents that are considered "demonstrably erroneous" or "manifestly erroneous." *See* United States v. Gaudin, 515 U.S. 506, 521 (1995); Randy J. Kozel, Stare Decisis *as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 418 (2010) (quoting *Gaudin*, 515 U.S. at 521) (citing BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 158 (1921)); *see also* discussion *infra* Section II.A.1.a.

[36] Kimble v. Marvel Ent., LLC, 576 U.S. 446, 455 (2015) (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)).

[37] *See* GORSUCH, *supra* note 28, at 218.

[38] *Burnet*, 285 U.S. at 405 (Brandeis, J., dissenting).

[39] Agostini v. Felton, 521 U.S. 203, 235 (1997). *But see* Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 430 (1987–1988) ("The observation that it is hard to amend the Constitution does not imply that judges should revise their work more freely.").

[40] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 264 (2022) (quoting *Kimble*, 576 U.S. at 455).

[41] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 326 (1816).

[42] *See Dobbs*, 597 U.S. at 264. The rationale for weakened stare decisis in the constitutional context rests on the difficulty of the process for changing the Constitution. *See id.* ("[W]hen one of our constitutional decisions goes astray, the country is usually stuck with the bad decision unless we correct our own mistake. An erroneous constitutional decision can be fixed by amending the Constitution, but our Constitution is notoriously hard to amend."). Whereas

But whether the Court agrees with a prior decision is usually just the first step in its analysis.[43] In general, stare decisis has discouraged modern courts from overturning precedent based upon error alone, instead requiring a "special justification."[44] The Court has emphasized that overruling based solely on a different judgment or opinion than the preceding Justices "would run counter to the view repeated in [its] cases, that a decision to overrule should rest on some *special reason over and above the belief that a prior case was wrongly decided*."[45] When determining whether to overturn precedent, the Court has frequently considered factors beyond the decision's wrongfulness to establish the existence of a special justification.[46]

Despite—or perhaps because of—the wealth of language describing the Court's factor analysis, application of stare decisis has remained uncertain.[47] This approach is malleable, and the Court has presented the considerations somewhat inconsistently in its past decisions.[48] Outside analyses of the Court's doctrine are similarly diverse in their approaches to grouping the

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decisions interpreting statutes, for example, can be relatively easily rectified by Congress, the hurdles are quite high to remedy a constitutional interpretation via extrajudicial means. *See id.*; U.S. CONST. art. V.

[43] *Dobbs*, 597 U.S. at 390 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

[44] Barrett, *supra* note 26, at 1018–19; Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864 (1992), *overruled by Dobbs*, 597 U.S. 215.

[45] *Casey*, 505 U.S. at 864 (emphasis added).

[46] Barrett, *supra* note 26, at 1019.

[47] GORSUCH, *supra* note 28, at 215. This extant indeterminacy in the doctrine, though perhaps necessary, has left the Court longing for "something to hold on to" when faced with the prospect of overruling its precedent. TURNPIKE TROUBADOURS, *Something to Hold On To*, *on* A LONG WAY FROM YOUR HEART (Bossier City Records 2017).

[48] *See, e.g.*, *Casey*, 505 U.S. at 854–55 (identifying as factors workability, reliance interests, legal developments, and factual changes); Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2478–79 (2018) (discussing quality of reasoning, workability, consistency with other related decisions, post-decision developments, and reliance interests); Ramos v. Louisiana, 140 S. Ct. 1390, 1414–15 (2020) (Kavanaugh, J., concurring) (identifying five factors—quality of reasoning, consistency with previous or subsequent decisions, changes in fact, changes in law, and workability—within three broad categories: egregious error, negative jurisprudential or real-world consequences, and reliance interests).

factors themselves.[49] For the sake of simplicity, this Note will adopt the *Dobbs* majority's presentation of five traditional stare decisis factors before focusing on "extraneous" considerations, of which judicial integrity is the most important.[50]

1. Traditional Stare Decisis Factors

In *Dobbs*, the Court outlined five factors that favored "overruling *Roe* 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."[51] A brief description of each factor is useful in contextualizing the dissent's concerns that this approach poses a threat to judicial integrity.

a. Nature of the error

According to the *Dobbs* majority, it is always significant when the Court misinterprets the Constitution, but certain misinterpretations are especially important to rectify.[52] Some decisions, such as *Plessy v. Ferguson*, were "egregiously wrong" when decided.[53] Such cases may betray the Constitution's established protections[54] or usurp moral inquiries that belong

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[49] *See, e.g.*, 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, 1199–200 (2008) (identifying as factors workability, reliance, remnant of abandoned doctrine, changed facts, and judicial integrity); Kozel, *supra* note 35 (discussing many factors and arguing that most of those factors are best understood as proxies for weighing reliance interests); Barrett, *supra* note 26, at 1019 (identifying as factors error, workability, impact on public perception, and reliance).

[50] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 291 (2022) (characterizing public reaction to the Court's decisions as an "extraneous" influence). By approaching stare decisis as the *Dobbs* Court did, this Note seeks to present the doctrine as it is likely to be treated by the Court in subsequent decisions. It is in these future revisitations of precedent that the importance of perceived legitimacy will again rear its head.

[51] *Id.* at 268.

[52] *Id.*

[53] *Id.* (quoting *Ramos*, 140 S. Ct. at 1414 (Kavanaugh, J., concurring)).

[54] *See* Plessy v. Ferguson, 163 U.S. 537, 562 (1896) (Harlan, J., dissenting) ("The arbitrary separation of citizens, on the basis of race . . . is a badge of servitude *wholly inconsistent with*

to the American people.[55] Others may not necessarily be egregiously wrong from the time of decision, but are later shown to be so due to changes in the law or factual developments.[56] In *Dobbs*, the Court considered *Roe* to have been egregiously wrong, describing it as "on a collision course with the Constitution from the day it was decided."[57] Such language emphasizes that, in any case, overruling requires more than a so-called "garden-variety error" or a personal disagreement with the prior decision.[58]

At times, courts have characterized egregiously wrong precedents as "demonstrably erroneous" or "manifestly erroneous."[59] These cases involve errors that run deeper than simple shifts in the opinion of a majority of Justices:

> The doctrine of stare decisis would indeed be no doctrine at all if courts were free to overrule a past decision *simply because they would have reached a different decision as an original matter*. But when a court says that a past decision is demonstrably erroneous, it is saying not only that it would have reached a different decision . . . but also that the [deciding] court went *beyond the range of indeterminacy* created by the relevant source of law.[60]

A decision may be demonstrably erroneous where the Court substitutes its own judgment or opinion for the authority of the law.[61] Behind this characterization is the rationale that precedents exceeding the discretion allowed by the law—especially when that law is the Constitution—effect

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the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds." (emphasis added)), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

55 *See Dobbs*, 597 U.S. at 268–69.

56 Ramos v. Louisiana, 140 S. Ct. 1390, 1415 (2020) (Kavanaugh, J., concurring).

57 *Dobbs*, 597 U.S. at 268.

58 *Ramos*, 140 S. Ct. at 1414 (Kavanaugh, J., concurring).

59 Kozel, *supra* note 35, at 418 & n.29; Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 8 (2008).

60 Nelson, *supra* note 59, at 8 (emphasis added).

61 *See id.*; *Dobbs*, 597 U.S. at 268–69.

policy choices the people did not adopt.[62] The *Dobbs* majority, without characterizing *Roe* as demonstrably erroneous, did recognize it as purporting to answer a profound question of morality that belonged to the people under the Constitution.[63] Thus, whether egregiously wrong or demonstrably erroneous, a past decision must, at minimum, involve an error that surpasses a mere difference of opinion.

b. Quality of the reasoning

The quality of the Court's reasoning in a prior decision must also be considered, according to the stare decisis framework applied in *Dobbs*.[64] A constitutional precedent's rationale may be sufficiently poor to weigh against retaining the decision when it lacks grounding in text, history, or other precedent.[65] Additionally, the force of stare decisis is diminished when neither party defends a precedent's reasoning.[66] The reasoning factor has been subject to sharp criticism; as discussed, mere disagreement with precedent is not grounds for overruling it, and "restating a merits argument with additional vigor does not give it extra weight in the *stare decisis* calculus."[67] Even this criticism, however, was accompanied by the acknowledgment that the Court would have adequate grounds for revisiting a prior decision that was irreconcilable with the Court's doctrine as a whole.[68] Like error, a precedent's reasoning cannot simply be poor; it must be

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[62] *Dobbs*, 597 U.S. at 269 (quoting Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 787 (1986) (White, J., dissenting) ("[D]ecisions that find in the Constitution principles or values that cannot fairly be read into that document usurp the people's authority, for such decisions represent choices that the people have never made and that they cannot disavow through corrective legislation.")).

[63] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 268–69 (2022). In his concurrence, Justice Thomas did describe all substantive due process decisions (including *Roe*) as "demonstrably erroneous." *Id.* at 332 (Thomas, J., concurring) ("[A]ny substantive due process decision is 'demonstrably erroneous[]' . . . .").

[64] *Id.* at 269.

[65] *See id.* at 270.

[66] Citizens United v. FEC, 558 U.S. 310, 363 (2010).

[67] *Id.* at 409 (Stevens, J., dissenting).

[68] *Id.* (Stevens, J., dissenting).

exceptionally weak or incompatible with the Court's doctrine to justify departure from the prior decision.[69]

In *Dobbs*, the Court described *Roe* as not only being erroneous, but also as extraordinarily poorly reasoned because it lacked a historical, textual, or precedential foundation.[70] These flaws had been recognized by numerous commentators, who were a swift and consistent source of criticism from the moment of *Roe*'s decision—even those who supported its policy outcome.[71] The Court also observed that even *Casey* made a point of reaffirming *Roe* without endorsing the majority of its rationale.[72] Instead, *Casey* employed its own poor reasoning by overlooking *Roe*'s logical shortcomings, inventing a troublesome new test, and applying a "novel version of the doctrine of *stare decisis*."[73] The Court may struggle to clarify precisely what makes prior reasoning sufficiently flawed to merit revisitation, but the quality of a precedent's reasoning remains a significant consideration in determining whether a precedent should be overruled.[74]

c. Workability of the rule

The next factor involves considering "whether the rule [a precedent] imposes is workable—that is, whether it can be understood and applied in a consistent manner."[75] This requires that the rule be useful and practically applicable by demanding only such determinations as a court can effectively

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[69] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 270 (2022) ("*Roe* . . . was more than just wrong. It stood on *exceptionally weak* grounds." (emphasis added)).

[70] *Id.*

[71] *See id.* at 278 (collecting criticisms of *Roe* from multiple well-known scholars, including John Hart Ely, former Solicitor General Archibald Cox, Laurence Tribe, Mark Tushnet, and Akhil Reed Amar).

[72] *Id.* at 279.

[73] *Id.* at 280; *see also* Rena M. Lindevaldsen, Dobbs v. Jackson Women's Health Organization*: The Court's Opportunity to Overrule* Roe*, or, at Least, Correct the Evidentiary Catch-22 Created by* Roe *and* Casey, 16 LIBERTY U. L. REV. 415, 424–25 (2022).

[74] Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2479 (2018).

[75] *Dobbs*, 597 at 280–81.

make.[76] Unworkable rules may resist precise delineation, involve excessive judgment, and be malleable, unprincipled, or amorphous.[77] Typically, they fail to guide judicial discretion with any apparent standard.[78] In addition to judicial utility, the ease with which attorneys or other stakeholders can apply a rule may also impact the rule's workability.[79] At bottom, the workability inquiry measures how effectively a precedential rule promotes judicial consistency, clarity, and efficiency.[80]

The Court in *Dobbs* considered the undue burden test that remained after *Casey* and determined that it was unworkable.[81] The supposed standard required only distinguishing between "due" and "undue," an exercise the *Dobbs* Court called "inherently standardless."[82] Similarly, the subrules that *Casey* offered in an attempt to give the test definition were themselves hazy and led to confusion in their application by the Supreme Court and the circuit courts of appeals.[83] Continued application of the undue burden standard was counter to the principles of consistency that stare decisis is designed to promote.[84] Thus, *Casey*—and, by extension, *Roe*—provided a rule that was unworkable, which weighed in favor of overruling both precedents.[85]

d. Disruptive effect on other areas of the law

When a precedent's effect is to distort other areas of law, even unrelated ones, overruling is more likely to be proper.[86] A decision that causes

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[76] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–55 (1992), *overruled by Dobbs*, 597 U.S. 215.

[77] *See Janus*, 138 S. Ct. at 2481.

[78] Paulsen, *supra* note 49, at 1173 (illustrating similarities between the workability inquiry and the political question doctrine).

[79] Kozel, *supra* note 35, at 418.

[80] Paulsen, *supra* note 49, at 1175.

[81] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 281, 286 (2022).

[82] *Id.* at 281 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 992 (1992) (Scalia, J., concurring in part and dissenting in part), *overruled by Dobbs*, 597 U.S. 215).

[83] *Id.* at 281–86.

[84] *See id.* at 286.

[85] *Id.*

[86] *See id.*

confusion in different legal areas lacks coherence with other cases, both prior and subsequent.[87] This determination, much like the workability analysis, speaks to negative jurisprudential consequences that may merit overruling.[88]

In *Dobbs*, the Court focused on the uniquely disruptive impact of *Roe* and *Casey* on many doctrines when those concepts arose in a case dealing with state abortion regulations.[89] The Court listed numerous other doctrines that those abortion precedents had muddled, including facial constitutional challenges, third-party standing, res judicata, severability, statutory interpretation, and First Amendment doctrines.[90] The incompatibility of *Roe* and *Casey* with so many longstanding rules in other fields indicated that those two decisions were not part of a "'principled and intelligible' development of the law."[91] Instead, they were disruptions of such development, ripe to be overruled.[92]

e. Absence of concrete reliance interests

The final traditional factor applied by the *Dobbs* majority examines whether individuals or groups have relied on the prior decision in a concrete way.[93] Reliance interests can, in some cases, strongly compel adherence to precedent even when the Court believes that precedent to be wrong.[94] When considering reliance, the focus is on the legitimate expectations of third parties that have reasonably and concretely relied on the precedent.[95] The quintessential reliance interest arises from commercial investments, where

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[87] *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring) (identifying "consistency and coherence" with other decisions as a factor for stare decisis analysis).

[88] *Id.* at 1415 (Kavanaugh, J., concurring).

[89] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 286 (2022).

[90] *Id.* at 286–87.

[91] *Id.* at 287 (quoting June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2152 (2023) (Thomas, J., dissenting)).

[92] *See id.*

[93] *Id.* at 268.

[94] Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2484 (2018).

[95] Ramos v. Louisiana, 140 S. Ct. 1390, 1415 (2020) (Kavanaugh, J., concurring); Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 287–88 (2022).

parties must be able to plan in advance with certainty and clarity.[96] To deter the Court from overruling precedent, such interests usually must be vested and backed by substantial investment;[97] typically, they involve property or contract cases.[98]

The *Dobbs* majority criticized *Casey*'s treatment of the reliance inquiry because the *Casey* Court expanded its analysis to examine reliance more abstractly.[99] While the Court in *Casey* could not identify any traditional, concrete reliance interests, it argued that individuals had organized their relationships and developed their own identities based on *Roe*'s purported abortion right.[100] Conceding that neither the significance of such a reliance interest in *Roe* nor the cost of overruling *Roe* could be measured with certainty, the *Casey* Court nonetheless viewed that nebulous form of reliance as compelling stare decisis.[101] The *Dobbs* Court, on the other hand, declined to accept this "intangible" approach to reliance, instead recognizing that the judiciary is "ill-equipped to assess 'generalized assertions about the national psyche.'"[102] Conversely, it said, courts can effectively evaluate concrete, empirical reliance interests like the commercial investments that have traditionally propped up bad precedent.[103]

2. Recent "Departures" from the Traditional Framework

Beyond the basic factors of its stare decisis analysis (and the variation in how the Court has described them), the focus of the analysis has not

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[96] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855–56 (1992), *overruled by Dobbs*, 597 U.S. 215; *see* Payne v. Tennessee, 501 U.S. 808, 828 (1991); Citizens United v. FEC, 558 U.S. 310, 365 (2010).

[97] Paulsen, *supra* note 49, at 1178.

[98] *Payne*, 501 U.S. at 828; *Citizens United*, 558 U.S. at 365; *see also* Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 381 (1977) ("Substantive rules governing the law of real property are peculiarly subject to the principle of stare decisis."); United States v. Title Ins. Co., 265 U.S. 472, 486–87 (1924) (noting the importance of stability in the realm of real property and the significance of public reliance on property laws).

[99] *Dobbs*, 597 U.S. at 288.

[100] *Casey*, 505 U.S. at 856.

[101] *Id.*

[102] *Dobbs*, 597 U.S. at 288 (*Casey*, 505 U.S. at 957 (Rehnquist, C.J., concurring in part and dissenting in part)).

[103] *Id.*

remained constant. Modern commentators have observed the Court's recent trend toward overruling based primarily on error, rather than requiring a special justification beyond error or poor reasoning.[104] While this has been criticized as a departure from traditional stare decisis demands, there is also evidence that the shift is better characterized as a *return* to historical understandings of the doctrine.[105] Whether the Court's changing focus indicates evolution or course correction, *Dobbs* represents another instance of overruling constitutional precedent based primarily on its original merit, rather than on changed law, changed facts, or pragmatic considerations like reliance and workability.

a. Is a "special justification" required?

In light of the apparent shift in the Court's focus, it is questionable whether modern stare decisis really demands a special justification beyond the Court's determination that the previous constitutional decision was wrong or irrational. The rule against overruling precedent without a special justification is itself a relatively new aspect of the Court's approach to stare decisis.[106] In 1944, Justice Stanley Reed observed that the Court had never hesitated to depart from prior erroneous decisions, especially constitutional ones.[107] The earliest identification of the need to locate a special justification

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[104] *See, e.g.*, Michael Gentithes, Janus-*Faced Judging: How the Supreme Court is Radically Weakening Stare Decisis*, 62 WM. & MARY L. REV. 83 (2020); Emery G. Lee III, *Overruling Rhetoric: The Court's New Approach to Stare Decisis in Constitutional Cases*, 33 U. TOL. L. REV. 581, 582 (2002).

[105] *See* Lee, *supra* note 104, at 582 (observing that the special justification requirement is not consistent with the historical approach to stare decisis); *see* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–07 n.2 (1932) (collecting numerous cases overruling constitutional precedent on the basis of error); Smith v. Allwright, 321 U.S. 649, 665 n.10 (1944) (collecting fourteen cases overruling constitutional precedent between *Burnet* and *Smith*).

[106] Lee, *supra* note 104, at 582.

[107] *Allwright*, 321 U.S. at 665. As the *Dobbs* majority implicitly pointed out, requiring a special justification can lead to judicial conclusions that offend common notions of justice. *See Dobbs*, 597 U.S. at 293 ("[T]he dissent claims that *Brown v. Board of Education* and other landmark cases overruling prior precedents 'responded to changed law and to changed facts and attitudes that had taken hold throughout society.' The unmistakable implication of this argument is that only the passage of time and new developments justified those

for overruling a particular precedent did not appear until 1984 in *Arizona v. Rumsey*.[108] There, while recognizing the weaker force of stare decisis in constitutional decisions, the Court declined to overrule a recent decision without a reason beyond error.[109] The majority opinion, written by Justice O'Connor, relied on two cases in setting this high bar for overruling, neither of which employed the same language.[110] Following *Rumsey*, subsequent opinions treated this conception of a special justification as requiring more than error, culminating with *Casey*'s deep deference to *Roe*.[111] However, the Court's apparent doctrine over the past few decades has shifted away from

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decisions. . . . Does the dissent really maintain that overruling *Plessy* was not justified until the country had experienced more than a half century of state-sanctioned segregation and generations of Black school children had suffered all its effects?" (citations omitted)). Such complications as those accompanying the special justification requirement illustrate that it is indeed "an awkward occupation disregarding right from wrong." TURNPIKE TROUBADOURS, *Down on Washington*, *on* DIAMONDS & GASOLINE (Bossier City Records 2009).

[108] Arizona v. Rumsey, 467 U.S. 203, 212 (1984); Lee, *supra* note 104, at 582.

[109] *Rumsey*, 467 U.S. at 212.

[110] *Id.*; *see* Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965) (declining to retain a rule based on stare decisis when it was unworkable); Smith v. Allwright, 321 U.S. 649, 665 (1944) (emphasizing the importance of correcting erroneous constitutional precedents though continuity of decision be desirable).

[111] *See, e.g.,* Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989) ("[W]e have held that 'any departure from [stare decisis] demands *special justification*.'" (emphasis added) (quoting *Rumsey*, 467 U.S. at 212)); Payne v. Tennessee, 501 U.S. 808, 842 (1991) (Souter, J., concurring) ("[E]ven in constitutional cases, [stare decisis] carries such persuasive force that we have always required a departure from precedent to be supported by some '*special justification*.'" (emphasis added) (quoting *Rumsey*, 467 U.S. at 212)); *Payne*, 501 U.S. at 849 (Marshall, J., dissenting) ("[T]his Court has never departed from precedent without '*special justification*.'" (emphasis added) (quoting *Rumsey*, 467 U.S. at 212)); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864 (1992) ("To overrule prior law for no other reason than [a present doctrinal disposition to come out differently from the deciding Court] would run counter to the view repeated in our cases, that a decision to overrule should rest on some *special* [*justification*] over and above the belief that a prior case was wrongly decided." (emphasis added) (first citing Mitchell v. W.T. Grant Co., 416 U.S. 600, 636 (1974) (Stewart, J., dissenting); and then citing Mapp v. Ohio, 367 U.S. 643, 677 (1961) (Harlan, J., dissenting))); *see also* Gentithes, *supra* note 104, at 97 ("*Casey* is, in a sense, the acme of the strong stare decisis tradition; it created a formal list of the '*special justifications*' to which *Rumsey* had only alluded." (emphasis added)).

that approach toward an increased willingness to overrule based on error alone.

b. Relying on wrongness—shifting emphases

Of late, the Court has recalibrated its stare decisis analysis to emphasize the wrongfulness or weak reasoning of constitutional decisions in determining when to overturn them.[112] Whether this represents a departure from the requirement of a special justification or a return to the Court's traditional framework, it is a noteworthy trend in stare decisis jurisprudence. The level of deference the Court affords to constitutional precedent has important implications for its perceived legitimacy; an increased readiness to depart from precedent makes the Court likely to face more accusations of unprincipled adjudication.

Payne v. Tennessee marked a turning point for the Court's treatment of stare decisis.[113] The majority, in an opinion written by Chief Justice Rehnquist, overruled two constitutional precedents without reference to any special justification.[114] Despite calls for a reason beyond error from the separate opinions of Justices Souter and Marshall, the majority did not frame its decision in such terms.[115] Instead, it overruled both precedents based on

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[112] *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 262–93 (2022); Ramos v. Louisiana, 140 S. Ct. 1390, 1405 (2020); Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2478–86 (2018); Citizens United v. FEC, 558 U.S. 310, 362–63 (2010); *Payne*, 501 U.S. at 827–30 (majority opinion). *But see* Arizona v. Gant, 556 U.S. 332, 358 (2009) (Alito, J., dissenting) ("I recognize that stare decisis is not an 'inexorable command,' and applies less rigidly in constitutional cases. But the Court has said that *a constitutional precedent should be followed unless there is a 'special justification' for its abandonment*." (emphasis added) (citations omitted) (quoting *Payne*, 501 U.S. at 828; Dickerson v. United States, 530 U.S. 428, 443 (2000)) (citing Glidden Co. v. Zdanok, 370 U.S. 530, 543 (1962) (plurality opinion))). Justice Alito's use of the "special justification" language appears to contradict his majority opinion in *Dobbs* to some extent. *Compare Gant*, 556 U.S. at 358–64 (Alito, J., dissenting), *with Dobbs*, 597 U.S. at 262–93. Importantly, however, Alito's inclusion of "bad reasoning" as potential grounds for overruling appears to be a precursor to his treatment of error and poor reasoning as sufficient justifications for overruling in *Janus* and *Dobbs*. *See Gant*, 556 U.S. at 358–64; *Janus*, 138 S. Ct. at 2478–86; *Dobbs*, 597 U.S. at 262–93.

[113] Lee, *supra* note 104, at 603.

[114] *Id.* at 600; *Payne*, 501 U.S. at 827–30.

[115] *Payne*, 501 U.S. at 842 (Souter, J., concurring); *id.* at 849 (Marshall, J., dissenting).

those cases having been narrowly decided amidst passionate debate among the Justices, questioned after decision, and inconsistently applied by lower courts.[116] That reasoning could have supported an argument that a special justification was present in that the precedential rules were unworkable—an argument made by Justice Souter in his concurring opinion—but workability was only a small part of the majority opinion's broader focus on the original merit of the prior decisions themselves.[117] The Chief Justice's omission of that argument suggests that the majority did not consider a special justification a true requirement of stare decisis.[118] Likewise, *Payne*'s apparent declaration that bad reasoning provides ample grounds for overruling paved the way for doing away with other decisions based on their error and poor reasoning.[119]

Since *Payne*, the Court has continued to treat error as a sufficient justification for overruling precedent, including in *Citizens United v. Federal Election Commission* and *Janus v. American Federation of State, County, and Municipal Employees, Council 31*.[120] In *Citizens United*, the Court again overruled precedent without declaring the need for a special justification, instead highlighting the poor reasoning of the prior decision.[121] This focus on precedential error, especially flawed reasoning, has been further perpetuated by *Janus* and *Dobbs*, among other cases.

Janus, decided in 2019, epitomizes what can be characterized as an approach in which erroneous constitutional decisions receive less weight.[122] There, the majority overruled *Abood v. Detroit Board of Education*, emphasizing that decision's poor reasoning and suggesting that a precedent's reasoning is the leading consideration when the Court contemplates overruling.[123] Moreover, *Janus* presented stare decisis as significantly less

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116 *Id.* at 828–30 (majority opinion).

117 *Id.*; *id.* at 842–43 (Souter, J., concurring); Lee, *supra* note 104, at 601.

118 *Payne*, 501 U.S. at 828–30 (majority opinion); Lee, *supra* note 104, at 601, 603.

119 *Payne*, 501 U.S. at 827 (quoting Smith v. Allwright, 321 U.S. 649, 665 (1944)); Gentithes, *supra* note 104, at 96.

120 Citizens United v. FEC, 558 U.S. 310 (2010); Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018).

121 *Citizens United*, 558 U.S. at 362–65; Gentithes, *supra* note 104, at 101.

122 Gentithes, *supra* note 104, at 87, 101–02.

123 *Janus*, 138 S. Ct. at 2478–79; Gentithes, *supra* note 104, at 101–03.

compulsory than other opinions have, stating only that "strong grounds" are necessary to depart from precedent.[124] The primacy of *Abood*'s weak reasoning in Justice Alito's discussion of each stare decisis factor indicates the diminished force of the once-prevalent special justification requirement.[125]

3. Further Departure—The *Dobbs* Treatment of Stare Decisis

Dobbs followed this trend of substance-focused stare decisis, emphasizing the error and poor reasoning of *Roe* and *Casey* while remaining silent as to the need for a further special justification.[126] The first two factors the Court addressed—the nature of *Roe* and *Casey*'s error and the quality of their reasoning—are direct assessments of the correctness of those decisions.[127] As he had in his *Janus* majority opinion, Justice Alito placed *Roe* and *Casey*'s poor reasoning at the forefront of his stare decisis analysis, devoting more attention to that factor than any other.[128] Although *Dobbs* proceeded to identify further workability concerns with *Roe* and *Casey*, criticize their negative effect on other areas of law, and dismiss any reliance concerns as uncertain and intangible, it did not treat any of those factors as necessary to its conclusion.[129] Rather, *Dobbs*'s stare decisis analysis points to the same philosophy contemplated in *Payne*, *Citizens United*, and *Janus*: a seriously wrong or poorly reasoned constitutional decision may be eliminated on that basis alone, whether or not additional grounds are present.[130]

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

125 Gentithes, *supra* note 104, at 102–03; *see Janus*, 138 S. Ct. at 2478–86.

126 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 262–93 (2022).

127 *Id.* at 268–69.

128 *Id.* at 269–80.

129 *Id.* at 280–89; *see* discussion *supra* Sections II.A.1.c.–e.

130 *See Dobbs*, 597 U.S. at 264. At the time of writing, *Dobbs* continues to stand as the Court's most recent decision with extensive discussion of the proper approach to revisiting precedent, although the Justices had opportunities to overrule precedent again in the 2022 term. *See, e.g.*, Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181 (2023) (reexamining race-based university admissions policies under the Equal Protection Clause); Groff v. DeJoy, 600 U.S. 447 (2023) (reconsidering religious accommodations under Title VII of the Civil Rights Act of 1964). Time will tell how the Court chooses to treat the special justification in the future.

4. The Doctrine's Nature—A Prudential Policy

Finally, before discussing judicial integrity in the stare decisis context, it is important to identify the nature of the stare decisis doctrine itself. Some commentators have argued that it inheres in the judiciary's Article III power.[131] Without rejecting the opposing position, this Note treats stare decisis as a doctrine of pragmatism, not as a constitutional requirement.[132] This distinction impacts the role of both integrity and independence. If stare decisis is a policy for the Court to follow on a prudential basis, it is more difficult for the Justices to undermine institutional integrity or to exceed their independence by declining to follow it.[133] Further, practical considerations that are not required by the Constitution weigh weakly in favor of adhering to prior decisions that the Court finds inconsistent with constitutionally

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[131] *See, e.g.*, Lee J. Strang, *An Originalist Theory of Precedent*, 2010 BYU L. REV. 1729, 1752–55 (2010); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 754 (1988); GORSUCH, *supra* note 28, at 215–16 (acknowledging the Constitution's silence on stare decisis but suggesting that "some degree of respect for precedent may be required for federal courts to exercise the 'judicial Power' endowed by Article III" and that "the Supreme Court's occasional references to stare decisis as a 'judicial policy' rather than an 'inexorable command' should be read as suggesting not that the doctrine lacks constitutional provenance but that the doctrine doesn't demand obedience to precedent without exception" (emphasis omitted)); Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 1997 (1994) ("[T]he precept that like cases should be treated alike—[is] rooted . . . in Article III's invocation of the 'judicial Power.'").

[132] That stare decisis may not be constitutionally *required* does not mean that it lacks roots in the Constitution. Justice Gorsuch has observed that adherence to precedent was contemplated by the framers, according to Blackstone, Hamilton, and Justice Story. GORSUCH, *supra* note 28, at 216. An in-depth analysis of whether stare decisis is constitutionally required or merely a discretionary policy is beyond the scope of this Note. By characterizing the doctrine as a judicial policy, this Note seeks only to clarify that the Court's precedent is not conclusively binding against the Court itself, a position consistent with the Court's own language on the subject. *See* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–07 (1932) (Brandeis, J., dissenting); Hertz v. Woodman, 218 U.S. 205, 212 (1910) ("The rule of stare decisis, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court . . . .").

[133] In other words, it's harder to criticize the Court for exercising discretion in its approach to stare decisis if that doctrine is *inherently discretionary* rather than a strict constitutional requirement.

mandated principles that the Court is duty bound to elucidate and apply.[134] Conversely, if stare decisis were part and parcel of the Article III power along with the Court's interpretive and adjudicative functions,[135] overruling precedent would be much more difficult to justify and would impose stricter limits on the Court's freedom to change course.

For several reasons, stare decisis is best treated as judicial policy, rather than an inherent part of the Article III judicial power.[136] First, as Justice Gorsuch has noted, Article III itself does not speak to the weight the Court should afford to its precedent, requiring no explicit deference to prior decisions.[137] Of course, the Constitution is facially silent as to many subjects implicit in its provisions.[138] Deducing that stare decisis is a requirement of the constitutional judicial power, however, would be inconsistent with the scope of that power. Certainly, the Court's decisions bind the "inferior courts" established by Congress.[139] But to treat the Court's decisions as conclusively binding on its subsequent members would be to consider the

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[134] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[135] *See id.*

[136] U.S. CONST. art. III, § 1; *Hertz*, 218 U.S. at 212; Paulsen, *supra* note 49, at 1169–70. *See also* Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43 (2001) (asserting that stare decisis did not inhere in the judicial power as it was understood at the time of the Founding). *But see* Thomas Healy, *Stare Decisis and the Constitution: Four Questions and Answers*, 83 NOTRE DAME L. REV. 1173, 1182–83 (2008) ("One might also argue that stare decisis is essential to the legitimacy of the courts and is therefore a de facto constitutional requirement.").

[137] U.S. CONST. art. III; GORSUCH, *supra* note 28, at 215; Paulsen, *supra* note 49, at 1169.

[138] For example, the entire doctrine of substantive due process rests on the idea that certain fundamental rights may exist which, despite being facially absent from the Constitution, are nonetheless within its contemplation. *See* Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (first citing Moore v. East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion); then citing Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); and then citing Palko v. Connecticut, 302 U.S. 319, 325–26 (1937)) ("[W]e have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"); *see also* U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.") (indicating that the scope of the Constitution is, in some cases, at least incidentally broader than its express provisions).

[139] U.S. CONST. art. III, § 1.

Article III power as more limited for successive Justices than for their predecessors; merely by deciding an issue, the Court would impair its future ability to judge the same issue.[140] Unless the judicial power is less today than it was in 1789, stare decisis cannot prevent the Court from overruling a previous decision merely because it previously decided that case.[141] Therefore, the doctrine should be treated as a judicial policy, a characterization consistent with the Court's own language.[142]

5. "Extraneous Influences"—Judicial Integrity Considerations

Beyond the traditional stare decisis factors, the *Dobbs* majority acknowledged that other concerns may influence the Court's stare decisis analysis: namely, considerations of judicial integrity.[143] *Casey* appealed to the public perception that might result from overturning *Roe*: a view of the Court as a political institution seeking to intrude on a controversial social issue.[144] This, the *Casey* Court said, would impair the judiciary's ability to function because, instead of the power to incentivize behavior with spending or coerce it by force, the judiciary depends on its perceived legitimacy to exercise its power to interpret the law and decide cases.[145] *Casey* identified two ways that the Court might damage its perceived legitimacy and its ability to perform its duties: first, by overruling precedent too often; and second, by deciding or overruling precedent "to resolve . . . intensely divisive controversy."[146] *Roe*, according to *Casey*, decided just that sort of controversy, meaning that an especially compelling precedential weight applied, lest *Roe* succumb to

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[140] Paulsen, *supra* note 49, at 1169–70; *see* AMAR, *supra* note 19, at 233–34 (treating the Court's own precedent as possibly creating a "rebuttable presumption of correctness" but not as constitutionally binding in subsequent Court decisions).

[141] Paulsen, *supra* note 49, at 1169–70.

[142] *Id.* at 1170; *see, e.g.,* Agostini v. Felton, 521 U.S. 203, 235–36 (1997) (observing the consistency of the Court's position that stare decisis is a policy judgment, the strength of which varies based on the type of decision at issue).

[143] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 290 (2022).

[144] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864 (1992).

[145] *Id.* at 865.

[146] *Id.* at 866.

subsequent efforts to nullify its effect.[147] Rather than accepting *Casey*'s presentation of integrity concerns (or that of the dissenting justices), the *Dobbs* majority expressed its unwillingness to base decisions on "extraneous influences" such as judicial integrity.[148] It also, however, acknowledged the importance of public perception, advocating for careful opinions to illustrate the principles guiding the Court when it makes decisions that threaten its perceived legitimacy.[149]

B. Judicial Integrity

Having described the doctrine of stare decisis and identified judicial integrity as a possible consideration within the Court's analysis of precedent, the next step in understanding the *Dobbs* dissent's concerns is to examine judicial integrity as a concept itself.

1. Defining Judicial Integrity

Integrity means "freedom from corruption" and "firm adherence" to a moral code, synonymous with purity, honesty, or soundness.[150] *Judicial* integrity refers to the legitimacy of the Court as an institution based on interpreting and applying law rather than merely distorting the law to effect the will of the Justices themselves.[151] When the judiciary is plagued by any of several forms of corruption (including venality, partiality, prejudice, and fear) integrity ceases to exist.[152] The Court's institutional integrity implicates both reality and perception: *actual* integrity means an absence of such

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[147] *Id.* at 867 ("[W]hatever the premises of opposition may be, only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure, and . . . to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question.").

[148] *Dobbs*, 597 U.S. at 290–91.

[149] *Id.*

[150] *Integrity*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Integrity*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/integrity (last visited Jan. 16, 2024).

[151] *See* Vasquez v. Hillery, 474 U.S. 254, 265–66 (1986).

[152] Isaac Grant Thompson, *A Few Words on Judicial Integrity*, 6 ALB. L.J. 265 (1872). Integrity is fragile. Just as trust can be broken by a single lie, it takes very little corruption to erase integrity. This is true not just for individuals, but also institutions comprised of fallen, imperfect people.

corruption as would impair the Court's ability to execute its interpretive and adjudicative functions, while *perceived* integrity refers to the belief of the American people that real integrity exists within the judicial branch.[153]

The nature of the judicial branch and its relation to the other two branches of government are critical to the importance of the Court's integrity. Alexander Hamilton considered the judiciary to be far weaker than both the legislature and the executive.[154] He based this conclusion on the structural separation of powers, particularly that the powers held by the two elected branches have no direct corollary in the judicial branch.[155] The legislature possesses the power of the purse, meaning that it can determine how to spend for the general welfare, and also has the power to make the laws regulating all

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[153] *See* Payne v. Tennessee, 501 U.S. 808, 827 (1991); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865 (1992). For purposes of this Note, perceived integrity is especially relevant. It is important to observe that, while actual integrity is based on an objective standard, perceived integrity necessarily fluctuates based on the values and biases of onlookers. In other words, perceived integrity is very much in the eyes of the beholders, and people-pleasing tends to be an ongoing exercise in gymnastics. Precisely delineating the objective standard that guides actual integrity is somewhat difficult (and beyond the scope of this Note), but the author's belief is that, like all moral inquiries, it is ultimately guided by the Word of God.

[154] THE FEDERALIST NO. 78, at 355 (Alexander Hamilton) (Fall River Press 2017). The weakness of the modern judicial branch is somewhat less clear. Hamilton was careful to note that the judiciary posed little threat to liberty as a result of its limited jurisdiction and separation from the legislative and executive branches. *See id.* at 356. As the Court has changed, debate has arisen as to whether Hamilton's characterization remains accurate. *Compare, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1986) (endorsing the Federalist's weak view of the judicial branch), *with* STEPHEN P. POWERS & STANLEY ROTHMAN, THE LEAST DANGEROUS BRANCH? CONSEQUENCES OF JUDICIAL ACTIVISM (2002) (critiquing Bickel's characterization given modern changes in the Court's influence). While Hamilton accurately described the judiciary's capacity for political intervention as understood by the Constitutional Convention and traditional thinkers like Locke and Montesquieu, even Hamilton's Anti-Federalist contemporaries raised concerns about the potential power of an unchecked independent judiciary. *See* THE FEDERALIST 412–13 (J.R. Pole ed., 2005) (discussing Hamilton's understanding of the judiciary's relative weakness as articulated in Federalist No. 78 and providing additional commentary on the continued validity of that understanding).

[155] THE FEDERALIST NO. 78, at 355 (Alexander Hamilton) (Fall River Press 2017).

citizens.[156] The executive, likewise, wields the power of the sword, meaning that it may enforce the laws created by the legislature.[157] In contrast, the courts "have neither Force nor Will, but merely judgment."[158] The judiciary is to interpret and pronounce the law and generally depends on the executive branch for enforcement of any judgment it declares.[159]

Such apparent weakness and dependence on the legislature and executive mean that the Court's integrity carries great weight in enabling it to exercise its functions. The *Casey* Court was quick to note that damaged integrity would weaken the Court's ability to serve its judicial role, identifying the Court's legitimacy as the source of its power.[160] Beyond actual, or substantive, integrity (the absence of corruption in decision-making),[161] the *Casey* Court considered it the duty of the judiciary to craft decisions the people can easily accept, which protects the Court's *perceived* integrity.[162] If the Court strains the people's ability to believe that a decision was the product of principled legal analysis rather than acquiescence to outside pressures, it will lose the popular trust.[163] Should the people, who directly choose the members of the legislature and the chief of the executive, come to view the Court as illegitimate, it would render the Court unable to perform its own functions.[164]

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156 U.S. CONST. art. I, § 8, cl. 1; U.S. CONST. art. I, § 1; THE FEDERALIST NO. 78, at 355 (Alexander Hamilton) (Fall River Press 2017).

157 U.S. CONST. art. II, §§ 1, 3; THE FEDERALIST NO. 78, at 355 (Alexander Hamilton) (Fall River Press 2017).

158 THE FEDERALIST NO. 78, at 355 (Alexander Hamilton) (Fall River Press 2017).

159 *Id.* at 355–57; Charles Gardner Geyh, *Judicial Independence at Twilight*, 71 CASE W. RES. L. REV. 1045, 1049 (2021) ("[I]f one conjured a new 'Survivor' reality television series involving three contestants, each with an exclusive power—one who could shoot things, one who could buy things, and one who could declare things—the smart money would not ride on the survival of declare-things guy. A competitor who snubs the guy who shoots things, or the guy who buys things, risks being shot or starved; but the guy who declares things can be ignored with impunity unless one or both of the other two has his back.").

160 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865 (1992).

161 *See supra* notes 150, 152–153 and accompanying text.

162 *Casey*, 505 U.S. at 865–66.

163 *Id.*

164 *See id.*

2. Judicial Integrity's Relevance Within the Stare Decisis Framework

Stare decisis has been recognized as a particular way for the Court to bolster its integrity—and public perception thereof—and promote a consistent rule of law.[165] The doctrine "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact."[166] This conception of stare decisis as a means of promoting integrity featured prominently in the *Casey* plurality opinion. There, the Court stated its belief that the people largely understand that some level of indeterminacy exists in the Constitution and accept some amount of error that must be corrected by overruling precedent.[167] In two particular circumstances, however, the public is unlikely to be very understanding of a departure from a prior decision.[168] First, the Court could overrule precedent with such sheer frequency as to destroy all trust in its exercise of principled judgment, instead giving the impression that overruling was purely teleological.[169] Alternatively, the *Casey* Court said, overruling precedent that decided an issue of particular controversy is also likely to erode institutional integrity.[170] Such a precedent should be granted special weight to avoid merely reversing course due to a difference in opinion regarding a hotly disputed political issue, according to the *Casey* plurality.[171] In addition, the Court decried so-called "overruling under fire"—that is, departing from a controversial landmark decision without an especially compelling justification.[172] Thus, regardless of *Roe*'s

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[165] *Id.* at 868; Payne v. Tennessee, 501 U.S. 808, 827 (1991); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1564 (2000).

[166] Vasquez v. Hillery, 474 U.S. 254, 265–66 (1986).

[167] *Casey*, 505 U.S. at 866.

[168] *Id.* at 866–67.

[169] *Id.* at 866.

[170] *Id.* at 866–67.

[171] *Id.* at 867.

[172] *Id.*

wrongfulness, the *Casey* Court considered it necessary to retain it to preserve the institution's own perceived legitimacy.[173]

Although stare decisis may, in some cases, be a mechanism for protecting the Court's perceived integrity, other cases have framed integrity as necessitating *departure* from precedent. Both *Lawrence v. Texas* and *Brown v. Board of Education* employed such reasoning in overruling *Bowers v. Hardwick* and *Plessy v. Ferguson*, respectively.[174] The *Lawrence* Court considered ongoing criticism of *Bowers* to weigh in favor of overruling the prior decision, a clear contradiction of *Casey*'s proclamation of the Court's duty to hold fast amid criticism.[175] Likewise, *Payne v. Tennessee* represented another case where the Court saw integrity as compelling course-correction, since adhering to a prior decision despite the decision's error reveals the Court's guiding principle to be its public image, rather than its duty to faithfully interpret the law.[176] It has been observed, long before the *Dobbs* majority overruled *Roe* and *Casey*, that the stare decisis framework's malleability permits criticism of virtually any decision to depart from or adhere to precedent—including such a decision regarding *Roe*.[177] Thus, the role of stare decisis is not clearly supportive of or inconsistent with judicial integrity in every case; instead, it is for the Court to decide when its prior decision was incorrect and begs elimination.[178] Such an inquiry must be free from undue outside influence, a requirement which directly concerns the principle of judicial independence.

C. Judicial Independence

Closely related to judicial integrity is the principle of judicial independence. The Court's ability to exercise its interpretive and declaratory functions should not be subject to the influence of other governmental

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[173] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 867 (1992).

[174] Lawrence v. Texas, 539 U.S. 558 (2003); Brown v. Bd. of Educ., 347 U.S. 483 (1954); Paulsen, *supra* note 49, at 1199.

[175] *Lawrence*, 539 U.S. 558; Paulsen, *supra* note 49, at 1199.

[176] *See* Paulsen, *supra* note 165, at 1565; Payne v. Tennessee, 501 U.S. 808, 827–28 (1991).

[177] James C. Rehnquist, *The Power That Shall Be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B.U. L. REV. 345, 359–61 (1986).

[178] *See* Paulsen, *supra* note 165, at 1565; Paulsen, *supra* note 49, at 1199; AMAR, *supra* note 19, at 234.

branches or that of the public at large. While independence and integrity can be at odds in certain circumstances, maintaining the proper integrity of the judiciary relies on independence itself.

1. Defining Judicial Independence

At its simplest, judicial independence is a rather self-explanatory principle. The judiciary must be free from the influence of the executive and political branches of government if it is to fulfill its duty to interpret and apply the law.[179] This independence is inherent in the Constitution's explicit grant of the judicial power to the judiciary itself, indicating that the other branches are not to exercise control over judicial determinations.[180] Preserving judicial independence is also a necessary response to the Court's fragility, as observed by Hamilton.[181] Without the lawmaking and enforcement powers of the legislature and executive, the judiciary carries inherent risk of becoming obsolete, overridden by the elected branches.[182] The framers, recognizing this risk, created structural protections to preserve the Court's ability to independently exercise its power.[183]

In the American constitutional system, judicial independence manifests itself in several features of the governmental structure, the most prominent of which is the insulation of judges themselves from influence via retaliation

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[179] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); MICHAEL STOKES PAULSEN & LUKE PAULSEN, THE CONSTITUTION: AN INTRODUCTION 68 (2015). Black's Law Dictionary defines judicial independence as "[t]he structural separation of the judiciary from the *political* branches of government so that judges remain free from improper influences, partisan interests, and the pressures of interest groups." *Judicial Independence*, BLACK'S LAW DICTIONARY (11th ed. 2019) (emphasis added).

[180] *See* U.S. CONST. art. III, § 1; Stephen G. Breyer, *Judicial Independence in the United States*, 40 ST. LOUIS U. L.J. 989, 989 (1996).

[181] THE FEDERALIST NO. 78, at 355–56 (Alexander Hamilton) (Fall River Press 2017); PAULSEN & PAULSEN, *supra* note 179, at 67–68.

[182] PAULSEN & PAULSEN, *supra* note 179, at 68.

[183] RUSSELL KIRK, THE ROOTS OF AMERICAN ORDER 429 (4th ed. 2003) (observing that the independent judiciary in the United States was a new development, granting significantly greater power to an independent judiciary than had the prior systems in England and France, for example).

from the other branches.[184] The Constitution provides for an independent judiciary directly by requiring that federal judges be appointed "during good behavior," which often equates to life appointment.[185] Thus, judges in the federal courts do not have to run for reelection or undergo reappointment procedures, largely removing their decisions from accountability to the people, the legislature, and the executive.[186] Likewise, the Constitution forbids Congress from reducing the salaries of federal judges, limiting the legislative purse power's influence over the judiciary.[187] Other, less prominent protections are present in the Fifth Amendment's Due Process Clause and the Suspension Clause of Article I.[188]

The independence of the judiciary is also critical in a positive sense as well as a negative one. Not only should the courts be free *from* outside influence in making judicial determinations, but they should also be free *to* recognize and correct abuses of power by the other branches.[189] The judiciary represents a necessary check on the legislative and executive branches. Montesquieu stated that "there is no liberty, if the power of judging be not separated from the legislative and executive powers."[190] Hamilton echoed this position, thus illustrating the need for judicial independence, that the courts may rein in the other branches by declaring when their actions breach the

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[184] PAULSEN & PAULSEN, *supra* note 179, at 68–69; Breyer, *supra* note 180, at 989 ("The primary basis of judicial independence in the United States is the protections guaranteed to judges under Article III of the Constitution . . . . Together, these protections assure that Congress or the executive cannot directly affect the outcome of judicial proceedings by threatening removal or reduction of salary.").

[185] U.S. CONST. art. III, § 1; THE FEDERALIST NO. 78, at 355, 358 (Alexander Hamilton) (Fall River Press 2017); Geyh, *supra* note 159, at 1054.

[186] U.S. CONST. art. III, § 1; THE FEDERALIST NO. 78, at 356 (Alexander Hamilton) (Fall River Press 2017); Geyh, *supra* note 159, at 1054.

[187] U.S. CONST. art. III, § 1; THE FEDERALIST NO. 79, at 361–62 (Alexander Hamilton) (Fall River Press 2017); Geyh, *supra* note 159, at 1054.

[188] U.S. CONST. amend V; U.S. CONST. art. I, § 9, cl. 2; Geyh, *supra* note 159, at 1054–55 (observing that the Fifth Amendment gives litigants the right to a hearing before an independent judge, while the Suspension clause prohibits the suspension of federal judges' authority to issue writs of habeas corpus).

[189] *See* THE FEDERALIST NO. 78, at 356 (Alexander Hamilton) (Fall River Press 2017); Pamela S. Karlan, *Two Concepts of Judicial Independence*, 72 S. CAL. L. REV. 535, 536 (1999).

[190] CHARLES MONTESQUIEU, THE SPIRIT OF LAWS 216 (Thomas Nugent trans. 1758) (1752).

Constitution.[191] This promotes a consistent rule of law in which the elected branches must comply with a uniform interpretation of the law as declared by the judiciary.[192] Of course, such a structure still does not offer the courts any true power of enforcement in most circumstances, but the ability to declare government actions illegal carries great weight, as ignoring such a judgment would require open defiance of the Court.[193]

While the Constitution establishes protections for judicial independence, it does not contemplate unbridled judicial discretion; rather, it imposes certain measures to check the judiciary should judges exhibit corruption or abuse the judicial power.[194] First, the appointment of federal judges is executed by the President with the advice and consent of the Senate.[195] Appointment is only "during good behavior," meaning that a judge *can* be removed through impeachment, though this mechanism is rarely used.[196] Congress may also influence the federal judiciary by establishing inferior federal courts and regulating judicial aspects such as procedure, structure, and size, as well as the Supreme Court's appellate jurisdiction.[197] Likewise, the taxing and spending powers give the legislature some control over the general judicial budget, and the Necessary and Proper Clause could authorize further supplemental regulation of the federal courts.[198] Thus, judicial independence, though a necessary and prominent feature of the constitutional system, is not a principle that should be pursued entirely without caution.

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191 *See* THE FEDERALIST NO. 78, at 356 (Alexander Hamilton) (Fall River Press 2017).

192 *Id.* at 358.

193 *See id.* at 355–56; PAULSEN & PAULSEN, *supra* note 179, at 68.

194 Geyh, *supra* note 159, at 1054–55; *see* PAULSEN & PAULSEN, *supra* note 179, at 68–69.

195 *See* U.S. CONST. art. II, § 2.

196 *See* U.S. CONST. art. III, § 1; Geyh, *supra* note 159, at 1055; PAULSEN & PAULSEN, *supra* note 179, at 69.

197 *See* U.S. CONST. art. III, § 1; Geyh, *supra* note 159, at 1055.

198 *See* U.S. CONST. art. I, § 8; Geyh, *supra* note 159, at 1055.

2. Judicial Independence's Relevance Within the Stare Decisis Framework

While the interaction between stare decisis and judicial integrity is, at times, uncertain,[199] judicial independence carries relatively straightforward consequences for the Court's application of stare decisis. Just as any judicial determination is meant to be the result of principled, independent legal analysis, so, too, should the Court's analysis of precedent be made on principle rather than outside influence.[200] The decision to overturn precedent should result from the Court's assessment that the prior decision was incorrect, not from fear of external consequences. While the particular methodology used in the determination can, and indeed has, varied significantly,[201] the determination itself remains one for the judiciary alone.[202] Where the determination to overrule or not implicates the Court's perceived legitimacy, however, integrity and independence can create a dilemma.

3. The Apparent Tension Between Judicial Integrity and Judicial Independence

Once judicial integrity and independence are understood, a clear tension emerges. Integrity, necessary for the Court's efficacy, depends to some degree

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[199] *See* discussion *supra* Section II.A.

[200] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 963 (1992) (Rehnquist, C.J., concurring in part and dissenting in part); *see* U.S. CONST. art. III, § 1; THE FEDERALIST NO. 78, at 355–58 (Alexander Hamilton) (Fall River Press 2017).

[201] *See supra* notes 47–48 and accompanying text.

[202] *See* U.S. CONST. art. III, § 1; 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) ("[T]he Court does have an autonomous, implied power to sometimes follow precedent, just as the president has an implied power to remove executive branch subordinates, and . . . neither of these implied powers can be restricted by Congress . . . ."). *But see* Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 985–86 (1986–1987) ("The Supreme Court, then, is not the only interpreter of the Constitution. Each of the three coordinate branches of government created and empowered by the Constitution—the executive and legislative no less than the judicial—has a duty to interpret the Constitution in the performance of its official functions."). That other branches are often obliged to interpret the Constitution does not mean that they supplant the Court as the Constitution's *prescribed ultimate* interpreter.

on how outsiders perceive the Court itself.[203] Independence, inherent in the American system and necessary to that system's scheme of separated powers, largely insulates the judiciary from external influence.[204] If the Court does not account for public perception in its decisions, it risks damaging its perceived integrity. Conversely, if the Court seeks to promote its own perceived legitimacy through its decisions, it risks abandoning its independence. Must, therefore, the tension between integrity and independence be addressed simply by attempting to balance the two principles, or is a clearer resolution possible? The following Part examines the advantages and shortcomings of both the majority and the dissent's solutions to this tension in *Dobbs*.

III. THE *DOBBS* CONFLICT: INTERPRETING THE PLANS

Against the complex backdrop of the doctrine of stare decisis, judicial integrity, and judicial independence, the Court's decision in *Dobbs* to overrule *Roe* and *Casey* presents a rift between the Justices. The dissenting Justices argued that integrity concerns mandated adherence to precedent,[205] while the majority largely dismissed such concerns as an improper justification for retaining an incorrect decision.[206] Both opinions present worthy considerations; the dissent rightly recognizes the risks of controversial decisions, while the majority calls out the issues raised when cases are determined by anticipated reception. Neither, however, satisfactorily address integrity concerns while staying true to the Court's role as the independent interpreter of the law. Two concurring opinions also offer useful guidance, but they do not bridge the gap between the majority and the dissent.

A. The Dissent's Judicial Integrity Concerns—Valid, but Curable

The *Dobbs* dissent criticized the majority's holding that the Constitution provides no right to abortion before expressing its disagreement with the

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[203] *See* discussion *supra* Section II.B.

[204] *See* discussion *supra* Section II.C.1.–2.

[205] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 413 (2022) (Breyer, Sotomayor, & Kagan, JJ., dissenting).

[206] *Id.* at 290–92 (majority opinion).

majority's conclusions regarding the primary stare decisis factors.[207] Next, adopting the rationale of the *Casey* plurality, it presented the controversy of *Roe* and *Casey* as requiring adherence to those precedents, even if they were wrongfully decided.[208] Criticizing the majority's contention that applying the law required overruling *Roe* and *Casey* even in the face of public disapproval, the dissent appealed to the need to follow stare decisis and appease public opinion.[209] It echoed *Casey*'s contention that a decision made in the heat of great controversy constituted a "promise of constancy" to the American people, meaning that anything less than a fundamental change in the understanding of the issue could not justify departure from it.[210] Rather than upholding the Court's "commitment" in *Roe* and *Casey*, said the dissent, the majority was breaching a solemn vow and destroying the Court's own institutional legitimacy.[211] Such a breach, the dissent continued, threatened legal instability and uprooted the very rule of law itself; it reduced the Court to little more than a third political branch in the eyes of the people.[212]

The dissenting opinion correctly identified, as did the *Casey* plurality, the significance of public perception of the Court as a legitimate institution operating on the basis of principled adjudication.[213] Indeed, a destruction of public trust on the scale contemplated by the dissent might be disastrous for the Court's ability to pronounce judgments that the people would accept and by which they would expect the elected branches to abide.[214] Neither did the *Dobbs* majority directly dispute the significance of such a development.[215] The question, however, is not whether institutional integrity is a worthy goal, a valid pursuit, or a desirable thing to promote. As discussed, the nature of the Court within the constitutional framework necessitates some reliance on the other branches, which is hindered by a lack of integrity, whether

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207 *Id.* at 359–411 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

208 *Id.* at 412.

209 *Id.* at 412–13.

210 *Id.* at 413–14; Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 868 (1992).

211 *Dobbs*, 597 U.S. at 413 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

212 *Id.* at 413–14, 417.

213 *Id.* at 412; *Casey*, 505 U.S. at 864.

214 *See Casey*, 505 U.S. at 865–66.

215 *Dobbs*, 597 U.S. at 294 (majority opinion).

perceived or actual.[216] Instead, the true question is whether promoting judicial integrity may be a sufficient reason for adhering to precedent the Court believes to be wrong. For several reasons, the Court's stare decisis analysis should not so hinge on integrity concerns.

First, past cases—many of which the majority did not fail to highlight—provide arguments that undermine the clear role of stare decisis in promoting the Court's legitimacy, even amidst great political controversy. *Casey* stands alone in applying heightened precedential weight to a prior case simply because of the controversy from which that decision emerged.[217] In particular, the majority questioned how the dissenting Justices would have applied their rationale to *West Virginia Board of Education v. Barnette* and *Brown v. Board of Education*.[218] In *Barnette*, the Court overruled a precedent only three years after the prior decision, without identifying any changes in law or facts.[219] According to the *Dobbs* dissent's view, no basis existed to depart from precedent.[220] *Brown*, on the other hand, overruled *Plessy v. Ferguson* after over fifty years of permitted segregation;[221] did the *Dobbs* dissenters truly believe that only changes in the facts and public opinion surrounding segregation justified overruling *Plessy*, or had that decision always been wrong?[222]

Likewise, it is not difficult to imagine a hypothetical scenario in which Justices aligned with the dissent might eagerly abandon or rationalize the dissent's integrity concerns to overrule precedent. Consider a scenario, perhaps only several years from now, in which the Court's ideological makeup shifts significantly. New Justices have been appointed to the Court—

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[216] *See* THE FEDERALIST NO. 78, at 355–56 (Alexander Hamilton) (Fall River Press 2017); discussion *supra* Section II.B.1.

[217] *Dobbs*, 597 U.S. at 294 ("*Casey* broke new ground when it treated the national controversy provoked by *Roe* as a ground for refusing to reconsider that decision, and no subsequent case has relied on that factor."); *see also Casey*, 505 U.S. at 866–67; AMAR, *supra* note 19, at 235 ("[I]f read broadly, *Casey*'s dictum about precedent was virtually unprecedented, and indeed contrary to precedent.").

[218] *Dobbs*, 597 U.S. at 293–94.

[219] *Id.*; W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[220] *Dobbs*, 597 U.S. at 293.

[221] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[222] *Dobbs*, 597 U.S. at 293.

jurists who are inclined to apply the pro-integrity, pro-stare decisis approach espoused by the *Casey* plurality and *Dobbs* dissent.[223] Women seeking abortion services in their home state, which outlawed abortion post-*Dobbs*, sue the state for depriving them of their rights to liberty, privacy, and bodily autonomy, as guaranteed by the Fourteenth Amendment's Due Process clause. Ultimately, the overhauled Court grants certiorari to consider whether *Dobbs* was wrongly decided. Would this new Court, if convinced that the Constitution implies the right for a woman to obtain an abortion, greet this case by upholding *Dobbs* based on its precedential strength, heightened due to the controversy within which it was decided?[224]

Perhaps this new Court would not, defending its departure by noting the short time between *Dobbs* and this new challenge, which leaves it less compelling than the longer-standing precedents *Dobbs* overruled. Suppose, then, that the challenge reaches the Court after five decades with *Dobbs* as the law of the land, but abortion is still an equally contested political controversy. Would not the precedential weight of a fifty-year-old *Dobbs* decision require the same deference the dissent granted to *Roe*,[225] and more than that belonging to *Casey*?[226] Surely, the rationale for dispensing with *Dobbs* could focus on different flaws the Court sought to expose, but it would be difficult to escape the inconsistency that might arise. Without a change in the controversy at hand, concerns of judicial integrity could be used to demand maintaining precedent in one instance and subsequently ignored to discard that very decision in an identical stare decisis scenario. It would be one thing for the Court to rest a decision to overrule on its continued belief that *Dobbs* was wrongfully decided, and perhaps it would. But that is exactly what the *Dobbs* dissent criticized the majority for doing: abandoning stare decisis and overruling an established precedent after nothing more than a change in the Court's membership.[227]

Similarly, the perception-focused approach would add little utility where adopted and applied by the Court to other controversial areas of law. Should

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223 *See supra* notes 207–214 and accompanying text.

224 *See Dobbs*, 597 U.S. at 411, 414 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

225 *Id.* at 414.

226 *Id.* at 413–14.

227 *Id.* at 413–16.

the Justices who have declined to consider public opinion within their stare decisis analysis change course, the constancy that justifies the doctrine[228] might disappear altogether. Perceived legitimacy, though it may encourage retaining precedent in some cases, can also counsel overruling a prior decision.[229] When this may be the case, what is an appearance-minded Court to do? Imagine, for example, a case calling on the Court to revisit a Second Amendment decision such as its recent one in *New York State Rifle & Pistol Association v. Bruen*.[230] Americans are hotly divided on gun ownership and restrictions.[231] But how can the Court determine how that division impacts its perception with sufficient certainty to inform a perception-based decision? In such cases, neither overruling nor reaffirming can reliably protect the Court's perceived legitimacy; both paths are likely to draw criticism from the disapproving side.[232] Therefore, focusing on perceived integrity is a poor guarantor of either consistent or popular outcomes in controversial decisions.

In addition to the inconsistency that would readily follow from the use of perceived integrity as a reason for adhering to precedent, such an approach presents a further logical quandary. The *Dobbs* dissent characterized the majority's departure from stare decisis as calling into question its commitment to principle, invoking the language of the *Casey* plurality in the process.[233] But if the principle the Court should follow is faithful interpretation and application of the law, consistent with its constitutional

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[228] *Id.* at 416 (characterizing stare decisis as a "core rule-of-law principle, designed to promote constancy in the law"); *see also* Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL'Y 509, 515–16 (1996).

[229] *See* discussion *supra* Section II.B.2.

[230] *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022) (holding that the State of New York could not prohibit law-abiding citizens from carrying handguns in public without demonstrating a special need for self-defense).

[231] *Guns*, GALLUP, https://news.gallup.com/poll/1645/guns.aspx (last visited Feb. 18, 2024) (presenting multiple polls illustrating divided public opinion on different gun-related topics).

[232] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 963 (1992) (Rehnquist, C.J., concurring in part and dissenting in part).

[233] *Dobbs*, 597 U.S. at 413–14 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

role,[234] then overruling a wrongful decision despite external public influences was, in fact, the principled decision. While the Court has the power to avoid participating in constitutional violations alongside its sister branches of government to maintain its perceived legitimacy, it has no authority to promote actions, decisions, or rules that violate the Constitution.[235] Where the Court is convinced that a decision is inconsistent with the Constitution, then, it should not maintain that decision merely to protect its public image.[236] From that perspective, ignoring its determination that *Roe* and *Casey* were egregiously wrong in an attempt to bolster its perceived legitimacy would have been the *unprincipled* decision. Adhering to wrongful precedent to assuage perceived integrity concerns can only align with principle if the principle supposed to be guiding the Court is acquiescence to the popular will. Yet, again, this was the warning put forth in *Casey* and reiterated by the *Dobbs* dissent: of utmost injury would be the misconception that the judiciary is merely another political branch of the United States government.[237]

Further, even assuming that perceived integrity is, as the *Dobbs* dissent contends, an appropriate basis for a judicial decision such as retaining wrongful precedent, the dissent's own opinion partly belies its purported integrity concerns. Readers could be forgiven for thinking that the dissent, by attacking the majority's "cavalier approach" as it did,[238] actually *wanted* the public to lose trust in the majority.[239] Indeed, the dissent blatantly accused

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[234] *See* U.S. CONST. art. III, § 1; THE FEDERALIST NO. 78, at 355–58 (Alexander Hamilton) (Fall River Press 2017); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); PAULSEN & PAULSEN, *supra* note 179, at 67–69.

[235] Paulsen, *supra* note 165, at 1565; *see* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 212 (2005) ("During the public ratification process that followed the secret drafting, Wilson, Publius, and other Federalists, especially in Virginia, explained that judges could and should refuse to enforce federal laws that were, in the words of *The Federalist* No. 78, 'contrary to the manifest tenor of the Constitution.'").

[236] *See* Paulsen, *supra* note 165, at 1565. *But see* AMAR, *supra* note 19, at 234–41 (arguing that a proper view of the constitutional system does not strictly require the Court to overrule every case it believes to have wrongly interpreted the Constitution).

[237] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864 (1992); *Dobbs*, 597 U.S. at 416 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

[238] *Dobbs*, 597 U.S. at 363.

[239] *See id.* at 413 ("[T]oday's decision . . . is its own loaded weapon.").

the majority of acting based on their own political motives instead of judicial reasoning.[240] It is not unheard of for Justices to issue scathing dissents similar in tone to that in *Dobbs*, but surely, according to the dissenting Justices' concerns about public perception, they should at least exercise caution when chastising their colleagues.[241]

Also interesting is how the dissent described the Justices whose example they claimed to be following:

> The Justices who wrote those words—O'Connor, Kennedy, and Souter—they were judges of wisdom. They would not have won any contests for the kind of ideological purity some court watchers want Justices to deliver. But if there were awards for Justices who left this Court better than they found it? And who for that reason left this country better? And the rule of law stronger? Sign those Justices up.[242]

What can explain those jurists' "ideological [im]purity" that supposedly "left th[e] Court better than they found it" if not the pursuit of policymaking over

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[240] *Id.* at 364 ("Today, the proclivities of individuals rule. The Court departs from its obligation to faithfully and impartially apply the law."); *id.* at 417 (quoting *Casey*, 505 U.S. at 864) (citations omitted) ("The American public, [the *Casey* plurality] thought, should never conclude that its constitutional protections hung by a thread—that a new majority, adhering to a new 'doctrinal school,' could 'by dint of numbers' alone expunge their rights. It is hard—no, it is impossible—to conclude that anything else has happened here. . . . [T]his Court betrays its guiding principles.").

[241] *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 719 n.22 (2015) (Scalia & Thomas JJ., dissenting) (quoting *Obergefell*, 576 U.S. at 651 (majority opinion)) ("If, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began: 'The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity,' I would hide my head in a bag. The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie."). It is worth noting, however, that there is some difference between an opinion that says, "this Court has made an indefensibly bad decision" and one that says, "this Court has abandoned being a Court for the sake of the majority's personal agendas, and no one should ever trust it again." The latter would seem to be more directly damaging to the Court's legitimacy—and more akin to the message of the *Dobbs* dissent. *See Dobbs*, 597 U.S. at 413–14 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

[242] *Dobbs*, 597 U.S. at 417 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

principled adjudication?[243] What can distinguish that philosophy from the purportedly unprincipled "proclivities" for which the dissent castigated the majority[244] if not the dissenting Justices' preference for *Casey*'s policy outcome? How does the one valiantly defend the Court's integrity while the other threatens to erase it completely?

B. The Majority's Treatment of Judicial Integrity—Faithful, but Incomplete

Rather than acquiescing to the expectation of public outcry—outcry which could have been reasonably expected in response to any outcome in *Dobbs*—the proper course for the Court was to faithfully apply its stare decisis framework and clearly pronounce the outcome it reached. The majority opinion did so, but it failed to adequately address the full weight of the dissent's integrity concerns.

The Justices in the *Dobbs* majority noted the *Casey* plurality's exhortation regarding the importance of the Court's public perception.[245] In addition, they noted the importance of diligent opinions showing the Court's principled application of law in the process of reaching its decisions.[246] Beyond that, however, the majority denied the propriety of any "extraneous influences" in its decision-making, including possible public response.[247] This independence from outside influences extends to not only initial decisions, but also stare decisis determinations.[248] Independent constitutional analysis—not public opinion—forms the basis of judicial legitimacy, the Court said.[249] The only judgment within the Court's authority is interpretation and application of the law; thus, no precedent, even that decided amidst great controversy, can be given special weight merely by judicial decree.[250] Least of all can an erroneous precedent evade correction

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243 *Id.*

244 *See id.* at 364, 414–17.

245 *Id.* at 290–91 (majority opinion).

246 *Id.* at 290.

247 *Id.* at 291.

248 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 291 (2022).

249 *Id.*

250 *Id.*

simply because the Court purports it to carry heightened precedential weight.[251]

This analysis is an effective rebuttal of the integrity justifications raised by the *Casey* plurality and *Dobbs* dissent, one which identifies the source of the Court's legitimacy—independent, principled constitutional adjudication.[252] The distinction is critical; should the Court ignore its role and seek to base its legitimacy in public opinion, it would forsake actual integrity for a mere perception. However, without considering and addressing its appearance, whatever actual integrity the Court possesses can be obscured by a public perception of illegitimacy. Thus, the success of the judiciary can be enhanced by decisions that are not only based on principle, but also accompanied by written opinions to communicate the grounds for independent decision-making itself. However, the majority opinion fell short in two critical ways.

First, it failed to adequately reckon with the significance of the integrity concerns raised by the dissent. While recognizing the integrity concerns as important,[253] the majority did not explain the ultimate consequence of a Court with no legitimacy in the public eye: perception as a political entity that should be subject to the control of the people and that deserves no compliance from the legislature or executive.[254] Such a result could have potentially disastrous consequences. Without an independent, apolitical judiciary, the American system of separate powers would collapse.[255] The Court, reduced to merely another political branch, would wield no authority

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[251] *Id.* at 291–92.

[252] *Id.* at 291; *see* U.S. CONST. art. III, § 1; THE FEDERALIST NO. 78, at 355–58; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); PAULSEN & PAULSEN, *supra* note 179, at 67–69; AMAR, *supra* note 19, at 208–11.

[253] *Dobbs*, 597 U.S. at 290–91.

[254] *See* THE FEDERALIST NO. 78, at 358 (Alexander Hamilton) (Fall River Press 2017); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865–66 (1992).

[255] *See* THE FEDERALIST NO. 78, at 356 (Alexander Hamilton) (Fall River Press 2017) ("[L]iberty . . . would have everything to fear from [the judiciary's] union with either of the other departments . . . ."); *see also* Breyer, *supra* note 180, at 996 ("The good that proper adjudication can do for the justice and stability of a country is only attainable, however, if judges actually decide according to law, and are perceived by everyone around them to be deciding according to law, rather than according to their own whim or in compliance with the will of powerful political actors.").

to check the other branches of government.[256] As a result, the written Constitution would be at risk of becoming effectively meaningless, allowing majority will to override principles of enumerated, separated powers and limited government.[257]

Following this shortcoming, the majority opinion did not propose or execute an adequate remedy to the risks of destroyed integrity. Indeed, the dissent's characterization of the majority as dismissive of potential damage to the Court's integrity is not altogether incorrect.[258] The majority only advocated for carefully written opinions explaining the principled analysis necessary to support the Court's decision in a given case.[259] Given the grave situation posed by any potential decay in the Court's perceived integrity, the majority's celebration of clear explanation is perhaps still partly unfulfilled. The majority thoroughly explained its rationale for deciding the case as it did, including an extensive stare decisis discussion, but its defense of its stare decisis *approach* is less comprehensive.[260] Even more effective for convincing readers of the Court's principled decision-making would have been an explanation of the role of the Court, the need for judicial independence, and the distinction between the *present* popular will and the will enshrined in the Constitution—which the Court is bound to follow. Therefore, while the fundamental precepts beneath the *Dobbs* majority opinion's treatment of judicial integrity follow from an apolitical view of the Court's role, additional support is sometimes needed to protect the Court against perceptions of partisanship and unprincipled adjudication.

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[256] THE FEDERALIST NO. 78, at 356 (Alexander Hamilton) (Fall River Press 2017) ("The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.").

[257] *See id.*

[258] *See Dobbs*, 597 U.S. at 412–13 (Breyer, Sotomayor, & Kagan, JJ., dissenting); *id.* at 290–91 (majority opinion).

[259] *Id.* at 290–91 (majority opinion).

[260] *See id.* (reiterating Chief Justice Rehnquist's criticisms of *Casey*'s perception-focused approach to stare decisis).

C. Concurring Opinions—Additional Perspectives

In addition to the discord between the majority and dissent, two Justices independently weighed in on the role of stare decisis in the Court's decision-making and the importance of the Court's perceived integrity. The opinions of both Chief Justice Roberts and Justice Kavanaugh provide additional perspectives for examining the interplay between integrity and independence in the context of precedent; these perspectives merit brief discussion.

1. Chief Justice Roberts—An Institutionalist Focus

Chief Justice John Roberts is often characterized as a leading "institutionalist" on the Court, meaning that he is "concerned with the durability of the law and the maintenance of respect for the Court."[261] While other Justices are often thought to be more driven by the merits of each case, "conventional wisdom on the subject argues that [Chief Justice] Roberts occasionally sides with the Court's progressive wing in hopes of preserving the [perceived] institutional integrity of the Court."[262] This objective leads the Chief Justice to emphasize the need to decide cases on the narrowest possible grounds and avoid leading the judiciary into significant conflict with the other branches of government.[263]

In *Dobbs*, the Chief Justice sided with the majority as to the ultimate result.[264] However, he expressed significantly more caution than the majority about totally overruling *Roe* and *Casey*.[265] Where the majority saw fit to undo *Roe*'s proclamation of a constitutional right to abortion, Chief Justice Roberts would have only partially overruled it to eradicate the viability line *Roe* drew.[266] True to his expected institutionalism, Chief Justice Roberts

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[261] Stuart Gerson, *Understanding John Roberts: A Conservative Institutionalist Concerned with Durability of the Law and Respect for the Court*, JURIST (July 31, 2020, 2:17 PM), https://www.jurist.org/commentary/2020/07/stuart-gerson-understanding-john-roberts/.

[262] William Rhyne, *Chief Justice John Roberts and the Combination of Conservatism and Institutionalism*, 2023 U. ILL. L. REV. ONLINE 147, 148 (2023).

[263] Gerson, *supra* note 261.

[264] *Dobbs*, 597 U.S. at 359 (Roberts, C.J., concurring).

[265] *Id.* at 357–59.

[266] *Id.* at 355–56.

expressed a desire to decide *Dobbs* on the narrowest grounds available,[267] even though he agreed that *some* aspect of *Roe* had to be explicitly overruled.[268] In so doing, he struck a sort of middle ground between the majority and dissent, adding his vote to the majority's disposition while criticizing its choice to overrule *Roe* and *Casey* as a "jolt to the legal system"—and the very institution of the Court.[269]

2. Justice Kavanaugh—Approaching Stare Decisis

In contrast to the Chief Justice's concern for the Court's image, Justice Brett Kavanaugh's concurrence focused largely on the Court's approach to stare decisis as a legal doctrine and, like Chief Justice Roberts's opinion, expressed hesitance to fully endorse the majority's zeal to discard *Roe* and *Casey*. During his relatively short tenure on the Court,[270] Justice Kavanaugh has frequently offered his own perspective on stare decisis.[271] The most significant of his opinions discussing the doctrine is his concurrence in *Ramos v. Louisiana*, where he outlined a multifactored stare decisis framework that summarized the Court's precedents on the doctrine.[272] That treatment of stare decisis has proved influential, continuing to be cited in later decisions, including *Dobbs*.[273]

In *Dobbs*, Justice Kavanaugh agreed with the majority that *Roe* and *Casey* were wrongly decided and should be overruled, and he once again promoted

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267 *Id.* at 353–56.

268 *Id.* at 352–54.

269 *Id.* at 355–57.

270 Justice Kavanaugh took his seat on the bench at the Supreme Court on October 6, 2018, making his tenure the third shortest of the current Justices. *Current Members*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/biographies.aspx (last visited Oct. 28, 2023).

271 In addition to his *Dobbs* concurrence, Justice Kavanaugh has authored several opinions addressing stare decisis since joining the Court. *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1410–20 (2020) (Kavanaugh, J., concurring); Edwards v. Vannoy, 593 U.S. 255 (2021); Allen v. Milligan, 599 U.S. 1, 42–45 (2023) (Kavanaugh, J., concurring).

272 *Ramos*, 140 S. Ct. at 1414–15; *see supra* note 48 (listing factors for analyzing stare decisis).

273 *See Dobbs*, 597 U.S. at 267–68 (acknowledging Justice Kavanaugh's formulation of stare decisis in *Ramos* before proceeding to apply it).

his stare decisis framework from *Ramos*.[274] He emphasized the Court's ability to overrule precedent under the right circumstances, especially constitutional interpretations.[275] Despite unreservedly supporting the decision to overrule both *Roe* and *Casey*, he also deliberately considered (and rebutted) potential objections to that decision, such as the "high bar" for overruling precedent, the complicating effect of *Casey*, the impact of *Dobbs* on other Due Process decisions, and the inevitable public reaction.[276] Indeed, Justice Kavanaugh's opinion seems to reflect an understanding of the importance of promoting the Court's integrity by thoroughly explaining the rationale behind his decision and addressing concerns that might subtly undermine the Court.[277] Thus, Justice Kavanaugh incorporates prudent concerns from both the majority and the Chief Justice into his emerging yet influential perspective on when to do away with the Court's prior decisions.

While the concurrences of both Chief Justice Roberts and Justice Kavanaugh offer insight into the Court's view of stare decisis and help flesh out the spectrum of the Justices' philosophies about precedent and legitimacy, they do not squarely address the question entertained by this Note. The following Part seeks to assemble bits of wisdom from the Court as a whole—majority, dissenting, and concurring Justices alike—into the beginnings of a more robust approach to the delicate balance of independence and integrity.

IV. INDEPENDENCE AND INTEGRITY: OUTWARD-FACING STRUCTURAL SUPPORTS

In response to the conflict between the *Dobbs* majority and dissenting opinions, the Court should approach stare decisis analysis by both prioritizing and promoting its role as the independent interpreter of the Constitution. This role, as understood by the Framers and established in the American system of separated powers, forms the basis of the Court's actual legitimacy.[278] Rather than limiting its concern to sheer independence,

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274 *Id.* at 336–47 (Kavanaugh, J., concurring).

275 *Id.* at 341–42.

276 *Id.* at 341–46.

277 *See id.* at 341–47; *infra* Section IV.A.2.

278 *See* discussion *infra* Section IV.A.1.

however, the Court should take care to preserve its perceived legitimacy to the greatest extent possible by openly embracing its role when a principled decision creates a significant risk of negative public perception.[279] The proposed approach faces numerous lurking pitfalls, many of which are outside the control of the judiciary.[280] Nevertheless, it represents a principled, optimistic attempt to secure for the Court both actual and perceived integrity.

A. Promoting Judicial Integrity Through Judicial Independence

In order to fulfill its constitutional role, the Court must remain an institution of principled, real integrity. The "whole American fabric" depends on the right of the People to establish laws, and the Court is duty bound to give effect to those laws.[281] Because of the pragmatic necessity of perceived integrity, however, independent decision-making must be accompanied by clear, complete, and winsome explanations of that duty and its implications for decisions of significant controversy.

1. Independence as the Root of Actual Integrity

To achieve actual integrity, the Court must understand and articulate its purpose as defined by the Constitution and envisioned by the framers.[282] Firstly, the judicial power is vested in the Court alone.[283] That power, as understood at the nation's birth, encompasses the authority to interpret and apply the law in cases and controversies between parties at odds.[284] In order to properly exercise its power, the judiciary must be independent, protected from external influences and legislative or executive control.[285] Without

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[279] *See* discussion *infra* Section IV.A.2.

[280] *See* discussion *infra* Section IV.B.

[281] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803); AMAR, *supra* note 19, at 237–38.

[282] *See, e.g.*, U.S. CONST. art. III, § 1; THE FEDERALIST NO. 78, at 355–58 (Alexander Hamilton) (Fall River Press 2017); *Marbury*, 5 U.S. (1 Cranch) at 176; AMAR, *supra* note 19, at 237–38; PAULSEN & PAULSEN, *supra* note 179179, at 67–69.

[283] U.S. CONST. art. III, § 1.

[284] *See* THE FEDERALIST NO. 78, at 355–58 (Alexander Hamilton) (Fall River Press 2017); *Marbury*, 5 U.S. (1 Cranch) at 177; PAULSEN & PAULSEN, *supra* note 179, at 67–69.

[285] THE FEDERALIST NO. 78, at 355–58 (Alexander Hamilton) (Fall River Press 2017); PAULSEN & PAULSEN, *supra* note 179, at 68–69.

independent courts, the constitutional system of checks, balances, and separated powers fails; the judicial branch is reduced to nothing more than a third political branch, if it continues to exist at all.[286]

Therefore, when facing stare decisis determinations, particularly those implicating constitutional rules, the Court must remain insulated from extraneous influences, including public opinion.[287] While the practical difficulty of amending the Constitution has long been recognized as a justification for weakened adherence to precedent in constitutional cases,[288] the nature of the Court and of written constitutionalism itself justifies departing from wrongfully decided constitutional precedents.[289] As Justice Marshall proclaimed, the very written nature of the Constitution justifies judicial review because it represents a tangible source of law against which decisions can be reliably evaluated.[290] The document itself is the "ultimate touchstone of constitutionality," before and above any interpretation articulated by a prior Court.[291] In determining whether the Court's prior interpretation of that touchstone is correct, then, the deciding Court should prioritize its own earnest assessment of the document's meaning, without capitulating to what it anticipates as a conflicting public will.

2. Perceived Integrity—Convincing the Public of Independence

Even if a majority of the Court emphasizes judicial independence to guide principled decisions in future stare decisis decisions, however, the significance of perception will not simply fade away. Whenever the Court overturns precedent on an issue that divides the public, the possibility that its legitimacy will be questioned looms constantly. Because of its dependence on

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[286] *See* THE FEDERALIST NO. 78, at 355–58 (Alexander Hamilton) (Fall River Press 2017); CHARLES MONTESQUIEU, THE SPIRIT OF LAWS 181 (Thomas Nugent trans. 1752) (1748).

[287] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 290–91 (2022) (quoting Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 963 (1992) (Rehnquist, C.J., concurring in part and dissenting in part)).

[288] Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405–07 (1932) (Brandeis, J., dissenting); *supra* note 42.

[289] *See* Rehnquist, *supra* note 177, at 364–66.

[290] *See Marbury*, 5 U.S. (1 Cranch) at 176–80; Rehnquist, *supra* note 177, at 365–66.

[291] Graves v. New York, 306 U.S. 466, 487, 491–92 (1939) (Frankfurter, J., concurring).

perception for its efficacy, the Court should concern itself with its legitimacy in the eyes of the public in some way. But how?

One version of an approach to stare decisis where the Court might expressly concern itself with its appearance has been advocated by Professor Deborah Hellman.[292] She argues that the need for appearance-focused judging stems from the loss of trust in judicial decisions, not just among the public, but among the Justices themselves.[293] As a result, the Court cannot simply make principled decisions; it must attend separately to *appearing* principled.[294] This, Professor Hellman contends, requires taking appearance into account not only in crafting opinion, but even in determining the rationale upon which the Court's decision lies.[295] Such perception-driven adjudication is, according to Professor Hellman, "necessary . . . for the court to justifiably compel compliance with its directives in individual cases."[296]

Professor Hellman's suggested approach is, in effect, that endorsed by the *Dobbs* dissent.[297] To the extent that it supports relying on the Court's likely appearance as a basis for decisions, Professor Hellman's proposal is subject to the same criticism: considering public perception when deciding whether to overrule precedent is inconsistent with the judiciary's role in the constitutional framework.[298] However, Professor Hellman's assertions about the loss of trust between Justices and the need to separately attend to

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[292] Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107, 1108 (1995).

[293] *Id.* at 1115. This same loss of trust is evident in the *Dobbs* dissent's characterization of the majority's approach to overruling *Roe* and *Casey*. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 412–14 (2022) (Breyer, Sotomayor, & Kagan, JJ., dissenting).

[294] Hellman, *supra* note 292, at 1124 (arguing that the "manifest quality" of principled decisions is lost).

[295] *Id.* at 1127.

[296] *Id.* at 1151.

[297] *See Dobbs*, 597 U.S. at 413–14.

[298] *See* discussion *supra* Section III.A. Professor Hellman seeks to draw a distinction between deferring judgment, which judicial independence prohibits, and "simply express[ing] respect for the pluralism of views about the right way to reach legal results by requiring that the reasons offered by judges be reasons that are likely to be accepted by others as principled reasons." Hellman, *supra* note 292, at 1130. Requiring that a reason conform to the likely acceptance of others, however, is not functionally different from deferring judgment to those others with respect to the reason's suitability as a basis for adjudication.

appearance are well-taken.[299] The dissenting Justices saw the majority's treatment of precedent as untrustworthy and thus expressed their concern that the public might similarly perceive the Court as untrustworthy.[300] Likewise, the Court's perception does play a significant role in its ability to fulfill its functions, as this Note has discussed.[301]

That appearance merits separate attention, however, does not necessitate that it become outcome determinative. Instead of treating appearance as a prior or concurrent consideration, appearance should be entertained *after* the Court's decision regarding precedent has been made as the Court decides how best to communicate its ruling. Opinions should be crafted to help the Court's decision and reasoning, once reached—and reached based upon the law—appear principled. By clearly acknowledging its understanding of the Court's role and contextualizing its decision as an exercise of that function, the Court could extend an olive branch of sorts to its readers and seek to restore faith in the "manifest quality" of its decisions.[302]

B. The Vulnerability of the Weakest Branch—Potential Pitfalls

Even if the Court were to follow such an approach and effectively communicate not only its rationale for overruling, but also its constitutional basis (independent of public opinion) for doing so, some drawbacks of overruling precedent are unavoidable. First, the doctrine of stare decisis itself

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[299] Hellman, *supra* note 292, at 1124.

[300] *See Dobbs*, 597 U.S. at 412–14.

[301] *See* discussion *supra* Section II.B.1.

[302] Hellman, *supra* note 292, at 1124. Instead, the Court sometimes does the exact opposite. *See* discussion *supra* Section III.A. Court watchers often enjoy displays of reciprocal admiration between Justices, even those who disagree about politics or fundamental aspects of jurisprudence. *See, e.g.*, Hope Ngo, *The Truth About Ruth Bader Ginsburg and Antonin Scalia's Friendship*, THE LIST (Oct. 12, 2020, 9:54 AM), https://www.thelist.com/260001/the-truth-about-ruth-bader-ginsburg-and-antonin-scalias-friendship/. However, opinions like Justice Scalia's *Obergefell* dissent sometimes reflect less collegiality than they do bitterness, like that of a particularly harsh parting of ways. *See* Obergefell v. Hodges, 576 U.S. 644, 719 n.22 (2015) (Scalia, J., dissenting); *cf.* TURNPIKE TROUBADOURS, *The Bird Hunters*, *on* THE TURNPIKE TROUBADOURS (Bossier City Records 2015).

is so nebulous that it offers no clear standard for the Court to follow.[303] Because of its flexibility, virtually any decision can be criticized as the result of the deciding Justices' covert agenda, political, personal, or otherwise.[304] Whenever a judge engages in a balancing of different factors and considerations, he has the opportunity to characterize the competing interests however necessary to lead to his desired outcome.[305] This is part of why revisiting precedent creates so much tension. Any time a Justice's position about retaining or discarding precedent aligns with the policy outcome others perceive that Justice to favor, complaints about politically motivated adjudication are to be expected. That inevitably creates the sense that stare decisis decisions suffer from an almost inherent arbitrariness.[306]

Additionally, while the approach outlined in this Note focuses on how the judiciary itself can promote its own legitimacy, the actual political landscape is more complex. The judicial branch has little to no control over how politicians in the legislative and executive branches characterize its decisions,[307] nor over how pundits in the media portray the Court.[308] Even

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[303] Easterbrook, *supra* note 39, at 422 (characterizing stare decisis as "a grand balancing test, with neither a maximand nor weights to produce a decision when the criteria conflict, as they always do"); *see supra* note 47 and accompanying text.

[304] *See, e.g.*, Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 402 (1988) ("The truth, of course, is that stare decisis has always been a doctrine of convenience, to both conservatives and liberals.").

[305] *See* Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591, 606 (1990) (discussing the malleable considerations that can allow judges to reach any desired outcome when balancing interests in the context of religious free exercise). Professor Tushnet has argued that, in the free exercise context, "[t]he 'relevant considerations' are defined so generally that the weight a decision maker gives to any particular consideration is left almost entirely open. The effect is that balancing tests are inevitably driven by the results sought . . . ." Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 706 (1986). These same "defects" extend to "all balancing tests." *See id.*

[306] *See* Tushnet, *supra* note 305, at 706.

[307] *See, e.g.*, Cleve R. Wootson, Jr., *Biden Sharply Criticizes Supreme Court After Affirmative Action Case*, WASH. POST (June 29, 2023, 6:17 PM), https://www.washingtonpost.com/politics/2023/06/29/biden-blasts-supreme-court-affirmative-action/.

[308] *See, e.g.*, Jill Filipovic, *It's Time to Say It: the U.S. Supreme Court Has Become an Illegitimate Institution*, THE GUARDIAN (June 25, 2022), https://www.theguardian.com/comm

the legal academy sometimes casts doubt on the Court.[309] This further stirs the treacherous political waters when the Justices cannot even ensure that their own opinions, however well-crafted, will be read at all.[310] It is difficult to avoid the delicate choice the judiciary faces: remain independent, but at the mercy of the more powerful branches of government (as Hamilton and others believed the judicial branch was),[311] or appease outside influences,

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entisfree/2022/jun/25/us-supreme-court-illegitimate-institution. Media portrayal of the Court is absolutely pivotal. As one prominent example, the unprecedented leak of the *Dobbs* majority opinion shocked the public and the legal community, drawing speculation that one of the Justices' clerks leaked the opinion in an effort to impact the final outcome or attack the Court's institutional integrity. *See* Mark Movsesian, *Why the* Dobbs *Leak is Dangerous*, FIRST THINGS (May 5, 2022), https://www.firstthings.com/web-exclusives/2022/05/why-the-dobbs-leak-is-dangerous (offering the perspective of a former Supreme Court clerk on the event). *Contra* Nathan T. Carrington & Logan Strother, *Leaks Don't Hurt Trust in the Supreme Court. Unpopular Decisions Do.*, WASH. POST (May 13, 2022), https://www.washingtonpost.com/politics/2022/05/13/roe-dodds-leak-confidentiality-legitimacy-scotus/ (suggesting that the leak itself did not cause as much damage as the actual *Dobbs* decision).

[309] *See, e.g.*, Rachel Reed, *Is the Supreme Court Broken?*, HARV. L. TODAY (Mar. 25, 2021), https://hls.harvard.edu/today/is-the-supreme-court-broken/ (summarizing Harvard Law School's Rappaport Forum, where multiple distinguished panelists "agreed on the need to reform the nation's highest court").

[310] While it is impossible to determine how many people actually read an opinion before reaching a conclusion about its merits, it is relatively easy to see that the Court itself can do little to affect those who do not. It is no help that most laypersons (and perhaps some lawyers) lack the requisite skills and background knowledge to meaningfully engage with complex legal arguments like those that typically run throughout a Supreme Court opinion. *See How to Read a U.S. Supreme Court Opinion*, A.B.A. (May 4, 2022), https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/how-to-read-a-u-s-supreme-court-opinion/. In light of that fact, the Court can and should make its opinions as accessible as possible, as many have argued is best practice for legal writing more broadly. *See, e.g.*, BRYAN A. GARNER, THE WINNING BRIEF 221–30 (3d ed. 2014); ANTONIN SCALIA & BRYAN GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 113–14 (2008). But there is not much else the Justices can do to prevent people from making up their minds based on characterizations of a given decision in the media—often as simplistic as a headline. *See* Chris Cillizza, *Americans Read Headlines. And Not Much Else.*, WASH. POST (Mar. 19, 2014, 12:32 PM), https://www.washingtonpost.com/news/the-fix/wp/2014/03/19/americans-read-headlines-and-not-much-else/; Maria Konnikova, *How Headlines Change the Way We Think*, NEW YORKER (Dec. 17, 2014), https://www.newyorker.com/science/maria-konnikova/headlines-change-way-think.

[311] *See supra* note 154 and accompanying text.

losing its independence in the process.[312] The Court's approach, however, must be to perform its judicial duties, doing what it can to address the public's concerns and present itself in the best light possible—while holding fast to the scope of judicial power contemplated by the Founders and the Constitution itself. If the Court can only control its own opinions and self-descriptions, then those become its most important tools for protecting its perceived integrity. Faced though it may be with many challenges and pitfalls, the Court must press on and apply those tools to the problems before it, trusting itself to the Founders' vision.[313]

V. CONCLUSION

The decision of the *Dobbs* Court to overrule precedents as widely known as *Roe* and *Casey* was inevitably placed at the center of the controversy over abortion in the United States. While future decisions to overrule precedent may involve topics less divisive and politicized, they will still raise the same question: How will the Court account for public perception if it continues to view itself as an independent branch that can, and even should, overrule precedent simply because it is wrong? The Court should not abandon the role that We the People established in the Constitution; it should persist in faithful efforts to interpret and apply the law fairly. Neither, however, should it lose sight of the importance of its perception in the eyes of that same People. To fulfill its purpose, and to do so effectively, the Court must pursue a holistic integrity—both actual and perceived.

Like the flying buttresses of Chartres Cathedral, the dome of the United States Capitol, and the columns of its own building's façade, the Supreme Court's independent exercise of judicial power is critical to its actual, structural integrity as an institution. But that foundational support also serves an outward purpose by putting the Court's ideological architecture on display, commanding the respect of onlookers, and subtly conveying the constitutional system's thoughtful design. Rather than beams that hide within plastered walls or appliqués meant to conceal structural defects, the pillars of judicial independence and integrity uphold the Court as an

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312 *See* discussion *supra* Section III.A.

313 Perhaps, "if pressure makes a diamond," the Court "still might come out clean." TURNPIKE TROUBADOURS, *A Cat in the Rain*, *on* A CAT IN THE RAIN (Bossier City Records 2023).

institution and proclaim its importance to the People. The Constitution's blueprint, though weathered by the storms of the American experiment, is worth preserving. May our Union hold on to that vision, "that the great idea may not die."[314]

[314] DOSTOEVSKY, *supra* note 1, at 280.