TAKING ANOTHER LOOK AT THE CALL ON THE FIELD: *ROE*, CHIEF JUSTICE ROBERTS, AND STARE DECISIS

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During his confirmation hearing, United States Supreme Court Chief Justice Roberts described the role of a judge as that of an umpire, and he insisted that "[n]obody ever comes to a ball game to see the umpire." These days, though, all eyes are on the Chief Justice. He appears to have become the swing vote on the Court, and his approach to overruling prior decisions may determine the future of Roe v. Wade.

The principle of stare decisis requires the Court to adhere to its earlier rulings—even those it considers wrongly decided—absent a "special justification." In Franchise Tax Board v. Hyatt *and* Knick v. Township of Scott, *both decided 5-4 in the waning days of the Court's October 2018 term, Chief Justice Roberts and the other conservative Justices on the Court found such a justification and overruled decisions dating back to 1979 and 1985.*

Justices Breyer and Kagan suggested that Hyatt *and* Knick *spell a bad omen for other precedents. But one should not be so quick to proclaim that the sky is falling for, on the basis of stare decisis alone, the Chief Justice sided with the Court's four progressives in* Kisor v. Wilkie, *a 5-4 decision of the same vintage as* Hyatt *and* Knick *in which the Court refused to overrule 1945 and 1997 precedents, and he joined Justices Alito and Kagan in dissenting from the fractured Court's 2020 decision in* Ramos v. Louisiana *to overturn a ruling handed down the year before* Roe. *The Chief Justice's votes in* Kisor *and* Ramos *suggest a commitment to stare decisis at least to a degree and that he will give serious and thoughtful consideration to the principle's demands if the Court is asked to overrule* Roe.

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This Article explores the Chief Justice's approach to stare decisis by examining what he himself has written and where he otherwise has stood in decisions in which stare decisis has featured prominently. Without attempting to predict whether the Chief Justice ultimately would vote in favor of overruling Roe*, the Article attempts to identify significant considerations that could push him in that direction, thereby offering guidance to litigants on both sides of the issue. And the Article concludes that Chief Justice Roberts's devotion to judicial restraint and the rule of law should lead him to vote in favor of overruling* Roe *only if a challenged abortion regulation cannot be upheld on narrower grounds and reaffirming the landmark 1973 decision will cause more harm to the Constitution than casting the abortion question out of the courts and back to the States.*

INTRODUCTION

Speculate no more. Chief Justice Roberts now has command of the United States Supreme Court. Nowhere was this on greater display than the last day of the October 2018 term when the Court issued opinions addressing partisan gerrymandering

and the propriety of including a question about immigration status in the census.[1] Chief Justice Roberts was the swing vote and authored both opinions of the Court, leading the Court's conservative wing in rejecting a challenge to North Carolina and Maryland redistricting plans and siding with the progressive Justices in concluding that the Department of Commerce's decision to include a citizenship question on the census did not proceed from reasoned agency judgment.[2] Now more than ever, the man who described the job of a judge as that of an "umpire"[3] is making the calls that decide the game.

Of course, it is one thing to say whether the last pitch was a ball or a strike.[4] It is quite another to review a call made almost fifty years ago and decide whether to overrule another umpire. Yet that is what abortion opponents want the Court to do with respect to *Roe v. Wade*.[5] And how Chief Justice Roberts would vote if presented with a request to reconsider the 1973 decision has been subject to much prognostication.[6]

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1. *See* Rucho v. Common Cause, 139 S. Ct. 2484 (2019); Dep't of Commerce v. New York, 139 S. Ct. 2551 (2019).

2. *Rucho*, 139 S. Ct. at 2506–07 ("We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts. Federal judges have no license to reallocate political power between the two major political parties . . . ."); *Dep't of Commerce*, 139 S. Ct. at 2576 ("We do not hold that the agency decision here was substantively invalid. . . . Reasoned decisionmaking under the Administrative Procedure Act calls for an explanation for agency action. What was provided here was more of a distraction.").

3. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) [hereinafter *Confirmation Hearing*] (statement of Judge John G. Roberts, Jr.).

4. *See id.* at 56.

5. 410 U.S. 113 (1973); *see, e.g.*, Brief *Amici Curiae* of 207 Members of Congress in Support of Respondent and Cross-Petitioner at 2, June Medical Services, LLC v. Russo, No. 18-1323 (U.S. Jan. 2, 2020).

6. *See* Joan Biskupic, *John Roberts has voted for restrictions on abortion. Will he overturn Roe v. Wade?*, CNN (May 15, 2019, 6:14 PM), https://www.cnn.com/2019/05/15/politics/john-roberts-abortion-alabama-roe-v-wade/index.html [https://perma.cc/QFE9-VY65] ("Chief Justice John Roberts will not vote to strike down Roe v. Wade and outright ban abortion. At least not yet."); Ryan Everson, Opinion, *Based on his* Obergefell *dissent, Chief Justice Roberts will overturn* Roe, WASH. EXAMINER (June 5, 2019, 1:40 PM), https://www.washingtonexaminer.com/opinion/based-on-his-obergefell-v-hodges-dissent-chief-justice-john-roberts-will-overturn-roe-v-wade [https://perma.cc/8FB5-RDHL] (describing Chief Justice's Roberts's dissent in Obergefell v. Hodges, 135 S. Ct. 2584 (2015), and asserting that, "[i]f Roberts applies this logic to abortion, he would have to overturn *Roe*"); Pete Williams, *The Supreme Court and abortion: Will Roe v. Wade survive the new onslaught?*, NBC NEWS

Both sides of the abortion debate have reason for optimism and for concern. In *Gonzales v. Carhart*,[7] decided shortly after Chief Justice Roberts took his seat on the Court, he and the other four conservative Justices united to form a 5-4 majority that upheld the federal partial-birth abortion ban.[8] In addition, in *Whole Woman's Health v. Hellerstedt*,[9] the Chief Justice joined Justice Alito in dissenting from the Court's decision to strike down Texas statutes requiring an abortion provider to have admitting privileges at a nearby hospital and requiring abortion facilities to meet the standards that apply to ambulatory surgery centers.[10] On the other hand, in *June Medical Services, LLC v. Gee*,[11] Chief Justice Roberts backed a stay against a Louisiana admitting privileges requirement similar to the one at issue in *Hellerstedt*.[12]

For several reasons, though, how the Chief Justice voted in *Gonzales* and *Hellerstedt* and with respect to the *Gee* stay is not particularly instructive when trying to gauge how he might vote in a direct challenge to *Roe*. First, the Court in *Gonzales* did not consider whether to overrule *Roe*.[13] Second, Justice Alito's dissent in *Hellerstedt* focused largely on procedural missteps Justice Alito believed the majority had made.[14] Third, the Chief Justice did not join Justice Thomas in *Gonzales* when he asserted his "view that the Court's abortion jurisprudence . . . has no basis in the Constitution"[15] or in *Hellerstedt* when Justice Thomas

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(May 16, 2019, 10:01 AM), https://www.nbcnews.com/politics/supreme-court/supreme-court-abortion-will-right-survive-new-onslaught-n1006386 [https://perma.cc/N8J6-7DXX] ("[I]t takes five votes to [overturn *Roe v. Wade*], and there's no guarantee Chief Justice John Roberts would provide it, given his interest in the court's long-term legacy.").

7. 550 U.S. 124 (2007).

8. *Id.* at 133 ("We conclude the [Partial-Birth Abortion Ban Act of 2003] should be sustained . . . .").

9. 136 S. Ct. 2292 (2016).

10. *See id.* at 2330–53 (Alito, J., dissenting).

11. 139 S. Ct. 663 (2019) (mem.).

12. *Id.* at 663.

13. *See Gonzales*, 550 U.S. at 156–67 (upholding the federal partial-birth abortion ban under the undue burden standard adopted in Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992)).

14. *See Hellerstedt*, 136 S. Ct. at 2330 (Alito, J., dissenting) ("[D]etermined to strike down two provisions of a new Texas abortion statute in all of their applications, the Court simply disregards basic rules that apply in all other cases.").

15. 550 U.S. at 169 (Thomas, J., concurring).

declared that he "remain[ed] fundamentally opposed to the Court's abortion jurisprudence."[16] Finally, the Chief Justice's vote in *Gee* was for temporary relief and therefore signals nothing about how he might vote on the merits.[17]

Divining how Chief Justice Roberts might vote in a case challenging *Roe* becomes all the more difficult when one considers where he has stood in recent decisions featuring stare decisis, a Latin phrase meaning "to stand by things decided"[18] and a principle that directs courts to follow precedent absent a "special justification" for doing otherwise.[19] During his confirmation hearing, the Chief Justice emphasized that "overruling of a prior precedent . . . is inconsistent with principles of stability and yet . . . the principles of *stare decisis* recognize that there are situations when that's a price that has to be paid."[20] In two decisions handed down as the October 2018 term drew to a close, the Chief Justice was willing to pay that price;[21] in two others at the end of that term and a third during the Court's most recent term, he declined.[22]

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16. 136 S. Ct. at 2324 (Thomas, J., dissenting).

17. The Court has issued a writ of certiorari and heard oral arguments in *June Medical Services, LLC v. Gee*, but has not issued an opinion on the merits. *See* June Medical Services, LLC v. Gee, 140 S. Ct. 35, 35–36 (2019) (mem.) (granting certiorari); June Medical Services, LLC v. Russo, No. 18-1323 (U.S. argued Mar. 4, 2020).

18. *Stare decisis*, BLACK'S LAW DICTIONARY (11th ed. 2019).

19. Kisor v. Wilkie, 139 S. Ct. 2400, 2422 (2019) (quoting Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 266 (2014)) (internal quotation marks omitted).

20. *See Confirmation Hearing*, *supra* note 3, at 144 (statement of Judge John G. Roberts, Jr.).

21. *See* Knick v. Township of Scott, 139 S. Ct. 2162, 2179 (2019) (overruling Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985)); Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1490 (2019) (overruling Nevada v. Hall, 440 U.S. 410 (1979)).

22. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1425 (2020) (Alito, J., dissenting) (dissenting from the Court's decision to overrule Apodaca v. Oregon, 406 U.S. 404 (1972)); *Kisor*, 139 S. Ct. at 2408 (refusing to overrule Auer v. Robbins, 519 U.S. 452 (1997), and Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945)); Gamble v. United States, 139 S. Ct. 1960, 1964 (2019) (affirming precedent supporting the "dual sovereignty" doctrine). During the current term, the Chief Justice also was part of the majority in *Allen v. Cooper*, 140 S. Ct. 994 (2020), a case in which the Court concluded that stare decisis stood in the way of the plaintiffs' claim against North Carolina for copyright infringement. *See id.* at 1003 (indicating that deciding in the plaintiffs' favor would require the Court to overrule Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999)). The Court in *Allen* declined to revisit the relevant precedent because the plaintiff as-

Chief Justice Roberts was in the majority in all four rulings at the close of the October 2018 term.[23] Three of the cases were decided by a 5-4 margin.[24] In *Franchise Tax Board v. Hyatt*,[25] the Chief Justice joined his conservative brethren in overturning the Court's 1979 decision in *Nevada v. Hall*.[26] About a month later, the Chief Justice wrote the opinion for the same conservative majority in *Knick v. Township of Scott*,[27] a case in which the Court discarded *Williamson County Regional Planning Commission v. Hamilton Bank*,[28] which dated back to 1985.[29] Justice Breyer dissented in *Hyatt* and "wonder[ed] which cases the Court [would] overrule next."[30] Justice Kagan latched on to this in her *Knick* dissent, responding: "[T]hat didn't take long. Now one may wonder yet again."[31]

Just days after the Court released its opinion in *Knick*, however, Chief Justice Roberts allied with the Court's progressives in *Kisor v. Wilkie*[32] to uphold decisions from 1997 and 1945—*Auer v. Robbins*[33] and *Bowles v. Seminole Rock & Sand Co.*[34] Less than a year later, the Chief Justice once again exhibited a reticence to overrule precedent, pairing up with Justices Alito and Kagan to decry the 6-3 decision in *Ramos v. Louisiana*[35] that disposed of *Apodaca v. Oregon*,[36] a 1972 Sixth Amendment ruling.[37]

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serted nothing more than that the earlier case was decided incorrectly. *See id.* (explaining that "error alone . . . cannot overcome *stare decisis*").

23. *Kisor*, 139 S. Ct. at 2408; *Knick*, 139 S. Ct. at 2166–67; *Gamble*, 139 S Ct. at 1963; *Hyatt*, 139 S. Ct. at 1490.

24. *Kisor*, 139 S. Ct. at 2408; *Knick*, 139 S. Ct. at 2166–67; *Hyatt*, 139 S. Ct. at 1490.

25. 139 S. Ct. 1485.

26. 440 U.S. 410; *see Hyatt*, 139 S. Ct. at 1490.

27. 139 S. Ct. 2162.

28. 473 U.S. 172 (1985).

29. *Knick*, 139 S. Ct. at 2179.

30. *Hyatt*, 139 S. Ct. at 1506 (Breyer, J., dissenting).

31. *Knick*, 139 S. Ct. at 2190 (Kagan, J., dissenting).

32. 139 S. Ct. 2400 (2019).

33. 519 U.S. 452 (1997).

34. 325 U.S. 410 (1945); *see Kisor*, 139 S. Ct. at 2408 (affirming *Auer* and *Seminole Rock*).

35. 140 S. Ct. 1390 (2020).

36. 406 U.S. 404 (1972).

37. *See Ramos*, 140 S. Ct. at 1439–40 (Alito, J., dissenting) (asserting that the Court should have upheld *Apodaca* based on stare decisis).

The Chief Justice's votes in *Hyatt*, *Knick*, *Kisor*, and *Ramos* evidence a complex and nuanced view about the place of stare decisis in our constitutional system. With these cases in the backdrop, eyes naturally turn to the Chief Justice when it comes to abortion. Indeed, his beliefs about stare decisis could prove critical to the continuing vitality of *Roe* and the right to choose that the Court recognized in 1973.

This Article examines Chief Justice Roberts's approach to stare decisis, attempting to identify matters that could prove important to him in evaluating *Roe*, but without offering a prediction about how he would vote in a case challenging the decision. Part I explores the Court's jurisprudence with respect to stare decisis since the Chief Justice took his seat on the Court, surveying how the Court has applied the principle in statutory, procedural, and constitutional contexts and describing important concurring and dissenting opinions that the Chief Justice either has written himself or has joined. Part II then attempts to distill from the Chief Justice's historical statements and positions on stare decisis particular matters that may influence his thinking about the principle in relation to *Roe*. In so doing, the Article highlights critical points for parties to address as they try to persuade the Chief Justice to vote one way or the other. Finally, the Article concludes that, to win Chief Justice Roberts's vote to overrule *Roe*, challengers will need to prove that *Roe* was "not just wrong," but that "[i]ts reasoning was exceptionally ill founded"[38] and that continuing to recognize a constitutional right to choose abortion would "do[] more damage to [the rule of law] than to advance it."[39]

The Chief Justice admitted in his confirmation hearing that "it is a jolt to the legal system when you overrule a precedent."[40] History tells us, however, that the Chief Justice believes fidelity to the Constitution is paramount and sometimes demands that the legal system absorb the shock.[41]

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38. Knick v. Township of Scott, 139 S. Ct. 2162, 2178 (2019).

39. Citizens United v. FEC, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring).

40. *Confirmation Hearing*, *supra* note 3, at 144 (statement of Judge John G. Roberts, Jr.).

41. *See, e.g.*, *Knick*, 139 S. Ct. at 2166–67.

I. THE CHIEF JUSTICE'S HISTORICAL APPROACH TO STARE DECISIS

Stare decisis is not a monolithic principle, as Chief Justice Roberts explained in his confirmation hearing.[42] It takes on "special force" with respect to a precedent that interprets a statute because, through subsequent legislation, Congress can remedy an erroneous ruling.[43] The principle is weaker, on the other hand, with respect to constitutional matters given that, absent Court action, correction usually requires the people to go through the onerous process of amending the Constitution.[44] But even these general parameters only go so far, for a weaker form of stare decisis applies when the Court interprets the Sherman Antitrust Act,[45] and according to Chief Justice Roberts, a stronger version applies in constitutional matters involving the dormant Commerce Clause.[46]

In the Court's 2019 decision in *Gamble v. United States*,[47] Justice Thomas announced his view that, in applying stare decisis, the Court should consider only whether the prior decision is "demonstrably erroneous."[48] If it is, according to Justice Thomas, the Court should overrule the decision without considering

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42. *See Confirmation Hearing*, *supra* note 3, at 164 (statement of Judge John G. Roberts, Jr.) (indicating that stare decisis "is strongest when you're dealing with a statutory decision" but enjoys less force in constitutional matters).

43. Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 274 (2014) ("The principle of *stare decisis* has 'special force' 'in respect to statutory interpretation' because 'Congress remains free to alter what we have done.'" (quoting John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 139 (2008))).

44. *Knick*, 139 S. Ct. at 2177–78 ("The doctrine 'is at its weakest when we interpret the Constitution' . . . because only this Court or a constitutional amendment can alter our holdings." (quoting Agostini v. Felton, 521 U.S. 203, 235 (1997))); *see also* U.S. CONST. art. V (requiring ratification by three-fourths of the states for constitutional amendments).

45. 15 U.S.C. § 1 (2018); Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401, 2412 (2015) ("This Court has viewed *stare decisis* as having less-than-usual force in cases involving the Sherman Act." (citing State Oil Co. v. Khan, 522 U.S. 3, 20–21 (1997))); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899 (2007) ("*Stare decisis* is not as significant in this case, . . . because the issue before us is the scope of the Sherman Act." (citing *Khan*, 522 U.S. at 20)).

46. *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2102 (2018) (Roberts, C.J., dissenting) ("We have applied this heightened form of *stare decisis* in the dormant Commerce Clause context.").

47. 139 S. Ct. 1960 (2019).

48. *Id.* at 1984–85 (Thomas, J., concurring).

other factors that might weigh in favor of retaining the precedent as a matter of policy.[49] The Chief Justice Roberts does not agree. Not only did he not support Justice Thomas's concurrence in *Gamble*, he spoke of the traditional factors underlying stare decisis in his confirmation hearing,[50] dissented from the Court's 2018 decision to overrule precedent in *South Dakota v. Wayfair*[51] even though he believed the previous cases were wrongly decided,[52] and voted in *Kisor* and *Ramos* to uphold *Auer*, *Seminole Rock*, and *Apodaca*, not based on the soundness of those rulings, but on the grounds of stare decisis alone.[53] If this were not enough, the Chief Justice made his view abundantly clear in *Allen v. Cooper*[54] by joining Justice Kagan's opinion for the Court, which explained that, "with th[e] charge of error alone, [one] cannot overcome *stare decisis*."[55]

As the Chief Justice stressed in *Citizens United v. FEC*:[56] "*Stare decisis* is . . . a 'principle of policy.' When considering whether to reexamine a prior erroneous holding, we must balance the importance of having constitutional questions *decided* against

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49. *See id.* at 1981–82 ("The Court currently views *stare decisis* as a 'principle of policy' that balances several factors . . . . This approach . . . might have made sense in a common-law legal system . . . . But our federal system is different." (quoting Citizens United v. FEC, 558 U.S. 310, 363 (2010)) (internal quotation marks omitted)). Justice Thomas reiterated this view in *Ramos* and in another 2020 concurrence. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1421–22 (2020) (Thomas, J., concurring in the judgment); Allen v. Cooper, 140 S. Ct. 994, 1007–08 (2020) (Thomas, J., concurring in part and concurring in the judgment).

50. *Confirmation Hearing*, *supra* note 3, at 143–44 (statement of Judge John G. Roberts, Jr.) ("It is not enough that you may think the prior decision was wrongly decided. . . . [Y]ou . . . look at these other factors, like settled expectations, like the legitimacy of the Court, like whether a particular precedent is workable or not, whether a precedent has been eroded by subsequent developments.").

51. 138 S. Ct. 2080.

52. *Id.* at 2101 (Roberts, C.J., dissenting) (indicating that, although he "agree[d] that [*National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967)] was wrongly decided," he would have "decline[d] the invitation" to overrule it).

53. *See Ramos*, 140 S. Ct. at 1434 (Alito, J., dissenting) (with Chief Justice Roberts joining) ("I cannot say that I would have agreed either with Justice White's analysis or his bottom line in *Apodaca* if I had sat on the Court at that time . . . ."); *Kisor*, 139 S. Ct. at 2424 (Roberts, C.J., concurring) (joining the majority opinion's consideration of stare decisis, but not its evaluation of whether *Auer* and *Seminole Rock* were correctly decided).

54. 140 S. Ct. 994.

55. *Id.* at 1003.

56. 558 U.S. 310 (2010).

the importance of having them *decided right*."[57] To earn the Chief Justice's vote to overrule *Roe*, it will take more than convincing him that the Court got it wrong in 1973.

A. Stare Decisis with Greater Force

Except with respect to a ruling that interpreted the Sherman Antitrust Act,[58] Chief Justice Roberts consistently has voted in favor of upholding precedent based on stare decisis when the earlier rulings have involved either statutory interpretation or a field in which Congress exercises primary authority.[59] In those cases, the Chief Justice has stressed, the Court should exercise restraint and defer to Congress because "legislators may more directly consider the competing interests at stake" and "ha[ve] the capacity to investigate and analyze facts beyond anything the Judiciary could match."[60]

In 2008, Chief Justice Roberts joined the majority in *John R. Sand & Gravel Co. v. United States*,[61] a decision in which the Court gave brief attention to stare decisis when declining an invitation to overrule the Court's decisions in three cases: *Soriano v. United States*,[62] *Finn v. United States*,[63] and *Kendall v. United*

57. *Id.* at 378 (Roberts, C.J., concurring) (citation omitted) (quoting Helvering v. Hallock, 309 U.S. 106, 119 (1940)).

58. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

59. One might argue that the Chief Justice did not take this approach when he joined Justice Alito's dissent in *Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401 (2015), with respect to a Patent Act decision or when he wrote the majority opinion in *Knick* which involved a practical problem that Congress could solve by amending a statute. *See infra* notes 231–254, 314–326 and accompanying text (discussing *Kimble* and *Knick*). But Justice Alito asserted in *Kimble* that the precedent the Court refused to overrule "d[id] not actually interpret a statute," *Kimble*, 135 S. Ct. at 2418 (Alito, J., dissenting), and in *Knick*, the Chief Justice stressed that Congress could not offer a complete solution to the prior opinion's erroneous interpretation of the Constitution. *Knick*, 139 S. Ct. at 2179 ("But takings plaintiffs, unlike plaintiffs bringing any other constitutional claim, would still have been forced to pursue relief under state law before they could bring suit in federal court. Congress could not have lifted that unjustified exhaustion requirement . . . .").

60. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2104 (2018) (Roberts, C.J., dissenting) (quoting Gen. Motors Corp. v. Tracy, 519 U.S. 278, 309 (1997)) (internal quotation marks omitted); *see* Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 277 (2014) (indicating that concerns regarding abuses associated with securities class action law suits "are more appropriately addressed to Congress").

61. 552 U.S. 130 (2008).

62. 352 U.S. 270 (1957).

63. 123 U.S. 227 (1887).

States.[64] The Court had concluded in all three that the statute of limitations for federal claims is jurisdictional in nature,[65] and consistent with those decisions, the *John R. Sand* Court ruled that the Court of Federal Claims must consider the running of any applicable statute of limitations even if the government does not assert the statute as a defense.[66]

Noting the "special force" of stare decisis with respect to statutory interpretation, the Court rejected arguments that the prior decisions had proved unworkable and that reliance interests were not an impediment to overruling them.[67] With regard to workability, the Court emphasized that its different treatment of "similarly worded[] statutes" more recently did not mean that the previous decisions had become unworkable, but if anything, reflected varying judicial assumptions.[68] Moreover, for reasons not explained, the Court indicated that, even if no governmental reliance on the earlier decisions could be established, having a settled matter now reversed could prove harmful.[69]

Just months after *John R. Sand*, the Court applied principles of stare decisis in a nontraditional way—to determine the scope of a civil rights statute. In *CBOCS West, Inc. v. Humphries*,[70] the Chief Justice again joined the opinion of the Court, which this time concluded that a person may make an unlawful retaliation claim under 42 U.S.C. § 1981.[71] In arriving at its decision, the Court reasoned that § 1981 historically has been treated in a manner similar to 42 U.S.C. § 1982, that in *Sullivan v. Little Hunting Park, Inc.*[72] in 1969 and *Jackson v. Birmingham Board of Education*[73] in 2005, the Court considered § 1982 to include a claim for retaliation, and that after the Court had interpreted § 1981 to reach only conduct related to the formation of a con-

64. 107 U.S. 123 (1883); *see John R. Sand*, 552 U.S. at 138–39.

65. *See John R. Sand*, 552 U.S. at 134–36.

66. *Id.* at 132.

67. *Id.* at 139.

68. *Id.* at 138–39.

69. *See id.* at 139.

70. 553 U.S. 442 (2008).

71. *Id.* at 446 ("The question before us is whether § 1981 encompasses retaliation claims. We conclude that it does.").

72. 396 U.S. 229 (1969).

73. 544 U.S. 167 (2005).

tract, Congress amended § 1981 in a way that permitted the Court to decide that it covered retaliation.[74]

Using stare decisis to justify its decision, the Court explained that *Sullivan* (as the Court in *Jackson* understood and applied it), when combined with the Court's extensive historical practice of treating §§ 1981 and 1982 similarly, indicates that "the view that § 1981 encompasses retaliation claims is . . . well embedded in the law."[75] As a result, the Court suggested, ruling to the contrary would undermine "many Court precedents" and effectively would overrule *Sullivan*.[76] According to the Court, the age of the *Sullivan* decision weighed against going that far.[77] Moreover, in disposing of CBOCS's argument that since *Sullivan* the Court has taken a more textualist approach to statutory interpretation, the *CBOCS* Court declared that changes in interpretive methods would not justify reconsideration of "well-established prior law."[78]

Returning to the traditional context for analyzing what stare decisis requires, the Court in *Michigan v. Bay Mills Indian Community*[79] decided against overruling its 1998 decision in *Kiowa Tribe v. Manufacturing Technologies, Inc*.[80] Contending that abrogating sovereign immunity was a matter for Congress and not the courts, the *Kiowa* Court had concluded that tribal sovereign immunity extends to suits with respect to a tribe's commercial activities even when those activities are not conducted on tribal lands.[81] The Court in *Bay Mills*, with the Chief Justice in the majority, indicated that, "[h]aving held in *Kiowa* that this issue is up to Congress, [it could not] reverse [itself] because some may think its conclusion wrong"[82] and that it would "scale the heights of presumption" for the Court to overturn

74. *See CBOCS*, 553 U.S. at 451.

75. *Id.*

76. *Id.* at 451–52.

77. *See id.* at 453 ("[W]e believe it is too late in the day in effect to overturn the holding in that case (nor does CBOCS ask us to do so) on the basis of a linguistic argument that was apparent, and which the Court did not embrace at that time.").

78. *Id.* at 457.

79. 572 U.S. 782 (2014).

80. 523 U.S. 751 (1998); *see Bay Mills*, 572 U.S. at 791.

81. *See Bay Mills*, 572 U.S. at 790.

82. *Id.* at 803.

Kiowa after Congress specifically considered *Kiowa* when debating legislation that would modify tribal immunity.[83]

In declining Michigan's request to overrule *Kiowa*, the *Bay Mills* Court indicated that several stare decisis factors raised a bar that Michigan could not overcome. Looking both forward and backward, the Court noted that *Kiowa* itself had "reaffirmed a long line of precedents"[84] and that the Court later followed *Kiowa* in a case involving commercial activity conducted outside tribal lands.[85] Moreover, the Court highlighted that "concerns of *stare decisis* . . . are 'at their acme'" in property and contract cases, and parties have looked to *Kiowa* in designing business transactions.[86] In addition, the Court noted that Michigan had not offered any new arguments and that the state's argument regarding changes in tribal commercial activity had been disposed of previously.[87] Finally, the *Bay Mills* Court emphasized that *Kiowa* recognized that "Congress . . . has the greater capacity 'to weigh and accommodate the competing policy concerns and reliance interests' involved" and its decisions therefore should command respect.[88]

One sees a similar emphasis on deferring to Congress in opinions Chief Justice Roberts authored after *Bay Mills*. Writing the opinion of the Court in 2014 in *Halliburton Co. v. Erica P. John Fund, Inc.*[89] and a dissent in the Court's 2018 *South Dakota v. Wayfair, Inc.* decision, Chief Justice Roberts rejected the idea that the Court should abandon precedents that arguably had become outmoded because of changes in the economy or in our understanding of the economy.[90] According to the Chief Justice,

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83. *Id.*

84. *Id.* at 798.

85. *See id.* (indicating that the Court began with *Kiowa* when it reached its decision in C & L Enters., Inc. v. Citizen Band Potawatomi Tribe, 532 U.S. 411 (2001)).

86. *Id.* at 799 (quoting State Oil Co. v. Khan, 522 U.S. 3, 20 (1997)).

87. *Id.*

88. *Id.* at 800–01 (quoting Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 759 (1998)).

89. 573 U.S. 258 (2014).

90. *See id.* at 272 ("Halliburton has not identified the kind of fundamental shift in economic theory that could justify overruling a precedent on the ground that it misunderstood, or has since been overtaken by, economic realities."); South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2104 (2018) (Roberts, C.J., dissenting) ("The Court is of course correct that the Nation's economy has changed dramatically since the

it is best to leave such considerations to Congress and, if the Court had erred, allow Congress to provide the remedy.[91] As he emphasized in *Wayfair*:

> A good reason to leave these matters to Congress is that legislators may more directly consider the competing interests at stake. Unlike this Court, Congress has the flexibility to address these questions in a wide variety of ways. . . . Congress "has the capacity to investigate and analyze facts beyond anything the Judiciary could match."[92]

In *Halliburton*, though, stare decisis may not have been the most compelling motivation for the Chief Justice's vote to retain a controversial aspect of the Court's 1988 decision in *Basic, Inc. v. Levinson*.[93] As Justice Kagan explained in *Kimble v. Marvel Entertainment, LLC*,[94] "*stare decisis* has consequence only to the extent it sustains incorrect decisions; correct judgments have no need for that principle to prop them up."[95] And it seems that Chief Justice Roberts was not convinced that the *Basic* Court had gone off track.[96]

The Court long has recognized that Rule 10b-5 under the Securities Exchange Act of 1934[97] includes a private cause of action for securities fraud,[98] and to recover, a plaintiff must establish reliance on the defendant's false or misleading statement.[99] In *Basic*, the Court made this task easier for Rule 10b-5

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time that *Bellas Hess* and *Quill* roamed the earth. I fear the Court today is compounding its past error by trying to fix it in a totally different era.").

91. *See Wayfair*, 138 S. Ct. at 2104–05 (Roberts, C.J., dissenting) ("I would let Congress decide whether to depart from the physical-presence rule that has governed this area for half a century."); *Halliburton*, 573 U.S. at 277 ("[C]oncerns [about abuses in class actions] are more appropriately addressed to Congress . . . .").

92. *Wayfair*, 138 S. Ct. at 2104 (Roberts, C.J., dissenting) (quoting Gen. Motors Corp. v. Tracy, 519 U.S. 278, 309 (1997)).

93. 485 US 224 (1988).

94. 135 S. Ct. 2401 (2015).

95. *Id.* at 2409.

96. *See Halliburton*, 573 U.S. at 272 ("The academic debates . . . have not refuted the modest premise underlying [*Basic*'s] presumption of reliance.").

97. 15 U.S.C. §§ 78a–78qq (2018).

98. *Halliburton*, 573 U.S. at 267 ("[W]e have long recognized an implied private cause of action to enforce [section 10(b) of the Securities Exchange Act of 1934] and its implementing regulation." (citing Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730 (1975))).

99. *Id.*

plaintiffs by giving them the benefit of a rebuttable presumption of reliance based on the "fraud-on-the-market" theory, which hypothesizes that the market price of securities traded on an efficient market will incorporate all information publicly available, including false or misleading statements.[100] Urging the Court to overrule *Basic*'s presumption, the defendants in *Halliburton* argued that the presumption was inconsistent with congressional intent and based on since-discredited economic theory.[101]

Refusing to overrule *Basic*'s presumption of reliance, the *Halliburton* Court observed that the defendants had not offered any new arguments regarding congressional intent that would give the Court cause to revisit the question.[102] In addition, the Court determined that subsequent developments in economic theory did not undermine the presumption's validity, but instead informed assessments of when the presumption applies or has been rebutted.[103] The Court in *Halliburton* also observed that *Basic* itself acknowledged the controversy surrounding the underlying economic theory and that the ensuing debate has not undermined *Basic*'s "modest premise."[104] Moreover, the *Halliburton* Court asserted, the defendants had not "identified the kind of fundamental shift in economic theory that could justify overruling a precedent on the ground that it misunderstood, or has since been overtaken by, economic realities."[105]

The Court in *Halliburton* also concluded that the principle of stare decisis stood in the way of overruling *Basic*'s presumption. Acknowledging that *Basic*'s presumption related to a judicially-created implied cause of action,[106] the Court insisted that *Basic* enjoyed the weighty form of stare decisis that applies to statutory interpretation because Congress can modify the Rule 10b-5 private cause of action if it disagrees with how the Court has

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100. *Id.* at 268.

101. *Id.* at 269.

102. *Id.* at 270.

103. *Id.* at 272 ("[I]n making the presumption rebuttable, *Basic* recognized that market efficiency is a matter of degree and accordingly made it a matter of proof.").

104. *Id.*

105. *Id.*

106. *Id.* at 274.

applied it. In fact, the *Halliburton* Court asserted, the abuses in securities fraud cases that the defendants cited were better addressed by Congress, which had enacted remedial statutes twice since *Basic*.[107] Finally, the Court denied that *Basic*'s presumption conflicted with more recent decisions.[108]

Unlike in *Halliburton*, the *Wayfair* Court was undeterred by stare decisis when it upheld a South Dakota law that requires an out-of-state merchant to collect sales taxes with respect to sales made in the South Dakota even when the merchant has no physical presence there.[109] In the course of reaching its decision, the Court overruled *National Bellas Hess, Inc. v. Department of Revenue*[110] and *Quill Corp. v. North Dakota*,[111] in which the Court had determined that the Constitution required a "physical presence" before a state could impose a collection obligation on out-of-state residents.[112]

In overruling *Bellas Hess* and *Quill*, the *Wayfair* majority emphasized that changes in the economic landscape, with the surge of internet sales, undermined the justifications for the physical presence rule.[113] Moreover, the Court insisted that *Bellas Hess* and *Quill* have resulted in a "judicially created tax shelter" and arbitrary discrimination against "economically identical actors."[114] The physical presence rule, the *Wayfair* Court contended, was "an extraordinary imposition by the Judiciary on States' authority to collect taxes and perform critical public functions,"[115] and allowing the rule to persist might undermine the Court's legitimacy concerning the cases involving the regulation of interstate commerce.[116]

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107. *Id.* at 274, 276–77.

108. *Id.* at 274–76.

109. *See* South Dakota v. Wayfair, 138 S. Ct. 2080, 2091–92, 2099 (2018).

110. 386 U.S. 753 (1967).

111. 504 U.S. 298 (1992).

112. *Wayfair*, 138 S. Ct. at 2099.

113. *Id.* at 2093 ("[T]he administrative costs of compliance [with a sales tax collection requirement], especially in the modern economy with its Internet technology, are largely unrelated to whether a company happens to have a physical presence in a State.").

114. *Id.* at 2094.

115. *Id.* at 2095.

116. *See id*. at 2096 ("It is essential to public confidence in the tax system that the Court avoid creating inequitable exceptions. This is also essential to the confi-

According to the *Wayfair* majority, stare decisis did not stand in the way of overruling *Bellas Hess* and *Quill*.[117] Although the *Wayfair* Court acknowledged that Congress could abrogate the "physical presence" rule under its power to regulate interstate commerce, the Court stressed that Congress could not correct an erroneous constitutional interpretation.[118] *Quill*, the Court held, was wrong when decided and changes in the economy only have made its effects more serious.[119] Furthermore, the Court opined that the physical presence rule was unworkable because attempting to define what constitutes physical presence has become increasingly difficult in the modern age, creating the risk that "technical and arbitrary disputes" would flood the court system.[120] In addition, the Court stressed that reliance interests can prop up errant precedent only when the interests are "legitimate," and they were not in the case of the physical presence rule because the rule aided consumers in avoiding tax obligations.[121] Moreover, the Court indicated that "other aspects of the Court's Commerce Clause doctrine" could fill the gaps in the protection of interstate commerce that abolition of the physical presence rule might leave open.[122]

In dissent, Chief Justice Roberts agreed that *Bellas Hess* was incorrect when decided, but he argued that the Court should have upheld *Bellas Hess* and *Quill* based on stare decisis.[123] Similar to his view in *Halliburton*, the Chief Justice pointed to the particular strength of the doctrine when Congress can correct the Court's missteps,[124] and he contended that the Court should avoid making new mistakes in trying to address changes in

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dence placed in this Court's Commerce Clause decisions. Yet the physical presence rule undermines that necessary confidence . . . .").

117. *See id.*

118. *Id.*

119. *See id.* at 2097 ("Though *Quill* was wrong on its own terms when it was decided in 1992, since then the Internet revolution has made its earlier error all the more egregious and harmful.").

120. *Id.* at 2098.

121. *Id.*

122. *Id.*

123. *Id.* at 2101 (Roberts, C.J., dissenting).

124. *Id.* (explaining that the force of stare decisis is "even higher [than normal] in fields in which Congress 'exercises primary authority' and can, if it wishes, override this Court's decisions with contrary legislation" (quoting Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 799 (2014))).

economic reality: "I fear the Court today is compounding its past error by trying to fix it in a totally different era. . . . I would let Congress decide whether to depart from the physical-presence rule that has governed this area for half a century."[125] He also asserted that there is even more reason to uphold the physical presence rule under stare decisis because the Court had reaffirmed the rule in *Quill*, "toss[ing] [the ball] into Congress's court" a second time.[126] In addition, the Chief Justice stressed that Congress has been considering how to address collection of taxes in the changing economy and the Court's decision to abandon the rule could impede congressional action.[127]

The Chief Justice's espousal of deference to the political branches when possible was on display most recently in *Kisor v. Wilkie*, a 2019 case in which the only question at issue was whether to retain or overrule *Auer v. Robbins* and *Bowles v. Seminole Rock*.[128] In *Auer* and *Seminole Rock*, the Court determined that courts should defer to reasonable agency interpretations of ambiguous regulations,[129] and with significant attention to the principles of stare decisis, the Court upheld both.[130]

Chief Justice Roberts was the swing vote in *Kisor*'s five-Justice majority, but unlike the other four Justices, he did not vote to uphold *Auer* and *Seminole Rock* because he believed they were correctly decided.[131] Instead, his vote turned solely on the Court's application of stare decisis.[132] In applying the principle to *Auer* and *Seminole Rock*, the Court emphasized that Congress has the ability to alter decisions deferring to agency interpretations—thus enhancing the force of stare decisis—and that Congress had declined to do so even as Supreme Court Justices

125. *Id.* at 2104–05.

126. *Id.* at 2102 (second alteration in original) (quoting Kimble v. Marvel Entm't, Inc., 135 S. Ct. 2401, 2409 (2015)) (internal quotation marks omitted).

127. *See id.* at 2102–03.

128. Kisor v. Wilkie, 139 S. Ct. 2400, 2408 (2019).

129. *See id.* (citing Auer v. Robbins, 519 U.S. 452 (1997); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945)).

130. *See id.*

131. *See id.* at 2424 (Roberts, C.J., concurring in part).

132. *See id.* ("For the reasons the Court discusses in [the part of the Court's opinion addressing stare decisis], I agree that overruling those precedents is not warranted.").

have questioned the propriety of deference.[133] Moreover, the Court stressed that overruling *Auer* and *Seminole Rock* would introduce unparalleled uncertainty with respect to previous Court decisions:

> Deference to reasonable agency interpretations of ambiguous rules pervades the whole corpus of administrative law. . . . [B]ecause that is so, abandoning *Auer* deference would cast doubt on many settled constructions of rules . . . [and] would allow relitigation of any decision based on *Auer* . . . . It is the rare overruling that introduces so much instability into so many areas of law, all in one blow.[134]

Finally, the *Kisor* Court pointed out the fact that a decision was incorrect or poorly reasoned is not the measure for stare decisis and that the petitioner had not argued that deference was unworkable, nor had he identified changes in legal doctrine that undermine *Auer*.[135]

B. Stare Decisis with Lesser Force

Although the Chief Justice consistently has voted against overruling precedents in which stare decisis enjoys particular force, he has not been so confined in contexts in which he has considered the principle's effect more modest. The Chief Justice, however, favored restraint in the first case after his elevation to the Court that specifically implicated the effect of stare decisis.

In *Randall v. Sorrell*[136] a fractured Court reversed the decision of the Court of Appeals for the Second Circuit to uphold a Vermont law limiting campaign contributions and expenditures.[137] Justice Breyer announced the judgment of the Court in *Randall*, but only Chief Justice Roberts joined in Justice Breyer's treatment of stare decisis.[138] According to Justice Breyer, the defendants in *Randall* "in effect" had asked the Court to over-

133. *Id.* at 2422–23 (majority opinion) (explaining conclusion power and pointing out that Congress has declined to exercise it).

134. *Id.* at 2422.

135. *Id.* at 2423.

136. 548 U.S. 230 (2006).

137. *Id.* at 236, 263 (plurality opinion).

138. *Id.* at 235.

rule *Buckley v. Valeo*,[139] a 1976 decision in which the Court struck down on First Amendment grounds federal campaign expenditure limits, but concluded that the contribution limits in the federal law did not contravene the Constitution's free speech guarantee.[140] Justice Breyer insisted that principles underlying stare decisis weighed against overruling *Buckley*.[141] In particular, he stressed that adhering to precedent is particularly important when it "has become settled through iteration and reiteration over a long period of time"[142] and that the Court repeatedly had applied *Buckley* in subsequent cases.[143] Moreover, he pointed out that circumstances have not changed that weaken the legal principles described in or the factual basis underlying *Buckley* and that Congress and state legislatures have relied on the decision in crafting campaign finance laws.[144]

Just a year after *Randall*, though, Chief Justice Roberts was willing to dispense with an antitrust precedent. In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,[145] the Chief Justice was part of a five-Justice conservative majority that overruled the Court's nearly 100-year-old decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*[146] The *Leegin* Court explained that the Court has understood *Dr. Miles* as adopting a per se rule that an agreement between a manufacturer and a distributor setting a minimum price for resale of a good—that is, a vertical price restraint—is illegal under section 1 of the Sherman Antitrust Act.[147] Emphasizing changes in the American economy and advances in understanding the effect of such agreements, the

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139. 424 U.S. 1 (1976); *Randall*, 548 U.S. at 243 (plurality opinion). Justices Kennedy, Souter, and Ginsburg, however, indicated that the defendants had not asked the Court to overrule *Buckley*. *See id.* at 264 (Kennedy, J., concurring in the judgment) ("The parties [do not] ask the Court to overrule *Buckley* in full . . . ."); *id.* at 283 (Souter, J., dissenting) ("Vermont's argument . . . does not ask us to overrule *Buckley* . . . .").

140. *See Randall*, 548 U.S. at 241 (plurality opinion).

141. *Id.* at 243–44.

142. *Id.* at 244; *see id.* at 242 (citing the number times that the Court has applied *Buckley* since it was decided).

143. *Id.* at 244 ("[T]his Court has followed *Buckley*, upholding and applying its reasoning in later cases.").

144. *Id.*

145. 551 U.S. 877 (2007).

146. 220 U.S. 373 (1911); *see Leegin*, 551 U.S. at 882.

147. *See Leegin*, 551 U.S. at 881.

Court in *Leegin* indicated that, if it were considering the matter in the first instance, it would not adopt a per se rule, but a rule of reason under which the factfinder evaluates whether a particular vertical price restraint is anticompetitive and therefore illegal under the Sherman Act.[148]

Nevertheless, the *Leegin* Court acknowledged that it was not "writ[ing] on a clean slate" and had to consider whether the force of stare decisis was enough to sustain *Dr. Miles*.[149] The Court determined that it was not.[150] Although it admitted stare decisis's potency in relation to statutory interpretation, the Court stressed that the principle is weaker with respect to the Sherman Act because the Court always has viewed the Act as "a common-law statute" whose interpretation evolves as the Court determines from time to time.[151] With economics experts widely agreeing that restrictions on resale prices can be procompetitive and federal antitrust enforcement agencies recommending against a per se rule, the Court explained, revisiting *Dr. Miles* was appropriate.[152] The Court added that, since *Dr. Miles* was decided, the Court had distanced itself from the ruling's underlying rationales and, in fact, began to "rein[] in the decision" just eight years after the Court handed it down.[153] In addition, according to the Court, it later had taken a more relaxed approach to vertical restraints on trade.[154] Moreover, the Court asserted that *Dr. Miles* was "inconsistent with a principled framework" governing vertical restraints on trade, and the Court expressed concern that failing to overrule *Dr. Miles* would give rise to questions about the continuing validity of more recent decisions.[155] The per se rule arising from *Dr. Miles*, the Court concluded, "[was] a flawed antitrust doctrine that serve[d] the interests of lawyers—by creating legal distinctions that operate[d] as traps for the unwary—more than the interests

148. *See id.* at 885, 887–99.

149. *Id.* at 899.

150. *Id.* at 900 ("*Stare decisis*, we conclude, does not compel our continued adherence to the *per se* rule against vertical price restraints.").

151. *Id.* at 899.

152. *See id.*

153. *Id.* at 901 (citing United States v. Colgate & Co., 250 U.S. 300, 307–08 (1919)).

154. *See id.* at 901–02.

155. *Id.* at 902–03.

of consumers—by requiring manufacturers to choose second-best options to achieve sound business objectives."[156] Finally, the Court explained that reliance interests could not "justify an inefficient rule" and were not a significant consideration with respect to *Dr. Miles* because the per se rule was relatively narrow, allowing manufacturers to achieve similar ends through other means.[157]

In contrast to the divisions in *Randall* and *Leegin*, the Court spoke with one voice in *Pearson v. Callahan*[158] as it overruled the requirement in *Saucier v. Katz*[159] that courts employ a rigid analytical structure in determining whether a defendant in an action under 42 U.S.C § 1983 is entitled to qualified immunity.[160] The *Pearson* Court explained that *Saucier* required judges first to evaluate whether the facts alleged or shown would support a claim for a constitutional violation and then whether the violation was clear at the time the defendant took the offending action.[161] Determining that stare decisis did not require otherwise, the Court in *Pearson* ruled that a court has the discretion to grant a defendant immunity from suit solely because a violation was unclear, without considering whether the facts alleged or shown support the plaintiff's claim that the defendant actually violated the plaintiff's constitutional rights.[162]

In reaching the decision to limit *Saucier*, the Court indicated that the strength that stare decisis bears when precedent interprets a statute or involves a matter that Congress may correct does not apply to court-fashioned rules designed to govern judicial operations.[163] Moreover, the Court stated, "Revisiting precedent is particularly appropriate where . . . a departure would not upset expectations, the precedent consists of a judge-made rule that was recently adopted to improve the op-

156. *Id.* at 904.

157. *Id.* at 906.

158. 555 U.S. 223 (2009).

159. 533 U.S. 194 (2001).

160. *See Pearson*, 555 U.S. at 227 ("We now hold that the *Saucier* procedure should not be regarded as an inflexible requirement . . . .").

161. *Id.* at 232 (citing *Saucier*, 533 U.S. at 201).

162. *Id.* at 231–36 (concluding that *Saucier*'s procedure "should no longer be regarded as mandatory").

163. *See id.* at 233–34.

eration of the courts, and experience has pointed up the precedent's shortcomings."[164] The *Saucier* rule, the Court insisted, all the more warranted reconsideration given that lower court judges and Justices on the Court repeatedly have criticized it.[165]

The *Pearson* Court acknowledged that reliance interests can be significant when a prior ruling implicates property or contract rights, but it explained that that is not so with respect to judicially-created trial court procedures.[166] According to the Court, overruling *Saucier*'s mandate would not upset anyone's "settled expectations."[167] And the Court stressed that the quality of *Saucier*'s underlying reasoning and its workability were not relevant because the decision did not involve constitutional or statutory interpretation.[168] Instead, the Court emphasized, experience was the key consideration.[169]

For the Court in *Pearson*, experience with *Saucier*'s procedure weighed heavily in favor of abandoning it. First, according to the Court, *Saucier*'s rule tended to waste both judicial resources and parties' resources with "[u]nnecessary litigation of constitutional issues."[170] Second, the *Pearson* Court observed that the *Saucier* rule had failed to achieve one of its intended benefits—developing a body of constitutional precedent.[171] Third, the Court indicated that the rule might impede the ability of a party who wins on the second prong to seek review of a decision with respect to the first prong that would govern the party's future practices.[172] Fourth, the Court stressed, "Adherence to [the *Saucier* structure] departs from the general rule of constitutional avoidance and runs counter to the 'older, wiser judicial counsel not to pass on questions of constitutionality . . . unless

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164. *Id.* at 233.

165. *Id.* at 234–35.

166. *Id.* at 233.

167. *Id.*

168. *Id.* at 234.

169. *See id.* ("[I]t is sufficient that we now have a considerable body of new experience to consider regarding the consequences of requiring adherence to this inflexible procedure.").

170. *Id.* at 237.

171. *Id.* at 237–41.

172. *Id.* at 240 ("Rigid adherence to the *Saucier* rule may make it hard for affected parties to obtain appellate review of constitutional decisions that may have a serious prospective effect on their operations.").

such adjudication is unavoidable.'"[173] Fifth, the Court identified the rigid *Saucier* structure as an outlier, given the latitude lower courts enjoy when making decisions with respect to comparable matters.[174] And finally, the *Pearson* Court denied that modifying *Saucier*'s mandate would be harmful, highlighting that lower courts remained free to apply *Saucier*'s two-step approach[175] and rejecting the argument that relaxing the *Saucier* rule would spawn suits against local governments or encourage litigation over standards for determining when a court must consider the merits of a case.[176]

The Court's unanimity in *Pearson* was short-lived. Three months after *Pearson*, the Court returned to a 5-4 split in *Arizona v. Gant*,[177] a Fourth Amendment decision in which the Chief Justice allied with Justices Kennedy, Breyer, and Alito in dissent.[178] The *Gant* majority concluded that, under the Court's 1981 decision in *New York v. Belton*[179] and its 2004 decision in *Thornton v. United States*,[180] if no other exception to the warrant requirement applies, a police officer may search an arrestee's vehicle without a warrant only when the arrestee has not been secured and can reach the passenger compartment or when the arresting officer reasonably believes that the compartment contains evidence related to the crime associated with the arrest.[181] In reaching this decision, the Court refused to interpret *Belton* as establishing a bright-line rule allowing an officer to search a vehicle's passenger compartment without a warrant when the search is in connection with an arrest of a recent occupant of the vehicle.[182]

With the Chief Justice joining, Justice Alito argued in dissent that the majority effectively overruled *Belton* and *Thornton*

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173. *Id.* at 241 (quoting Scott v. Harris, 550 U.S. 372, 388 (Breyer, J., concurring)) (internal quotation marks omitted).

174. *See id.* at 241–42.

175. *Id.* at 242–43.

176. *Id.* at 243.

177. 556 U.S. 332 (2009).

178. *Id.* at 355 (Alito, J., dissenting).

179. 453 U.S. 454 (1981).

180. 541 U.S. 615 (2004).

181. *See Gant*, 556 U.S. at 343.

182. *See id.* (rejecting "a broad reading of *Belton*").

without the defendant's request that it do so,[183] disposing of the "bright-line" rule that the *Belton* Court adopted and that the *Thornton* Court understood *Belton* to recognize.[184] According to Justice Alito, the *Gant* Court should not have abandoned *Belton*'s clear rule,[185] and he addressed five factors relevant to stare decisis in reaching that conclusion: "whether the precedent has engendered reliance, whether there has been an important change in circumstances in the outside world, whether the precedent has proved to be unworkable, whether the precedent has been undermined by later decisions, and whether the decision was badly reasoned."[186]

Although Justice Alito acknowledged that reliance normally is "most important" when property or contract rights are at issue, he also emphasized that the Court has weighed reliance "heavily" when a change would affect "embedded . . . routine police practice."[187] In addition, Justice Alito pointed out that police work had not become any more or less risky than it was when *Belton* was decided; therefore changed circumstances did not justify departing from *Belton*.[188] And he insisted that the broad reading given to *Belton* makes it very workable, supplying a rule that both judges and law enforcement officials easily can apply.[189] Rather, Justice Alito suggested, the *Gant* Court's new standard was the unworkable one, "reintroduc[ing] the same sort of case-by-case, fact-specific decisionmaking that the *Belton* rule was adopted to avoid."[190] As to inconsistency with later cases, Justice Alito noted none and that, in fact, the Court in *Thornton* had "reaffirmed and extended" the rule.[191] More-

183. *Id.* at 356 (Alito, J., dissenting) ("Although the Court refuses to acknowledge that it is overruling *Belton* and *Thornton*, there can be no doubt that it does so."); *id.* at 365 ("Respondent in this case has not asked us to overrule *Belton* . . . .").

184. *See id.* 356–57.

185. *Id.* at 358 (arguing that the principles underlying stare decisis "weigh in favor of retaining the rule established in *Belton*").

186. *Id.* at 358 (citations omitted).

187. *Id.* at 358–59 (quoting Dickerson v. United States, 530 U.S. 428, 443 (2000)) (internal quotation marks omitted).

188. *See id.* at 360.

189. *Id.*

190. *Id.*

191. *Id.* at 361.

over, contrary to the majority's view that a broad interpretation of *Belton* was inconsistent with the Court's 1969 decision in *Chimel v. California*,[192] Justice Alito maintained that *Belton* represented only a slight extension of the rule in *Chimel* that the area subject to search extends just to the arrestee's body and to the area within which he or she might reach a weapon or evidence that could be destroyed.[193] According to Justice Alito, *Chimel* must have concluded that the measure of one's reach is determined at the time of arrest, not at the time of the search, and therefore, *Belton* merely avoided a case-by-case determination of a particular person's reach when he or she occupies a particular vehicle.[194]

Later in the same term in which the Court decided *Pearson* and *Gant*, Chief Justice Roberts was part of a five-Justice conservative majority in *Montejo v. Louisiana*[195] that overruled *Michigan v. Jackson*,[196] a Sixth Amendment decision that "forb[ade] police [from] initiat[ing] interrogation of a criminal defendant once he has requested counsel at an arraignment or similar proceeding."[197] According to the *Montejo* Court, *Jackson* was unnecessary because rules established in Fifth Amendment cases sufficiently protect a defendant's Sixth Amendment right to counsel by barring certain conduct once a defendant approached for interrogation indicates that he or she wants an attorney.[198]

Addressing stare decisis, the *Montejo* Court identified workability, *Jackson*'s age, reliance, and the quality of *Jackson*'s reasoning as the key considerations.[199] The Court in *Montejo* devoted quite a bit of attention to workability, explaining that the rule from *Jackson* did not make sense in states where a defend-

192. 395 U.S. 752 (1969).

193. *See Gant*, 556 U.S. at 361–63 (Alito, J., dissenting).

194. *See id.* 362–63.

195. 556 U.S. 778 (2009).

196. 475 U.S. 625 (1986).

197. *Montejo*, 556 U.S. at 780–81.

198. *See id.* 794–95.

199. *Id.* at 792 ("[T]he fact that a decision has proved 'unworkable' is a traditional ground for overruling it."(citing Payne v. Tennessee, 501 U.S. 808, 827 (1991))); *id.* at 792–93 ("Beyond workability, the relevant factors . . . include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." (citing Pearson v. Callahan, 555 U.S. 223, 234–35 (2009))).

ant is appointed counsel either as a matter of course or by the court without any request.[200] The Court then determined that *Jackson*'s over-twenty-year life was no impediment to overruling it, and it decided that reliance likewise was not an issue because criminal defendants who understood *Jackson* did not need its protection and prosecutors remained free to limit themselves as *Jackson* had required.[201]

With respect to the quality of the Court's reasoning in *Jackson*, the *Montejo* Court indicated that, because the rule at issue was a Court-created "prophylactic rule . . . to protect a constitutional right," the Court's inquiry consisted of weighing the rule's costs against its benefits.[202] And according to the Court, *Jackson*'s benefits were insufficient when compared with its costs.[203] The purpose of the *Jackson* rule, the Court explained, was to prevent "badgering" a defendant after the defendant asserts his or her right to counsel, and Fifth Amendment precedents are adequate for that end.[204] Acknowledging Jesse Montejo's argument that Fifth Amendment protection only applies when a defendant is in custody, the Court indicated that protection otherwise is not critical because a defendant who is not in custody has other ways to avoid police attempts at interrogation without counsel present.[205] Moreover, the Court pointed out the significant costs associated with *Jackson*, including the societal effects of deterring police from attempting to obtain voluntary confessions and of letting guilty parties go free.[206]

Chief Justice Roberts and the rest of the *Montejo* quintet got together again in *Citizens United v. FEC*, a controversial 2010 decision that overruled *Austin v. Michigan State Chamber of Commerce*[207] and part of *McConnell v. FEC*.[208] *Citizens United* in-

200. *See id.* at 784–85 (discussing the problems associated with the Louisiana Supreme Court's interpretation of *Jackson*).

201. *Id.* at 792–93.

202. *Id.* at 793.

203. *Id.* at 797 (concluding that the *Jackson* rule did not "pay its way" (quoting United States v. Leon, 468 U.S. 897, 907 n.6 (1984)) (internal quotation marks omitted)).

204. *Id.* at 794–95.

205. *See id.* at 795 ("When a defendant is not in custody, he is in control, and need only shut his door or walk away to avoid police badgering.").

206. *Id.* at 796.

207. 494 U.S. 652 (1990).

208. 540 U.S. 93 (2003); Citizens United v. FEC, 558 U.S. 310, 365–66 (2010).

volved a First Amendment challenge to a federal campaign finance statute.[209] The statute barred a corporation from using its general funds to pay for a communication to be made during the period immediately before an election if the communication mentions a candidate for federal office by name.[210] The Court in *McConnell* had upheld the federal law, and according to the *Citizens United* Court, *McConnell* was predicated on *Austin*,[211] a 1990 decision in which the Court rejected a challenge to a state law prohibiting similar corporate expenditures with respect to candidates for state office.[212]

In overruling *Austin* and the part of *McConnell* that relied on *Austin*, the *Citizens United* Court evaluated whether *Austin* should enjoy the protection of stare decisis. And the following factors, the Court indicated, typically guide a stare decisis inquiry: workability, a precedent's age, reliance interests, the quality of a precedent's reasoning, and experience that "point[s] up [a] precedent's shortcomings."[213] The *Citizens United* Court, however, did not address workability or consider *Austin*'s twenty-year age. According to the Court, the other factors weighed heavily enough against *Austin*.[214]

The Court in *Citizens United* commented that even the federal statute's proponents ignored *Austin*'s reasoning, turning instead to other justifications for the decision, and that *Austin* had "abandoned First Amendment principles" when it looked to an earlier case that erroneously described the history of campaign finance laws.[215] Regarding experience with *Austin*, the *Citizens United* Court noted that parties usually find ways around campaign finance laws and that continuing technological changes in how information is delivered counsel against restrictions on political speech "based on the corporate identity

209. *Citizens United*, 558 U.S. at 319, 321.

210. *Id.* at 320–21.

211. *Id.* at 331 ("The holding and validity of *Austin* were essential to the reasoning of the *McConnell* majority opinion . . . .").

212. *See id.* at 347 (citing *Austin*, 494 U.S. at 695).

213. *Id.* at 362–63 (first citing Montejo v. Louisiana, 556 U.S. 778, 792–93 (2009); then quoting Pearson v. Callahan, 555 U.S. 223, 233 (2009)) (internal quotation marks omitted).

214. *Id.* at 363–65.

215. *Id.* at 363.

of the speaker and the content of the . . . speech."[216] Finally, the Court highlighted the absence of significant reliance on *Austin*, explaining that reliance considerations are more important where property and contract rights are at stake and stressing that legislative reliance through enacting campaign finance laws cannot prevent the Court from performing its duty to interpret the law accurately.[217]

Chief Justice Roberts joined in full the majority opinion in *Citizens United*, but he also wrote separately to give particular attention to stare decisis.[218] Notably, the Chief Justice emphasized that reexamining *Austin* was appropriate because the Court had been asked to do so and because it could not grant the plaintiffs relief on narrower grounds.[219]

The Chief Justice's concurring opinion in *Citizens United* did not identify reaffirmation of an earlier decision as a relevant stare decisis factor, but he made the point that, in the case of *Austin*, earlier decisions could not "be understood as a *reaffirmation*" because the Court had not previously been asked to overrule *Austin*.[220] In addition, the Chief Justice treated in detail two specific issues: whether *Austin* deviated from earlier Court decisions[221] and whether "adherence to [*Austin*] actually [would] impede[] the stable and orderly adjudication of future cases."[222] With respect to the latter, the Chief Justice stressed that a precedent may be an impediment when its "validity is so hotly contested that it cannot reliably function as a basis for decision in future cases," when the underlying basis "threatens to upend [the Court's] settled jurisprudence in related areas of law," and when, to stand by the precedent, the Court must adopt a justification different from the one underlying the precedent.[223] According to the Chief Justice, all of these consid-

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216. *Id.* at 364.

217. *Id.* at 365.

218. *Id.* at 372–85 (Roberts, C.J., concurring).

219. *Id.* at 374–76.

220. *Id.* at 377.

221. *Id.* at 378 (indicating that returning to previous decisions might more effectively serve the function of stare decisis).

222. *Id.* at 379.

223. *Id.*

erations tipped in favor of departing from the principle of stare decisis with respect to *Austin*.[224]

First, the Chief Justice asserted, *Austin* "departed from the robust protections" the Court otherwise had accorded to political speech and from the previously-held view that speech does not receive less First Amendment protection just because a corporation is the speaker.[225] Second, the Chief Justice observed that *Austin* had not merely been controversial, but that the level of disagreement with the decision "undermine[d] [*Austin*]'s ability to contribute to the stable and orderly development of the law."[226] Third, the Chief Justice pointed to the fact that *Austin* had been extended beyond its scope to curtail First Amendment protection and that it might reach further in the future, threatening the speech protection that media corporations enjoy: "[B]ecause *Austin* is so difficult to confine to its facts—and because its logic threatens to undermine our First Amendment jurisprudence and the nature of public discourse more broadly—the costs of giving it *stare decisis* effect are unusually high."[227] Finally, the Chief Justice called attention to the federal government's having abandoned the original arguments in favor of *Austin*'s holding, instead attempting to advance two arguments that the *Austin* Court did not consider.[228] The Chief Justice emphasized: "*Stare decisis* is a doctrine of preservation, not transformation. It counsels deference to past mistakes, but provides no justification for making new ones. . . . [A]llow[ing] the Court's past missteps to spawn future mistakes [would] undercut[] the very rule-of-law values that *stare decisis* is designed to protect."[229]

In 2015, five years after *Citizens United*,[230] Chief Justice Roberts once again espoused a weak form of stare decisis, this time in a

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224. *Id.*

225. *Id.* at 379–80.

226. *Id.* at 380.

227. *Id.* at 382.

228. *Id.* at 383 ("Th[e] interests [the government asserted] may or may not support the *result* in *Austin*, but they were plainly not part of the *reasoning* on which *Austin* relied.").

229. *Id.* at 384.

230. Three years after *Citizens United*, the Chief Justice dissented from the Court's decision in *Alleyne v. United States*, 570 U.S. 99 (2013), but stated that he "w[ould] not quibble with the majority's application of our *stare decisis* prece-

statutory context. In *Kimble v. Marvel Entertainment, LLC*, the Chief Justice joined in Justice Alito's dissent to the Court's decision to uphold its 1964 ruling in *Brulotte v. Thys Co.*,[231] a case in which the Court concluded that federal patent law bars a patent holder from receiving royalties for use of the patented invention after the patent's term has ended.[232]

Though the majority acknowledged that both courts and commentators had been urging the Court to abandon *Brulotte*, the *Kimble* Court decided to sustain *Brulotte* on the grounds of stare decisis.[233] In so doing, the Court noted the principle's power with respect to statutory interpretation.[234] In that regard,

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dents." *Id.* at 132 (Roberts, C.J., dissenting). Curiously, though, the majority opinion in *Alleyne* gave no specific attention to stare decisis other than to state that it is least potent when a procedural rule offering central protection under the Constitution is at issue. *See id.* at 116 n.5 (majority opinion) ("The force of *stare decisis* is at its nadir in cases concerning procedural rules that implicate fundamental constitutional protections.").

Justice Sotomayor, however, in a concurrence that only Justices Ginsburg and Kagan joined, addressed stare decisis in some detail. *Id.* at 118–22 (Sotomayor, J., concurring). In *Alleyne*, the Court overruled *Harris v. United States*, 536 U.S. 545 (2002), a 2002 decision in which the Court had concluded that it was not inconsistent with the Sixth Amendment's right to a jury trial to permit a judge to increase a mandatory minimum sentence following the judge's own determination by a preponderance of the evidence that aggravating factor existed. *Alleyne*, 570 U.S. at 103. In her concurrence, Justice Sotomayor considered minimal any reliance interest that state and federal governments had because prosecutors could alter their practices with respect to indictments. *Id.* at 119 (Sotomayor, J., concurring). In addition, according to Justice Sotomayor, the weakness of *Harris* was evident because, after the decision, the Court continued to apply an earlier decision to limit mandatory sentencing schemes. *See id.* at 119–20 (discussing application of Apprendi v. New Jersey, 530 U.S. 466 (2000), following *Harris*). Moreover, Justice Sotomayor indicated that only a minority of the Justices in *Harris* had agreed with a key point, and she emphasized that the Court in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), had explained that "a decision may be 'of questionable precedential value' when 'a majority of the Court expressly disagreed with the rationale of [a] plurality." *Alleyne*, 570 U.S. at 120 (Sotomayor, J., concurring) (alteration in original) (quoting *Seminole Tribe*, 517 U.S. at 66).

231. 379 U.S. 29 (1964); *see* Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401, 2405 (2015) (declining to overrule *Brulotte*); *id.* at 2415–19 (Alito, J., dissenting).

232. *See Kimble*, 135 S. Ct. at 2405 (majority opinion).

233. *Id.* at 2406 ("[S]ome courts and commentators have suggested [that] we should overrule *Brulotte*. For reasons of *stare decisis*, we demur." (footnote omitted)).

234. *Id.* at 2409 ("*[S]tare decisis* carries enhanced force when a decision, like *Brulotte*, interprets a statute."); *id.* at 2410 ("[W]e have often recognized that in . . . 'cases involving property and contract rights' . . . considerations favoring *stare decisis* are 'at their acme.'" (quoting Payne v. Tennessee, 501 U.S. 808, 828 (1991); State Oil Co. v. Khan, 522 U.S. 3, 20 (1997))).

the Court emphasized that "Congress has spurned multiple opportunities to reverse *Brulotte*—openings as frequent and clear as this Court ever sees,"[235] and, the Court added, with property and contracts at issue, reliance interests carry considerable weight because parties have ordered their affairs with *Brulotte* in mind.[236] Given Congress's failure to act and the reliance interests at stake, the Court declared, *Brulotte* enjoyed a "superpowered form of *stare decisis*, [requiring] a superspecial justification to warrant revers[al]."[237]

With this high bar in the background, the Court contended that *Brulotte*'s foundations had not diminished—that the statutory text had not changed, that cases from which *Brulotte* drew continued to stand, and that later rulings have not left *Brulotte* as a "doctrinal dinosaur."[238] In addition, the Court maintained that *Brulotte*'s rule is eminently workable, offering a clear and bright line.[239]

Stephen Kimble failed to convince the Court to overrule *Brulotte* because the earlier ruling was founded on the flawed economic assumption that requiring royalties for post-effectiveness use is anticompetitive.[240] Although the *Kimble* Court saw no reason to discredit the broad scholarly consensus that supported Kimble's argument,[241] the Court found the consensus insufficient to overcome stare decisis given that *Brulotte* was a patent case rather than an antitrust case where stare decisis carries much less weight.[242] In addition, the *Kimble* Court concluded that the erroneous economic principle that Kimble cited had not served as the basis for *Brulotte*, but that the decision instead relied on "a categorical principle that all patents, and all benefits from them, must end when their terms expire."[243] Finally, the Court in *Kimble* rejected the plea to overturn *Brulotte* because it discouraged the type of innovation that patent

235. *Id.* at 2409–10.
236. *Id.* at 2410.
237. *Id.*
238. *Id.* at 2410–11.
239. *Id.*
240. *Id.* at 2412.
241. *Id.* ("We do not join issue with Kimble's economics . . . .").
242. *Id.* at 2412–13.
243. *Id.* at 2413 (citing Brulotte v. Thys Co., 379 U.S. 29, 30–32 (1964)).

law is intended to foster.[244] According to the Court, the judiciary is ill-suited to decide that matter and Congress is the proper venue for a debate over the effect of *Brulotte* on invention.[245]

Justice Alito disagreed, and joined by the Chief Justice, blasted the *Kimble* majority's application of stare decisis to keep *Brulotte*:

> The Court employs *stare decisis*, normally a tool of restraint, to reaffirm a clear case of judicial overreach. Our decision in *Brulotte* . . . was not based on anything that can plausibly be regarded as an interpretation of the terms of the Patent Act. It was based instead on an economic theory—and one that has been debunked. . . . *Stare decisis* does not require us to retain this baseless and damaging precedent.[246]

Noting the absence of any language in the Patent Act regarding post-term royalties, Justice Alito described *Brulotte* as a "bald act of policymaking" and "not really statutory interpretation at all."[247] Moreover, Justice Alito stressed that, in *Brulotte*'s approximately fifty-year history, the underlying economic rationale had become indefensible.[248] Allowing *Brulotte* to live on, he insisted, was economically harmful, unduly inhibiting the ability of parties to achieve their goals.[249] Furthermore, according to Justice Alito, Marvel Entertainment had offered no evidence of reliance, and given that Marvel did not know of the *Brulotte* rule when negotiating its license with Kimble, any suggestion that other parties were relying on the rule was a fantasy.[250] In fact, Justice Alito asserted, *Brulotte* itself had had the effect of upsetting commercial expectations.[251]

Justice Alito insisted that the Court does "not give super-duper protection to decisions that do not actually interpret a statute"[252] and that cases involving pure policymaking should

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244. *See id.* (addressing *Brulotte*'s foundations).
245. *Id.* at 2414.
246. *Id.* at 2415 (Alito, J., dissenting).
247. *Id.*
248. *Id.*
249. *Id.* at 2416 (explaining harms associated with *Brulotte*'s rule).
250. *Id.* at 2417.
251. *Id.*
252. *Id.* at 2418.

enjoy the same stare decisis effect as antitrust decisions.[253] Finally, Justice Alito assailed the majority for relying on the absence of congressional action as a reason to keep *Brulotte*, explaining that "[p]assing legislation is no easy task" and therefore the Court should not be too quick to equate a failure to act with approbation.[254]

Within days after the Court's refusal to dispose of *Brulotte*, Chief Justice Roberts was part of the six-Justice majority with two additional Justices concurring in the judgment in *Johnson v. United States*[255] that overruled two decisions that had interpreted the Armed Career Criminal Act of 1984[256] (ACCA)—*James v. United States*[257] and *Sykes v. United States*.[258] In *James* and *Sykes*, the Court declined to strike down the "residual clause" of the ACCA as unconstitutionally vague under the Due Process Clause of the Fifth Amendment.[259] Admitting that the Court had not succeeded in adopting a generally applicable test for applying the residual clause, the *Johnson* Court decided that *James* and *Sykes* were wrong about the clause's constitutionality.[260]

Furthermore, the *Johnson* Court determined that stare decisis could not save *James* or *Sykes*.[261] The Court in *Johnson* dismissed out of hand any argument that a reliance interest supported the two decisions.[262] More importantly, the Court explained that stare decisis does not prevent it from reconsidering a decision "where experience with its application reveals that it is unworkable"—even when the Court reached the decision based on a well-developed record.[263] Revisiting *James* and *Sykes* was

253. *Id.* (likening *Brulotte* to an antitrust decision).

254. *See id.* at 2418–19.

255. 135 S. Ct. 2551 (2015).

256. 18 U.S.C. § 924(e) (2018).

257. 550 U.S. 192 (2007).

258. 564 U.S. 1 (2011); *Johnson*, 135 S. Ct. at 2555, 2563.

259. *Johnson*, 135 S. Ct. at 2555–56.

260. *Id.* at 2557 ("We are convinced that the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges. Increasing a defendant's sentence under the clause denies due process of law.").

261. *Id.* at 2562–63.

262. *See id.* at 2563 ("[D]eparting from [*James* and *Sykes*] does not raise any concerns about upsetting private reliance interests.").

263. *Id.* at 2562 (first citing Payne v. Tennessee, 501 U.S. 808, 827 (1991); then citing United States v. Dixon, 509 U.S. 688, 711 (1993); *Payne*, 501 U.S. at 828–30).

all the more appropriate, the *Johnson* Court explained, because the vagueness issue had not been fully briefed or argued in either case,[264] and experience in applying the residual clause testified to errors the Court had made:

> Unlike other judicial mistakes that need correction, the error of having rejected a vagueness challenge manifests itself precisely in subsequent judicial decisions: the inability of later opinions to impart the predictability that the earlier opinion forecast. . . . Even after *Sykes* tried to clarify the residual clause's meaning, the provision remains a "judicial morass that defies systemic solution," "a black hole of confusion and uncertainty" that frustrates any effort to impart "some sense of order and direction."[265]

In *Hurst v. Florida*,[266] a 7-1-1 decision with the Chief Justice in the majority, the Court overruled in part two more precedents—*Spaziano v. Florida*[267] and *Hildwin v. Florida*.[268] According to the Court in *Hurst*, the *Spaziano* and *Hildwin* Courts had incorrectly concluded that the Sixth Amendment does not require that the jury determine the existence of aggravating factors before a court may impose the death penalty.[269]

In reaching its decision, the *Hurst* Court dispensed with stare decisis quickly, focusing on *Spaziano*'s and *Hildwin*'s inconsistency with the Court's 2000 opinion in *Apprendi v. New Jersey*[270] and on the Court's 2002 decision in *Ring v. Arizona*[271] to overrule another pre-*Apprendi* case in which the Court had relied on *Hildwin*.[272] "[I]n the *Apprendi* context," the Court explained, "*stare decisis* does not compel adherence to a decision whose

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264. *Id.* at 2562–63.

265. *Id.* at 2562 (quoting United States v. Vann, 660 F.3d 771, 787 (4th Cir. 2011) (Agee, J., concurring)).

266. 136 S. Ct. 616 (2016).

267. 468 U.S. 447 (1984).

268. 490 U.S. 638 (1989); *Hurst*, 136 S. Ct. at 624.

269. *Hurst*, 136 S. Ct. at 623 ("*Spaziano* and *Hildwin* summarized earlier precedent to conclude that 'the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.'" (quoting *Hildwin*, 490 U.S. at 640–41)).

270. 530 U.S. 466 (2000).

271. 536 U.S. 584 (2002).

272. *See Hurst*, 136 S. Ct. at 623 (concluding that *Spaziano* and *Hildwin* were "irreconcilable" with *Apprendi*, and discussing *Ring*).

underpinnings have been eroded by subsequent developments of constitutional law."[273]

Making up for its brevity in *Hurst*, the Court gave extensive attention to stare decisis in *Janus v. AFSCME*,[274] a 2018 case in which the Court overturned its 1977 decision in *Abood v. Detroit Board of Education*.[275] In *Janus*, the Court considered the constitutionality of an Illinois law compelling a public employee to pay fees to a union even when the employee does not join the union and disagrees intensely with the union's positions in collective bargaining and other matters.[276] The Illinois law was similar to one the Court in *Abood* had upheld against a First Amendment challenge,[277] but the *Janus* Court concluded that requiring a public employee who is not a union member to subsidize union activities offends the First Amendment.[278]

Addressing stare decisis, the *Janus* Court noted that the principle is "at its weakest" in constitutional matters[279] and perhaps enjoys the "least force" in the First Amendment context.[280] To guide its evaluation of *Abood* amidst such feebleness, the Court identified five factors: "the quality of *Abood*'s reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision."[281] After giving studied attention to all of these factors, the Court decided that stare decisis was not enough to sustain *Abood*.[282]

First, the Court cited significant problems in the *Abood* Court's reasoning.[283] According to the Court in *Janus*, *Abood* re-

273. *Id.* at 623–24 (quoting Alleyne v. United States, 570 U.S. 99, 119 (2013) (Sotomayor, J., concurring)) (internal quotation marks omitted).

274. 138 S. Ct. 2448 (2018).

275. 431 U.S. 209 (1977); *Janus*, 138 S. Ct at 2460.

276. *Janus*, 138 S. Ct. at 2459–60.

277. *Id.* at 2460.

278. *Id.* ("We conclude that this arrangement violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern.").

279. *Id.* at 2478 (quoting Agostini v. Felton, 521 U.S. 203, 235 (1997)) (internal quotation marks omitted).

280. *Id.*

281. *Id.* at 2478–79.

282. *Id.* at 2479 ("After analyzing these factors, we conclude that *stare decisis* does not require us to retain *Abood*.").

283. *Id.* at 2480–81.

lied on two previous cases that were inapposite to its decision because they dealt with Congress's authorization of private-sector unions and focused on Commerce Clause and substantive due process issues, with only scant attention to the First Amendment.[284] In addition, the *Janus* Court indicated, the Court in *Abood* applied a deferential standard of review that is foreign to free speech cases, and if the Court had applied the appropriate standard, it might have invalidated the law it was considering.[285] Moreover, the Court in *Janus* asserted, the *Abood* Court failed to grasp the importance of the context in which the law operated and the nature of the speech that was at issue.[286]

Second, the Court in *Janus* concluded that the rule in *Abood* was unworkable.[287] *Abood*, the *Janus* Court observed, attempted to draw a line between expenses that may be charged to nonunion members and those that may not, and the test the Court later adopted in *Lehnert v. Ferris Faculty Ass'n*[288] to assist in making that distinction had resulted in splintered decisions and spawned litigation: "*Lehnert* failed to settle the matter; States and unions have continued to 'give it a try' ever since."[289] Furthermore, the *Janus* Court pointed out that even the respondents in the case acknowledged the difficulty in distinguishing between chargeable and non-chargeable expenses, thus undermining the forty-year standard's workability.[290] Moreover, the Court noted that practical problems impeded the ability of nonunion members to challenge the union's allocation of expenses.[291]

Third, the Court in *Janus* identified legal and factual developments that had "'eroded' [*Abood*]'s 'underpinnings,'" making

284. *See id.* at 2479 (discussing Ry. Emps. v. Hanson, 351 U.S. 225 (1956), and Machinists v. Street, 367 U.S. 740 (1961)).

285. *Id.* at 2479–80.

286. *Id.* at 2480 ("*Abood* failed to appreciate the conceptual difficulty of distinguishing in public-sector cases between union expenditures that are made for collective-bargaining purposes and those that are made to achieve political ends." (quoting Harris v. Quinn, 573 U.S. 616, 636 (2014)) (internal quotation marks omitted)).

287. *Id.* at 2481–82.

288. 500 U.S. 507 (1991).

289. *Janus*, 138 S. Ct. at 2481.

290. *See id.* at 2481 (discussing the respondents' suggestion that the Court revisit how to distinguish between chargeable and non-chargeable expenses).

291. *See id.* at 2482.

the decision "an outlier among [the Court's] First Amendment cases."[292] According to the *Janus* Court, one of the assumptions underlying *Abood* had proven to be false.[293] In addition, the Court reported, at the time *Abood* was decided, public-sector unions were in their infancy, and since then they have blossomed, with a significant impact on state and local government costs, "giv[ing] collective-bargaining issues a political valence that *Abood* did not fully appreciate."[294] Furthermore, the Court pointed out that *Abood*'s failure to apply heightened scrutiny is inconsistent with more recent cases in which the Court has held that public employees usually cannot be forced to provide funding to a political party.[295]

Finally, the *Janus* Court determined that reliance interests could not buoy *Abood*.[296] The Court stressed that overruling *Abood* would merely have a short-term effect on existing collective bargaining agreements and that "it would be unconscionable to permit free speech rights to be abridged in perpetuity in order to preserve contract provisions that will expire on their own in a few years' time."[297] The Court also emphasized that the uncertainty surrounding the *Abood* standard and the divisions on the Court surrounding its viability undermined union reliance.[298] Last, the Court explained that unions have the ability to protect themselves in their collective bargaining agreements if agency fees are essential.[299]

A year after *Janus*, the Court returned to stare decisis in the constitutional context with three decisions, and Chief Justice Roberts was part of the majority in all three. In the first, *Franchise Tax Board v. Hyatt*, the Court overruled *Nevada v. Hall*, a 1979 decision in which the Court had held that a state is not immune

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292. *Id.* (quoting United States v. Gaudin, 515 U.S. 506, 521 (1995)).

293. *See id.* at 2465 ("*Abood* cited no evidence that the pandemonium it imagined would result if agency fees were not allowed, and it is now clear that *Abood*'s fears were unfounded.").

294. *Id.* at 2483.

295. *Id.* at 2484 (discussing the Court's "political patronage" cases).

296. *Id.*

297. *Id.*

298. *Id.* at 2485 ("[A]ny public-sector union seeking an agency-fee provision in a collective-bargaining agreement must have understood that the constitutionality of such a provision was uncertain.").

299. *See id.* at 2485.

from a suit by a private plaintiff in another state's courts.[300] Drawing on the understanding of state sovereignty that existed at the nation's Founding, the Court in *Hyatt* concluded that the *Hall* Court had gone off course.[301]

According to the *Hyatt* Court, stare decisis could not save *Hall*.[302] Unlike in *Janus*, however, the Court in *Hyatt* considered just four stare decisis factors: "the quality of [*Hall*]'s reasoning; its consistency with related decisions; legal developments since [*Hall*]; and reliance."[303] And the Court dispensed with all four quickly. The Court first pointed out that *Hall*'s reasoning was divorced from the historical understanding of the immunity that states would enjoy in relation to each other.[304] Moreover, the Court noted that *Hall* represented a departure from the Court's sovereign immunity corpus, particularly when considered against recent cases.[305] Finally, the Court identified no reliance interest that weighed in favor of retaining *Hall*.[306] Although it sympathized with the plaintiff's loss of time and money in pursuing his claim based on *Hall*, the Court indicated that reliance of this type does not carry weight for stare decisis purposes because the prospect that the Court will overturn a critical prior ruling is ever present when one pursues a legal claim.[307]

In *Gamble v. United States*—the second of the three 2019 cases implicating stare decisis with respect to a constitutional precedent—the Court refused to overrule a long line of precedents holding that the Fifth Amendment's Double Jeopardy Clause does not proscribe prosecution in separate proceedings of an

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300. Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1492 (2019); Nevada v. Hall, 440 U.S. 410, 426–27 (1979).

301. *See Hyatt*, 139 S. Ct. at 1492 ("*Nevada v. Hall* is contrary to our constitutional design and the understanding of sovereign immunity shared by the States that ratified the Constitution.").

302. *Id.* at 1499.

303. *Id.* (citing *Janus*, 138 S. Ct. at 2478–79; United States v. Gaudin, 515 U.S. 506, 521 (1995)).

304. *Id.*

305. *Id.* ("*Hall* stands as an outlier in our sovereign-immunity jurisprudence, particularly when compared to more recent decisions."); *id.* at 1496 (citing other cases addressing sovereign immunity).

306. *See id.* at 1499.

307. *Id.*

offense under state law and an offense under federal law, even when both offenses arise out of the same set of facts.[308] Noting that the Fifth Amendment bars prosecution more than once for an "offence," the Court explained that, because both the state and the United States are separate sovereigns, an offense under federal law is different from one under state law.[309]

The Court in *Gamble* highlighted the extremely high burden that the defendant had to meet to persuade the Court that it had erred in its previous decisions and therefore should discard them:

> [E]ven in constitutional cases, . . . something more than "ambiguous historical evidence" is required before we will "flatly overrule a number of major decisions of this Court." And the strength of the case for adhering to such decisions grows in proportion to their "antiquity." Here, . . . Gamble's historical arguments must overcome *numerous* "major decisions of this Court" spanning *170 years*. In light of these factors, Gamble's historical evidence must, at a minimum, be better than middling.[310]

According to the Court, Terance Gamble had not satisfied the minimum.[311] Among other things, the Court noted the absence of directly applicable reported cases, that some of the cases Gamble proffered undermined his argument, that the evidence Gamble attempted to draw from a seventeenth-century case was less than conclusive, and that two of the cases Gamble cited did not rely on the principle Gamble was asserting.[312] Moreover, the Court indicated that an earlier case had considered some of Gamble's arguments and rejected them, and nothing had changed since then that would make those arguments more powerful.[313]

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308. Gamble v. United States, 139 S. Ct. 1960, 1964 (2019) (affirming precedent supporting the "dual-sovereignty" doctrine).

309. *Id.* at 1963–64 (quoting U.S. CONST. amend. V).

310. *Id.* at 1969 (first quoting Welch v. Tex. Dept. of Highways & Pub. Transp., 483 U.S. 468, 479 (1987); then quoting Montejo v. Louisiana, 556 U.S. 778, 792 (2009)).

311. *Id.*

312. *Id.* at 1973–74.

313. *Id.* at 1974 ("Surveying the pre-Fifth Amendment cases in 1959, we concluded that their probative value was 'dubious' due to 'confused and inadequate reporting.' Our assessment was accurate then, and the passing years have not made those early cases any clearer or more valuable." (quoting Bartkus v. Illinois, 359 U.S. 121, 128 n.9 (1959))); *id.* at 1976 ("When we turn from 19th-century trea-

Having assigned Justices Thomas and Alito the majority opinions in *Hyatt* and *Gamble*, Chief Justice Roberts himself took on the responsibility of drafting the last of the Court's 2019 constitutional stare decisis opinions. In *Knick v. Township of Scott*, the Court concluded that a violation of the Takings Clause under the Fifth Amendment occurs immediately when a government takes property without compensation and that a property owner may sue in federal court under 42 U.S.C. § 1983 right away.[314] In reaching that conclusion, the Court overruled *Williamson County Regional Planning Commission v. Hamilton Bank*, a 1985 decision in which the Court had held that a property owner must be unsuccessful in seeking compensation in state court and under state law before a taking violates the Fifth Amendment.[315]

Noting that stare decisis is "at its weakest" with respect to decisions interpreting the Constitution,[316] Chief Justice Roberts evaluated *Williamson County* using four of the stare decisis factors identified in *Janus* (but not the same ones the Court employed in *Hyatt*): "the quality of [the precedent's] reasoning, the workability of the rule it established, its consistency with other related decisions, . . . and reliance on the decision."[317] According to the Chief Justice, *Williamson County* failed at every turn.[318]

First, the Chief Justice emphasized that *Williamson County* was "exceptionally ill founded," drawing on dicta from another opinion, ignoring more recent decisions, and conflicting with the Court's customary approach to takings.[319] Moreover, the Chief Justice noted that Justices later had discredited *Williamson*

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tises to 19th-century state cases, Gamble's argument appears no stronger. The last time we looked, we found these state cases to be 'inconclusive.'" (quoting *Bartkus*, 359 U.S. at 131)).

314. 139 S. Ct. 2162, 2172 (2019) ("[B]ecause a taking without compensation violates the self-executing Fifth Amendment at the time of the taking, the property owner can bring a federal suit at that time.").

315. *See id.* at 2167 (reciting the holding in *Williamson County*); *id.* at 2170 ("Fidelity to the Takings Clause and our cases construing it requires overruling *Williamson County* . . . .").

316. *Id.* at 2177 (quoting Agostini v. Felton, 521 U.S. 203, 235 (1997)).

317. *Id.* at 2178 (quoting Janus v. AFSCME, 138 S. Ct. 2448, 2478 (2018)) (internal quotation marks omitted).

318. *Id.* ("All of these factors counsel in favor of overruling *Williamson County*.").

319. *Id.*

County, as had scholars, including those who defend requiring a property owner to litigate takings in state court.[320] In addition, according to the *Knick* Court, the justifications for *Williamson County*'s rule had shifted over time: "The fact that the justification for the state-litigation requirement continues to evolve is another factor undermining the force of stare decisis."[321]

Second, the *Knick* Court decided that *Williamson County* had created an indefensible consequence that made the decision unworkable. As a result of *Williamson County*, the Court explained, an unsuccessful state court plaintiff could not pursue a federal takings claim because the federal full faith and credit statute requires a federal court to give preclusive effect to the state court judgment.[322] Furthermore, Chief Justice Roberts rejected the dissent's argument that *Williamson County* should enjoy a heartier version of stare decisis given Congress's power to amend the full faith and credit statute to eliminate the problem.[323] For the Chief Justice, that was not enough. Congressional action, he pointed out, could not fix *Williamson County*'s incorrect interpretation of the Fifth Amendment.[324]

Finally, the Court in *Knick* found that reliance interests did not counsel against overruling *Williamson County*. The *Knick* Court observed that stare decisis is weaker when the relevant rule does not deal with what behavior is lawful and what is not.[325] And according to the Court, overruling *Williamson County* would not subject governments to greater liability, but only allow a plaintiff to bring a federal court action in place of a state court action.[326]

Unlike in *Knick*, reliance interests weighed heavily in the Chief Justice's vote in *Ramos v. Louisiana*, a 2020 case in which the Court gave significant attention to stare decisis in a patchwork of opinions that combined to reach five votes to overrule

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320. *Id.*

321. *Id.* (citing *Janus*, 138 S. Ct. at 2472).

322. *Id.* at 2178–79.

323. *Id.* at 2179.

324. *See id.*

325. *Id.* ("We have recognized that the force of *stare decisis* is 'reduced' when rules that do not 'serve as a guide to lawful behavior' are at issue." (quoting United States v. Gaudin, 515 U.S. 506, 521 (1995))).

326. *Id.*

Apodaca v. Oregon.[327] This time, the Chief Justice found himself out of step with the majority and joined Justices Alito and Kagan in dissent.[328]

The Court handed down *Apodaca*, a ruling that turned away a Sixth Amendment challenge to an Oregon rule permitting nonunanimous verdicts for criminal convictions,[329] just eight months before *Roe*. In *Ramos*, the Court evaluated *Apodaca* under the four stare decisis factors cited in *Hyatt* and concluded that none of them reflected favorably on the 1972 decision.[330] First, the Court in *Ramos* described *Apodaca* not just as wrong, but as "gravely mistaken."[331] According to the *Ramos* Court, the underlying reasoning in the two opinions that resulted in *Apodaca*'s holding widely missed the mark, ignoring the Sixth Amendment's historical underpinnings, Court decisions interpreting the amendment to require unanimity, and the Oregon rule's racist patrimony.[332] Moreover, the Court in *Ramos* criticized the *Apodaca* four-member plurality's use of "an incomplete functionalist analysis of its own creation" to support the constitutionality of nonunanimous verdicts, and spurned the fifth, concurring Justice's stubborn adherence to a view the Court long since had abandoned.[333]

Second, pointing to eight Court decisions after *Apodaca* that referred to a unanimity requirement, the *Ramos* Court asserted that *Apodaca* had departed from related decisions and that legal developments had left the precedent behind.[334] Finally, observing "that neither Louisiana nor Oregon claim[ed] anything like the prospective economic, regulatory, or social disruption litigants seeking to preserve precedent usually invoke" nor "that nonunanimous verdicts have 'become part of our national cul-

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327. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1404–08 (2020) (overruling Apodaca v. Oregon, 406 U.S. 404 (1972)); *see id.* at 1432 n.17 (Alito, J., dissenting) (describing the various opinions that result in the Court's decision).

328. *See id.* at 1425 (Alito, J., dissenting) ("I would not overrule *Apodaca*.").

329. *See id.* at 1398–99 (majority opinion).

330. *Id.* at 1405 (citing Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1499 (2019)).

331. *Id.*

332. *See id.* at 1397–1401.

333. *Id.* at 1405; *see id.* at 1398 (describing Justice Powell's "belief in 'dual-track' incorporation").

334. *See id.* at 1399 n.35 (listing eight cases); *id.* at 1405–06 (discussing jurisprudential considerations).

ture,'" the Court in *Ramos* dismissed the contention that overruling *Apodaca* would upend the reliance courts in Louisiana and Oregon had placed on the precedent in conducting criminal trials for nearly fifty years.[335]

These judicial reliance interests, however, apparently moved the Chief Justice to join Justice Alito's *Ramos* dissent.[336] Justice Alito devoted quite a bit of his opinion to reliance, but before doing so, he explained why the majority's criticisms of the *Apodaca* Court's reasoning were "overblown."[337] Although Justice Alito would not say whether he agreed with the *Apodaca* plurality, he defended the plurality's reasoning, explaining in significant detail why the underlying rationales were not as flawed as the *Ramos* majority charged.[338] Moreover, responding to the majority's arguments about developments and *Apodaca*'s fit with related decisions, Justice Alito contended that the majority disregarded how *Apodaca* was "intertwined" with the Court's Sixth Amendment jurisprudence.[339]

Reliance interests, though, were what carried the day for Justice Alito and the Chief Justice.[340] Justice Alito expressed serious concerns about what overruling *Apodaca* would mean for the "thousands and thousands" of trials that Louisiana and Oregon had conducted in reliance on the precedent.[341] According to Justice Alito, disposing of *Apodaca* threatened to unleash a torrent of direct and collateral challenges to criminal convictions.[342] The risk of this type of upheaval, Justice Alito insisted, is significant and real, and the weak, nonexistent, "air[y]," and "abstract" reliance interests presented in *Hyatt*, *Wayfair*, *Pearson*, *Montejo*, *Citizens United*, and *Janus* paled in comparison.[343]

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335. *Id.* at 1406 (quoting Dickerson v. United States, 530 U.S. 428, 443 (2000)).

336. *See id.* at 1436 (Alito, J., dissenting) ("What convinces me that *Apodaca* should be retained are the enormous reliance interests of Louisiana and Oregon.").

337. *Id.* at 1433.

338. *See id.* at 1433–35.

339. *Id.* at 1436.

340. Justice Kagan did not join the portion of Justice Alito's dissent that considered reliance.

341. *Ramos*, 140 S. Ct. at 1436.

342. *See id.* at 1438–40.

343. *See id.* at 1439.

II. CONVINCING THE CHIEF JUSTICE

Justice Thomas repeatedly has expressed hostility to *Roe* and its progeny,[344] and he is resolute that faithfulness to the Constitution demands that the Court overrule errant decisions, other considerations associated with stare decisis be damned.[345] Justice Thomas needs no convincing; if presented with the opportunity, he will vote to overrule *Roe*.

It is not so easy with Chief Justice Roberts. Although he has dissented in the two significant abortion cases that have come before the Court since he joined its ranks, the Chief Justice himself has not expressed disagreement with, nor has he joined an opinion expressing disagreement with, *Roe*'s premises.[346] Moreover, his concurrence in *Citizens United* and the majority opinions he authored in *Halliburton* and *Knick* evidence a commitment to evaluating multiple factors when considering the continuing vitality of an earlier Court decision.[347]

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344. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2324 (2016) (Thomas, J., dissenting) ("I remain fundamentally opposed to the Court's abortion jurisprudence."); Gonzales v. Carhart, 550 U.S. 124, 169 (2007) (Thomas, J., concurring) ("I write separately to reiterate my view that the Court's abortion jurisprudence . . . has no basis in the Constitution."); Stenberg v. Carhart, 530 U.S. 914, 980 (2000) (Thomas, J., dissenting) ("In 1973, this Court . . . render[ed] unconstitutional abortion statutes in dozens of States. . . . [T]hat decision was grievously wrong." (citing Roe v. Wade, 410 U.S. 113, 119 (1973))). Justice Thomas also joined Justice Scalia's opinion in *Casey*, which expressed a similar sentiment. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 1002 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) ("We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining.").

345. *See Ramos*, 140 S. Ct. at 1421–22 (Thomas, J., concurring in the judgment) (asserting that the Court's consideration of additional factors is inconsistent with its constitutional duty); Allen v. Cooper, 140 S. Ct. 994, 1008 (2020) (Thomas, J., concurring in part and concurring in the judgment) ("If our decision in *Florida Prepaid* were demonstrably erroneous, the Court would be obligated to 'correct the error, regardless of whether other factors support overruling the precedent.'" (quoting Gamble v. United States, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring))); *Gamble*, 139 S. Ct. at 1984 (Thomas, J., concurring) ("When faced with a demonstrably erroneous precedent, my rule is simple: We should not follow it.").

346. *See supra* notes 15–16 and accompanying text (noting that Chief Justice Roberts did not join in Justice Thomas's concurrence in *Gonzales* or Justice Thomas's dissent in *Hellerstedt*).

347. *See* Citizens United v. FEC, 558 U.S. 310, 384 (2010) (Roberts, C.J., concurring); *see also* Knick v. Township of Scott, 139 S. Ct. 2162, 2177–78 (2019); Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 275–77 (2014). Most recently, the

Thus, those who want to earn the Chief Justice's vote to overrule *Roe* will need to do more than convince him that the Court got it wrong. They will need to attack *Roe* successfully on multiple fronts. And an important bulwark—the Court's 1992 decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[348]—stands in the way.[349]

A. The Force of Planned Parenthood v. Casey

During Chief Justice Roberts's confirmation hearing, Senator Arlen Specter displayed a chart showing some thirty-eight cases in which *Roe* had been addressed and asked then-Judge Roberts if he might consider *Roe* to be a "super-duper precedent."[350] The Chief Justice declined to comment on the moniker and emphasized that, of the thirty-eight, the only one relevant to the level of *Roe*'s precedential force is *Casey* because the *Casey* Court specifically had considered overruling *Roe*, yet reaffirmed it.[351] And in his 2010 *Citizens United* concurrence, Chief Justice Roberts indicated that he continued to hold the view that reaffirmation requires reconsideration and only decisions

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Chief Justice expressed this view indirectly by joining Justice Kagan's majority opinion in *Cooper*. *See Cooper*, 140 S. Ct. at 1003 ("[W]ith th[e] charge of error alone, [one] cannot overcome *stare decisis*.").

348. 505 U.S. 833 (1992).

349. *Id.* at 833–34.

350. *Confirmation Hearing*, *supra* note 3, at 145 (statement of Sen. Arlen Specter).

351. *See id.* at 145 (statement of Judge John G. Roberts, Jr.) ("The interesting thing . . . is not simply the opportunity to address [*Roe*], but when the Court actually [has] consider[ed] the question [whether to overrule the decision]. And that, of course, is in the *Casey* decision where it did apply the principles of *stare decisis* and specifically addressed [the question]."). Citing *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), and *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), the *Casey* Court stated that *Roe* was "expressly affirmed by a majority of six in 1983 and by a majority of five in 1986," and in both *Akron* and *Thornburgh*, the Court stated that it was reaffirming *Roe*. *Casey*, 505 U.S. at 858 (plurality opinion) (citation omitted); *Thornburgh*, 476 U.S. at 759 ("Again today, we reaffirm the general principles laid down in *Roe* and in *Akron*."); *Akron*, 462 U.S. at 420 ("We . . . reaffirm *Roe v. Wade*."). Chief Justice Roberts, however, seems to discredit this characterization because the Court in neither *Akron* nor *Thornburgh* actually considered whether to overrule *Roe*. Instead, the Court respected *Roe* and applied it. And notably, the Court in *Gonzales v. Carhart*, 550 U.S. 124 (2007), did not even intimate that it was reaffirming *Casey*, but "assume[d] . . . principles [from *Casey*] for the purposes of th[e] opinion." *Id.* at 146.

reaffirming a precedent are germane to the strength that stare decisis enjoys with respect to the precedent.[352]

Consequently, if called upon to reevaluate *Roe*, Chief Justice Roberts almost certainly will embark at *Casey*. Indeed, the Chief Justice said as much in his confirmation hearing:

> [T]he *Casey* decision itself, which applied the principles of *stare decisis* to *Roe v. Wade*, is itself a precedent of the Court, entitled to respect under principles of *stare decisis*. . . . [*Casey*]'s a precedent on whether or not to revisit the *Roe v. Wade* precedent. And under principles of *stare decisis*, that would be where any judge . . . would begin.[353]

The first critical battlefront for the Chief Justice's vote, then, will be whether the principles of stare decisis require the Court to respect *Casey*'s application of stare decisis to *Roe*.

In *Casey*, the Court abandoned *Roe*'s detailed trimester framework for evaluating the constitutionality of abortion regulations,[354] but purported to preserve what it described as *Roe*'s "essential holding"—that viability is the critical dividing line between a woman's right to choose and a state's ability to bar the choice and that "the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child."[355] Importantly, though, the *Casey* Court's decision was not rooted in the conclusion that *Roe* had been decided correctly, but solely in stare

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352. *See Citizens United*, 558 U.S. at 377 (Roberts, C.J., concurring) (asserting that previous decisions could not "be understood as a *reaffirmation* of [*Austin*]" because the Court had not previously been asked to overrule the decision); *see also* Gamble v. United States, 139 S. Ct. 1960, 1976 (2019) ("When we turn from 19th-century treatises to 19th-century state cases, Gamble's argument appears no stronger. The last time we looked, we found these state cases to be 'inconclusive.'" (quoting Bartkus v. Illinois, 359 U.S. 121, 131 (1959))); Randall v. Sorrell, 548 U.S. 230, 244 (2006) (indicating that *Buckley* "has become settled through iteration and reiteration over a long period").

353. *Confirmation Hearing*, *supra* note 3, at 145 (statement of Judge John G. Roberts, Jr.).

354. *See Casey*, 505 U.S. at 873 (plurality opinion) ("We reject the trimester framework, which we do not consider to be part of the essential holding of *Roe*." (citing Webster v. Reprod. Health Servs., 492 U.S. 490, 518 (1989) (opinion of Rehnquist, C.J.); *id.* at 529 (O'Connor, J., concurring in part and concurring in the judgment))).

355. *Id.* at 846.

decisis.[356] And according to the Court, the principle is extraordinarily powerful as it relates to *Roe*—in the Court's words, *Roe* enjoys "rare precedential force"—because the ruling has been deeply polarizing.[357]

In support of its decision to uphold *Roe*, the *Casey* Court began with several factors that have appeared in stare decisis rulings handed down during Chief Justice Roberts's tenure on the Court: workability, reliance, erosion of precedent, and developments since the case was decided.[358] All of these factors, the Court determined, swung in *Roe*'s favor. First, the Court in *Casey* concluded that *Roe* had not been unworkable, but imposed only a "simple limitation" that courts are competent to assess.[359] Second, taking a sweeping view of reliance, the Court asserted that, "for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail."[360] Third, the Court contended that *Roe* remained consistent with decisions regarding liberty, both in the context of "intimate relationships, the family, and decisions about whether or not to beget or bear a child" and in the context of "personal autonomy and bodily integrity."[361] Moreover, the Court explained that *Roe* might even fit within a classification all its own, and intervening abortion-related decisions have not departed from *Roe*'s fundamental premises.[362] Finally, according to the *Casey* Court, although technological advances had enhanced the safety of abortion and pushed viability earlier, these developments did not undermine the use of viability as the key marker in deciding when the state's interest in protect-

356. *See id.* at 871 ("We do not need to say whether each of us . . . would have concluded . . . that [the] weight [of the State's interest in potential life] is insufficient to justify a ban on abortions prior to viability . . . . [T]he immediate question is . . . [*Roe*'s] precedential force . . . .").

357. *Id.* at 867.

358. *Id.* at 854–55.

359. *Id.* at 855.

360. *Id.* at 856.

361. *Id.* at 857.

362. *See id.* ("[O]ne could classify *Roe* as *sui generis*.").

ing potential life becomes strong enough to limit a woman's ability to choose abortion.[363]

Though the *Casey* Court concluded that all of the stare decisis factors weighed in *Roe*'s favor, the Court nevertheless felt compelled to venture further and consider what overruling *Roe* would mean for the Court's legitimacy. According to *Casey*, the Court's legitimacy rests not only on making sound decisions founded on valid legal principles, but also on the public's perception that the judiciary is capable of interpreting the nation's laws.[364] Overturning *Roe* in the midst of extreme divisiveness and under public pressure that is no less intense than it was in 1973, the Court contended, would undermine these foundations intolerably: "[T]o overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question."[365] With this in mind, *Roe*—or, more precisely, its "essence"—would stand.[366]

One of the principal questions with respect to a new challenge to *Roe* is whether the Chief Justice would consider himself bound by *Casey*'s stare decisis rubric, with its broad view of reliance and its assertions regarding legitimacy. And those opposing *Roe* certainly have significant ammunition to convince him that he is not so constrained.

Of the cases in which the Court has given significant attention to stare decisis since Roberts became Chief Justice, *Pearson* stands out as one that might guide his thinking about the respect that the Court must afford *Casey*'s approach to precedent. In *Pearson*, with all of the Justices of one accord, the Court suggested that stare decisis is weak in relation to decisions regarding rules that govern the judiciary,[367] and stare decisis itself is a

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363. *See id.* at 860 (discussing changes weakening *Roe*'s factual premises).

364. *See id.* at 865.

365. *Id.* at 867.

366. *Id.* at 869 ("A decision to overrule *Roe*'s essential holding under the existing circumstances would [come] at the cost of both profound and unnecessary damage to the Court's legitimacy and to the Nation's commitment to the rule of law.").

367. *See* Pearson v. Callahan, 555 U.S. 223, 233 (2009) ("'Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved; the opposite is true in cases . . . involving procedural and evidentiary rules' that do not produce such reliance." (quoting Payne v. Tennessee, 501 U.S. 808, 828 (1991))).

principle of judicial policy that controls reconsideration of previous decisions.[368] Therefore, Congress does not have the liberty to change how the Court applies stare decisis. Because Congress does not have that power, a weak form should apply to *Casey*'s application of the principle.[369]

Pearson teaches that reliance, the quality of a precedent's reasoning, and workability are inapposite when evaluating cases involving rules governing the judiciary and that experience is the measure of whether to retain or dispose of such decisions.[370] And relevant to the question of experience, the *Pearson* Court indicated, are later criticism by Justices and inconsistent application of the relevant rule.[371]

Although the application of stare decisis in *Casey* drew criticism from a dissenting Chief Justice Rehnquist,[372] the Court's treatment of the principle in *Casey* has elicited virtually no studied attention from individual members of the Court since then.[373]

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368. *See id.*; *see also* Citizens United v. FEC, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring) ("*Stare decisis* is . . . a 'principle of policy.'" (quoting Helvering v. Hallock, 309 U.S. 106, 119 (1940))).

369. *See Pearson*, 555 U.S. at 233–34 ("[T]he *Saucier* rule is judge made and implicates an important matter involving internal Judicial Branch operations. Any change should come from this Court, not Congress.").

370. *See id.* at 233–34.

371. *See id.* at 235 ("Where a decision has 'been questioned by Members of the Court in later decisions and [has] defied consistent application by the lower courts,' these factors weigh in favor of reconsideration." (alteration in original) (quoting Payne, 501 U.S. at 829–30)).

372. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 953–66 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

373. Justice O'Connor's 1995 opinion in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), distinguished the Court's application of stare decisis in *Casey* from the way she believed it should apply to the 1990 precedent that the Court overruled in *Adarand*, but only Justice Kennedy joined in Justice O'Connor's opinion. *See id.* at 233–34 (opinion of O'Connor, J.). Justice Stevens in *Hubbard v. United States*, 514 U.S. 695 (1995), a decision of the same vintage, cites *Casey* as secondary authority for certain propositions associated with stare decisis; like Justice O'Connor's decision in *Adarand*, however, Justice Stevens's opinion in *Hubbard* did not command majority support. *See id.* at 711–15 (1995) (opinion of Stevens, J.). And, since *Casey* was decided, references to *Casey*'s treatment of stare decisis have appeared in a smattering of concurrences and dissents, but without any significant examination. *See, e.g.*, Gamble v. United States, 139 S. Ct. 1960, 1981, 1988–89 (2019) (Thomas, J., concurring); *Citizens United*, 558 U.S. at 408–09 (Stevens, J., concurring in part and dissenting in part); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 918 (2007) (Breyer, J., dissenting); *see* FEC v. Wis. Right to

The 2003 decision in *Lawrence v. Texas*[374] might be the exception. In *Lawrence*, the Court struck down a Texas anti-sodomy law, overruling *Bowers v. Hardwick*[375] and provoking Justice Scalia. The majority, Justice Scalia contended, had employed stare decisis with respect to *Bowers* in a manner inconsistent with *Casey*.[376] According to Justice Scalia, absent from the *Lawrence* Court's decision was any consideration of the workability of *Bowers*, and unlike in *Casey*, the *Lawrence* Court cited divisiveness as a reason *for* overruling precedent, rather than upholding it.[377] True to form, Justice Scalia did not mince words: "To tell the truth, it . . . should surprise no one[] that the Court has chosen today to revise the standards of *stare decisis* set forth in *Casey*. It has thereby exposed *Casey*'s extraordinary deference to precedent for the result-oriented expedient that it is."[378]

Moreover, again perhaps with *Lawrence*'s being the exception, a majority of the Court has not once come close to using *Casey* as a model for a stare decisis inquiry.[379] The principal opinion in *Ramos*, the Court's most recent foray into stare decisis, does not mention *Casey* at all,[380] and Justice Kavanaugh's concurrence in *Ramos* includes *Casey* among a long list of decisions *overruling* precedent.[381] Perhaps most significant, though, is the absence of any reference to *Casey* in the majority opinion

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Life, Inc., 551 U.S. 449, 535 (2007) (Souter, J., dissenting); Gonzales v. Carhart, 550 U.S. 124, 190–91 (2007) (Ginsburg, J., dissenting).

374. 539 U.S. 558 (2003).

375. 478 U.S. 186 (1986); *Lawrence*, 539 U.S. at 578.

376. *Lawrence*, 539 U.S. at 587 (Scalia, J., dissenting).

377. *Id.*

378. *Id.* at 592.

379. *See supra* note 373 (discussing the sparse attention paid to *Casey*'s analysis of stare decisis). In *Agostini v. Felton*, 521 U.S. 203 (1997), the majority cited *Casey* in finding that principles of stare decisis did not require it to reaffirm a 1985 decision and rejected the idea that overruling the case would undermine the Court's legitimacy, finding that it "do[es] no violence to the doctrine of *stare decisis* when [the Court] recognize[s] bona fide changes in . . . decisional law." *Id.* at 235–39.

380. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1404–08 (2020).

381. *See id.* at 1411–12 (Kavanaugh, J., concurring in part). Justice Kavanaugh observed that the *Casey* Court "rejected *Roe*'s trimester framework[] and . . . expressly overruled two other important abortion precedents." *Id.* at 1412 n.1; *see* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882 (1992) (plurality opinion) (overruling in part Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416 (1983), and Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986)).

in *Obergefell v. Hodges*,[382] the Court's watershed decision regarding same sex marriage. In *Obergefell*, the Court cited *Lawrence* and overruled the 1972 *Baker v. Nelson*[383] decision with nary a mention of stare decisis.[384] In addition, *Ramos* and other recent stare decisis decisions have devoted particular attention to the quality of a precedent's reasoning, suggesting that *Casey*'s analysis is impoverished by today's standards.[385] Thus, those who oppose *Roe* might try to convince the Chief Justice that *Casey* has become a "doctrinal dinosaur,"[386] "an outlier" among the Court's cases about stare decisis,[387] and completely out of step with the Court's application of stare decisis since 1992.

Roe's proponents, one the other hand, might reply that *Pearson* dealt with extensive lower-court experience in applying the *Saucier* procedure[388] and that the Court has not applied *Casey*'s approach to stare decisis because it has not had to decide whether to curtail individual constitutional rights (rather than expand them as it did in *Lawrence* and *Obergefell*). Indeed, in discussing reliance interests in *Lawrence*, the Court emphasized that, "[i]n *Casey* [it had] noted that when a court is asked to overrule a precedent *recognizing* a constitutional liberty interest, individual or societal reliance on the existence of that liberty cautions with particular strength against reversing course."[389] Finally, although less compelling, those seeking to preserve *Roe* through *Casey*'s application of stare decisis can point to Justice

382. 135 S. Ct. 2584 (2015).

383. 409 U.S. 810 (1972).

384. *Obergefell*, 135 S. Ct. at 2605–06.

385. *See Ramos*, 140 S. Ct. at 1405; Knick v. Township of Scott, 139 S. Ct. 2162, 2177–78 (2019); Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1499 (2019); Janus v. AFSCME, 138 S. Ct. 2448, 2478–79 (2018).

386. Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401, 2411 (2015).

387. *Janus*, 138 S. Ct. at 2482.

388. *See* Pearson v. Callahan, 555 U.S. 223, 235 (2009) (indicating that the lack of "consistent application by the lower courts . . . weigh[s] in favor" of reconsidering a precedent involving a judiciary rule (quoting Payne v. Tennessee, 501 U.S. 808, 829–30 (1991))).

389. Lawrence v. Texas, 539 U.S. 558, 577 (2003) (emphasis added) (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855–56 (1992) (plurality opinion)).

Thomas's assertion in a 2009 concurrence that *Casey* defines "the prevailing approach to *stare decisis*."[390]

But the Chief Justice's characterization of stare decisis in *Citizens United* is at odds with *Casey*: "*Stare decisis* is a doctrine of preservation, not transformation."[391] And the view Chief Justice Roberts expressed in *Citizens United* is reminiscent of what a dissenting Chief Justice Rehnquist said in *Casey*:

> *Stare decisis* is defined in Black's Law Dictionary as meaning "to abide by, or adhere to, decided cases." Whatever the "central holding" of *Roe* that is left after the joint opinion finishes dissecting it is surely not the result of that principle. While purporting to adhere to precedent, the joint opinion instead revises it. *Roe* continues to exist, but only in the way a storefront on a western movie set exists: a mere facade to give the illusion of reality.[392]

Indeed, even though the Court in *Casey* upheld the right of a woman to choose abortion before fetal viability, it transformed *Roe*'s trimester framework into an undue burden test.[393] Moreover, one sees in *Casey* a subtle but significant shift in the identified constitutional foundation for the right to choose, from an emphasis on privacy rights[394] to the declaration that "[t]he controlling word . . . is 'liberty,'"[395] "the heart of [which] is the right to define one's own concept of existence, of meaning, of

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390. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 534 (2009) (Thomas, J., concurring).

391. Citizens United v. FEC, 558 U.S. 310, 384 (2010) (Roberts, C.J., concurring); *see also* Knick v. Township of Scott, 139 S. Ct. 2162, 2178 (2019) ("The fact that the justification for the state-litigation requirement continues to evolve is another factor undermining the force of *stare decisis*." (citing *Janus*, 138 S. Ct. at 2472 ("[W]e have previously taken a dim view of similar attempts to recast problematic First Amendment decisions.")).

392. *See Casey*, 505 U.S. at 954 (Rehnquist, C.J., dissenting) (citation omitted).

393. *Id.* at 876 (plurality opinion) ("The trimester framework . . . does not fulfill *Roe*'s own promise that the State has an interest in protecting fetal life or potential life. . . . In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.").

394. *See* Roe v. Wade, 410 U.S. 113, 153 (1973) ("Th[e] right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty . . . , as we feel it is, or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

395. *Casey*, 505 U.S. at 846 (plurality opinion).

the universe, and of the mystery of human life."[396] In addition, the *Casey* Court cited "personal dignity and autonomy," words that appear nowhere in *Roe*, as "central to the liberty protected by the Fourteenth Amendment."[397] Finally, gone is the primacy of a woman's physician in making the abortion decision—"[f]or the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician"[398]—and in the physician's place is the woman as principal decision maker—"a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability."[399] With these differences, *Roe*'s challengers might succeed in persuading the Chief Justice that the *Casey* Court's application of stare decisis was not stare decisis at all and therefore is not entitled to respect.

B. Placing Roe *on the Stare Decisis Continuum*

Although Chief Justice Roberts reliably has favored upholding earlier rulings when a strong version of stare decisis applies (for example, cases involving statutory interpretation and constitutional arenas where Congress exercises primary authority), he otherwise has exhibited little hesitation in voting to overrule Court precedent.[400] Decisions from 2018 and 2019 present in stark relief the contextual distinctions the Chief Justice has drawn. In *Wayfair*, he advocated adherence to a decision he admitted was wrongly decided because the decision involved interstate commerce, an area in which the Constitution grants Congress broad regulatory latitude.[401] In addition, the Chief Justice cast the deciding vote in *Kisor* to retain *Auer* and *Seminole*

396. *Id.* at 851.

397. *Id.*

398. *Roe*, 410 U.S. at 164; *see also id.* at 163 ("This means . . . that, for the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine . . . that . . . the patient's pregnancy should be terminated.").

399. *Casey*, 505 U.S. at 879 (plurality opinion).

400. *See supra* Part I.

401. *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2101–02 (2018) (Roberts, C.J., dissenting) ("We have applied this heightened form of *stare decisis* in the dormant Commerce Clause context.").

Rock[402]—administrative law decisions that Congress perhaps could address by statute[403]—not because he believed that those decisions were decided correctly, but on the basis of stare decisis alone.[404] In contrast, his opinion in *Knick* rejected the idea that the Court should leave *Williamson County* alone because Congress could amend a statute to fix a practical problem the decision had wrought.[405] That, the Chief Justice explained, was not enough because Congress could not remedy the Court's erroneous interpretation of the Constitution.[406]

Moreover, by joining Justice Alito's dissent in *Kimble*, Chief Justice Roberts rejected the majority's suggestion that *Brulotte* enjoyed a "superpowered form of *stare decisis*" because it involved statutory interpretation and could affect contractual relationships.[407] As Justice Alito explained: "[W]e do not give super-duper protection to decisions that do not actually interpret a statute. When a precedent is based on a judge-made rule . . . , we cannot 'properly place on the shoulders of Congress' the entire burden of correcting 'the Court's own error.'"[408] How much more might one expect the Chief Justice to reject the idea of "super-duper precedent" when referring to *Roe*. Legislative action cannot eliminate the putative right to abortion, which is mentioned nowhere in the Constitution, but ostensibly resides in a right to privacy emanating from the penumbra of the Bill of Rights or in some amorphous right to privacy, dignity, or autonomy hidden within the term "liberty" under the Fourteenth Amendment's Due Process Clause.[409]

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402. Kisor v. Wilkie, 139 S. Ct. 2400, 2424 (2019) (Roberts, C.J., concurring in part).

403. *Id.* at 2412 (plurality opinion). *But see id.* at 2444 (Gorsuch, J., concurring in the judgment) ("[I]t [is not] entirely clear that Congress *could* overturn the *Auer* doctrine legislatively.").

404. *See id.* at 2424 (Roberts, C.J., concurring).

405. *See* Knick v. Township of Scott, 139 S. Ct. 2162, 2179 (2019) (addressing dissent's assertion that *Williamson County* should enjoy an "enhanced" form of stare decisis).

406. *See id.* (indicating that Congress did not have the power to fix *Williamson County*'s disparate treatment of takings claims and other constitutional claims).

407. Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401, 2418 (2015) (Alito, J., dissenting) (quoting *id.* at 2410 (majority opinion)).

408. *Id.* (quoting Girouard v. United States, 328 U.S. 61, 69–70 (1946)).

409. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (finding abortion right within Fourteenth Amendment's concept of liberty); Roe v. Wade,

Chief Justice Roberts, in fact, underscored in his confirmation hearing the risk associated with interpreting the Due Process Clause: "[I]t is an area in which the danger of judges going beyond their appropriately limited authority is presented because of the nature of the sources of authority. You're not construing the text narrowly."[410] If the Chief Justice was unwilling to accord stare decisis the usual force in *Kimble*, the risk he identified with respect to interpreting the Due Process Clause would seem to push him even more toward applying a weaker from of stare decisis to *Roe*.

This is not to say that Chief Justice Roberts would apply the weakest form of stare decisis to *Roe*. The *Janus* Court indicated that First Amendment precedents may enjoy the least respect,[411] and the Court in *Alleyne v. United States*[412] stated that "[t]he force of *stare decisis* is at its nadir in cases concerning procedural rules that implicate fundamental constitutional protections."[413] Furthermore, unlike *Janus*, a case in which the Court was *recognizing* greater free speech rights,[414] overruling *Roe* would *decommission* a very personal individual right. And although the Court in *Hyatt* seemed to do so rather easily,[415] it is hard to equate the right to sue one state in the courts of another with one of the most controversial rights that the Court has recognized in recent history.

The key for pro-choice advocates, then, is to convince Chief Justice Roberts that he must adhere to *Casey*'s view that stare decisis enjoys particular force with respect to decisions addressing divisive constitutional issues—that *Roe* really is a special case, one to which the customarily weak form of stare decisis with respect to constitutional precedents does not apply. He was not on the Court in *Casey*, however, and none of the opinions he has authored or joined during his tenure suggest that

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410 U.S. 113, 152–53 (1973) (discussing sources of constitutional right to privacy and contending that right to choose abortion is included in this right).

410. *Confirmation Hearing*, *supra* note 3, at 259–60 (statement of Judge John G. Roberts, Jr.).

411. Janus v. AFSCME, 138 S. Ct. 2448, 2478 (2018).

412. 570 U.S. 99 (2013).

413. *Id.* at 116 n.5.

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

415. Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1499 (2019).

he would gravitate toward this view. Thus, pushing the Chief Justice toward a stronger form of stare decisis with respect to *Roe* seems a tall order.

C. Applying Stare Decisis Factors to Roe

Persuading Chief Justice Roberts about where *Roe* falls on the stare decisis continuum is not insignificant given his voting record. In contexts where the Chief Justice has determined that stare decisis enjoys particular strength, he has voted to uphold precedent every single time.[416] When the Chief Justice has concluded that the principle is weak, on the other hand, he has favored disposing of precedent ten of fourteen times.[417] And *Gamble*—one of the decisions in which he voted to uphold prior rulings—probably should not count among the fourteen given that the Court in that case emphasized that the challenger had not offered sufficient evidence of error.[418] After all, as Justice Kagan pointed out in *Kimble*, stare decisis only is important when the Court determines that a previous decision was wrong.[419]

The Chief Justice's vote in *Ramos* to retain *Apodaca* is the first significant sign in over ten years that he is open to upholding precedent when stare decisis is weak, and thus *Roe*'s proponents would be wise to mine Justice Alito's dissent (which the Chief Justice joined) for clues about how to persuade the Chief Justice to leave *Roe* alone.[420] Moreover, recent history indicates

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416. *See supra* Part I.A.

417. *See id.* Not counted among these numbers is the Chief Justice's recent vote in *Cooper*. The *Cooper* Court declined to evaluate whether to overrule *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999), because the plaintiffs asserted nothing more than that the earlier decision was incorrect. *See* Allen v. Cooper, 140 S. Ct. 994, 1003 (2020). Thus, one cannot glean how the Chief Justice might have voted had the plaintiffs asserted more, giving the Court reason to evaluate the effect of stare decisis.

Also not counted is the Chief Justice's vote in *Alleyne*, a decision in which the Court overruled its 2002 *Harris* ruling. Although the Chief Justice dissented in *Alleyne*, he did not challenge the manner in which the majority evaluated the demands of stare decisis. *See supra* note 230.

418. *See supra* notes 308–313 and accompanying text.

419. Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401, 2409 (2015) ("[*S*]*tare decisis* has consequence only to the extent it sustains incorrect decisions; correct judgments have no need for that principle to prop them up.").

420. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1431–40 (2020) (Alito, J., dissenting) (discussing stare decisis).

that, regardless of where the Chief Justice situates *Roe* on the stare decisis continuum, he would give studied attention to various factors from the Court's stare decisis jurisprudence in deciding how to vote in a challenge to *Roe*.[421] With the Court's uneven consideration of various factors,[422] however, which factors Chief Justice Roberts would consider relevant is an open question. If he determines that *Casey* sets the stare decisis standard, one would expect him to look to the factors the *Casey* Court addressed—workability, reliance, and developments (legal and factual) since the decision.[423] But if the Chief Justice does not view *Casey* as a constraint, he might dispense with one or more of the *Casey* factors and add one or more other factors which the *Casey* Court neglected.

In the Chief Justice's confirmation hearing, he identified workability, doctrinal developments, and reliance (which he also referred to as "settled expectations") as the principal considerations when deciding whether to overrule an erroneous precedent.[424] As noted above, these factors featured in *Casey*. Not surprisingly, they also have been present in the many cases examining the effect of stare decisis while the Chief Justice has been on the Court.[425] Opinions that he has written and those he has joined since becoming Chief Justice have addressed with some frequency other factors as well, including the age of the

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421. *See Cooper*, 140 S. Ct. at 1003; Knick v. Township of Scott, 139 S. Ct. 2162, 2177–78 (2019); Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 266 (2014).

422. *See, e.g.*, Janus v. AFSCME, 138 S. Ct. 2448, 2478–79 (2018) (identifying five relevant factors); *see also Knick*, 139 S. Ct. at 2178 (reciting only four of the five factors identified in *Janus*); Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1499 (2019).

423. *See supra* notes 354–366 and accompanying text (describing *Casey*'s application of stare decisis).

424. *See, e.g.*, *Confirmation Hearing*, *supra* note 3, at 142 (statement of Judge John G. Roberts, Jr.); *see also id.* at 223 (indicating that reliance "is often expressed in the Court's opinions [as] settled expectations").

425. *See, e.g.*, *Ramos*, 140 S. Ct. at 1432–36 (Alito, J., dissenting); *Knick*, 139 S. Ct. at 2178; *Janus*, 138 S. Ct. at 2478; Johnson v. United States, 135 S. Ct. 2551, 2562–63 (2015); Citizens United v. FEC, 558 U.S. 310, 362–63 (2010); Montejo v. Louisiana, 556 U.S. 778, 792–93 (2009); Arizona v. Gant, 556 U.S. 332, 358–63 (2009) (Alito, J., dissenting); Pearson v. Callahan, 555 U.S. 223, 233 (2009). *Janus* identified as separate factors consistency with related decisions and doctrinal developments. *Janus*, 138 S. Ct. at 2478–79. But the *Janus* Court did not evaluate them separately, instead addressing them together in an evaluation of factual legal developments. *Id.* at 2482–84.

precedent[426] and, with particular prominence of late, the quality of the precedent's reasoning.[427]

1. Roe*'s Age*

That *Roe* is pushing fifty is unlikely to figure much in the Chief Justice's stare decisis evaluation. Admittedly, he joined the 2019 *Kisor* majority in declining to overrule the Court's 1945 decision in *Seminole Rock* and disagreed with the 2018 majority in *Wayfair* when it did away with the Court's 1967 decision in *Bellas Hess*; the Chief Justice situated both *Seminole Rock* and *Bellas Hess* on the strong side of the stare decisis continuum.[428] And although he voted in 2020 to retain a 1972 constitutional precedent in *Ramos*, in the 2019 *Hyatt*, 2018 *Janus*, and 2015 *Kimble* decisions, all of which involved precedents the Chief placed on the weak side, he favored overruling decisions dating back to 1979, 1977, and 1964.[429] Moreover, the Chief Justice sided with the majority in *Leegin*, a 2007 decision overruling a 1911 decision in the antitrust realm, where stare decisis also is weak.[430] Thus, he does not seem compelled to keep an erroneous precedent merely because it is old.

If overruling a precedent threatens to upend a host of later decisions that have relied on the precedent—a risk that increases with age—the calculus is different. The Chief Justice in *Ramos* joined a dissenting Justice Alito, who observed that Louisiana and Oregon "ha[d] conducted thousands and thousands of trials" assuming *Apodoca*'s validity and who warned that disposing of *Apodaca* could unleash a "tsunami of litigation."[431] Similarly, in the *Kisor* Court's discussion of stare decisis, which the Chief Justice endorsed, the Court observed, "This Court alone

426. *E.g.*, Gamble v. United States, 139 S. Ct. 1960, 1969 (2019); *Citizens United*, 558 U.S. at 362–63; *Montejo*, 556 U.S. at 792–93; *Pearson*, 555 U.S. at 233; CBOCS West, Inc. v. Humphries, 553 U.S. 442, 452–53 (2008).

427. *E.g.*, *Ramos*, 140 S. Ct. at 1432–35 (Alito, J., dissenting); *Knick*, 139 S. Ct. at 2177–78; *Hyatt*, 139 S. Ct. at 1499; *Janus*, 138 S. Ct. at 2478–79; *Citizens United*, 558 U.S. at 362–63; *Montejo*, 556 U.S. at 792–93; *Gant*, 556 U.S. at 361–63 (Alito, J., dissenting).

428. *See supra* notes 109–135 and accompanying text.

429. *See supra* notes 231–254, 274–299, 300–307, 327–343 and accompanying text.

430. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899, 907 (2007).

431. *Ramos*, 140 S. Ct. at 1436 (Alito, J., dissenting).

has applied *Auer* or *Seminole Rock* in dozens of cases, and lower courts have done so thousands of times. . . . It is the rare overruling that introduces so much instability into so many areas of law, all in one blow."[432] Moreover, with the Chief Justice on board, the *Gamble* Court stressed that the evidence of error needed to be very strong to "overcome *numerous* 'major decisions of th[e] Court' spanning *170 years*."[433] In addition, the 2008 *CBOCS* majority (of which the Chief Justice was a part) cited age as a reason not to depart from *Sullivan* (decided four years before *Roe*) and emphasized that doing otherwise would destabilize "many Court precedents."[434] Finally, back in 2006, the Chief Justice joined Justice Breyer who asserted in *Randall* that stare decisis should buoy the Court's 1976 *Buckley* decision because the underlying principle "ha[d] become settled through iteration and reiteration over a long period of time."[435]

Taking *Roe* and *Casey* at their word, the abortion right *Roe* recognized is one of a kind,[436] and therefore, overruling *Roe* should not have similar ripple effects. In considering whether there were doctrinal developments that undermined *Roe*, the *Casey* Court emphasized that any error in *Roe* goes to the strength of the state's interest in potential life and that perpetuating that error in future decisions was unlikely to have far-reaching consequences.[437] If the *Casey* Court was correct that *Roe* is so limited, then—although *Roe*'s demise no doubt would create a cultural tidal wave—it would not have the wide-ranging effects of the kind that seem to have concerned the Chief Justice in *Ramos*, *Kisor*, *Gamble*, and *Randall*. In fact, because overruling *Roe* would staunch a stream of litigation that has continued unabated since 1973, departing from stare deci-

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432. Kisor v. Wilkie, 139 S. Ct. 2400, 2422 (2019).

433. Gamble v. United States, 139 S. Ct. 1960, 1969 (2019) (quoting Welch v. Tex. Dep't. of Highways & Pub. Transp., 483 U.S. 468, 479 (1987)).

434. CBOCS West, Inc. v. Humphries, 553 U.S. 442, 451–52 (2008).

435. Randall v. Sorrell, 548 U.S. 230, 244 (2006) (plurality opinion).

436. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992) (plurality opinion) ("Abortion is a unique act. It is an act fraught with consequences . . . , depending on one's beliefs, for the life or potential life that is aborted."); *id.* at 857 ("[O]ne could classify *Roe* as *sui generis*."); Roe v. Wade, 410 U.S. 113, 159 (1973) ("The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education . . . .").

437. *See Casey*, 505 U.S. at 858–59 (discussing the effect of not overruling *Roe*).

sis would have the very opposite effect that the *Kisor* majority feared and that Justice Alito's *Ramos* dissent forecasted.

2. *Quality of* Roe*'s Reasoning*

The *Casey* Court did not evaluate *Roe*'s reasoning when it decided to affirm *Roe*'s essential holding,[438] and in *Kisor*, Chief Justice Roberts joined the portion of the opinion of the Court in which Justice Kagan stated that whether an earlier decision was "right and well-reasoned . . . is not the test for overturning [it]."[439] Numerous opinions during the Chief Justice's tenure, though, indicate that he believes that a precedent's reasoning is an important consideration, at least in cases when stare decisis is weak.[440] For the Chief Justice, it seems to be a matter of degree. As he explained in *Knick*: "*Williamson County* was not just wrong. Its reasoning was exceptionally ill founded and conflicted with much of [the Court's] takings jurisprudence."[441]

Based on what the Chief Justice himself has written and the opinions he has joined, a number of details are relevant in measuring the extent to which a precedent's reasoning has gone off course. Among the pertinent considerations are whether the decision relies on dicta[442] or decisions that are not germane,[443] ignores applicable precedent,[444] conflicts with the pertinent jurisprudential corpus,[445] has been subject to criticism by Justices and scholars,[446] fails to account for contextual dis-

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438. *See id.* at 869 ("A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, *if error there was* . . . ." (emphasis added)); *id.* at 982 (Scalia, J., concurring in the judgment in part and dissenting in part).

439. Kisor v. Wilkie, 139 S. Ct. 2400, 2423 (2019).

440. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1432–36 (2020) (Alito, J., dissenting); Knick v. Township of Scott, 139 S. Ct. 2162, 2178 (2019); Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1499 (2019); Janus v. AFSCME, 138 S. Ct. 2448, 2479 (2018); Citizens United v. FEC, 558 U.S. 310, 362–63 (2010); Montejo v. Louisiana, 556 U.S. 778, 792–93 (2009); Arizona v. Gant, 556 U.S. 332, 358 (2009) (Alito, J., dissenting); Pearson v. Callahan, 555 U.S. 223, 234 (2009).

441. *Knick*, 139 S. Ct. at 2178.

442. *See id.* at 2178.

443. *See Janus*, 138 S. Ct. at 2479.

444. *See Knick*, 139 S. Ct. at 2178; *Citizens United*, 558 U.S. at 348 (indicating that *Austin v. Michigan State Chamber of Commerce* "bypass[ed]" two important precedents).

445. *See Knick*, 139 S. Ct. at 2178; *Janus*, 138 S. Ct. at 2479–80.

446. *Knick*, 139 S. Ct. at 2178.

tinctions,[447] has had changing justifications over time,[448] lacked a sufficient judicial record,[449] or departed from the understanding of relevant principles at the Founding.[450] Importantly, though, *Gamble* teaches that, for the Court to overrule a precedent, the evidence must make clear that the reasoning was errant.[451] Unlike in *Gamble*, however, where repeating old arguments met disfavor, it would seem that any arguments made in *Casey* about how *Roe* went off course still are fair game in a challenge to *Roe*, given that the *Casey* Court did not consider and reject any arguments regarding *Roe*'s premises, but avoided them entirely.[452]

An exhaustive study of all of the considerations identified above would stretch this Article beyond its principal aim, but in light of what the Chief Justice himself stated in *Knick* and what Justice Alito said in the *Ramos* dissent the Chief Justice joined, a few points warrant specific mention. First, regarding the weakness of *Roe*'s reasoning, the Chief Justice might find it telling that the Court in *Casey* did not even consider *Roe*'s reasoning,[453] but affirmed *Roe*'s "essential" holding based on the *Casey* Court's explanation of liberty and on other factors underlying stare decisis.[454] Of course, one rightly might point out that, similar to the *Casey* Court, Justice Alito declined to say how he would have voted in *Apodaca* if he were on the Court at the time,[455] but it seems more notable that Justice Alito departed

447. *Janus*, 138 S. Ct. at 2480.

448. *Knick*, 139 S. Ct. at 2178; *Citizens United*, 558 U.S. at 363.

449. Johnson v. United States, 135 S. Ct. 2551, 2562 (2015).

450. Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1499 (2019).

451. Gamble v. United States, 139 S. Ct. 1960, 1969 (2019).

452. *See id.* at 1974, 1976 (discussing arguments previously raised and noting the absence of any changes making the arguments more convincing); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 869 (1992) (plurality opinion) ("A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, *if error there was* . . . ." (emphasis added)); *id.* at 982 (Scalia, J., dissenting).

453. *See Casey*, 505 U.S. at 854–69 (plurality opinion) (omitting an evaluation of *Roe*'s logic).

454. *See id.* at 853 ("[T]he reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*.").

455. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1434 (2020) (Alito, J., dissenting) ("I cannot say that I would have agreed either with Justice White's analysis or his bottom line in *Apodaca* if I had sat on the Court at that time . . . ."); *cf. Casey*, 505

from the *Casey* Court when he engaged in a careful and detailed evaluation of the reasoning that led to the *Apodaca* Court's judgment.[456] Whatever one might say about the *Apodaca* Court's bottom line, according to Justice Alito (and the Chief Justice with him), the errors the *Ramos* majority identified did not make the *Apodaca* decision "gravely mistaken"[457] or, as the Chief Justice described the precedent in *Knick*, "exceptionally ill founded."[458]

Which leads to the second point. Unlike what the Chief Justice noted in *Knick* with respect to *Williamson County*, during the "[n]early . . . half century . . . since [the Court decided *Apodaca*], no Justice ha[d] even hinted that *Apodaca* should be reconsidered."[459] The same cannot be said of *Roe*'s almost fifty-year history. Before *Casey*, Justice O'Connor repeatedly criticized *Roe*.[460] For example, in *Akron v. Akron Center for Reproductive Health, Inc.*,[461] she asserted that *Roe*'s adoption of the trimester framework and viability as a critical marker therein "violates the fundamental aspiration of judicial decision making through the application of neutral principles 'sufficiently absolute to give them roots throughout the community and continuity over significant periods of time . . . .'"[462] Furthermore in *Akron*, she voiced her opposition to the *Roe* Court's conclusion that the

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U.S. at 871 (plurality opinion) ("We do not need to say whether each of us, . . . when the valuation of the state interest came before [the Court] as an original matter, would have concluded . . . that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions.").

456. *See Ramos*, 140 S. Ct. at 1432–36 (Alito, J., dissenting).

457. *Id.* at 1405 (majority opinion).

458. *Knick*, 139 S. Ct. at 2178; *see Ramos*, 140 S. Ct. at 1433 (Alito, J., dissenting) (describing errors the *Ramos* majority identified as "overblown").

459. *Ramos*, 140 S. Ct. at 1425 (Alito, J., dissenting).

460. *See* Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 828–29 (1986) (O'Connor, J., dissenting) (asserting that the state has a compelling interest in protecting potential life that exists throughout pregnancy and that *Roe*'s trimester framework is "outmoded"); Planned Parenthood Ass'n of Kan. City, Mo. v. Ashcroft, 462 U.S. 476, 504 (1983) (O'Connor, J., concurring in part in the judgment and dissenting in part) ("[T]he State possesses a compelling interest in protecting and preserving fetal life, [and] I believe this state interest is extant throughout pregnancy."); City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 453–66 (1983) (O'Connor, J., dissenting) (criticizing *Roe*'s trimester framework and evaluation of the state's interests).

461. 462 U.S. 416.

462. *Id.* at 458 (O'Connor, J., dissenting) (quoting ARCHIBALD COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 114 (1976)).

state's interest in protecting potential life is not compelling throughout pregnancy.[463]

Justice Kennedy seems to have held similar views. By joining Chief Justice Rehnquist's 1989 opinion in *Webster v. Reproductive Health Services*,[464] it appears that Justice Kennedy both concurred with Justice O'Connor about the nature of the state's interest in potential life[465] and fundamentally disapproved of *Roe*'s declarations regarding trimesters and viability: "The key elements of the *Roe* framework—trimesters and viability—are not found in the text of the Constitution or in any place else one would expect to find a constitutional principle."[466] Other Justices—Chief Justice Rehnquist and Justices Scalia, Thomas, and Byron White, in particular—have repeatedly and more vociferously aired their objections to *Roe*.[467] Even Justice Ginsburg

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463. *See id.* at 461 ("The choice of viability as the point at which the state interest in *potential* life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward. Accordingly, I believe that the State's interest in protecting potential human life exists throughout the pregnancy.").

464. 492 U.S. 490 (1989).

465. *See id.* at 519 (opinion of Rehnquist, C.J.) (criticizing *Roe*).

466. *Id.* at 518.

467. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2324 (2016) (Thomas, J., dissenting) ("I remain fundamentally opposed to the Court's abortion jurisprudence."); Gonzales v. Carhart, 550 U.S. 124, 169 (2007) (Thomas, J., concurring) ("I write separately to reiterate my view that the Court's abortion jurisprudence, including *Casey* and *Roe v. Wade*, has no basis in the Constitution." (citation omitted)); Stenberg v. Carhart, 530 U.S. 914, 956 (2000) (Scalia, J., dissenting) ("If only for the sake of its own preservation, the Court should return this matter to the people—where the Constitution, by its silence on the subject, left it—and let *them* decide, State by State, whether this practice should be allowed."); *id.* at 980 (Thomas, J., dissenting) ("In 1973, this Court . . . render[ed] unconstitutional abortion statutes in dozens of States. . . . [T]hat decision was grievously wrong." (citing Roe v. Wade, 410 U.S. 113 (1973))); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 944 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) ("We believe that *Roe* was wrongly decided, and that it can and should be overruled . . . ."); *id.* at 980 (Scalia, J., concurring in the judgment in part and dissenting in part) ("The issue is whether [the power of a woman to abort her unborn child] is a liberty protected by the Constitution of the United States. I am sure it is not."); Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 520–21 (1990) (Scalia, J., concurring) ("I continue to believe . . . that the Constitution contains no right to abortion. . . . The Court should end its disruptive intrusion into this field as soon as possible."); *Webster*, 492 U.S. at 532 (Scalia, J., concurring in part and concurring in the judgment) ("As to Part II-D [of Chief Justice Rehnquist's opinion], I [hold the] view that it effectively would overrule *Roe* v. *Wade*. I think that should be done, but would do it more explicitly." (citation omitted)); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 788 (1986) (White, J.,

before ascending to the Court commented that the "[h]eavy-handed judicial intervention [in *Roe*] was difficult to justify."[468] And perhaps most significant, Chief Justice Burger, a member of *Roe*'s majority,[469] was questioning the decision by 1986: "The soundness of our holdings must be tested by the decisions that purport to follow them. If [*Planned Parenthood of Central Missouri v.*] *Danforth* and today's holding really mean what they seem to say, I agree we should reexamine *Roe*."[470]

In addition, scholarly criticism began immediately after the Court handed down *Roe*.[471] In 1973, pro-choice Yale professor John Ely Hart[472] stated: "The opinion strikes the reader initially as a sort of guidebook, addressing questions not before the Court and drawing lines with an apparent precision one generally associates with a commissioner's regulations. On closer examination, however, the precision proves largely illusory."[473] Harvard professor Laurence Tribe contemporaneously expressed a similar sentiment: "One of the most curious things about *Roe* is that, behind its own verbal smokescreen, the substantive judgment on which it rests is nowhere to be found."[474] And Professors Hart and Tribe have not been alone.[475] Given

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dissenting) ("[T]he time has come to recognize that *Roe* v. *Wade* . . . 'departs from a proper understanding' of the Constitution and to overrule it." (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 557 (1985))); *Roe*, 410 U.S. at 174 (Rehnquist, J., dissenting) ("To reach its result, the Court necessarily has had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment."); Doe v. Bolton, 410 U.S. 179, 222 (1973) (White, J., dissenting) ("I find nothing in the language or history of the Constitution to support the Court's judgments. The Court simply fashions and announces a new constitutional right for pregnant women . . . .").

468. Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 385 (1985).

469. *Roe*, 410 U.S. at 115.

470. *Thornburgh*, 476 U.S. at 785 (Burger, C.J, dissenting).

471. *Cf.* Ramos v. Louisiana, 140 S. Ct. 1390, 1427 (2020) (Alito, J., dissenting) (noting scholarly approbation of nonunanimous verdicts, which the *Apodaca* Court concluded were permissible under the Sixth Amendment).

472. *See* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 926 (1973) ("Were I a legislator I would vote for a statute very much like the one the Court [in *Roe*] ends up drafting.").

473. *Id.* at 922 (footnote omitted).

474. Laurence H. Tribe, *Forward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 7 (1973).

475. *See, e.g.*, Timothy P. Carney, *The pervading dishonesty of Roe v. Wade*, WASH. EXAMINER (Jan. 23, 2012, 12:00 AM), https://www.washingtonexaminer.com/the-

that Chief Justice Roberts considered persuasive less extensive critiques of *Williamson County*,[476] one would expect *Roe*'s opponents to remind the Chief Justice early and often of the widespread disapproval of *Roe*'s reasoning.

Finally, in his majority opinion in *Knick*, the Chief Justice cited the shifting justification for the rule in *Williamson County* as undercutting its precedential force.[477] As discussed above, one can see multiple revisions in the Court's abortion jurisprudence over time—from being founded on privacy to being rooted in dignity and autonomy, from employing a trimester framework to using a structured undue burden standard that has further morphed into an uncertain balancing test, and from the primacy of the doctor in the decisionmaking process to the woman's right to make "the ultimate decision."[478] Indeed, drawing from *Knick*, abortion foes might argue to the Chief Justice that the *Roe* Court errantly recognized an unenumerated right wobbling on "shaky foundations," with a shifting justification, and with respect to which the Court has been in search of a workable test "for over [forty-five] years."[479]

3. Roe*'s Workability*

The fact that the constitutional test for abortion regulations has evolved over the years could prove important to the Chief Justice in evaluating *Roe*'s workability. Workability, however, did not feature prominently in the *Casey* Court's stare decisis evaluation. Having decided to abandon the trimester framework, the Court described *Roe* as a "simple limitation beyond

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pervading-dishonesty-of-roe-v-wade [https://perma.cc/W8XH-CM6V] (recounting numerous criticisms of *Roe*); Kermit Roosevelt, Opinion, *Shaky Basis for a Constitutional 'Right,'* WASH. POST (Jan. 22, 2003), https://www.washingtonpost.com/archive/opinions/2003/01/22/shaky-basis-for-a-constitutional-right/dd30d42e-188d-42f6-8fb2-b935394e63aa/ [https://perma.cc/8HUY-DT33] ("As constitutional argument, Roe is barely coherent. The court pulled its fundamental right to choose more or less from the constitutional ether.").

476. *See* Knick v. Township of Scott, 139 S. Ct. 2162, 2178 (2019).

477. *Id.* ("[T]he state-litigation requirement has been a rule in search of a justification for over 30 years."). With the Chief Justice as part of the majority, the Court in *Janus* expressed a similar point. *See* Janus v. AFSCME, 138 S. Ct. 2448, 2472 (2018).

478. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 875 (1992) (plurality opinion); *see supra* notes 391–399 and accompanying text (discussing how *Casey* modified *Roe*).

479. *Knick*, 139 S. Ct. at 2178.

which a state law is unenforceable."[480] Gone were Justice O'Connor's concerns about the absence of a "bright line" rule to guide legislatures and about courts being ill-equipped to "act as science review boards."[481] According to *Casey*, courts are perfectly capable of evaluating regulations under the undue burden standard with viability acting as the fulcrum.[482]

Testing experience since *Casey* against what Chief Justice Roberts has considered relevant in assessing workability suggests he might not view *Roe* and *Casey* as setting out such a simple and workable limitation. Based on the opinions he has written or joined, key considerations in evaluating workability include whether the decision has given rise to unreasonable or unanticipated consequences[483] or draws unclear lines, which result in different applications that create uncertainty and increase litigation.[484] *Roe*'s advocates might point out that the consequences of the decision have not resulted in a practical conundrum like the one in *Knick*, but what the *Casey* Court anticipated and what has happened have differed sharply.

Roe, even as the *Casey* Court interpreted it, has proved incapable of yielding the result that the Court promised—"call[ing] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution."[485] Through persistent legislative action,[486] "States . . . have continued to 'give it a try' ever since"[487] *Roe*, thereby spawning constant litigation.[488]

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480. *Casey*, 505 U.S. at 855.

481. City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 455, 458 (1983) (O'Connor, J., dissenting).

482. *See Casey*, 505 U.S. at 855 (discussing workability).

483. *See Knick*, 139 S. Ct. at 2179.

484. *See* Janus v. AFSCME, 138 S. Ct. 2448, 2481 (2018); Johnson v. United States, 135 S. Ct. 2551, 2557, 2562 (2015); Arizona v. Gant, 556 U.S. 332, 360 (2009) (Alito, J., dissenting); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 902–04 (2007).

485. *Casey*, 505 U.S. at 867.

486. Elizabeth Nash, Lizamarie Mohammed & Olivia Cappello, *Illinois Steps Up as Other States Decimate Abortion Rights*, GUTTMACHER INST. (June 12, 2019), https://www.guttmacher.org/article/2019/06/illinois-steps-other-states-decimate-abortion-rights [https://perma.cc/ZF2L-2H37] (noting that "53 abortion restrictions ha[d] been enacted in 17 states" in the first half of 2019).

487. *Janus*, 138 S. Ct. at 2481.

488. *See* Amanda Holpuch & Erin Durkin, *'We're in the fight of our lives': Alabama abortion law spurs lawsuits and protests*, GUARDIAN (May 15, 2019, 6:25 PM), https://

Moreover, *Casey*'s undue burden test did not even attract the votes of a majority of the Justices hearing the case,[489] and the test has proven difficult to apply. The Court in *Hellerstedt* interpreted the undue burden test to require courts to balance the burdens and benefits of abortion regulations.[490] When the Court in *Gonzales* nine years earlier applied the undue burden standard, however, it did not balance burdens and benefits, but was more faithful to *Casey*'s text and considered whether the applicable regulation had the "purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion"[491] pre-viability.[492] With changes from one test to another and with clear variations in application even within the Court, it may be difficult to convince Chief Justice Roberts that *Roe* is workable. The stream of litigation since *Roe* suggests that neither *Roe* nor *Casey* "provid[ed] a test that would be relatively easy for . . . judges to apply," and to the extent that *Hellerstedt* calls for a free-flowing balancing exercise, the undue burden standard now requires the type of "case-by-case, fact-specific decisionmaking" that the Chief Justice rejected in *Gant*.[493] Indeed, similar to what the Court said in *Johnson* with the Chief Justice in the majority, *Roe*'s opponents reasonably can argue

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www.theguardian.com/us-news/2019/may/15/were-in-the-fight-of-our-lives-alabama-abortion-bill-spurs-lawsuits-and-protests [https://perma.cc/8VN4-PUGR] (indicating that a lawsuit challenging an Alabama abortion ban "join[ed] a slew of other legal actions filed in response to efforts in other states to drastically restrict abortion access in the US").

489. *Cf.* Alleyne v. United States, 570 U.S. 99, 120 (2013) (Sotomayor, J., concurring) ("[A] decision may be 'of questionable precedential value' when 'a majority of the Court expressly disagreed with the rationale of [a] plurality.'" (alteration in original) (quoting Seminole Tribe v. Florida, 517 U.S. 44, 66 (1996))). As the Ninth Circuit Court of Appeals has explained, "[a]lthough parts of the joint opinion were a plurality not joined by a majority of the Court, the joint opinion is nonetheless considered the holding of the Court . . . as the narrowest position supporting the judgment." Whole Woman's Health v. Cole, 790 F.3d 563, 571 (9th Cir. 2015) (citing Marks v. United States, 430 U.S. 188, 193 (1977)); *see also* Stenberg v. Carhart, 530 U.S. 914, 952 (2000) (Rehnquist, C.J., dissenting) ("Despite my disagreement with the opinion, . . . the *Casey* joint opinion represents the holding of the Court in that case." (citing *Marks*, 430 U.S. at 193)).

490. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309 (2016).

491. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992) (plurality opinion).

492. *See* Gonzales v. Carhart, 550 U.S. 124, 156–67 (2007) (considering the partial birth abortion ban's purpose and effect).

493. Arizona v. Gant, 556 U.S. 332, 360 (2009) (Alito, J., dissenting).

that, "[a]ll in all, [*Roe*], [*Casey*], and [*Hellerstedt* have] failed to establish any generally applicable test that prevents [judicial decisionmaking] from devolving into guesswork and intuition."[494] Rather, "[e]ven [since *Casey*] tried to clarify the [scope of the abortion right], [it] remains a 'judicial morass that defies systemic solution,' 'a black hole of confusion and uncertainty' that frustrates any effort to impart 'some sense of order and direction.'"[495] Consequently, reminiscent of his *Wayfair* dissent, Chief Justice Roberts might conclude that the Court in *Casey* "compound[ed] its past error by trying to fix it"[496] and that another attempted fix may compound the error even more. As he said in *Citizens United*, stare decisis, "counsels deference to past mistakes, but provides no justification for making new ones."[497]

4. Developments Since Roe

Although approaching the Chief Justice by defending *Roe*'s reasoning and workability seems perilous, *Roe*'s supporters may have an opportunity with respect to developments since 1973. Various developments appear to have influenced the Chief Justice in the past. Among them are proof that the assumptions underlying a precedent were incorrect;[498] changes in technology;[499] changes in economic understanding;[500] attempts to limit the precedent;[501] developments in constitutional law;[502] and that the Court previously addressed a point in an earlier decision.[503] Of these, changes in constitutional law may prove to be of particular import.

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494. Johnson v. United States, 135 S. Ct. 2551, 2559 (2015).

495. *Id.* at 2562 (quoting United States v. Vann, 660 F.3d 771, 787 (4th Cir. 2011) (Agee, J., concurring)).

496. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2104 (2018) (Roberts, C.J., dissenting).

497. Citizens United v. FEC, 558 U.S. 310, 384 (2010) (Roberts, C.J., concurring).

498. *See* Janus v. AFSCME, 138 S. Ct. 2448, 2483 (2018); Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401, 2415 (2015) (Alito, J., dissenting); Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 274–76 (2014).

499. *See Citizens United*, 558 U.S. at 364.

500. *Kimble*, 135 S. Ct. at 2415 (Alito, J., dissenting); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899 (2007).

501. *Leegin*, 551 U.S. at 901.

502. *See* Hurst v. Florida, 136 S. Ct. 616, 623–24 (2016).

503. *See* Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 799 (2014).

The Court in *Casey* took a brief look at factual developments and noted that abortion had become more safe and that viability was coming earlier, but the Court suggested that those changes "ha[d] no bearing on the validity of *Roe*'s central holding, that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions."[504] Yet the *Roe* Court offered no factual support for viability as the appropriate marker. It noted a divergence in thought about when life begins, declared that the state could not put its thumb on the scale, and declared that viability is the point at which the state's interest in protecting potential life becomes compelling.[505] According to *Roe*, both logic and biology justified this decision because, at viability, "the fetus . . . presumably has the capability of meaningful life outside the mother's womb."[506] Whether something is meaningful, of course, is a value judgment, and otherwise, as Professor Ely aptly stated, "the Court's defense seems to mistake a definition for a syllogism."[507] When a decision is not based on facts, factual changes cannot undermine it. As a result, factual developments as such may not be relevant to the Chief Justice at all. The lack of a factual basis, on the other hand, is another mark against *Roe*'s reasoning.

Developments in constitutional law since *Roe*, though, appear to weigh in favor of retaining the decision. In fact, the Court's decision in *Obergefell* seems to reflect not an erosion of *Roe*, but an expansion of unenumerated rights arising out of the Fourteenth Amendment's liberty interest.[508]

In his dissent in *Lawrence*, Justice Scalia asserted that *Washington v. Glucksberg*,[509] in which the Court concluded that the Fourteenth Amendment does not bar a prohibition against physician-

504. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 860 (1992) (plurality opinion).

505. *See* Roe v. Wade, 410 U.S. 113, 159–66 (1973).

506. *Id.* at 163.

507. Ely, *supra* note 472, at 924.

508. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2015) ("[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.").

509. 521 U.S. 702 (1997).

assisted suicide, represented a retreat from *Roe* and *Casey*.[510] According to Justice Scalia, the *Glucksberg* Court concluded that a right is fundamental under the Fourteenth Amendment "*only* [if it is] 'deeply rooted in this Nation's history and tradition,'" a question that the Court in *Roe* and *Casey* had not explored.[511] But the majority in *Lawrence* made no mention of *Glucksberg* and looked to *Casey* as support for overruling *Bowers*,[512] and the Court in *Obergefell* explained that, although *Glucksberg*'s approach may have been appropriate with respect to the right considered therein, it did not exclude other approaches.[513] And the *Obergefell* Court cited *Lawrence* when it stated that "[h]istory and tradition guide and discipline [a fundamental rights] inquiry but do not set its outer boundaries."[514]

Thus, *Roe*'s proponents might argue to the Chief Justice that, although the *Obergefell* Court made no mention of *Roe* or *Casey*, *Obergefell* represents a development that reinforces those two rulings. Moreover, recalling the concern that Justice Alito expressed in the *Ramos* dissent that the Chief Justice joined, prochoice advocates could maintain that *Roe* "is intertwined with the body of [the Court's Fourteenth] Amendment case law" and that "[r]epudiating the reasoning of [*Roe*] will almost certainly prompt calls to overrule [*Obergefell*]" and other rulings with similar roots.[515] The problem, of course, is that *Obergefell* stresses that the Fourteenth Amendment inquiry is right-specific, and to argue that constitutional developments fortify *Roe*, one may need to bring up a decision the Chief Justice considered one of alarming judicial overreach.[516] That could be a bridge too far.

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510. *See* Lawrence v. Texas, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting) (observing that the Court in *Glucksberg* concluded that a person does not have a constitutional right to physician-assisted suicide because such a right was not grounded in "this Nation's history and tradition" (quoting *Glucksberg*, 521 U.S. at 721) (internal quotation marks omitted)).

511. *Id.*

512. *See id.* at 573–74 (majority opinion) (citing *Casey* as a development that undermined *Bowers*).

513. *See Obergefell*, 135 S. Ct. at 2602.

514. *Id.* at 2598 (citing *Lawrence*, 539 U.S. at 572).

515. Ramos v. Louisiana, 140 S. Ct. 1390, 1436 (2020) (Alito, J., dissenting).

516. *See Obergefell*, 135 S. Ct. at 2612 (Roberts, C.J., dissenting) ("The majority's decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court's precedent.").

5. Reliance on Roe

Which way reliance pushes Chief Justice Roberts may depend on how broadly he conceives the factor. The Court in *Casey* employed an expansive view, looking to economic and social developments since the Court decided *Roe*.[517] To win favor with the Chief Justice on reliance, *Roe*'s defenders likely will need to convince him that *Casey*'s conception represents the relevant standard with respect to precedent under which the Court has recognized a constitutional right.

That is a hard sell. Opinions since the Chief Justice's elevation to the Court have taken a narrower view of reliance interests. Just recently in *Ramos*, with the Chief Justice joining, Justice Alito underscored the concrete reliance interests related to *Apodaca*, contrasting those interests with what the *Montejo* dissent raised and the *Montejo* majority (including the Chief Justice) rejected—a vague "public . . . interest 'in knowing that counsel, once secured, may be reasonably relied upon as a medium between the accused and the power of the State.'"[518] This interest, according to Justice Alito, was an "abstract [one], if it c[ould] be called reliance in any proper sense of the term."[519] Additionally, the *Janus* Court emphasized that reliance interests are weaker when there is uncertainty regarding the applicable standard and when there are significant questions about a decision's continuing vitality.[520] Moreover, the Court in *Janus* stressed that reliance is a less important factor when overruling a decision will have only a short-term effect on expectations and affected parties have the ability to protect themselves against the changes that would result.[521]

Under this narrower view, *Roe* is more vulnerable to attack. Looking to what Justice Alito said about *Montejo* in *Ramos*, one might suggest to the Chief Justice that the nebulous societal reliance the *Casey* Court credited is not "reliance in any proper

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517. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855–56 (1992).

518. *Ramos*, 140 S. Ct. at 1439 (Alito, J., dissenting) (quoting Montejo v. Louisiana, 556 U.S. 778, 809 (2009) (Stevens, J., dissenting)).

519. *Id.*

520. *See* Janus v. AFSCME, 138 S. Ct. 2448, 2484–85 (2018).

521. *See id.*; *see also Ramos*, 140 S. Ct. at 1439 (Alito, J., dissenting) (reiterating the *Janus* Court's conclusion that the ability to protect against consequences if a precedent is overruled mitigates reliance interests with respect to the precedent).

sense of the term."[522] As the Court in *Casey* conceded, and decisions since Chief Justice Roberts joined the Court have confirmed, reliance usually takes on significance when a precedent involves contract or property rights,[523] and *Roe* does not implicate those rights. Also, in *Kisor* and *Ramos*, the Chief Justice ostensibly feared that overruling precedent would bring about an avalanche of legal challenges to decisions in which *courts* had relied on precedent,[524] and overruling *Roe* quite likely would put a damper on, if not smother, most constitutional abortion-related litigation. Furthermore, any legitimate reliance interest in *Roe* surely has been weakened substantially by the obvious uncertainty surrounding *Roe*'s future, which uncertainty is manifest both in commentary[525] and in legislative efforts to shore up abortion rights in the event that the Court overrules *Roe*.[526] Finally, pointing to those legislative developments and to the availability of birth control,[527] abortion opponents might look to *Janus* and argue that "it would be unconscionable to . . . abridge[] in perpetuity" the States' right to enact legislation prohibiting abortion when the public can take steps to preserve access to abortion or to prevent the need for the procedure.[528]

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522. *Ramos*, 140 S. Ct. at 1439 (Alito, J., dissenting).

523. *See* Citizens United v. FEC, 558 U.S. 310, 365 (2010); Arizona v. Gant, 556 U.S. 332, 358–59 (2009) (Alito, J., dissenting); Pearson v. Callahan, 555 U.S. 223, 233 (2009); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992).

524. *See Ramos*, 140 S. Ct. at 1436 (Alito, J., dissenting) (observing that "thousands and thousands of trials" had been held based on *Apodaca*'s validity); Kisor v. Wilkie, 139 S. Ct. 2400, 2422 (2019) (noting that lower courts had applied *Auer* or *Seminole Rock* "thousands of times").

525. *See, e.g.*, Rebecca Shapiro, *CNN's Jeffrey Toobin: 'No Doubt' Abortion Will Be Illegal In 20 States In 18 Months*, HUFFPOST (June 28, 2018), https://www.huffpost.com/entry/jeffrey-toobin-abortion-illegal-20-states-18-months_n_5b33ea80e4b0b5e692f3dced [https://perma.cc/Q337-ES88] ("Roe v. Wade is doomed." (quoting CNN legal analyst Jeffrey Toobin) (internal quotation marks omitted)).

526. *See* Nash et al., *supra* note 486 (indicating that *Roe* is under direct threat and identifying state efforts to protect the abortion right).

527. *See* PLANNED PARENTHOOD, A HISTORY OF BIRTH CONTROL METHODS (2012), https://www.plannedparenthood.org/files/2613/9611/6275/History_of_BC_Methods.pdf [https://perma.cc/4EXN-XY8K] (describing various methods of birth control).

528. Janus v. AFSCME, 138 S. Ct. 2448, 2484 (2018). Of course, *Roe*'s proponents might point out that the availability of birth control is no solution when emergency contraception can be ineffective following nonconsensual sex. *Emergency Contraception*, HHS.GOV (May 21, 2019), https://www.hhs.gov/opa/pregnancy-prevention/birth-control-methods/emergency-contraception/index.html [https://perma.cc/AQM8-DX96].

To be successful with the Chief Justice, therefore, pro-choice advocates likely will need to convince him that *Roe* really is a unique case and thus he must take into account the broader reliance interests that *Casey* identified. Although the Court in *Hyatt* took away the right of private parties to sue a state in the court of another state,[529] that right simply is not of the same magnitude as a right to choose abortion. Moreover, *Roe*'s supporters might remind Chief Justice Roberts that he joined Justice Alito's dissents in both *Gant* and *Ramos*, which emphasized reliance interests unrelated to contract and property rights,[530] and that the Chief Justice himself indicated in *Knick* that reliance interests take on greater importance "when rules that . . . 'serve as a guide to lawful behavior' are at issue."[531] As discussed above, although abortion foes might point to *Lawrence* and *Obergefell* as evidence that the Court has abandoned a broad view of reliance like that in *Casey*, both *Lawrence* and *Obergefell* expanded individual rights and a decision to overrule *Roe* would abridge such a right.[532]

Of course, persuading the Chief Justice that he should employ a broad view of reliance *a la Casey* would not end the inquiry. Instead, it would invite a skirmish over some of *Casey*'s premises for finding reliance to be a key factor—that the availability of abortion has influenced how "people have organized [their] intimate relationships" and has facilitated "[t]he ability of women to participate equally in the economic and social life of the Nation."[533] To win the battle over these assertions, the parties would be left to offer competing evidence.

D. Effect of Overruling Roe *on the Court's Legitimacy*

After evaluating how various stare decisis factors applied in relation to *Roe*, the Court in *Casey* offered a long discourse

529. *See supra* notes 300–307 and accompanying text (discussing *Hyatt*).

530. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1425 (Alito, J., dissenting) (weighing heavily reliance by courts in trials that have been completed); Arizona v. Gant, 556 U.S. 332, 358–59 (2009) (Alito, J., dissenting) (arguing that reliance interests enjoy considerable weight when dealing with routine police practices).

531. Knick v. Township of Scott, 139 S. Ct. 2162, 2179 (2019) (quoting United States v. Gaudin, 515 U.S. 506, 521 (1995)).

532. *See supra* note 389 and accompanying text (discussing *Lawrence* and *Obergefell*).

533. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992) (plurality opinion).

about the need to preserve the Court's legitimacy, and at the end, the *Casey* Court proclaimed that "[a] decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law."[534] Thus, if the Chief Justice concludes that he must apply *Casey*'s approach to stare decisis, he would need to reach beyond whatever specific factors he might address and speak to the question of legitimacy. And even if he does not conclude that he is bound by *Casey*, he almost certainly would address the question as one of fundamental importance.[535]

Lawrence and *Obergefell* suggest that "overrul[ing a prior decision] under fire"[536] should not give rise to the same level of apprehension regarding legitimacy that it did in *Casey*. And those worries are unlikely to influence the Chief Justice's thinking anyway, for his views regarding legitimacy differ sharply from those the *Casey* Court articulated. In his *Obergefell* dissent, Chief Justice Roberts explained that legitimacy "flows from the perception—and reality—that [the Court] exercise[s] humility and restraint in deciding cases according to the Constitution and law."[537] In addition, he stressed in his *Citizens United* concurrence that "adherence to a precedent . . . impedes the stable and orderly adjudication of future cases . . . when the precedent's validity is so hotly contested that it cannot reliably function as a basis for decision in future cases . . . and when the precedent's underlying reasoning has become [seriously] dis-

534. *Id.* at 869.

535. *See Confirmation Hearing*, *supra* note 3, at 143–44 (statement of Judge John G. Roberts, Jr.) (indicating that legitimacy is an important consideration when deciding to overrule a prior decision); *cf.* Adam Liptak, *In Surprise Abortion Vote, John Roberts Avoids 'Jolt to the Legal System,'* N.Y. TIMES (Feb. 8, 2019), https://nyti.ms/2DYUuJ6 [https://perma.cc/ZKF4-FBY8] (describing the Chief Justice as "a guardian of his court's legitimacy"); William McGurn, Opinion *John Roberts's 'Illegitimate' Court*, WALL STREET J. (May 27, 2019 4:35 P.M.), https://www.wsj.com/articles/john-robertss-illegitimate-court-11558989312 [https://perma.cc/Z6Q4-F32W] ("[N]ews stories about a big case that may end up before the Supreme Court come with a warning that what's at stake is the 'legitimacy of the Roberts court.'").

536. *Casey*, 505 U.S. at 867 (plurality opinion); *see supra notes* 508–516 and accompanying text (discussing *Lawrence* and *Obergefell*).

537. Obergefell v. Hodges, 135 S. Ct. 2584, 2624 (2015) (Roberts, C.J., dissenting).

credited."[538] Moreover, Chief Justice Roberts was part of a six-Justice majority with two additional Justices concurring in the judgment in *Johnson*, a case in which the Court declared that propping up two recent cases under stare decisis would undermine "'evenhanded, predictable, and consistent development of legal principles[,]' . . . the goals that *stare decisis* is meant to serve."[539] Finally, in *Kimble*, the Chief Justice signed on to Justice Alito's dissenting opinion that decried the majority's use of stare decisis to preserve a prior ruling that Justice Alito believed was the product of judicial policymaking: "The Court employs *stare decisis*, normally a tool of restraint, to reaffirm a clear case of judicial overreach. . . . *Stare decisis* does not require us to retain this baseless and damaging precedent."[540] Thus, even in the context of statutory interpretation, where stare decisis normally holds particular strength, the Chief Justice appears open to discarding a decision in which the Court exceeded its authority.

The Chief Justice's views as expressed in his *Obergefell* and *Citizens United* opinions and in Justice Alito's *Kimble* dissent do not reflect a recent revelation. They date at least as far back as Chief Justice Roberts's confirmation hearing, when he described the Court's decision in *Brown v. Board of Education*[541] to overrule *Plessy v. Ferguson*[542] not as an act hubris, but one of restraint because the Court had focused on legal argument and the erosion of precedent, refusing to cower at the prospect of pandemonium that might result from disposing of *Plessy*.[543] Therefore, according to the Chief Justice, legitimacy depends on "humility and restraint,"[544] and restraint sometimes requires the Court to overrule hotly contested decisions.

For the Chief Justice, restraint is characterized by three fundamental principles. First, the Court should refrain from inserting itself into controversial issues except in those cases when

538. Citizens United v. FEC, 558 U.S. 310, 379 (2010) (Roberts, C.J., concurring).

539. Johnson v. United States, 135 S. Ct. 2551, 2563 (2015) (quoting Payne v. Tennessee, 501 U.S. 808, 827 (1991)).

540. Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401, 2415 (2015) (Alito, J., dissenting).

541. 347 U.S. 483 (1954).

542. 163 U.S. 537 (1896).

543. *See Confirmation Hearing*, *supra* note 3, at 409 (statement of Judge John G. Roberts, Jr.).

544. *Obergefell*, 135 S. Ct. at 2624 (Roberts, C.J., dissenting).

there is a case or controversy—as the Constitution requires.[545] Second, the Court should defer to the political branches whenever possible. And third, the Court should avoid deciding more than is necessary to resolve a case.

Regarding the first principle, the Chief Justice was clear in his confirmation hearing: "[J]udges should be very careful to make sure they've got a real case or controversy before them, because that is the sole basis for the legitimacy of them acting in the manner they do in a democratic republic."[546] And opinions he has written since joining the Court testify to his commitment to this constitutional requirement.[547] For example, when the Court turned away the challenge to partisan gerrymandering in the 2019 *Rucho* decision, Chief Justice Roberts wrote in his opinion that the "case or controversy" requirement has been understood to mean that the judiciary must avoid questions that are not appropriate to the judicial process.[548] Likewise, he dissented from the Court's decision to strike down the Defense of Marriage Act[549] in *United States v. Windsor*,[550] agreeing with Justice Scalia that there was no case or contro-

545. *See* U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases [and] . . . Controversies . . . ").

546. *Confirmation Hearing*, *supra* note 3, at 342 (statement of Judge John G. Roberts, Jr.).

547. The Chief Justice's recent vote to declare a Second Amendment claim moot, over some very compelling arguments by Justice Alito in dissent, might suggest that he is committed to the case or controversy requirement to a fault. *See* N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York, 140 S. Ct. 1525, 1525–26 (2020). Some, however, have not been so charitable in describing the Chief Justice's motives. *See* Editorial Board, Opinion, *The Chief Justice Ducks on Gun Rights*, WALL STREET J. (Apr. 27, 2020, 6:49 PM), https://www.wsj.com/articles/the-chief-justice-ducks-on-gun-rights-11588026396 [https://perma.cc/N639-APUS] ("The Chief Justice is carving out a reputation as a highly political Justice whose views on the law can be coerced with threats to the Court's 'independence.'").

548. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2493–94 (2019) ("Article III of the Constitution limits federal courts to deciding 'Cases' and 'Controversies.' We have understood that limitation to mean that federal courts can address only questions 'historically viewed as capable of resolution through the judicial process.'" (quoting Flast v. Cohen, 392 U.S. 83, 95 (1968))).

549. Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2018) and 28 U.S.C. § 1738C (2018)).

550. 570 U.S. 744, 751–52 (2013).

versy to be resolved because the Government had stopped defending the act.[551]

The weight Chief Justice Roberts gives to stare decisis when a precedent involves statutory interpretation or a when a matter comes within a sphere where Congress has broad authority reflects his adherence to the second principle of restraint.[552] The Chief Justice's dissent in *Wayfair* in fact evidences downright distrust of the Court's ability to fix one of its previous errors[553] and stresses why the Court should leave correction to the legislative process when that process can provide a remedy: "A good reason to leave these matters to Congress is that legislators may more directly consider the competing interests at stake. Unlike this Court, Congress has the flexibility to address these questions in a wide variety of ways [and can] . . . 'investigate and analyze facts beyond anything the Judiciary could match.'"[554] And the Court in *Bay Mills*, a 5-4 decision in which the Chief Justice was part of the majority, expressed a similar sentiment.[555]

Moreover, Chief Justice Roberts has stretched to defer to the political process under intense pressure to do otherwise. He famously—or infamously, depending on one's perspective—wrote the opinion of the Court in *National Federation of Independent Business v. Sebelius*,[556] a case in which the Court upheld the individual mandate under President Barack Obama's Patient Protection and Affordable Care Act,[557] going out of his way to conclude that enacting the mandate was a proper exercise of

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551. *See id.* at 775 (Robert, C.J., dissenting) ("I agree with Justice Scalia that this Court lacks jurisdiction to review the decisions of the courts below."); *id.* at 782 (Scalia, J., dissenting) ("What the petitioner United States asks us to do in the case before us is exactly what the respondent Windsor asks us to do: not to provide relief from the judgment below but to say that that judgment was correct.").

552. *See supra* Part I.A (discussing cases in which the Chief Justice deemed a strong form of stare decisis appropriate).

553. *See* South Dakota v. Wayfair, 138 S. Ct. 2080, 2104 (2018) (Roberts, C.J., dissenting) ("I fear the Court today is compounding its past error by trying to fix it in a totally different era.").

554. *Id.* (quoting Gen. Motors Corp. v. Tracy, 519 U.S. 278, 309 (1997)).

555. *See* Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 800–01 (2014) ("Congress . . . has the greater capacity 'to weigh and accommodate the competing policy concerns and reliance interests' involved . . . ." (quoting Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 759 (1998))).

556. 567 U.S. 519 (2012).

557. 26 U.S.C. § 5000A (2018).

Congress's taxing authority.[558] In *Sebelius*, he explained: "'[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality.' . . . Granting the Act the full measure of deference owed to federal statutes, it can be . . . read [as imposing a tax]."[559]

Furthermore, in the context of guarantees to due process and equal protection, the Chief Justice voted in favor of deferring to Congress's decision to enact the Defense of Marriage Act[560] and recognizing that the States have broad latitude in defining marriage.[561] His explanation of the judicial role and judicial overreach in *Obergefell* expresses his view quite distinctly:

> Just who do we think we are?
>
> > It can be tempting for judges to confuse our own preferences with the requirements of the law. . . . "[C]ourts are not concerned with the wisdom or policy of legislation." The majority today neglects that restrained conception of the judicial role. It seizes for itself a question the Constitution leaves to the people, at a time when the people are engaged in a vibrant debate on that question.[562]

Finally, the Chief Justice's view of judicial restraint extends to how he believes courts should go about deciding cases. In his *Citizens United* concurrence, he noted approvingly the Court's approach—first determining whether the case could be decided on statutory grounds, then considering whether it could be decided on narrow constitutional grounds, and only

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558. *NFIB*, 567 U.S. at 575.

559. *Id.* at 563 (quoting Hooper v. California, 155 U.S. 648, 657 (1895)).

560. *See* United States v. Windsor, 570 U.S. 744, 775 (2013) (Roberts, C.J., dissenting) ("I . . . agree with Justice Scalia that Congress acted constitutionally in passing the Defense of Marriage Act (DOMA). Interests in uniformity and stability amply justified Congress's decision to retain the definition of marriage that, at that point, had been adopted by every State in our Nation, and every nation in the world."); *id.* at 795 (Scalia, J., dissenting) ("[T]he Constitution does not forbid the government to enforce traditional moral and sexual norms. . . . [T]here are many perfectly valid—indeed, downright boring—justifying rationales for this legislation. Their existence ought to be the end of this case." (citing Lawrence v. Texas, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting))).

561. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2611 (2015) (Roberts, C.J., dissenting) ("[T]his Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us.").

562. *Id.* at 2612 (citation omitted) (quoting Lochner v. New York, 198 U.S. 45, 69 (1905) (Harlan, J., dissenting)).

after those two avenues had been exhausted, taking the more drastic step of overruling *Austin*.[563] The Chief Justice's majority opinion in the Court's 2007 decision in *FEC v. Wisconsin Right to Life, Inc.* (*WRTL*)[564] offers an important contrast. In *WRTL*, the Court did not reconsider *Austin* because it was not asked to do so.[565] Moreover, the Court declined to conclude that the federal statute at issue in *WRTL* was facially invalid because it had been presented only with an as-applied challenge.[566] It was not until the Court directly faced the question of overruling *Austin* in *Citizens United* that the Court decided to do so,[567] and it was not until *Citizens United* that the Court struck down the federal statute at issue in *WRTL* as facially invalid.[568] Similarly, with Chief Justice Roberts in the majority, the Court in *Harris v. Quinn*[569] declined a request to overrule *Abood*[570] as it struck down on First Amendment grounds an Illinois law that required nonunion members to pay agency fees.[571] Rather than overruling *Abood* in haste, the Court waited four years to take that step in

563. *See* Citizens United v. FEC, 558 U.S. 310, 374–75 (2010) (Roberts, C.J., concurring) (discussing the sequence of the majority's analytical process).

564. 551 U.S. 449 (2007).

565. *See Citizens United*, 558 U.S. at 377 (Roberts, C.J., concurring) (indicating that the question of whether *Austin* should be overruled was not raised in *WRTL*). Notably, the Chief Justice joined Justice Alito's dissent in *Gant*, which objected to the Court's decision to overrule *Belton* and *Thornton* when the defendant had not asked it to do so. *See* Arizona v. Gant, 556 U.S. 332, 355 (2009) (Alito, J., dissenting).

566. *See WRTL*, 551 U.S. at 464 ("After all, appellants reason, *McConnell* already held that [§ 203 of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (BCRA)] was facially valid. These cases, however, present the separate question whether § 203 may constitutionally be applied to these specific ads."); *id.* at 482 (Alito, J., concurring) ("I join the principal opinion because I conclude . . . that because § 203 is unconstitutional as applied to the advertisements before us, it is unnecessary to go further and decide whether § 203 is unconstitutional on its face.").

567. *See Citizens United*, 558 U.S. at 365.

568. *See id.* at 365–66 (overruling *McConnell* and striking down BCRA § 203).

569. 573 U.S. 616 (2014).

570. *See id.* at 658 (Kagan, J., dissenting) ("Today's majority cannot resist taking potshots at *Abood*, but it ignores the petitioners' invitation to depart from principles of *stare decisis*." (citation omitted) (citing *id.* at 635–38 (majority opinion))); Janus v. AFSCME, 138 S. Ct. 2448, 2484 (2018) ("[I]n *Harris*, we were asked to overrule *Abood*, and . . . we found it unnecessary to take that step . . . .").

571. *See Harris*, 573 U.S. at 624, 635–39, 645–46 (describing the Illinois law, criticizing *Abood*, and refusing to extend its reasoning to the law under consideration).

Janus when it encountered a statute that was more like the one at issue in *Abood* than the one considered in *Harris*.[572]

CONCLUSION

When evaluating how the Chief Justice might vote with respect to a direct challenge to *Roe*, one must understand well what he believes is necessary for a legitimate decision. For Chief Justice Roberts, legitimacy and restraint go hand in hand, as he made clear from day one:

> Judges have to have the courage to make the unpopular decisions when they have to. That sometimes involves striking down Acts of Congress. That sometimes involves ruling that acts of the Executive are unconstitutional. That is a requirement of the judicial oath. You have to have that courage. But you also have to have the self-restraint to recognize that your role is limited to interpreting the law and doesn't include making the law.[573]

The Chief Justice's *Obergefell* dissent reveals a consistent sentiment: "The legitimacy of this Court ultimately rests 'upon the respect accorded to its judgments.' That respect flows from the perception—and reality—that we exercise humility and restraint in deciding cases according to the Constitution and law."[574]

And given that dissent, it would not be at all surprising to learn that he believes that the Court in *Roe* failed to act with restraint and thereby undermined the Court's institutional legitimacy. But in deciding what to do with *Roe* now, the Chief Justice likely would assess whether the Court can put the genie back in the bottle—whether the act of overruling *Roe* will help to restore the Court's legitimacy or damage it more—whether overruling *Roe* would be an act of hubris like what he saw in *Obergefell* or an act of restraint like what he saw in *Brown*.[575]

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572. *See Janus*, 138 S. Ct. at 2463, 2486 (indicating that the *Abood* Court had upheld a similar "agency-shop arrangement" and overruling *Abood*).

573. *See Confirmation Hearing*, *supra* note 3, at 256 (statement of Judge John G. Roberts, Jr.).

574. Obergefell v. Hodges, 135 S. Ct. 2584, 2624 (Roberts, C.J., dissenting) (citation omitted) (quoting Republican Party of Minn. v. White, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring)).

575. *See Confirmation Hearing*, *supra* note 3, at 409 (statement of Judge John G. Roberts, Jr.) (discussing *Brown*).

Chief Justice Roberts declared in his confirmation hearing that "the rule of law—that's the only client I have as a judge."[576] Based on his judicial approach since joining the Court, one would expect that the Chief Justice will serve his client by moving cautiously. History suggests that he only will reconsider an earlier Court ruling if asked to do so and if he must do so to decide the case. And if both of those conditions are met with respect to *Roe*, one would expect that he will apply traditional factors associated with stare decisis, not ducking the question of error as the *Casey* Court did, but assessing whether *Roe* was "not just wrong" but "exceptionally ill founded."[577]

When Chief Justice Roberts described the job of a judge as being that of an umpire, he added that "[n]obody ever went to a ball game to see the umpire."[578] Given the current climate, though, that statement seems to reflect an aspiration, not an observation. If abortion opponents succeed in getting the Court to "check the tapes" on *Roe*,[579] everyone will line up to see how Chief Justice Roberts—the most powerful umpire in America[580]—calls the pitch.

576. *Id.* at 279.

577. Knick v. Township of Scott, 139 S. Ct. 2162, 2178 (2019).

578. *Confirmation Hearing*, *supra* note 3, at 55 (statement of Judge John G. Roberts, Jr.).

579. *See* Connor Groel, *Upon Further Review: Instant Replay Should Be Banned from Sports*, TOP LEVEL SPORTS (May 17, 2019), https://toplevelsports.net/upon-further-review-instant-replay-should-be-banned-from-sports/ [https://perma.cc/LK84-JLCJ] (referring to instant replay as "stop[ping] play to check the tapes").

580. Adam Liptak, *John Roberts, Leader of Supreme Court's Conservative Majority, Fights Perception That It Is Partisan*, N.Y. TIMES (Dec. 23, 2018), https://nyti.ms/2RlcjKd [https://perma.cc/4M8A-7CLP] ("[Chief Justice Roberts] has taken Justice Kennedy's place as the swing vote at the court's ideological center, making him the most powerful chief justice in 80 years.").