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.\footnote{Rucho v. Common Cause, 139 S. Ct. 2484 (2019); Dep’t of Commerce v. New York, 139 S. Ct. 2551 (2019).} 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.\footnote{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.”).} Now more than ever, the man who described the job of a judge as that of an “umpire”\footnote{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.).} 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.\footnote{See id. at 56.} 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 \textit{Roe v. Wade}.\footnote{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).} And how Chief Justice Roberts would vote if presented with a request to reconsider the 1973 decision has been subject to much prognostication.\footnote{See Joan Biskupic, John Roberts has voted for restrictions on abortion. Will he overturn \textit{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/QF69-VY65] (“Chief Justice John Roberts will not vote to strike down \textit{Roe} v. \textit{Wade} and outright ban abortion. At least not yet.”); Ryan Everson, Opinion, Based on his Obergefell dissent, Chief Justice Roberts will overturn \textit{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 \textit{Roe}”); Pete Williams, \textit{The Supreme Court and abortion: Will \textit{Roe} v. \textit{Wade} survive the new onslaught?}, NBC NEWS}
Both sides of the abortion debate have reason for optimism and for concern. In *Gonzales v. Carhart*, 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. In addition, in *Whole Woman’s Health v. Hellerstedt*, 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. On the other hand, in *June Medical Services, LLC v. Gee*, Chief Justice Roberts backed a stay against a Louisiana admitting privileges requirement similar to the one at issue in *Hellerstedt*.

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*. Second, Justice Alito’s dissent in *Hellerstedt* focused largely on procedural missteps Justice Alito believed the majority had made. 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” or in *Hellerstedt* when Justice Thomas
declared that he “remain[ed] fundamentally opposed to the Court’s abortion jurisprudence.” 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

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).


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


Chief Justice Roberts was in the majority in all four rulings at the close of the October 2018 term. In Franchise Tax Board v. Hyatt, the Chief Justice joined his conservative brethren in overturning the Court’s 1979 decision in Nevada v. Hall. About a month later, the Chief Justice wrote the opinion for the same conservative majority in Knick v. Township of Scott, a case in which the Court discarded Williamson County Regional Planning Commission v. Hamilton Bank, which dated back to 1985. Justice Breyer dissented in Hyatt and “wonder[ed] which cases the Court [would] overrule next.” Justice Kagan latched on to this in her Knick dissent, responding: “[T]hat didn’t take long. Now one may wonder yet again.”

Just days after the Court released its opinion in Knick, however, Chief Justice Roberts allied with the Court’s progressives in Kisor v. Wilkie to uphold decisions from 1997 and 1945—Auer v. Robbins and Bowles v. Seminole Rock & Sand Co. 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 that disposed of Apodaca v. Oregon, a 1972 Sixth Amendment ruling.

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.
29. 139 S. Ct. 2162.
30. Hyatt, 139 S. Ct. at 1506 (Breyer, J., dissenting).
32. 139 S Ct. 2400 (2019).
34. 325 U.S. 410 (1945); see Kisor, 139 S. Ct. at 2408 (affirming Auer and Seminole Rock).
35. 140 S. Ct. 1390 (2020).
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”\(^\text{38}\) and that continuing to recognize a constitutional right to choose abortion would “do[] more damage to [the rule of law] than to advance it.”\(^\text{39}\)

The Chief Justice admitted in his confirmation hearing that “it is a jolt to the legal system when you overrule a precedent.”\(^\text{40}\) 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.\(^\text{41}\)

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


\(^{40}\) 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 “de-monstrably 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).


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).


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 \textit{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 \textit{South Dakota v. Wayfair}\(^{51}\) even though he believed the previous cases were wrongly decided,\(^{52}\) and voted in \textit{Kisor} and \textit{Ramos} to uphold \textit{Auer}, \textit{Seminole Rock}, and \textit{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 \textit{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 \textit{stare decisis}.”\(^{55}\)

As the Chief Justice stressed in \textit{Citizens United v. FEC},\(^{56}\) “\textit{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 \textit{decided} against


\(^{50}\) \textit{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.

\(^{52}\) \textit{id.} at 2101 (Roberts, C.J., dissenting) (indicating that, although he “agree[d]” that [\textit{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 \textit{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 \textit{Apodaca} if I had sat on the Court at that time . . . .”); \textit{Kisor}, 139 S. Ct. at 2424 (Roberts, C.J., concurring) (joining the majority opinion’s consideration of \textit{stare decisis}, but not its evaluation of whether \textit{Auer} and \textit{Seminole Rock} were correctly decided).

\(^{54}\) 140 S. Ct. 994.

\(^{55}\) \textit{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)).
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 “did 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 . . . .”).
63. 123 U.S. 227 (1887).
The Court had concluded in all three that the statute of limitations for federal claims is jurisdictional in nature, 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.

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. 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. 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.

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, 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. 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. in 1969 and Jackson v. Birmingham Board of Education 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-
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 Community79 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.
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,
it is best to leave such considerations to Congress and, if the Court had erred, allow Congress to provide the remedy.\textsuperscript{91} As he emphasized in \textit{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.”\textsuperscript{92}

In \textit{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 \textit{Basic, Inc. v. Levinson}.\textsuperscript{93} As Justice Kagan explained in \textit{Kimble v. Marvel Entertainment, LLC}, “\textit{stare decisis} has consequence only to the extent it sustains incorrect decisions; correct judgments have no need for that principle to prop them up.”\textsuperscript{94} And it seems that Chief Justice Roberts was not convinced that the \textit{Basic} Court had gone off track.\textsuperscript{96}

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

\textsuperscript{91} See \textit{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.”); \textit{Halliburton}, 573 U.S. at 277 (“[C]oncerns [about abuses in class actions] are more appropriately addressed to Congress . . . .”).

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

\textsuperscript{93} 485 US 224 (1988).

\textsuperscript{94} 135 S. Ct. 2401 (2015).

\textsuperscript{95} Id. at 2409.

\textsuperscript{96} \textit{See Halliburton}, 573 U.S. at 272 (“The academic debates . . . have not refuted the modest premise underlying [\textit{Basic’s}] presumption of reliance.”).


\textsuperscript{98} \textit{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 \textit{Blue Chip Stamps v. Manor Drug Stores}, 421 U.S. 723, 730 (1975))).

\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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,\textsuperscript{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

\textsuperscript{100}Id. at 268.
\textsuperscript{101}Id. at 269.
\textsuperscript{102}Id. at 270.
\textsuperscript{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.”).
\textsuperscript{104}Id.
\textsuperscript{105}Id.
\textsuperscript{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 Revenue110 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

107. Id. at 274, 276–77.
108. Id. at 274–76.
110. 386 U.S. 753 (1967).
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.\textsuperscript{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.\textsuperscript{118} Quill, the Court held, was wrong when decided and changes in the economy only have made its effects more serious.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{124} and he contended that the Court should avoid making new mistakes in trying to address changes in

\begin{itemize}
  \item \textsuperscript{117} See id.
  \item \textsuperscript{118} Id.
  \item \textsuperscript{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.”).
  \item \textsuperscript{120} Id. at 2098.
  \item \textsuperscript{121} Id.
  \item \textsuperscript{122} Id.
  \item \textsuperscript{123} Id. at 2101 (Roberts, C.J., dissenting).
  \item \textsuperscript{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))).
\end{itemize}
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.”

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. 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.

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. In Auer and Seminole Rock, the Court determined that courts should defer to reasonable agency interpretations of ambiguous regulations, and with significant attention to the principles of stare decisis, the Court upheld both.

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. Instead, his vote turned solely on the Court’s application of stare decisis. 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.
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. 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.

Finally, the Kis or 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.

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 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. Justice Breyer announced the judgment of the Court in Randall, but only Chief Justice Roberts joined in Justice Breyer’s treatment of stare decisis. 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.
137. Id. at 236, 263 (plurality opinion).
138. Id. at 235.
rule *Buckley v. Valeo*, 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. Justice Breyer insisted that principles underlying stare decisis weighed against overruling *Buckley*. 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” and that the Court repeatedly had applied *Buckley* in subsequent cases. 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.

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.*, 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.* 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. 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.


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 pro-competitive 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, “[w]as 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."\(^\text{156}\) 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.\(^\text{157}\)

In contrast to the divisions in *Randall* and *Leegin*, the Court spoke with one voice in *Pearson v. Callahan*\(^\text{158}\) as it overruled the requirement in *Saucier v. Katz*\(^\text{159}\) 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.\(^\text{160}\) 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.\(^\text{161}\) 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.\(^\text{162}\)

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.\(^\text{163}\) 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.” 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.

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. According to the Court, overruling Saucier’s mandate would not upset anyone’s “settled expectations.” 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. Instead, the Court emphasized, experience was the key consideration.

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.” Second, the Pearson Court observed that the Saucier rule had failed to achieve one of its intended benefits—developing a body of constitutional precedent. 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. 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

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 approach175 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. Belton179 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

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.
178. Id. at 355 (Alito, J., dissenting).
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, disposing of the “bright-line” rule that the Belton Court adopted and that the Thornton Court understood Belton to recognize. According to Justice Alito, the Gant Court should not have abandoned Belton’s clear rule, 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.”

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.” 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. 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. 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.” As to inconsistency with later cases, Justice Alito noted none and that, in fact, the Court in Thornton had “reaffirmed and extended” the rule.

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. Louisiana195 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-

194. See id. 362–63.
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. 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.

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. And according to the Court, Jackson’s benefits were insufficient when compared with its costs. 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. 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. 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.

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 and part of McConnell v. FEC. 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.
volved a First Amendment challenge to a federal campaign finance statute. 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. The Court in McConnell had upheld the federal law, and according to the Citizens United Court, McConnell was predicated on Austin, 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.

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.” 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.

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. 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

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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).
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 decisions221 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-

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*.

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. 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.” 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.”

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. 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.”

In 2015, five years after *Citizens United*, 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 *Allegne v. United States*, 570 U.S. 99 (2013), but stated that he “would 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.*, 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.

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. In so doing, the Court noted the principle’s power with respect to statutory interpretation. In that regard, 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).


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. 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.

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.

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.” Moreover, Justice Alito stressed that, in Brulotte’s approximately fifty-year history, the underlying economic rationale had become indefensible. Allowing Brulotte to live on, he insisted, was economically harmful, unduly inhibiting the ability of parties to achieve their goals. 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. In fact, Justice Alito asserted, Brulotte itself had had the effect of upsetting commercial expectations.

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

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.\textsuperscript{253} Finally, Justice Alito assailed the majority for relying on the absence of congressional action as a reason to keep \textit{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.\textsuperscript{254}

Within days after the Court’s refusal to dispose of \textit{Brulotte}, Chief Justice Roberts was part of the six-Justice majority with two additional Justices concurring in the judgment in \textit{Johnson v. United States}\textsuperscript{255} that overruled two decisions that had interpreted the Armed Career Criminal Act of 1984\textsuperscript{256} (ACCA)—\textit{James v. United States}\textsuperscript{257} and \textit{Sykes v. United States}\textsuperscript{258} In \textit{James} and \textit{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.\textsuperscript{259} Admitting that the Court had not succeeded in adopting a generally applicable test for applying the residual clause, the \textit{Johnson} Court decided that \textit{James} and \textit{Sykes} were wrong about the clause’s constitutionality.\textsuperscript{260}

Furthermore, the \textit{Johnson} Court determined that stare decisis could not save \textit{James} or \textit{Sykes}.\textsuperscript{261} The Court in \textit{Johnson} dismissed out of hand any argument that a reliance interest supported the two decisions.\textsuperscript{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.\textsuperscript{263} Revisiting \textit{James} and \textit{Sykes} was

\begin{footnotesize}
253. Id. (likening \textit{Brulotte} to an antitrust decision).
254. See id. at 2418–19.
258. 564 U.S. 1 (2011); \textit{Johnson}, 135 S. Ct. at 2555, 2563.
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 [\textit{James} and \textit{Sykes}] does not raise any concerns about upsetting private reliance interests.”).
\end{footnotesize}
all the more appropriate, the Johnson Court explained, because
the vagueness issue had not been fully briefed or argued in
either case, 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 re-
sidual clause’s meaning, the provision remains a “judicial
morass that defies systemic solution,” “a black hole of con-
fusion and uncertainty” that frustrates any effort to impart
“some sense of order and direction.”

In Hurst v. Florida, a 7-1-1 decision with the Chief Justice in
the majority, the Court overruled in part two more preced-
ents—Spaziano v. Florida and Hildwin v. Florida. According
to the Court in Hurst, the Spaziano and Hildwin Courts had in-
correctly concluded that the Sixth Amendment does not require
that the jury determine the existence of aggravating factors be-
fore a court may impose the death penalty.

In reaching its decision, the Hurst Court dispensed with stare
decisis quickly, focusing on Spaziano’s and Hildwin’s inconsis-
tency with the Court’s 2000 opinion in Apprendi v. New Jersey
and on the Court’s 2002 decision in Ring v. Arizona to over-
rule another pre-Apprendi case in which the Court had relied on
Hildwin. “In the Apprendi context,” the Court explained,
“stare decisis does not compel adherence to a decision whose

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).
268. 490 U.S. 638 (1989); Hurst, 136 S. Ct. at 624.
269. Hurst, 136 S. Ct. at 623 (“Spaziano and Hildwin summarized earlier preced-
ent 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).
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.”

Making up for its brevity in Hurst, the Court gave extensive attention to stare decisis in Janus v. AFSCME, a 2018 case in which the Court overturned its 1977 decision in Abood v. Detroit Board of Education. 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. The Illinois law was similar to one the Court in Abood had upheld against a First Amendment challenge, but the Janus Court concluded that requiring a public employee who is not a union member to subsidize union activities offends the First Amendment.

Addressing stare decisis, the Janus Court noted that the principle is “at its weakest” in constitutional matters and perhaps enjoys the “least force” in the First Amendment context. 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.” After giving studied attention to all of these factors, the Court decided that stare decisis was not enough to sustain Abood.

First, the Court cited significant problems in the Abood Court’s reasoning. According to the Court in Janus, Abood re-

275. 431 U.S. 209 (1977); Janus, 138 S. Ct at 2460.
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.\footnote{284 See id. at 2479 (discussing Ry. Emps. v. Hanson, 351 U.S. 225 (1956), and Machinists v. Street, 367 U.S. 740 (1961)).} 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.\footnote{285 Id. at 2479–80.} 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.\footnote{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)).}

Second, the Court in Janus concluded that the rule in Abood was unworkable.\footnote{287 Id. at 2481–82.} Abood, the Janus Court observed, attempted to draw a line between expenses that may be charged to non-union members and those that may not, and the test the Court later adopted in Lehnert v. Ferris Faculty Ass’n\footnote{288 500 U.S. 507 (1991).} 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.”\footnote{289 Janus, 138 S. Ct. at 2481.} 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.\footnote{290 See id. at 2481 (discussing the respondents’ suggestion that the Court revisit how to distinguish between chargeable and non-chargeable expenses).} Moreover, the Court noted that practical problems impeded the ability of nonunion members to challenge the union’s allocation of expenses.\footnote{291 See id. at 2482.}

Third, the Court in Janus identified legal and factual developments that had “‘eroded’ [Abood]’s ‘underpinnings,’” making
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

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

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. 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.

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.

According to the Court, Terance Gamble had not satisfied the minimum. 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. 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.

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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. 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.

Noting that stare decisis is “at its weakest” with respect to decisions interpreting the Constitution, 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.” According to the Chief Justice, *Williamson County* failed at every turn.

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. Moreover, the Chief Justice noted that Justices later had discredited *Williamson County*.

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

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. This time, the Chief Justice found himself out of step with the majority and joined Justices Alito and Kagan in dissent. The Court handed down Apodaca, a ruling that turned away a Sixth Amendment challenge to an Oregon rule permitting nonunanimous verdicts for criminal convictions, 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. First, the Court in Ramos described Apodaca not just as wrong, but as “gravely mistaken.” 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. 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.

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. 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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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, “airy,” 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.
343. *See id.* at 1439.
Justice Thomas repeatedly has expressed hostility to *Roe* and its progeny, and he is resolute that faithfulness to the Constitution demands that the Court overrule errant decisions, other considerations associated with stare decisis be damned. 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. 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.


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*).

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*—stands in the way.

### 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.” 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. 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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349. Id.


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] considered 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. 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.

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, 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.” Importantly, though, the *Casey* Court’s decision was not rooted in the conclusion that *Roe* had been decided correctly, but solely in stare

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”).


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. 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.

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. 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. 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.”

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.” 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. 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

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. 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.

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. And relevant to the question of experience, the Pearson Court indicated, are later criticism by Justices and inconsistent application of the relevant rule.

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


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)).


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 Chief 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.


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

[^376]: *Lawrence*, 539 U.S. at 587 (Scalia, J., dissenting).

[^377]: *Lawrence*, 539 U.S. at 592.

[^378]: *Lawrence*, 539 U.S. at 592 (Scalia, J., dissenting).

[^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.


in *Obergefell v. Hodges*, the Court’s watershed decision regarding same sex marriage. In *Obergefell*, the Court cited *Lawrence* and overruled the 1972 *Baker v. Nelson* decision with nary a mention of stare decisis. 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. Thus, those who oppose *Roe* might try to convince the Chief Justice that *Casey* has become a “doctrinal dinosaur,” “an outlier” among the Court’s cases about stare decisis, and completely out of step with the Court’s application of stare decisis since 1992.

*Roe*’s proponents, on the other hand, might reply that *Pearson* dealt with extensive lower-court experience in applying the *Saucier* procedure 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.” Finally, although less compelling, those seeking to preserve *Roe* through *Casey*’s application of stare decisis can point to Justice

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Thomas’s assertion in a 2009 concurrence that *Casey* defines “the prevailing approach to *stare decisis*.”

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.” 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.

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. 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 to the declaration that “[t]he controlling word . . . is ‘liberty,’” “the heart of [which] is the right to define one’s own concept of existence, of meaning, of

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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.” 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.” 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”—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.” 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. 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. 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.
Rock—administrative law decisions that Congress perhaps could address by statute—not because he believed that those decisions were decided correctly, but on the basis of stare decisis alone. 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. That, the Chief Justice explained, was not enough because Congress could not remedy the Court’s erroneous interpretation of the Constitution.

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. 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.’” 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.

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).
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.” 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 form 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, and the Court in *Alleyne v. United States* stated that “[t]he force of *stare decisis* is at its nadir in cases concerning procedural rules that implicate fundamental constitutional protections.” Furthermore, unlike *Janus*, a case in which the Court was recognizing greater free speech rights, overruling *Roe* would decommission a very personal individual right. And although the Court in *Hyatt* seemed to do so rather easily, 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.).
413. Id. at 116 n.5.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{420} Moreover, recent history indicates

\textsuperscript{416. See supra Part I.A.}

\textsuperscript{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.

\textsuperscript{418. See supra notes 308–313 and accompanying text.}

\textsuperscript{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.”).}

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. With the Court’s uneven consideration of various factors, 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. 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. 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. 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

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”).
precedent and, with particular prominence of late, the quality of the precedent’s reasoning.

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. 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. 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. 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 Apodaca’s validity and who warned that disposing of Apodaca could unleash a “tsunami of litigation.” Similarly, in the Kisor Court’s discussion of stare decisis, which the Chief Justice endorsed, the Court observed, “This Court alone

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


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 the 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 “had 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-

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 dicta442 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-

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).
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).
446. Knick, 139 S. Ct. at 2178.
tinctions,\textsuperscript{447} has had changing justifications over time,\textsuperscript{448} lacked a sufficient judicial record,\textsuperscript{449} or departed from the understanding of relevant principles at the Founding.\textsuperscript{450} Importantly, though, Gamble teaches that, for the Court to overrule a precedent, the evidence must make clear that the reasoning was errant.\textsuperscript{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.\textsuperscript{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,\textsuperscript{453} but affirmed Roe’s “essential” holding based on the Casey Court’s explanation of liberty and on other factors underlying stare decisis.\textsuperscript{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,\textsuperscript{455} but it seems more notable that Justice Alito departed

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\textsuperscript{447} Janus, 138 S. Ct. at 2480.  
\textsuperscript{448} Knick, 139 S. Ct. at 2178; Citizens United, 558 U.S. at 363.  
\textsuperscript{450} Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1499 (2019).  
\textsuperscript{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, \textit{if error there was . . . .}” (emphasis added)); id. at 982 (Scalia, J., dissenting).  
\textsuperscript{453} See Casey, 505 U.S. at 854–69 (plurality opinion) (omitting an evaluation of Roe’s logic).  
\textsuperscript{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 \textit{stare decisis}.”).  
\textsuperscript{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 \textit{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 had 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

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.”).

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”).
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 life465 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

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.”).
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 Hart472 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

469. Roe, 410 U.S. at 115.
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).
473. Id. at 922 (footnote omitted).
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*, 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. 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.” 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.”

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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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).


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 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

480. Casey, 505 U.S. at 855.
482. See Casey, 505 U.S. at 855 (discussing workability).
483. See Knick, 139 S. Ct. at 2179.
485. Casey, 505 U.S. at 867.
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, 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. 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” pre-viability. 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** “provide[d] 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**. Indeed, similar to what the Court said in **Johnson** with the Chief Justice in the majority, **Roe**’s opponents reasonably can argue


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)).


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.” 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.’” 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” 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.”

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; changes in technology; changes in economic understanding; attempts to limit the precedent; developments in constitutional law; and that the Court previously addressed a point in an earlier decision. Of these, changes in constitutional law may prove to be of particular import.

495. Id. at 2562 (quoting United States v. Vann, 660 F.3d 771, 787 (4th Cir. 2011) (Agee, J., concurring)).
501. Leegin, 551 U.S. at 901.
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-
assisted suicide, represented a retreat from Roe and Casey. 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. But the majority in Lawrence made no mention of Glucksberg and looked to Casey as support for overruling Bowers, 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. 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.”

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, pro-choice 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. 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. That could be a bridge too far.

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).
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 could 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

519. Id.
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.” 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, 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, 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 and in legislative efforts to shore up abortion rights in the event that the Court overrules Roe. Finally, pointing to those legislative developments and to the availability of birth control, 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.

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).
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 “[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).


\(^{532}\). See supra note 389 and accompanying text (discussing *Lawrence* and *Obergefell*).

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 “overrule[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.
536. Casey, 505 U.S. at 867 (plurality opinion); see supra notes 508–516 and accompanying text (discussing Lawrence and Obergefell).
Moreover, Chief Justice Roberts was part of a six-Judge 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.” 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.” 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 to overrule Plessy v. Ferguson 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. Therefore, according to the Chief Justice, legitimacy depends on “humility and restraint,” 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

542. 163 U.S. 537 (1896).
543. See Confirmation Hearing, supra note 3, at 409 (statement of Judge John G. Roberts, Jr.).
there is a case or controversy—as the Constitution requires. 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.” And opinions he has written since joining the Court testify to his commitment to this constitutional requirement. 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. Likewise, he dissented from the Court’s decision to strike down the Defense of Marriage Act in United States v. Windsor, 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))).
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 errors553 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. Sebelius556 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

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)).


Congress’s taxing authority. 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].”

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 and recognizing that the States have broad latitude in defining marriage. 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.

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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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


\(^{564}\) 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*).

\(^{566}\) 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

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.).
Chief Justice Roberts declared in his confirmation hearing that “the rule of law—that’s the only client I have as a judge.” 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.”

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.” 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, everyone will line up to see how Chief Justice Roberts—the most powerful umpire in America—calls the pitch.

576. Id. at 279.
578. Confirmation Hearing, supra note 3, at 55 (statement of Judge John G. Roberts, Jr.).