NOTE

Conservative Stare Decisis on the Roberts Court: A Jurisprudence of Doubt

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TABLE OF CONTENTS

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INTRODUCTION

Stare decisis is a core principle of the American legal system, one older than the Constitution itself.[1] However, despite its foundational status, when and how *stare decisis* is applied to prior decisions has remained elusive, especially for constitutional, rather than statutory, interpretation decisions.[2] Prior to *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[3] there was "no predictable pattern" to new decisions that overruled prior constitutional precedent.[4] A plurality of Justices in *Casey* attempted to articulate a consistent approach to the *stare decisis* analysis, which involved the consideration of several "prudential and pragmatic" factors used to determine if there is some "special reason over and above the belief that a prior case was wrongly decided" to overrule a prior case.[5] This factor-based approach is the current analysis the Supreme Court uses to evaluate *stare decisis*.[6]

Although the *stare decisis* analysis appears unified, the Court's current application is fractured by competing individual approaches. This has created a "jurisprudence of doubt"[7] that requires the Court to fundamentally reassess the role and function of the *stare decisis* analysis in future constitutional cases.[8] This Note proceeds in three parts. Part I

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[1] *See* June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring) (providing two sources supporting fidelity to precedent from 1696 and 1765, respectively).

[2] *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1413-14 (2020) (Kavanaugh, J., concurring) (noting that *stare decisis* is not as strict when interpreting the Constitution because of the difficulty in changing the Court's interpretation, but *stare decisis* is applied without a "consistent methodology or roadmap" in such cases); *see also* Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 13 (2012) ("Sometimes precedents will be followed; sometimes not. No one really knows when or why.").

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

[4] *See* Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 74 (1991) [hereinafter *Role of Precedent*].

[5] *Casey*, 505 U.S. at 854-55, 864 (noting several factors the Court may consider when evaluating the precedential status of a prior case, including workability, reliance, changes in law, and changes in factual circumstances).

[6] *See Ramos*, 140 S. Ct. at 1414 (Kavanaugh, J., concurring); Gamble v. United States, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring).

[7] *Casey*, 505 U.S. at 844 ("Liberty finds no refuge in a jurisprudence of doubt.").

[8] This Note focuses solely on Constitutional interpretations at the Supreme Court level and "horizontal" *stare decisis* considerations. There are separate *stare decisis* arguments for statutory interpretation. *See* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-11 (1932) (Brandeis, J., dissenting). There are also "vertical" *stare decisis* considerations between the higher and lower courts. *See* BRANDON J. MURRILL, CONG. RSCH. SERV., R45319, THE SUPREME COURT'S OVERRULING OF CONSTITUTIONAL PRECEDENT

of this Note offers an overview of the doctrine of *stare decisis*, including its traditional formulation and the Court's current factor-based formulation.[9] Part II will: (1) analyze the ways in which the *stare decisis* jurisprudence of the current conservative Justices on the Court has diverged in recent cases, (2) outline the ways in which this divergence undermines important justifications for *stare decisis*, and (3) argue there are negative incentives in place that inhibit the diverging *stare decisis* formulations from converging.[10] Part III argues the Court is in a prime position to reevaluate its approach to *stare decisis* and should bind itself to a unified approach in both theory and practice.[11] This Note concludes that whatever unified approach the Court adopts, it will remain subject to the general principles of *stare decisis* and can be modified by subsequent Supreme Courts.[12]

I. THE SUPREME COURT'S VARIOUS FORMULATIONS OF STARE DECISIS

A. Stare Decisis Generally

Stare decisis is a Latin phrase used in the Anglo/American legal system for fidelity to legal precedent.[13] It is often translated as "to stand by things decided"[14] and broadly means the courts must follow prior judicial decisions when the same issues arise again.[15] Adhering to precedent is meant to avoid arbitrary discretion in the courts and maintain a level of consistency in judicial opinions.[16] Doing so separates the judicial branch from the legislative or executive branches of government and allows the legal system to remain stable, predictable,

4 (2018). This discussion may also be relevant to state supreme courts. However, this Note will not discuss these related issues.

[9] *See infra* Part I. The focus of this Note is trained on the conservative Justices through the lens of *Gamble v. United States*, *Ramos v. Louisiana*, and *June Medical Services v. Russo*. There are not enough separate opinions or discussions of *stare decisis* in those cases from Justices Breyer, Ginsburg, Kagan, and Sotomayor to engage in a full discussion of their *stare decisis* views. Therefore, including an analysis of those Justices is beyond the scope of this Note.

[10] *See infra* Part II.

[11] *See infra* Part III.

[12] *See infra* Conclusion.

[13] June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring).

[14] The full Latin phrase is *stare decisis et non quieta movere*, meaning "stand by the precedents and do not disturb the calm." Stanley Reed, *Stare Decisis and Constitutional Law*, 9 PA. BAR ASS'N Q. 131, 131 (1938).

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

[16] *See June Med. Servs.*, 140 S. Ct. at 2134 (Roberts, C.J., concurring).

and reliable.[17] *Stare decisis* also reflects a respect for the collective wisdom, experience, and deliberations of prior courts.[18] Once these aspects of *stare decisis* are combined, they create a rebuttable presumption in favor of adhering to precedent.[19] The strength of this presumption has fluctuated over time, but the general standard has been in favor of following precedent.[20]

However, *stare decisis* does not require absolute adherence to prior precedent,[21] nor that the Court must overrule mistaken precedent.[22] As Justice Brandeis famously stated, *stare decisis* is not an "inexorable command."[23] In other words, the Court is not bound to follow precedent it thinks was wrongly decided.[24] Conversely, the Court can choose to leave a prior decision intact, but limit its holding to the specific factual circumstances of that decision, freeing the Court to pursue a different outcome for similar, but not identical, factual circumstances.[25] Thus, *stare decisis* grants the Court flexibility and discretion as to when and how it is able to overcome the rebuttable presumption in favor of precedent.[26]

The scope of this flexibility is the main source of division in the *stare decisis* analysis.[27] Two general approaches have formed to address this

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[17] *See* Robert A. Sprecher, *The Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied*, 31 A.B.A. J. 501, 505 (1945); *see also* Payne v. Tennessee, 501 U.S. 808, 827 (1991) ("*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.").

[18] *See* Sprecher, *supra* note 17, at 506.

[19] *See* Randy J. Kozel, *Precedent and Constitutional Structure*, 112 NW. U. L. REV. 789, 820-21 (2017) [hereinafter *Precedent*]; Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 1 (2001).

[20] *See* Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 286 (1990); Sprecher, *supra* note 17, at 507.

[21] *See June Med. Servs.*, 140 S. Ct. at 2134 (Roberts, C.J., concurring).

[22] *See* MURRILL, *supra* note 8, at 5.

[23] Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting).

[24] *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1411 (2020) (Kavanaugh, J., concurring); Emery G. Lee III, *Overruling Rhetoric: The Court's New Approach to Stare Decisis in Constitutional Cases*, 33 U. TOL. L. REV. 581, 585-86 (2002) [hereinafter *Overruling Rhetoric*].

[25] *See* Gerhardt, *Role of Precedent*, *supra* note 4, at 98.

[26] *See id.*

[27] *See* Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 261 (2005) ("How and when precedent should be rejected remains one of the great unresolved controversies of jurisprudence.").

issue.[28] The first approach, which this Note will refer to as the "traditional approach,"[29] focuses on error correction, such that if the Court holds a prior decision was erroneously decided, it is free to overrule the precedent in favor of establishing one that more closely aligns with the meaning of the Constitution.[30] The second and more popular approach, which this Note will refer to as the "factor approach,"[31] requires an additional "special justification" over and above that the precedent was wrongly decided in order to overrule the precedent and applies a number of factors to determine what constitutes a "special justification."[32]

B. The Traditional Approach to Constitutional Stare Decisis

The traditional formulation to constitutional *stare decisis* requires the Court to determine if a challenged precedent was correctly decided and, if not, whether there are any compelling reasons to adhere to that precedent.[33] Under this view, if the precedent accurately captures the text or meaning of the Constitution, the precedent should be upheld.[34] If the Court decides that the precedent is not consistent with the text or meaning of the Constitution, that error should be freely corrected whenever possible.[35] As Justice Douglas stated, a Justice must keep in mind "above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it."[36] Furthermore, because the only way to correct a mistaken Supreme Court precedent is for the Court to overrule itself or to go through the difficult process of constitutional amendment, the Court should vigilantly correct its own mistakes.[37] Thus, the deference the

[28] *See* Colin Starger, *Expanding Stare Decisis: The Role of Precedent in the Unfolding Dialectic of* Brady v. Maryland, 46 LOY. L.A. L. REV. 77, 90 (2012).

[29] This approach is also sometimes referred to as the "weaker" version of *stare decisis*. *See* Nelson, *supra* note 19, at 53. It is also called the "lax view" of *stare decisis*. *See* Starger, *supra* note 28, at 90.

[30] *See* Lee, *Overruling Rhetoric*, *supra* note 24, at 585-86.

[31] This approach is also sometimes referred to as the "stronger" version of *stare decisis*. *See* Nelson, *supra* note 19, at 53. It is also called the "strict view" of *stare decisis*. *See* Starger, *supra* note 28, at 90.

[32] MURRILL, *supra* note 8, at 4-5.

[33] *See* Lee, *Overruling Rhetoric*, *supra* note 24, at 587.

[34] *See* Nelson, *supra* note 19, at 53.

[35] *See* Smith v. Allwright, 321 U.S. 649, 665 (1944).

[36] William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949).

[37] *See* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-10 (1932) (Brandeis, J., dissenting); Lee, *Overruling Rhetoric*, *supra* note 24, at 592-93.

Court usually grants precedent is substantially lowered in these circumstances.[38]

In determining if a prior decision was wrongly decided, the Justices on the Court look primarily to the quality of reasoning.[39] For example, a Justice may look to the Constitution itself and evaluate if the reasoning falls within a range of permissible interpretations.[40] What constitutes a permissible interpretation will necessarily depend on which interpretive method the Justice applies, whether that method is originalism or living constitutionalism or something else.[41] However, regardless which method they choose, a Justice must still apply the law in an objective fashion, rather than apply their own "personal predilections."[42]

However, under the traditional approach, just because a prior decision may be "poorly reasoned" does not mean the Court is necessarily required to overrule it.[43] The Court has historically adhered to erroneous precedent if they have a special reason to uphold it.[44] Typically, this manifested when commercial interests and rights of property were threatened by overruling a prior decision.[45] Alternatively, the Court may determine that a prior decision was poorly reasoned, but decide to uphold it regardless because it is not "flat-out wrong" and is at least debatably incorrect.[46] The Court may also ask if the costs of perpetuating an erroneous constitutional interpretation are high enough to warrant overruling or if overruling would do more harm than good.[47] In sum, the traditional approach requires the Court to generally correct any perceived judicial errors unless there is some special reason to retain the erroneous precedent.[48]

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[38] *See* Lee, *Overruling Rhetoric*, *supra* note 24, at 596.

[39] *See Burnet*, 285 U.S. at 406-08 (Brandeis, J., dissenting).

[40] *See* Nelson, *supra* note 19, at 8.

[41] *See* Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 TEX. L. REV. 1843, 1869 (2013) [hereinafter *Settled Versus Right*].

[42] Lee, *Overruling Rhetoric*, *supra* note 24, at 586; *see also* Kozel, *Precedent*, *supra* note 19, at 793.

[43] *See* Nelson, *supra* note 19, at 53.

[44] *See id.*

[45] *See* Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 645, 699 (1999) [hereinafter *Stare Decisis*].

[46] Randy Kozel refers to this as "degrees-of-wrongness theory." *See* Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 418 (2010) [hereinafter *Stare Decisis*].

[47] *See* Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 U. PA. J. CONST. L. 1, 13 (2016); Kozel, *Settled Versus Right*, *supra* note 41, at 1868.

[48] *See* Nelson, *supra* note 19, at 53.

C. The Factor Approach to Constitutional Stare Decisis

In *Planned Parenthood v. Casey*, the Court transformed the traditional *stare decisis* analysis into a factor-based test.[49] The primary difference between the traditional approach and the factor approach articulated by *Casey* is the additional requirement of a "special justification" in order to overrule precedent.[50] Absent a special justification for overruling, the Court should follow the precedent even if it believes the precedent's reasoning is flawed.[51]

This requirement is the inverse of the traditional approach.[52] The traditional approach requires some special justification, usually property interests, to *adhere* to a precedent.[53] In contrast, the factor approach requires the opposite, such that a special justification, as determined by a number of practical factors, is needed to *overrule* a precedent.[54] Thus, the factor approach places a much higher barrier to overruling a precedent than the traditional approach in the interest of promoting stability.[55]

In *Casey*, the fundamental issue was the constitutionality of several provisions of a Pennsylvania abortion control law under *Roe v. Wade*'s[56] trimester framework.[57] A plurality of Justices reaffirmed the "central holding of *Roe*" under the doctrine of *stare decisis*.[58] To support this holding, the plurality stated that the "soundness of *Roe*'s resolution of the issue" was secondary to the "precedential force" the decision carried.[59] The *Casey* plurality defined the strength of an opinion's precedential force, and whether or not there was a "special justification" for its overrule with a four-factor balancing test.[60]

The four factors *Casey* established are: (1) the workability of a prior decision's rule, (2) whether that rule created substantial reliance,

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[49] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854-55 (1992); *see* Michael J. Gerhardt, *The Pressure of Precedent: A Critique of the Conservative Approaches to Stare Decisis in Abortion Cases*, 10 CONST. COMMENT. 67, 69 (1993) [hereinafter *The Pressure of Precedent*].

[50] *See* Starger, *supra* note 28, at 90-92.

[51] *Id.* at 92.

[52] *See* Nelson, *supra* note 19, at 53.

[53] *See id.*

[54] *See id.*

[55] *See* Lee, *Overruling Rhetoric*, *supra* note 24, at 587-88.

[56] 410 U.S. 113 (1973).

[57] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992).

[58] *Id.* at 853.

[59] *Id.* at 871.

[60] *Id.* at 854-55.

(3) whether subsequent legal developments undermined the rule, and (4) whether the factual circumstances supporting the decision have removed the rule's applicability or justification.[61] First, workability looks at whether the rule provides intelligible guidance as to how an issue should be resolved.[62] An unworkable rule is one that is inadequate to properly adjudicate the issue it was designed for or can be used to reach different, and potentially conflicting, outcomes.[63] Second, evaluating reliance interests means assessing whether overruling the decision would cause special hardship to anyone who oriented their lives around the decision's validity.[64] Third, determining if subsequent legal developments undermine the rule means evaluating whether related legal principles have been created, developed, or rejected since the prior decision.[65] If such changes have occurred, the Court must evaluate if those changes erode the legal foundation supporting the prior decision.[66] Finally, a substantial change in the factual circumstances surrounding the previous decision may render the decision obsolete as precedent.[67] As an example of changed factual circumstances, the *Casey* court used *Plessy v. Ferguson*'s[68] separate-but-equal rule, stating it depended on segregated facilities actually being equal.[69] However, by the time *Brown v. Board of Education*[70] was decided almost sixty years later, racially segregated facilities were factually unequal, and the separate-but-equal rule was rendered obsolete.[71] These above four factors formed the foundation for the future *stare decisis* analysis.[72]

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[61] *Id.* at 855.

[62] *See* MURRILL, *supra* note 8, at 13-14.

[63] *See id.* at 14.

[64] *Casey*, 505 U.S. at 855-56. This is arguably the most complex factor. Randy Kozel breaks reliance interests into four different subcategories: (1) reliance by specific individuals, groups, and organizations, (2) reliance by governments, (3) reliance by courts, and (4) reliance by society at large. According to Kozel, each of these categories requires its own analysis in the context of *stare decisis*. *See* Kozel, *Stare Decisis*, *supra* note 46, at 465-66. A 2018 congressional report on *stare decisis* divided reliance into three subcategories: (1) economic reliance, (2) societal reliance, and (3) governmental reliance. *See* MURRILL, *supra* note 8, at 18-22.

[65] *See Casey*, 505 U.S. at 854-55.

[66] *See id.* at 855.

[67] *See id.*

[68] 163 U.S. 537 (1896).

[69] *See Casey*, 505 U.S. at 862-63.

[70] 347 U.S. 483 (1954).

[71] *See Casey*, 505 U.S. at 862-64.

[72] *See* MURRILL, *supra* note 8, at 11-12.

Over time, the factor-based approach was modified, and other factors were added.[73] While the full list of factors used by the Court remains undefined,[74] several factors have become commonly used, including the age of the precedent[75] and the quality of reasoning of the prior decision.[76] As precedents become older, they gain more and more precedential value, reflecting "centuries of experience in law."[77] When evaluating the quality of reasoning, the Court looks to how many and how strongly Justices on the Court disagree with the reasoning of a prior case, often stating "no Member of the Court today defends [the case] as rightly decided."[78] The Court is careful to state that a disagreement on the reasoning alone is not enough; other factors must also weigh in favor of overruling the prior decision.[79] These factors, in combination with those outlined in *Casey*, form the current *stare decisis* formulation of the Court.[80]

II. DIVERGENT APPLICATION OF THE FACTOR APPROACH UNDERMINES STARE DECISIS

While the factor approach is the predominant approach to *stare decisis* for the current Supreme Court,[81] Justices retain significant discretion over the *stare decisis* analysis and may apply the factor approach in different ways.[82] Thus, although there is a general, surface-level of uniformity to *stare decisis* within the current Supreme Court, closer inspection reveals a significantly diverging *stare decisis* analysis in practice.[83] This divergence, in turn, undermines stability and predictability — two core justifications for *stare decisis*.[84]

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[73] *See id.* at 12, 22.

[74] *See id.* at 22.

[75] *See* Montejo v. Louisiana, 556 U.S. 778, 792 (2009).

[76] *See* MURRILL, *supra* note 8, at 12.

[77] Sprecher, *supra* note 17, at 506; *see also Montejo*, 556 U.S. at 792; Kozel, *Stare Decisis*, *supra* note 46, at 430.

[78] Ramos v. Louisiana, 140 S. Ct. 1390, 1405 (2020).

[79] *See* June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring).

[80] *See* MURRILL, *supra* note 8, at 12.

[81] *See* Gamble v. United States, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring).

[82] *See* MURRILL, *supra* note 8, at 23.

[83] *See infra* Part II.A.

[84] *See infra* Part II.B.

A cluster of three recently decided Supreme Court opinions — *Gamble v. United States*,[85] *Ramos v. Louisiana*,[86] and *June Medical Services v. Russo*[87] — provide a snapshot of how *stare decisis* is evaluated by the current Roberts Court. This snapshot is especially clear for the conservative Justices, as these cases provide one or more opinions written by each Justice.[88] *Gamble* held, seven-to-two, that the Double Jeopardy Clause does not preclude state law prosecution of an offense that has already been prosecuted under federal law and upheld 170 years of precedent.[89] *Ramos* held, five-to-four, that the Sixth Amendment requires all jury trial convictions to be unanimous and overruled a forty-eight year old precedent.[90] *June Medical* held, again five-to-four, that a Louisiana abortion law was unconstitutional because the law was substantially identical to a Texas law the Court struck down in *Whole Woman's Health v. Hellerstedt*[91] and constituted an "undue burden" under *Casey*.[92] For purposes of this Note, the substantive rationale of each of these cases is secondary to the *stare decisis* analysis put forward by each conservative Justice.

A. Divergent Application of the Factor Approach

1. Justice Thomas

It is easiest to start with Justice Thomas because he is the lone Supreme Court Justice who rejects the factor-based approach entirely.[93] Justice Thomas wrote an extensive concurring opinion in *Gamble* outlining his exact understanding of *stare decisis*.[94] In his view, the

[85] 139 S. Ct. 1960 (2019).

[86] 140 S. Ct. 1390 (2020).

[87] June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103 (2020).

[88] *See id.* at 2133-42 (2020) (Roberts, C.J., concurring); *id.* at 2142-53 (Thomas, J., dissenting); *id.* at 2153-71 (Alito, J., dissenting); *id.* at 2171-82 (Gorsuch, J., dissenting); Ramos v. Louisiana, 140 S. Ct. 1390, 1393-1408 (2020) (majority opinion); *id.* at 1410-20 (Kavanaugh, J., concurring); *id.* at 1420-25 (Thomas, J., concurring); *id.* at 1425-40 (Alito, J., dissenting); Gamble v. United States, 139 S. Ct. 1960, 1963-80 (2019) (majority opinion); *id.* at 1980-89 (Thomas, J., concurring); *id.* at 1996-2009 (Gorsuch, J., dissenting).

[89] *See Gamble*, 139 S. Ct. at 1964, 1969 (majority opinion).

[90] *See Ramos*, 140 S. Ct. at 1401-02 (majority opinion).

[91] 136 S. Ct. 2292 (2016).

[92] *See June Med. Servs.*, 140 S. Ct. at 2112-13 (majority opinion).

[93] *See Gamble*, 139 S. Ct. at 1984, 1988 (Thomas, J., concurring) (noting the Court's multifactor *stare decisis* test conflicts with the Court's judicial duty and should be abandoned).

[94] *See id.* at 1980-89.

Court's job is "modest" and the Court must apply written laws, like the Constitution, to the facts of particular cases.[95] Judicial power is thus limited because judges can only "expound" or "liquidate" the meaning of written laws, not alter them.[96] Justice Thomas further acknowledges that this understanding of judicial power necessarily relies on the premise that written laws have objective, ascertainable meanings.[97] The only real question for the Court is to determine if a precedent falls within the permissible range of interpretations of that objective meaning, and if not, it is deemed "demonstrably erroneous."[98] If a precedent is demonstrably erroneous, Justice Thomas says the Court should simply "not follow it" and the Court "should correct the error, regardless of whether other factors support overruling the precedent."[99]

Justice Thomas's approach focuses solely on correcting erroneous decisions and is therefore a more extreme version of the traditional approach rejected in *Casey*.[100] He explicitly rejects the need for a "special justification" for overruling erroneous precedent, arguing that considerations of additional factors are "inapposite."[101] Thus, Justice Thomas places a premium on judicial accuracy and rejects the notion that the Court's ability to correct judicial error should be restricted in any way.[102] In this regard, Justice Thomas's view accords even much less deference to precedent than the traditional approach, which recognized *some* situations where adherence to erroneous precedent could be tolerated.[103]

2. Chief Justice Roberts

Chief Justice Roberts, who accords substantial deference to precedent, represents the opposite end of the *stare decisis* spectrum compared to Justice Thomas.[104] His own view is best captured by his deciding vote and concurring opinion in *June Medical*. In that opinion,

[95] *Id.* at 1984.

[96] *Id.* at 1984-87. For Justice Thomas, "to liquidate" means "to make clear or plain," "to render unambiguous," or "to settle (differences [and] disputes)." *Id.* at 1982.

[97] *See id.* at 1984. In order to gather this objective meaning, Justice Thomas looks to the original understanding of the relevant legal text. *Id.*

[98] *See id.* at 1985.

[99] *Id.* at 1984.

[100] *See* Gerhardt, *The Pressure of Precedent*, *supra* note 49, at 69.

[101] *Gamble*, 139 S. Ct. at 1986 (Thomas, J., concurring).

[102] *See id.* at 1985.

[103] *See* Nelson, *supra* note 19, at 53.

[104] *See* June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2133 (2020) (Roberts, C.J., concurring).

he states *stare decisis* is "pragmatic and contextual" and not a "mechanical formula of adherence" to the latest decisions.[105] Chief Justice Roberts believes *stare decisis* represents a deep respect and basic humility for the collective wisdom of previous Courts.[106] As such, *stare decisis* requires a special justification that goes beyond the correctness of a prior decision in order to justify overruling precedent, as determined by the factor approach.[107] In *June Medical*, the Chief Justice found it unnecessary to evaluate if such a special justification existed because the Louisiana and Texas laws were so alike that the case could be decided under *Whole Woman's Health*.[108] If this were the full extent of his view, Chief Justice Roberts' version of *stare decisis* would be unremarkable, as it is completely in line with the factor approach, with perhaps slightly more emphasis on the wisdom of the past.[109]

What makes Chief Justice Roberts' formulation of *stare decisis* in *June Medical* unique is his willingness to uphold a prior decision that he himself dissented from four years prior.[110] As Frederick Schauer notes, examples of a Supreme Court Justice who reversed course and voted contrary to their own views are "few and far between."[111] Conversely, it is extremely common for Justices to engage in "persistent dissent" when the same issue arises again and refuse to uphold a precedent they disagree with.[112] The current Court is no exception to the general trend of persistent dissent.[113] While one can question if a four-year-old case belongs to the "general bank and capital of nations and of ages,"[114] it is clear that the Chief Justice, at least in the context of the abortion line of cases, has greater faith in the strength of precedent than his peers.[115]

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105 *See id.* at 2135 (quoting Helvering v. Hallock, 309 U.S. 106, 119 (1940)).

106 *See id.* at 2134.

107 *See id.*

108 *See id.* at 2134-42.

109 *See id.* at 2134; *see also supra* Part I.B.

110 *See June Med. Servs.*, 140 S. Ct. at 2133 (Roberts, C.J., concurring); *see* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2330-53 (2016) (Alito, J., dissenting).

111 Frederick Schauer, *Has Precedent Ever Really Mattered in the Supreme Court?*, 24 GA. STATE U.L. REV. 381, 393 (2007) [hereinafter *Has Precedent*].

112 *See id.* at 395; *see also June Med. Servs.*, 140 S. Ct. at 2151 (Thomas, J., dissenting) ("Court has doggedly adhered to [its core holding of *Roe*] again and again, often to disastrous ends." (quoting Gamble v. United States, 139 S. Ct. 1960, 1989 (2019) (Thomas, J., concurring))).

113 *See, e.g.*, *June Med. Servs.*, 140 S. Ct. at 2153-54 (Alito, J., dissenting) (arguing the stare decisis factors weigh in favor of overruling *Whole Woman's Health*, a case in which he also dissented).

114 *See id.* at 2134 (Roberts, C.J., concurring).

115 *Cf.* Frederick Schauer, *Stare Decisis—Rhetoric and Reality in the Supreme Court*, 2018 SUP. CT. REV. 121, 131-32 (2018) [hereinafter *Stare Decisis*] (noting the "presence

The remaining question for Chief Justice Roberts is if he will similarly adhere to *stare decisis* for other cases he previously dissented in that are not abortion-related.[116]

3. Justice Kavanaugh

Justice Kavanaugh's basic approach to *stare decisis* is outlined in his concurring opinion in *Ramos v. Louisiana* and contains several similarities to the approaches of other Justices. He, like Chief Justice Roberts, respects the collective wisdom of past judges.[117] Like Justice Thomas, he believes judicial power is limited to liquidating the meaning of written laws.[118] However, unlike Justice Thomas, he asserts that the factor approach falls within the appropriate exercise of judicial power in the context of *stare decisis*.[119] Justice Kavanaugh, along with most of the other members of the Court, believes that there must be a special justification to warrant overruling prior precedent.[120] Finally, like all Justices on the Roberts Court, Justice Kavanaugh agrees there are situations where the Court must overrule erroneous precedent.[121]

However, Justice Kavanaugh departs from his colleagues in a distinct way when determining how the Court should decide which cases warrant overruling.[122] Justice Kavanaugh accepts the premise that a special justification is required to justify overruling a prior decision, but believes the factor-based approach is not the best vehicle for carrying

of an opposed precedent is rarely a barrier" to a Justice voting for their desired outcome).

116 *See, e.g.*, Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198 (2016) (Alito, J., dissenting) (joining Justice Alito's dissent in which the Justices questioned the use of race-based admissions decisions in higher education); Obergefell v. Hodges, 576 U.S. 644 (2015) (Roberts, C.J., dissenting) (noting the Court exceeded its Constitutional role by extending the right to marriage to same-sex couples); Brown v. Ent. Merchs. Ass'n, 564 U.S. 786 (2011) (Alito, J., concurring) (joining Alito's separate opinion that concurs in judgment, but not in reasoning. Justice Alito asserted the interactive nature of violent video games means they should be treated differently in the context of the First Amendment, disagreeing with the majority).

117 *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1413 (2020) (Kavanaugh, J., concurring).

118 *See id.* at 1414.

119 *Compare id.* (noting "[a]s the Court has exercised the 'judicial [p]ower' over time, the Court has identified various *stare decisis* factors"), *with* Gamble v. United States, 139 S. Ct. 1960, 1988 (2019) (Thomas, J., concurring) (asserting "the Court's multifactor approach to *stare decisis* invites conflict with its constitutional duty").

120 *See Ramos*, 140 S. Ct. at 1413-14 (Kavanaugh, J., concurring).

121 *See id.* at 1411.

122 *See id.* at 1414 (focusing on what constitutes a "special justification").

out that analysis.[123] He outlines seven different factors the Court has identified in past cases, but laments that the Court has failed to establish any "consistent methodology or roadmap" for how the Court should balance these factors against each other.[124]

In an attempt to provide such a roadmap for the Court, Justice Kavanaugh reduces the factor-based approach to three key questions.[125] First, is the prior decision not just incorrect, but "grievously or egregiously" incorrect?[126] Second, has the prior decision led to "significant negative jurisprudential or real-world consequences?"[127] Third and finally, would overruling the prior decision unduly upset reliance interests?[128] According to Justice Kavanaugh, the first inquiry encapsulates several factors, including quality of reasoning, consistency with other decisions, changes in law or facts, and workability.[129] The focus of the first question is to establish the prior decision's correctness as a matter of law.[130] The second question incorporates many overlapping factors with the first, like workability and consistency with other decisions, but also looks at effects of the prior decision on the citizenry.[131] The third question is focused on the reliance interests generated by the prior decision, including how old the precedent is.[132] Together, the second and third questions focus on the practical consequences of upholding or overruling the prior decision.[133] Justice Kavanaugh contends that such an approach will serve as a better analytical guide than the current factor approach while still maintaining a high barrier to overruling precedent.[134]

Curiously, Justice Kavanaugh declined to apply his new formulation of this *stare decisis* analysis in *June Medical*.[135] While he wrote a short dissenting opinion in *June Medical*, he joined a portion of Justice Alito's

[123] *See id.* (stating that the factor-based approach "poses a problem for the rule of law and for this Court, as the Court attempts to apply *stare decisis* principles in a neutral and consistent manner").

[124] *See id.*

[125] *See id.* at 1414-15.

[126] *See id.* at 1414.

[127] *See id.* at 1415.

[128] *See id.*

[129] *See id.* at 1414-15.

[130] *See id.* at 1415.

[131] *See id.*

[132] *See id.*

[133] *See id.*

[134] *See id.*

[135] *See* June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2182 (2020) (Kavanaugh, J., dissenting).

dissent with regard to the controlling nature of *Whole Woman's Health*.[136] However, he simultaneously declined to join another portion of Justice Alito's dissent,[137] which contained the bulk of the *stare decisis* factor analysis.[138] It is plausible to assume that if Justice Kavanaugh truly felt his formulation of *stare decisis* was a better analytical guide, he would demonstrate that in subsequent *stare decisis* cases like *June Medical*. However, like Chief Justice Roberts, Justice Kavanaugh's commitment to his formulation of the *stare decisis* analysis will necessarily depend on how he rules in other *stare decisis* cases in the future.

4. Justice Alito

Justice Alito subscribes to the special justification and factor approach to *stare decisis* but retains a great deal of discretion on which factors he applies.[139] Justice Alito wrote opinions in *Gamble*, *Ramos*, and *June Medical* with extensive *stare decisis* discussions in each.[140] In *Gamble*, Justice Alito rejected the claim that Supreme Court precedent conflicted with the original understanding of the Double Jeopardy Clause because the historical evidence provided by petitioner failed to overcome the "antiquity" of "numerous 'majority decisions' . . . spanning *170 years*."[141] Therefore, Justice Alito only examined the age of the precedent in question to determine no special justification for overrule existed.[142] In the other two cases, *Ramos* and *June Medical*, Justice Alito considered several factors including quality of reasoning,[143] consistency with other decisions and legal developments,[144] and reliance

[136] *See id.* at 2157-58 (Alito, J., dissenting) (asserting in Part III.A that *Whole Woman's Health* is not controlling as a matter of *stare decisis* because the Louisiana law is in a different procedural posture than the Texas law in *Whole Woman's Health*).

[137] *See id.* at 2171 (asserting in Part IV that the *stare decisis* factors weigh in favor of overruling *Whole Woman's Health* because of the absence of reliance interests).

[138] *See id.* at 2182 (Kavanaugh, J., dissenting) (joining Justice Alito's dissent with respects to Parts I, II, and III, but declining to join Part IV).

[139] *See id.* at 2170 (Alito, J., dissenting).

[140] *See id.* at 2157-58, 2170-71; Ramos v. Louisiana, 140 S. Ct. 1390, 1425-26, 1432-40 (2020) (Alito, J., dissenting); Gamble v. United States, 139 S. Ct. 1960, 1964, 1969-80 (2019).

[141] *Gamble*, 139 S. Ct. at 1969-70 (emphasis in original).

[142] *See id.* at 1969.

[143] *See Ramos*, 140 S. Ct. at 1432 (Alito, J., dissenting); *June Med. Servs.*, 140 S. Ct. at 2170 (Alito, J., dissenting).

[144] *See June Med. Servs.*, 140 S. Ct. at 2170 (Alito, J., dissenting); *Ramos*, 140 S. Ct. at 1436 (Alito, J., dissenting).

interests.[145] Of these factors, Justice Alito placed the greatest weight on reliance interests.[146]

The *stare decisis* analysis in these cases indicates that whenever applying the factor approach, Justice Alito usually lists only the factors immediately implicated and declines to list or evaluate other factors.[147] In other words, unlike most Justices who list the most common factors before proceeding to their analysis, Justice Alito will only mention the factors he considers relevant. Such an approach makes it difficult to predict which factors he will apply in any given case.[148]

5. Justice Gorsuch

Justice Gorsuch is perhaps the most consistent conservative Justice when it comes to the factor approach. When evaluating if there is a special justification for overruling a case, he applies the same four factors: (1) the quality of reasoning in a prior decision, (2) its consistency with related decisions, (3) legal developments since the decision, and (4) reliance on the decision.[149] However, it is Justice Gorsuch's consistency that separates him from his peers as the rest of the Court has declined to commit themselves to an exhaustive list of factors.[150] Justice Gorsuch's consistency also implies he does not see the

[145] *See June Med. Servs.*, 140 S. Ct. at 2171 (Alito, J., dissenting); *Ramos*, 140 S. Ct. at 1436-40 (Alito, J., dissenting).

[146] *See June Med. Servs.*, 140 S. Ct. at 2171 (Alito, J., dissenting) ("The presence or absence of reliance is often a critical factor in applying the doctrine of *stare decisis*."); *Ramos*, 140 S. Ct. at 1436-40 (Alito, J., dissenting) (finding the reliance interests of Louisiana and Oregon on precedent "far outstrips that asserted in recent cases in which past precedents were overruled").

[147] *See June Med. Servs.*, 140 S. Ct. at 2170-71 (Alito, J., dissenting) (evaluating only consistency with prior decisions and reliance interests); *Ramos*, 140 S. Ct. at 1436-40 (Alito, J., dissenting) (evaluating only quality of reasoning, consistency with legal developments, and reliance interests). In an earlier case, Justice Alito listed relevant five factors — quality of reasoning, workability, consistency with prior decisions, factual developments, and reliance interests. *See* Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2478-79 (2018); *see also* MURRILL, *supra* note 8, at 12.

[148] *See* MURRILL, *supra* note 8, at 22-23 (noting an incomplete list of factors creates uncertainty as to when a prior decision will be overruled, and that Justice Alito stated in his confirmation hearings that he considers "all of the factors that are relevant").

[149] *See Ramos*, 140 S. Ct. at 1405 (majority opinion); Gamble v. United States, 139 S. Ct. 1960, 2006 (2019) (Gorsuch, J., dissenting).

[150] *See* MURRILL, *supra* note 8, at 22.

unlisted factors, such as age of precedent or workability, as relevant or critical for determining if a special justification exists.[151]

6. Justice Barrett

Although Justice Barrett was not confirmed when *Gamble*, *Ramos*, and *June Medical* were decided,[152] she has written extensively on *stare decisis* as an academic and would likely bring another unique, but complex, perspective on the *stare decisis* analysis.[153] Justice Barrett's commitment to originalism as her preferred method of constitutional interpretation fundamentally shapes her *stare decisis* views.[154] However, unlike fellow originalist Justice Thomas, Justice Barrett believes *stare decisis* can coexist with a strong commitment to originalism because originalism does not require Justices to "exhume and rectify every nonoriginalist precedent" and institutional practices associated with *stare decisis* keeps these precedents off the Court's docket.[155] When important precedents

[151] *Cf. Ramos*, 140 S. Ct. at 1405 (only listing and discussing the four factors Justice Gorsuch lists and does not discuss other common factors addresses by other Justices' separate opinions like age of precedent).

[152] Justice Barrett was confirmed to the Supreme Court in October 2020. *See* Barbara Sprunt, *Amy Coney Barrett Confirmed to Supreme Court, Takes Constitutional Oath*, NPR, (Oct. 26, 2020, 8:07 PM ET), https://www.npr.org/2020/10/26/927640619/senate-confirms-amy-coney-barrett-to-the-supreme-court [https://perma.cc/A8ZC-P29Q]. *Ramos* and *June Medical* were decided in April and June 2020, respectively, and *Gamble* was decided in 2019.

[153] *See, e.g.*, Amy Coney Barrett, *Introduction*, 83 NOTRE DAME L. REV. 1147 (2008) [hereinafter *Introduction*] (discussing the various ways in which nonjudicial actors challenge Supreme Court precedent); Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921 (2017) [hereinafter *Originalism*] (discussing how Justice Scalia reconciled the demands of originalism and *stare decisis*); Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711 (2013) [hereinafter *Precedent*] (arguing that constitutional *stare decisis* serves a mediating role for disagreements over the meaning of the Constitution); Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011 (2003) [hereinafter *Stare Decisis*] (arguing a strict *stare decisis* formulation operates like issue preclusion and potentially denies litigants due process because they are unable to bring forth arguments on settled areas of constitutional law); Barrett & Nagle, *supra* note 47, at 1 (2016) (discussing how members of Congress can reconcile originalism and precedent in their capacity as members of the legislative branch).

[154] *See* Barrett, *Originalism*, *supra* note 153, at 1942-43 (agreeing with Justice Scalia's reconciliation of originalism and *stare decisis* that practical and pragmatic exceptions must be made to uphold past decisions that do not conform to original public meaning); *see also* Barrett & Nagle, *supra* note 47, at 1 ("Precedent poses a notoriously difficult problem for originalists.").

[155] *Compare* Barrett, *Precedent*, *supra* note 153, at 1730, 1735-36 (arguing treating constitutional precedent as "always subject to revisions" potentially undermines the stability of constitutional law and factors of *stare decisis*, like certiorari standards, keep

that do not conform to original public meaning reach the Supreme Court, Justice Barrett believes the Court should make pragmatic exceptions to avoid overruling those precedents that are "truly part of the constitutional fabric."[156] If overruling such a precedent would cause substantial harm, the result of that precedent should be retained, but not necessarily the underlying rationale.[157]

Unlike many of the Justices on the Roberts Court, Justice Barrett believes the traditional approach to *stare decisis* better suits constitutional adjudication at the Supreme Court level than the more stringent factor approach.[158] Justice Barrett agrees with the traditional approach that a Justice's duty is to the Constitution itself, and to enforce "her best understanding of the Constitution" rather than defer to precedent that conflicts with it.[159] She argues that the traditional approach's weaker presumption in favor of retaining precedent mediates disagreements over interpretive methodology and forces the Court to proceed carefully and thoughtfully before deciding to overrule precedent.[160] Furthermore, the binding aspects of *stare decisis* placed on lower courts protects stability and compensates for a weaker presumption in favor of precedent on constitutional issues at the Supreme Court level.[161] These aspects of *stare decisis* keep settled areas of law off the Supreme Court's docket and helps ensure the issues being heard by the Supreme Court are truly unsettled.[162] Finally, Justice Barrett argues *stare decisis* must be "flexible in fact, not just in theory" in order to avoid denying litigants due process of law by barring their case with an overly strict version of *stare decisis*.[163] Thus, Justice Barrett may depart from her colleagues during her tenure on the Court and attempt to revive the traditional approach to constitutional *stare decisis*.

foundational cases off the Court's docket and insulates them from reconsideration), *and* Barrett & Nagle, *supra* note 47, at 20 (arguing institutional practices associated with *stare decisis* "permits all Justices to let some sleeping dogs lie" and Justices are not "duty-bound to wake them up"), *with* Gamble v. United States, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring) (noting the Court should correct demonstrably erroneous precedent "regardless of whether other factors support overruling the precedent").

156 Barrett & Nagle, *supra* note 47, at 22, 43.

157 *See* Barrett, *Originalism*, *supra* note 153, at 1931, 1939.

158 *See* Barrett, *Precedent*, *supra* note 153, at 1715.

159 *See id.* at 1728; Douglas, *supra* note 36, at 736.

160 *See* Barrett, *Precedent*, *supra* note 153, at 1725.

161 *See id.*

162 *See id.* at 1730-34.

163 Barrett, *Stare Decisis*, *supra* note 153, at 1013.

7. The Conservative Approaches Combined

One key takeaway emerges from comparing the *stare decisis* analysis of each conservative member of the current Roberts Court. Despite the majority adopting the factor approach to *stare decisis*,[164] there exists significant variance between the individual Justices on what exactly constitutes a special justification needed to overrule an erroneous precedent.[165] Not a single conservative Justice analyzes *stare decisis* in the same way. Chief Justice Roberts places an extremely high barrier to overruling precedent, such that he is willing to uphold decisions in which he dissented.[166] Justice Kavanaugh agrees a special justification is required to overrule, but thinks the factor approach is too unclear and should be replaced by an inquiry-based approach.[167] Justices Alito and Gorsuch both apply the factor approach, but Justice Alito applies only the factors he thinks naturally emerge from the case at hand, whereas Justice Gorsuch applies the same factors in every case.[168] Justice Thomas rejects the factor approach entirely and calls for a return to the traditional approach with a strong emphasis on error correction.[169] Finally, Justice Barrett may attempt to revive the traditional approach that was slowly phased out following *Planned Parenthood v. Casey*.[170] Thus, it becomes incredibly difficult to predict how *stare decisis* issues will be decided because every Justice applies their own individual framework.[171]

164 *See* Gamble v. United States, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring).

165 *See supra* Parts II.A.ii–vi.

166 *See* June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2133 (2020) (Roberts, C.J., concurring); Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2330 (2016) (Alito, J., dissenting).

167 *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1414-15 (2020) (Kavanaugh, J., concurring).

168 *Compare Ramos*, 140 S. Ct. at 1436-40 (Alito, J., dissenting) (evaluating only quality of reasoning, consistency with legal developments, and reliance interests), *with id.* 140 S. Ct. at 1405 (majority opinion) (applying only the four factors of quality of reasoning, consistency with other decisions, legal developments since the prior decisions, and reliance interests).

169 *See Gamble*, 139 S. Ct. at 1984 (Thomas, J., concurring).

170 *See supra* Part II.A.vi.

171 *See* MURRILL, *supra* note 8, at 22-23.

B. Divergent Stare Decisis Analysis Undermines Justifications for Stare Decisis

The doctrine of *stare decisis* is meant to provide stability and predictability to the legal system by ensuring the decisions of the past are not overruled each time the Court changes Justices, but it also extracts a cost in exchange for stability.[172] Therefore, *stare decisis* must *actually* provide stability in order to justify the negative costs associated with the doctrine.[173] However, the current Supreme Court applies *stare decisis* in diverging and sometimes conflicting manners, compromising the stability *stare decisis* is meant to provide in two ways. First, the factor approach is so loosely defined and enforced that it is unclear how *stare decisis* cases are adjudicated. Second, the Roberts Court's formulation of *stare decisis* collapses the key distinction between the traditional and factor approaches by using quality of reasoning as a special justification. The original *Casey* factor formulation of *stare decisis* created a high barrier to overruling by preventing Justices from relying on a precedent's flawed reasoning to justify overruling,[174] but including quality of reasoning as a factor allows Justices to do just that.

1. A Muddled Stare Decisis Methodology Undermines Stability

The modern Supreme Court treats *stare decisis* as a discretionary principle of policy focused on pragmatic and contextual considerations.[175] Consequently, the Court generally rejects a mechanical formulation of *stare decisis*.[176] However, as Justice Kavanaugh notes in *Ramos*, the Court has articulated a nonexhaustive list of factors that may constitute a special justification to overrule precedent but failed to provide a roadmap for how to balance these factors.[177] A 2018 congressional report on *stare decisis* warned Congress it is difficult to predict when the Court will overrule a prior decision because there is not a comprehensive list of factors that may be

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[172] *See* Kozel, *Settled Versus Right*, *supra* note 41, at 1860-63 (listing the costs associated with maintain continuity of precedent); *see also* Waldron, *supra* note 2, at 3 (noting *stare decisis* can entrench unjust decisions and can negatively shift efforts from arguing the merits of a case to arguing the relevance of precedent).

[173] *See* Kozel, *Settled Versus Right*, *supra* note 41, at 1860-63 (stating the costs of *stare decisis* need to be worth bearing).

[174] *See* Starger, *supra* note 28, at 91-92.

[175] *See* June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2135 (2020) (Roberts, C.J., concurring); MURRILL, *supra* note 8, at 22.

[176] *See June Med. Servs.*, 140 S. Ct. at 2135 (Roberts, C.J., concurring).

[177] *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring).

considered, nor any information on how individual factors are weighed against each other.[178] Justice Thomas asserts the factor approach is subjective and can easily provide "a ready means of justifying whatever result five Members of the Court seek to achieve."[179] Each of these characterizations indicates the Court's factor approach is *too* discretionary, such that it is difficult to ascertain how much analytical work the factors *actually* do.[180]

The substantial discretion taken by the Court in the *stare decisis* analysis undermines stability and predictability because the contours of the factor approach are so undefined. For example, this substantial discretion frees the Justices from applying the same factors as their peers, and the factors applied in any given case can vary from Justice to Justice. Justice Alito's approach is emblematic of this issue, as the factors he weighs are case-specific and it is unknown which ones he will find relevant until after his opinion is published.[181] Furthermore, an undefined list of factors that could be used to constitute a special justification raises concerns that the factors cited by the Court are simply a means to justify particular outcomes after the fact, rather than a prospective rule.[182]

Additionally, there is also no consistent methodology for how the Court weighs each factor against each other.[183] The Court has made no effort to address the importance of individual factors such that if there are two factors supporting overrule and two factors against overrule, there is no reliable way to predict the outcome.[184] Moreover, within the same case, two Justices can apply the same factors and come to different results.[185] This is especially common with reliance interests, as reliance

[178] *See* MURRILL, *supra* note 8, at 22.

[179] Gamble v. United States, 139 S. Ct. 1960, 1988 (2019) (Thomas, J., concurring).

[180] *See* Kozel, *Stare Decisis*, *supra* note 46, at 414.

[181] *See supra* notes 147–148 and accompanying text.

[182] *See Gamble*, 139 S. Ct. at 1984, 1981 (Thomas, J., concurring).

[183] *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1414-15 (2020) (Kavanaugh, J., concurring).

[184] Indeed, one cannot even conclude that a factor tie would mean the precedent is upheld due to the presumption because a Justice writing for the majority might determine that the two factors in favor of overrule are so strong that they outweigh the other competing factors for that particular circumstance. However, in the next case, those same two factors may be too weak to outweigh the competing factors and the opposite result could occur. *See generally* MURRILL, *supra* note 8 (evaluating the ways in which the Court conducts the factor analysis and concludes it is difficult to predict when the Court will overrule itself).

[185] *Compare Ramos*, 140 S. Ct. at 1436-40 (Alito, J., dissenting) (finding reliance interests weigh heavily in favor of adhering to prior precedent), *with id.* at 1414-15 (Kavanaugh, J., concurring) (finding overruling prior precedent will not unduly upset

interests can take several forms and it is extremely difficult to compare how overruling precedent may impact each form.[186] For example, in *Ramos*, both Justice Alito and Justice Gorsuch noted that reliance interests were implicated in overruling precedent, but Justice Alito focused on the governmental reliance of Louisiana and Oregon,[187] whereas Justice Gorsuch focused on societal reliance on the unanimity requirement of the Sixth Amendment.[188] As Justice Thomas points out, any attempt to compare the value of governmental versus societal reliance is an attempt to "quantify the unquantifiable."[189]

Finally, an unclear rule of *stare decisis* further undermines stability by failing to conform to the rule of law. Rule of law is a legal principle that requires, in part, laws be "accessible to the people in a clear, public, stable, and prospective form" and that these laws are exercised by legal authorities impersonally, rather than through their personal "preferences or ideology."[190] Chief Justice Roberts has stated that the "greatest purpose" of *stare decisis* is to "serve a constitutional ideal—the rule of law."[191] Therefore, there exists a well-established connection between the two concepts.[192]

However, the divergent *stare decisis* analysis of the current Supreme Court fails to adhere to either aspect of the rule of law. First, as noted above, the current factor approach to *stare decisis* is a muddled rule with little consistency and thus, not accessible to the public in either a clear or stable form.[193] Second, no conservative Justice applies *stare decisis* in

reliance interests), *and id.* at 1406-08 (majority opinion) (finding reliance interests "feeble" and weighing in favor of overruling prior precedent).

[186] *See* MURRILL, *supra* note 8, at 18-21 (noting reliance can take the form of economic reliance, societal reliance, and governmental reliance); Kozel, *Stare Decisis*, *supra* note 46, at 465-66 (arguing reliance interests can be divided into four different categories: (1) Reliance by specific individuals, groups, and organizations, (2) reliance by governments, (3) reliance by courts, and (4) reliance by society at large).

[187] *See Ramos*, 140 S. Ct. at 1436-40 (Alito, J., dissenting) (noting the incredible costs of retrying people who were convicted by nonunanimous juries is too great for Louisiana and Oregon to bear).

[188] *See id.* at 1408 (majority opinion) (noting the reliance interests of "the American people" on the constitutional requirement of unanimous jury verdicts constitutes "the most important" reliance interest).

[189] Gamble v. United States, 139 S. Ct. 1960, 1988 (2019) (Thomas, J., concurring).

[190] Waldron, *supra* note 2, at 3.

[191] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring).

[192] *See* Kozel, *Settled Versus Right*, *supra* note 41, at 1857; Waldron, *supra* note 2, at 31 ("[T]he justification of *stare decisis* might depend to a large extent on the rule of law).

[193] *See supra* notes 175–192 and accompanying text.

the same way and instead each follows their own personal formulations of the doctrine.[194] While each Justice arguably conducts the *stare decisis* analysis in a principled manner, the substantial discretion granted to each individual Justice allows them to adjudicate *stare decisis* issues in accordance with their own personal ideologies about the scope and nature of the doctrine rather than impersonally.

2. The Current Stare Decisis Formulation Collapses the Traditional and Factor Approaches

The conservative Justices have implicitly criticized the factor approach by incorporating the quality of reasoning as a factor in determining the existence of a special justification, thereby collapsing the main distinction between the traditional and factor approaches.[195] Justices Kavanaugh, Alito, Gorsuch, and Roberts[196] all consider the quality of a prior decision's reasoning as a factor in determining a special justification to overrule.[197] However, the main innovation the factor approach provided was the requirement that a prior decision could only be overruled if there were additional reasons in favor of overruling *above and beyond* a decision's flawed or poor reasoning.[198] In other words, "principled disagreement" with the substantive reasoning of a case should be insufficient to find there is a special justification for

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[194] *See supra* Part II.A.

[195] *See supra* Part I.C (stating the key difference between the traditional and factor approaches is the requirement of a special justification to overrule in addition to an argument that the precedent in question is erroneous).

[196] Chief Justice Roberts did not explicitly include the quality of a decisions reasoning as a factor for overruling precedent in his *June Medical* opinion, but he did indicate the bar for overruling was higher than mere disagreement with the reasoning of a prior case. *See* June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring) ("But for precedent to mean anything, the doctrine must give way only to a rationale that goes beyond whether the case was decided correctly."). However, Chief Justice Roberts also concedes that the Court should follow decisions possessing an "intrinsically sounder doctrine" which may indicate quality of reasoning plays some part in his *stare decisis* analysis. *See id.* at 2134 (Roberts, C.J., concurring). The Chief Justice has also used quality of reasoning as a factor in other *stare decisis* cases. *See, e.g.*, Knick v. Twp. of Scott, 139 S. Ct. 2162, 2178 (2019) ("We have identified several factors to consider in deciding whether to overrule a past decision, including 'the quality of [its] reasoning . . .'")

[197] *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1405 (2020) (majority opinion) (noting quality of reasoning as a factor in *stare decisis* analysis); *id.* at 1414 (Kavanaugh, J., concurring) (noting the same); Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2478-79 (2018) (noting the same).

[198] *See* Starger, *supra* note 28, at 92.

overruling precedent, and yet these Justices use their disagreement with a prior decision's reasoning as sufficient for a special justification.[199]

One possible explanation for this collapse is that the factor approach places too high of a barrier to overruling precedent, so Justices have incorporated the quality of reasoning as a factor to help lower that barrier.[200] Even supporters of the factor approach are sometimes frustrated by the high barrier to overruling precedent created by the factor approach.[201] Incorporating quality of reasoning into the factor approach allows some Justices to avoid being forced to adhere to erroneous precedent longer than they think is acceptable and gives them an avenue to overruling that may not have been available under the original *Casey* formulation.[202] For example, in *June Medical*, Justices Alito, Kavanaugh, and Gorsuch criticized the Chief Justice's affirmation of *Whole Woman's Health* as it demanded "allegiance to a nonexistent ruling inconsistent with the approach actually taken by the Court."[203] In their eyes, *Whole Woman's Health* reasoning impermissibly changed *Casey*'s undue burden test and therefore warranted overrule, but their efforts to overrule were stymied by the Chief Justice's deciding vote.[204] In effect, the Justices occasionally feel uncomfortable upholding decisions with faulty or poor reasoning, and by folding disagreements with reasoning into the factor approach, they can circumvent that particular restriction.[205] Therefore, by introducing quality of reasoning

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[199] *See* Lee, *Overruling Rhetoric*, *supra* note 24, at 582-83; *see also Ramos*, 140 S. Ct. at 1401-05 (majority opinion) (relying heavily on the low quality of reasoning of a prior decision to justify overruling it).

[200] *See* Kozel, *Precedent*, *supra* note 19, at 824 (noting that using quality of reasoning as a factor "dilutes the constraining, stabilizing effect of precedent").

[201] *See Ramos*, 140 S. Ct. at 1405 (majority opinion) ("*[S]tare decisis* isn't supposed to be the art of methodically ignoring what everyone knows to be true." (emphasis in original)).

[202] *See, e.g.*, Lee, *Stare Decisis*, *supra* note 45, at 654 (noting the doctrine of *stare decisis* seeks to prevent "the perpetuation of an error in future cases for the sole reason that is was once enshrined as case law by the votes of five Justices"); Waldron, *supra* note 2, at 8 (noting factor based *stare decisis* has the power to "entrench erroneous decisions against later correction").

[203] June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2181 (2020) (Gorsuch, J., dissenting); *id.* at 2154 (Alito, J., dissenting).

[204] *Id.* at 2181 (Gorsuch, J., dissenting); *id.* at 2154 (Alito, J., dissenting).

[205] Randy Kozel posits that one possible explanation for incorporating quality of reasoning is to trigger the *stare decisis* analysis and not to actually use quality of reasoning as a factor for determining a special justification. *See* Kozel, *Stare Decisis*, *supra* note 46, at 427-30. Kozel presents another possible explanation that looking at the quality of reasoning should be conceived as a "degree-of-wrongness theory" that looks at whether the perceived judicial error is egregious enough to warrant overrule instead of a general determination about the quality of the reasoning. *See id.* at 418.

as a factor, the Justices have blurred the line between the traditional and factor approaches and may reduce the special justification requirement to a mere formality when it suits them.[206]

Collapsing the traditional and factor approaches together undermines stability because it masks overruling on the basis of an erroneous constitutional interpretation with the factor approach's high barrier to overruling. Including quality of reasoning as a factor allows Justices to use methodological disagreements on the merits of a prior decision as a special justification for overruling it.[207] An originalist Justice could, in theory, determine a prior precedent was poorly reasoned because it did not conform to original public meaning of the constitutional issue in question, and therefore, the precedent should be reversed. This determination would be protected under the guise of a special justification, even though it is functionally similar to correcting erroneous precedent under the traditional approach. But if that originalist Justice were replaced by a living constitutionalist Justice and the same issue were to arise, the precedent may be overruled again under the exact same reasoning.

C. Inconsistent Stare Decisis Analysis Is Preserved by Negative Incentives

The divergent nature of the *stare decisis* analysis will likely persist because there are several negative incentives in place that encourage Justices to pursue their own idiosyncratic *stare decisis* views. First, divergent *stare decisis* analyses grant disproportionate judicial power to Justices who use their idiosyncratic *stare decisis* views to cast the deciding vote in close cases.[208] In hotly contested cases on important, controversial constitutional issues, the deciding vote will often come down to razor-thin margins.[209] Divergent *stare decisis* analyses exacerbate this problem because a case could be decided by one Justice's

206 *See* Kozel, *Precedent*, *supra* note 19, at 826.

207 *See id.* at 824-25.

208 *See, e.g.*, *June Med. Servs.*, 140 S. Ct. at 2103 (determining the outcome of the case with a five-to-four decision in which Chief Justice Roberts cast the deciding vote under *stare decisis*).

209 *Cf.* SHELDON WHITEHOUSE, AMERICAN CONSTITUTION SOCIETY, A RIGHT-WING ROUT: WHAT THE "ROBERTS FIVE" DECISIONS TELL US ABOUT THE INTEGRITY OF TODAY'S SUPREME COURT 2 (2019), https://www.acslaw.org/issue_brief/briefs-landing/a-right-wing-rout-what-the-roberts-five-decisions-tell-us-about-the-integrity-of-todays-supreme-court/ [https://perma.cc/FB4A-TCJP] (noting 212 cases were five-to-four decisions between 2005 and 2018).

stare decisis formulation that the eight other Justices reject.[210] Second, the Court has a history of treating individual Justice's *stare decisis* analyses as if they were binding, incentivizing Justices to promote their own formulations over forming an institutional approach.[211]

1. Divergent Stare Decisis Analyses Grant Disproportionate Power

On the Supreme Court, each Justice theoretically has the same amount of power — a single vote. It takes four affirmative votes to grant certiorari[212] and it takes five affirmative votes to issue a majority opinion on the merits of a case.[213] Thus, if a Justice wants to advance any particular view, they must also convince several other Justices to hear a particular case or to decide that case in that Justice's desired manner.[214] However, this restriction potentially disappears in close cases where five Justices agree on the result, but disagree on the reasoning.[215] In those circumstances, each opinion issued by the five Justices is necessary to achieve the result and the opinion decided on the narrowest grounds becomes controlling precedent.[216] Therefore, in a close case containing a mix of *stare decisis* and substantive analyses, a Justice can issue a concurring opinion to uphold or reject a precedent solely on the grounds of *stare decisis* and their opinion will become controlling.

The outcome of *June Medical* provides an illustrative example. As explained earlier, Chief Justice Roberts issued a concurring opinion upholding *Whole Woman's Health* by joining the rare number of instances in which a Justice upheld a precedent they disagreed with originally.[217] According to the Chief Justice, *Whole Woman's Health* reaffirmed and applied the "undue burden" test of *Casey* — a standard

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[210] *But see* Schauer, *Has Precedent*, *supra* note 111, at 399 (concluding that "precedent has rarely genuinely mattered in the Supreme Court").

[211] *See, e.g.*, Kozel, *Precedent*, *supra* note 19, at 823-24 (noting there are numerous permissible formulations of *stare decisis* and choosing between the two is not a constitutional question but a matter of "common law decisionmaking").

[212] John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 14 (1983).

[213] Barrett, *Precedent*, *supra* note 153, at 1733.

[214] *Id.*

[215] *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1398 (2020) (majority opinion) (describing the situation in Apodaca v. Oregon, 406 U.S. 404 (1972), in which Justice Powell issued a concurring opinion and the deciding vote in a five-to-four split but with completely different reasoning than the majority).

[216] *See* Marks v. United States, 430 U.S. 188, 193 (1977).

[217] *See* Part II.A.ii; *see also* Schauer, *Stare Decisis*, *supra* note 115, at 132.

both parties accepted as valid.[218] Therefore, under *stare decisis*, the Court struck down the Louisiana abortion law under the same rationale as *Whole Woman's Health*, even though Chief Justice Roberts disagreed with the case as an original matter.[219]

No other Justices joined the Chief Justice's opinion.[220] The four Justices in the plurality declined to join the Chief Justice's opinion because they believe the Court should adhere to *Whole Woman's Health*'s test on substantive grounds beyond *stare decisis*.[221] Furthermore, as Justices Alito and Gorsuch contended, the Chief Justice seemed to reject the balancing of benefits and burdens reasoning in *Whole Woman's Health*, and instead reaffirmed *Casey*'s "undue burden" test.[222] If one accepts this characterization of Chief Justice Roberts' opinion, it implies that five Justices, including the Chief Justice, again rejected *Whole Woman's Health*'s cost-benefit test in *June Medical*.[223] In other words, there were five votes in favor of rejecting the *Whole Woman's Health*'s cost-benefit test on the merits and but only four votes in favor overruling the precedent solely because of Chief Justice Roberts' idiosyncratic *stare decisis* analysis.[224] Therefore, all eight Justices disagreed with the reasoning in the Chief Justice's concurring opinion to a significant degree.

Despite these issues, Chief Justice Roberts' concurring opinion is controlling because it was necessary for the outcome of the case.[225] That is to say the Chief Justice's unique application of *stare decisis* was the pivotal factor for determining the outcome of *June Medical* and, by virtue of being the deciding vote, dictated the outcome of the case.[226] Moreover, the Chief Justice failed to convince any of his colleagues to agree with him, yet his idiosyncratic *stare decisis* opinion is controlling for future abortion cases.[227] Granting individual Justices that much power over the outcomes of cases can be dangerous, whether or not one

[218] June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2135, 2138-39 (2020) (Roberts, C.J., concurring).

[219] *Id.* at 2139 (Roberts, C.J., concurring).

[220] *See id.* (showing Justices Breyer, Ginsburg, Sotomayor, and Kagan joined the plurality opinion while Justices Thomas, Gorsuch, Alito, and Kavanaugh each issued dissenting opinions).

[221] *See id.* (plurality opinion) (holding the *Whole Woman's Health* standard renders the Louisiana law unconstitutional).

[222] *See id.* at 2181 (Gorsuch, J., dissenting); *id.* at 2154 (Alito, J., dissenting).

[223] *See id.* at 2182 (2020) (Kavanaugh, J., dissenting).

[224] *See id.*

[225] Hopkins v. Jegley, 968 F.3d 912, 915 (8th Cir. 2020).

[226] *See id.*

[227] *See id.*

agrees that Chief Justice Roberts made the correct decision. As Justice Gorsuch put it in *Ramos*, this requires the Court to "embrace a new and dubious proposition: that a single Justice writing only for himself has the authority to bind this Court to propositions it has already rejected."[228]

In the context of *stare decisis*, this proves especially troublesome as individual formulations of *stare decisis* have been treated as if they are binding on subsequent Supreme Courts.[229] Even more troubling, *stare decisis*' role as a foundational legal doctrine amplifies the unsettling effects an idiosyncratic controlling opinion has on the legal system. An idiosyncratic controlling solo opinion from a fragmented court may have destabilizing effects on that particular area of law, but those effects are relatively contained whereas the same type of opinion governing *stare decisis* may have ripple effects in all areas of law where precedent may be relevant.[230]

2. Individual Stare Decisis Analyses Are Sometimes Treated as Binding

The way the Court describes the constraining nature of *stare decisis* belies a tension between its descriptions and its practices. The Court often describes *stare decisis* as a "self-governing principle within the Judicial Branch" and a self-imposed constraint on judicial decision-making.[231] Because *stare decisis* is self-imposed, the Court grants Justices substantial independence to define its scope, as demonstrated by the numerous diverging formulations described in Part II.A.[232] Despite this characterization, the Court has previously treated individual *stare decisis* formulations as if they were binding on future courts. Two prominent examples illustrate this point — Justice

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[228] Ramos v. Louisiana, 140 S. Ct. 1390, 1402 (2020) (majority opinion).

[229] *See infra* Part II.C.ii.

[230] For example, in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), the Supreme Court fractured over the standard of scrutiny to apply to race-based affirmative action programs and the lower courts split on whether Justice Powell's solo opinion was controlling. *See id.* at 267. However, Justice Powell's reasoning did not extend into other areas of the law beyond the narrow context of race-based affirmative action. *See id.*; *see also* Grutter v. Bollinger, 539 U.S. 306, 325 (2003) ("In the wake of our fractured decision in *Bakke*, courts have struggled to discern whether Justice Powell's diversity rationale, set forth in part of the opinion joined by no other Justice, is nonetheless binding precedent under Marks.").

[231] Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989); *see* Barrett, *Precedent*, *supra* note 153, at 1735.

[232] *See supra* Part II.A.

Brandeis' dissenting opinion in *Burnet v. Coronado Oil*[233] and the factor approach of *Casey*.[234]

Justice Brandeis' dissent in *Coronado Oil* is considered the "canonical articulation" of the traditional approach,[235] but it also introduced a conception of *stare decisis* that did not adhere the Court's normal practice at the time.[236] Justice Brandeis introduced the concept that it is better that most areas of law are "settled" rather than "settled right" because the legislature can freely correct any erroneous decisions.[237] However, in the context of constitutional law, the Court should freely correct errors because "correction through legislative action is practically impossible."[238]

While this assertion is a foundational assumption for both the traditional and factor approaches to *stare decisis*, it was novel at the time because the Court's practice until *Coronado Oil* was to treat constitutional interpretations with the same level of deference as other areas, like statutory interpretations.[239] Nevertheless, Justice Brandeis' lowered deference to constitutional interpretations has become so intertwined with *stare decisis* that a modern Supreme Court can overrule constitutional precedent "with little more than a citation to Brandeis."[240] While the distinction between statutory and constitutional *stare decisis* is not relevant for this Note, Justice Brandeis' dissent demonstrates that an idiosyncratic view of *stare decisis* can rise to the level of near universal acceptance by the Supreme Court despite not being legally controlling.[241]

The special justification and factor approach itself provides another, more impactful example of individual *stare decisis* formulations becoming binding on subsequent Courts. The phrase "special justification" first occurred in reference to *stare decisis* in a 1984 case,

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[233] Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting).

[234] *See* Lee, *Overruling Rhetoric*, *supra* note 24, at 582-83.

[235] Starger, *supra* note 28, at 90.

[236] *See* Lee, *Stare Decisis*, *supra* note 45, at 727.

[237] *Burnet*, 285 U.S. at 406 (Brandeis, J., dissenting).

[238] *Id.* at 407.

[239] Lee, *Stare Decisis*, *supra* note 45, at 727; *see* Lee, *Overruling Rhetoric*, *supra* note 24, at 582-83.

[240] Lee, *Stare Decisis*, *supra* note 45, at 728.

[241] Justice Thomas rejects the distinction between statutory and constitutional stare decisis. *See* Gamble v. United States, 139 S. Ct. 1960, 1987-88 (2019) (Thomas, J., concurring).

Arizona v. Rumsey,[242] written by Justice O'Connor.[243] In *Rumsey*, Justice O'Connor declined to overrule a prior decision and concluded the opinion by stating, "any departure from the doctrine of *stare decisis* demands special justification."[244] Justice O'Connor did not elaborate on her use of "special justification" in *Rumsey*, but supported the proposition with citations to two prior decisions.[245] However, as Emery G. Lee persuasively argues, neither cited opinion uses "special justification" in the same way as Justice O'Connor and marked an "extraordinary doctrinal development."[246] Yet, a need for a "special justification" was proliferated in critical *stare decisis* opinions written by Justices Kennedy[247] and Souter,[248] culminating in the Justice O'Connor-Kennedy-Souter plurality opinion of *Planned Parenthood v. Casey*.[249] In each case leading up to and following *Casey*, these Justices reaffirmed and refined the "special justification" briefly mentioned in *Rumsey* and consequently began shifting *stare decisis* from the traditional approach's non-deferential standard to a much more deferential standard.[250] Several Justices attempted to halt this shift, especially Chief Justice Rehnquist, but by the time *Dickerson v. United States*[251] was decided in 2000, even the Chief Justice acquiesced to the need for a special justification in order to overrule a precedent.[252]

These examples are relevant to the fractured state of *stare decisis* among conservative Justices on the current Roberts Court because they demonstrate that individual formulations of *stare decisis* can eventually dominate future Courts. Justice Brandeis' *Coronado Oil* dissent caused subsequent Courts to treat statutory and constitutional precedents with different levels of deference despite that not being the practice of the Court at the time and that the Court was not bound to follow Brandeis'

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242 Arizona v. Rumsey, 467 U.S. 203, 212 (1984).

243 Lee, *Overruling Rhetoric*, *supra* note 24, at 588.

244 *Rumsey*, 467 U.S. at 212.

245 *See* Lee, *Overruling Rhetoric*, *supra* note 24, at 588 (noting that Justice O'Connor does not explain what "special justification" means in the context of *stare decisis* and only supports the claim with a citation to Swift & Co. v. Wickham, 382 U.S. 111 (1965) and Smith v. Allwright, 321 U.S. 649 (1944)).

246 *Id.* (arguing that Justice O'Connor's use of *Swift* and *Allwright* does not support her claim about needing a special justification to overrule precedent).

247 Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989).

248 Payne v. Tennessee, 501 U.S. 808, 835 (1991) (Souter, J., concurring).

249 *See* Lee, *Overruling Rhetoric*, *supra* note 24, at 597-603.

250 *See id.* at 596.

251 530 U.S. 428 (2000).

252 *See* Lee, *Overruling Rhetoric*, *supra* note 24, at 613-16.

dissent.[253] Justices O'Connor, Kennedy, and Souter turned an unsupported phrase into the dominant method of the *stare decisis* analysis in under two decades.[254] The level of influence these *stare decisis* formulations exert on future Courts provide tantalizing examples of what an individual Justice's *stare decisis* views are capable of. However, these examples are also dangerous as they also increase the likelihood of Justices injecting their own personal predilections into the law.[255] If a Justice can get their *stare decisis* analysis in a controlling opinion — like the factor approach in *Casey* — they can work to embed that analysis into future *stare decisis* cases. If a Justice's analysis fails to be controlling — such as Justice Brandeis' *Coronado Oil* dissent — they can continue to put forward their idiosyncratic *stare decisis* analysis through the practice of persistent dissent in the hopes that future Supreme Courts will find the view persuasive. *Stare decisis* is meant to limit the arbitrary discretion of judges and encourage them to adjudicate impersonally.[256] The divergent way *stare decisis* is currently analyzed by the conservative Justices makes it unclear where the law ends and where a Justice's personal views begin.[257]

It is important to stress that while the Court *appears* to treat certain *stare decisis* formulations as binding, the Court has not stated *stare decisis* analysis itself is *actually* binding.[258] Instead of being bound to follow the views articulated in these opinions, it is plausible to argue that Justices on the Court more so find them to be extremely persuasive — to the point that these opinions are dutifully cited in most discussions of *stare decisis*.[259] Furthermore, just as the Court recognizes a plurality of interpretational methods, so too does the Court recognize a plurality of approaches to *stare decisis*.[260] This stance is evident by the

[253] Lee, *Stare Decisis*, *supra* note 45, at 727; *see id.* at 582-83.

[254] *See* Lee, *Overruling Rhetoric*, *supra* note 24, at 613-16.

[255] *See* Obergefell v. Hodges, 576 U.S. 644, 687 (2015) (Roberts, C.J., dissenting) ("[It is always] tempting for judges to confuse our own preferences with the requirements of the law.").

[256] June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring); *see* Waldron, *supra* note 2, at 3.

[257] *Cf.* Gamble v. United States, 139 S. Ct. 1960, 1988 (2019) (Thomas, J., concurring) (noting the factor approach to *stare decisis* leads to "policy-driven, 'arbitrary discretion'" (citation omitted)).

[258] *See* MURRILL, *supra* note 8, at 22-23.

[259] *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1413-14 (2020) (Kavanaugh, J., concurring) (citing both Justice Brandeis's distinction and the factor approaches' "special justification" language when outlining the contours of the *stare decisis* analysis).

[260] *See* Kozel, *Settled Versus Right*, *supra* note 41, at 1880-82.

substantial deference given to Justices on *stare decisis* and the wide variety of approaches exhibited by the conservative Justices of the Roberts Court.[261] However, by embracing a plurality of approaches to the *stare decisis* analysis, the Court tacitly encourages the divergent views that undermine the stability *stare decisis* is meant to provide. Thus, this pluralistic approach to *stare decisis* is itself a major source of the issues described above and must be addressed by the Court if it wishes to resolve these issues.[262]

III. THE SUPREME COURT SHOULD BIND ITSELF TO A UNIFIED APPROACH TO STARE DECISIS

This Note has demonstrated that the conservative Justice's approaches to *stare decisis* diverges substantially.[263] Furthermore, this Note has argued this divergence undermines the stability provided by the doctrine,[264] and is unlikely to converge because there are negative incentives pushing each Justice to pursue their own *stare decisis* formulations.[265] However, with a six-to-three majority on the current Supreme Court, the conservative Justices are in a prime position to reevaluate the role of *stare decisis* in constitutional cases and effectively address these problems.[266]

The Court's pluralistic approach to the *stare decisis* analysis and constitutional interpretation more generally,[267] creates an environment in which there is no force in place to prevent this pluralistic approach from producing fractured and competed modes of analysis. The Court's pluralistic approach to constitutional interpretation is a byproduct of its

261 *See supra* Part II.A.

262 *See, e.g.*, Kozel, *Settled Versus Right*, *supra* note 41, at 1878-85 (describing the Supreme Court's pluralistic approach to constitutional interpretive methodology and the problems for precedent that arise from such an approach).

263 *See supra* Part II.A.

264 *See supra* Part II.B.

265 *See supra* Part II.C.

266 This does not need to be accomplished solely by the conservative Justices on the Court, as the remaining Justices have their own views on *stare decisis*, some of which align with the views outlined in this Note. *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1408-10 (2020) (Sotomayor, J., concurring) (noting the precedent being overruled was "on shaky ground from the start" and "this Court should not shy away from correcting its errors" as well as briefly outlining Justice Sotomayor's general views on *stare decisis*). However, because the focus of this Note is trained on the conservative Justices through the lens of *Gamble*, *Ramos*, and *June Medical*, and there are not enough separate opinions in those cases from the remaining Justices, a full discussion of the *stare decisis* views of Justices Breyer, Sotomayor, and Kagan is beyond the scope of this Note.

267 Kozel, *Settled Versus Right*, *supra* note 41, at 1879.

multimember nature, containing "different individuals appointed by different presidents and espousing different judicial philosophies."[268] This pluralism is an asset to constitutional adjudication generally because disagreements about the Constitution demonstrate a commitment to the Constitution and its meaning.[269] However, when it comes to adjudicating discrete doctrines, like *stare decisis* or substantive due process, pluralism transforms into a burden because each Justice applies a different approach, and by extension a different rule, to the cases in question.[270] When this happens, it is difficult to predict how a doctrine will be adjudicated until after the opinion is handed down — the opposite of the predictability *stare decisis* is meant to provide. Therefore, with regard to the *stare decisis* analysis, the Court should bind itself to a unified approach, thereby converging individual approaches into an institutional approach.[271]

Being bound to a unified approach would alleviate several of the issues outlined in Parts II A and B.[272] First, a unified approach would clarify much of the muddle surrounding *stare decisis* because all parties would know the exact rule being applied to *stare decisis* cases.[273] For this same reason, a unified approach better conforms to the rule of law because it would provide the public with a clear and stable rule as to how *stare decisis* cases are adjudicated.[274] As Justice Thomas notes, a "clear, principled rule" would provide much more stability than the "malleable balancing test" the Court currently adheres to.[275] Second, explicitly treating a particular *stare decisis* approach as binding on the Court would clarify the role and scope of *stare decisis* and thereby limit the frequency of opportunities for individual Justices to advocate for their individual approaches.[276] Instead, they would be bound by an institutional approach that speaks for the Court as a whole.

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[268] *Id.*

[269] *See* Barrett, *Introduction*, *supra* note 153, at 1172.

[270] *See, e.g.*, Miller v. California, 413 U.S. 15, 24 (1973) (providing a specific definition for "obscene material" because following Roth v. United States, 354 U.S. 476 (1957), the Court had been unable to agree on a specific standard to adjudicate First Amendment cases on obscene material).

[271] *See* Kozel, *Precedent*, *supra* note 19, at 811.

[272] *See supra* Parts II.A and II.B.

[273] *Cf.* Ramos v. Louisiana, 140 S. Ct. 1390, 1414-16 (2020) (Kavanaugh, J., concurring) (providing an inquiry-based rule for *stare decisis* that would support rule of law).

[274] *See id.*

[275] Gamble v. United States, 139 S. Ct. 1960, 1988 (2019) (Thomas, J., concurring).

[276] *Cf. Ramos*, 140 S. Ct. at 1414 (Kavanaugh, J., concurring) (noting *stare decisis* principles should be applied in a "neutral and consistent manner").

The Justices may be concerned that a unified approach would turn *stare decisis* into a mechanical exercise. This concern is particularly important to Chief Justice Roberts and Justice Alito.[277] A mechanical version of *stare decisis* would also make it difficult for *stare decisis* to serve the mediating role Justice Barrett values.[278] However, a unified approach does not necessarily delineate a formulaic approach in which Justices must conduct paint-by-numbers *stare decisis* analysis.[279] Indeed, both Justices Thomas and Kavanaugh stress that their proposed alternatives to the factor approach would preserve the ability for Justices to engage in reasonable disagreement if adopted by the Court.[280] A unified approach would simply ensure that all Justices begin their *stare decisis* analyses from the same rule but would not dictate the substantive arguments a Justice might make when applying that rule.

One might counter this solution by arguing the Court already agrees that the factor approach should uniformly govern *stare decisis*. However, the way the Court conducts factor-based *stare decisis* analysis is indicative that they fundamentally do *not* agree on what the factor approach entails. If every conservative Justice applies the factor approach differently, the rule cannot be considered uniform.[281] Thus, even though a majority of the Court already agrees on the factor approach,[282] the divergent application of the factor approach in practice indicates the need for a binding approach.[283]

Advocating for the particular formulation of *stare decisis* that the Court should bind itself to is beyond the scope of this Note and could take any number of forms. For example, the Court could, as Justice Thomas suggests, revert to the traditional approach, and place a

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[277] For Chief Justice Roberts, see June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2135 (2020) (Roberts, C.J., concurring) (noting *stare decisis* is pragmatic and contextual and not a "mechanical formula"). For Justice Alito, see *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 399 (2006) ("Well, I think what needs to be done is a consideration of all of the factors that are relevant. This is not a mathematical formula. It would be a lot easier for everybody if it were. But it is not. The Supreme Court has said that this is a question that calls for the exercise of judgment.").

[278] *See* Barrett, *Precedent*, *supra* note 153, at 1711-12.

[279] *See, e.g.*, *Ramos*, 140 S. Ct. at 1415-16 (Kavanaugh, J., concurring) (noting "judges of good faith" use the same *stare decisis* considerations and arrive at different results).

[280] *See id.*; Gamble v. United States, 139 S. Ct. 1960, 1986-87 (Thomas, J., concurring).

[281] *See supra* Part II.A.vii.

[282] *See* MURRILL, *supra* note 8, at 12.

[283] *See supra* Part II.A.

renewed emphasis on error correction.[284] It could also retain the special justification requirement. In doing so, the Court could refine its approach by creating an exhaustive list of factors or providing some metric for weighing the factors against one another. The Court could also abandon the factor approach for determining special justifications and instead adopt Justice Kavanaugh's inquiry-based approach.[285] In sum, the specific approach is secondary to ensuring that whatever approach the Court adopts is uniformly and consistently applied in practice.

CONCLUSION

As constitutional scholar Randy Barnett stated, "[h]ow and when precedents should be rejected remains one of the great unresolved controversies of jurisprudence."[286] The purpose of this Note is not to suggest an answer to the controversy, but instead to call attention to the untenable *stare decisis* analysis of the current Supreme Court and encourage the Court to reconsider its approach to the doctrine. *Stare decisis* may be a self-imposed constraint on the judicial branch, but presently, the Court is restricting itself too little as to how *stare decisis* analysis should be conducted.[287] Thus, the Court should collectively decide on a unified *stare decisis* methodology and formally grant that methodology the binding effect *stare decisis* affords other judicial precedents. If the Court finds whatever method of *stare decisis* analysis it chooses to be inadequate, it can modify its approach again by overcoming the rebuttable presumption in favor of adhering to precedent.[288] With a six-to-three majority, the conservative Justices on the Court can accomplish this goal as long as they are willing to abandon their individual *stare decisis* approaches in favor of an institutional approach.

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[284] This change seems unlikely given that every other Justice values the special justification requirement, including Justice Barrett who has the closest position to Justice Thomas on the topic of *stare decisis*.

[285] *See supra* Part II.A.iii.

[286] Barnett, *supra* note 27, at 261.

[287] *See* Kozel, *Stare Decisis*, *supra* note 46, at 414; *see also* Kozel, *Precedent*, *supra* note 19, at 811 ("Having nine principled Justices is a start, but it is not enough if each one is committed to a different principle. A collective dedication to precedent can help the institution become something more than the individuals who comprise it.").

[288] *See supra* Part I.A.