

COMMENTS

Alito Takes All in the Race of His Life— The Race to Overrule Precedent: How *Dobbs* Is Not the End for LGBTQ+ Rights

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“[T]he elimination of constitutional stare decisis would represent an explicit endorsement of the idea that the Constitution is nothing more than what five Justices say it is.”¹

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1. Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 288 (1990). *Accord* Vasquez v. Hillery, 474 U.S. 254, 265-66 (1986) (stating stare decisis “contributes to the integrity of our constitutional system of government, both in appearance and in fact” by maintaining the notion “that bedrock principles are founded in the law rather than in the proclivities of individuals”).

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I. INTRODUCTION

In *Dobbs v. Jackson Women's Health Organization*, the United States Supreme Court overruled *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, burying the federal constitutional protections for abortion that had been in place since 1973.² To secular America, the Supreme Court's decision in *Dobbs* will be remembered nationwide for its usurpation of abortion rights.³ Currently, in the post-*Dobbs* aftermath, substantive due process rights and jurisprudence are threatened and bracing for further limitation in the future terms to come.⁴ For example, the broad substantive due process right to privacy, established in *Griswold v. Connecticut*, especially as it extends to reproductive rights and bodily autonomy, is no longer a federally recognized constitutional right.⁵ Historically, substantive due process rights, derived from the penumbras of the Bill of Rights, developed as positive rights.⁶ However, the Supreme Court's destruction of *Roe* and *Casey*—two landmark decisions in the creation of substantive due process jurisprudence—has presented a novel situation: one in which the substantive due process clause of the Fourteenth Amendment is being

2. See generally *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973).

3. See generally *Dobbs*, 597 U.S. 215.

4. See generally *id.*

5. See generally 381 U.S. 479, 481-86 (1965); *Dobbs*, 597 U.S. at 302.

6. See *Griswold*, 381 U.S. at 484-86; *Positive Right*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "positive right" as "[a] right entitling a person to have another do some act for the benefit of the person entitled").

utilized as a weapon to transform established positive rights into non-existent negative ones.⁷ In turn, because *Dobbs* can effectively be utilized to restrict other rights, Justice Alito, in writing for the Majority, felt the need to clarify that while “the dissent suggests that our decision calls into question *Griswold*, *Eisenstadt*, *Lawrence*, and *Obergefell* . . . we have stated unequivocally that ‘nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.’”⁸

The Supreme Court’s jurisprudential approach to the line of cases comprising substantive due process has essentially eviscerated the respected doctrine of *stare decisis* by utilizing it as a weapon against the rights promised to us by both Country and Constitution.⁹ Because few precedents recognizing a constitutional right have been affirmed, reaffirmed, and consistently applied more than *Roe* and *Casey*, there is reason to legitimately fear that our rights rooted in the constitutional right to privacy, specifically LGBTQ+ rights, may eventually vanish due to the Supreme Court’s willingness to distort *stare decisis* principles to reach its desired outcome.¹⁰

As the *Dobbs* dissent emphasizes, without a changed legal or factual circumstance or some other cognizable rationale for eliminating a half-century of protection of a constitutional right, the “one reason and one reason only” for the Court’s decision is that “the composition of [the] Court has changed” and “the proclivities of individuals” rule.¹¹ Justice Alito attempted to narrow *Dobbs* by implicitly asserting that other substantive due process rights, such as the right to same-sex marriage, are protected as precedent under the judicial doctrine of *stare decisis*.¹² However, in reality, Alito is telling the world that *Griswold*, *Lawrence*,

7. See generally *Dobbs*, 597 U.S. 215; *Casey*, 505 U.S. 833; *Roe*, 410 U.S. 113.

8. *Dobbs*, 597 U.S. at 295 (citations omitted).

9. See *infra* notes 63-188 and accompanying text; see generally *Dobbs*, 597 U.S. 215.

10. See, e.g., *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 419-20 (1983) (“[A]rguments [against *Roe*] continue to be made, [but] . . . the doctrine of *stare decisis* . . . demands respect in a society governed by the rule of law.”); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 759 (1986) (“[T]he vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.” (quoting *Brown v. Bd. of Educ.* 349 U.S. 294, 300 (1955))); *Casey*, 505 U.S. at 852-55, 869 (taking full account of the diversity of views on abortion and the importance of various competing state interests before once again reaffirming *Roe*); see also *June Med. Servs. L.L.C. v. Russo*, 591 U.S. 299, 320-21 (2020) (plurality opinion); *Dobbs*, 597 U.S. at 355-59 (Roberts, C.J., concurring); *Whole Woman’s Health v. Hellerstedt*, 579 U.S. 582, 588-91 (2016); *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007); *Hodgson v. Minnesota*, 497 U.S. 417, 434-35 (1990); *Bellotti v. Baird*, 443 U.S. 622, 639-42 (1979); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 60-61 (1976).

11. *Dobbs*, 597 U.S. at 364 (Breyer, J., dissenting).

12. See *id.* at 295.

and *Obergefell* are no less safe today than they were the day before *Dobbs* was decided.¹³ Evidenced by the contradictions and false statements that pillage his career and judicial decisions, the words and promises of Justice Samuel Alito are similar to abortion clinics today—empty and meaningless. When it comes to the rights of protected classes, especially LGBTQ+ people, Justice Samuel Alito cannot be trusted.¹⁴ Therefore, another equally scary and important legacy of *Dobbs* is not only the blatant manipulation of *stare decisis* but the frightening uncertainty surrounding Supreme Court decisions and the continued protection of LGBTQ+ rights in light of Justice Alito’s secular crusade against America, which is far from over.¹⁵

This Comment argues Justice Alito’s inconsistent and contradictory jurisprudence regarding the judicial doctrine of *stare decisis* is accelerating the Supreme Court toward a new precedent—one allowing Justices to overrule settled decisions based on their substantive disagreement rather than any “special justifications” required by law—one paving the way for the elimination of LGBTQ+ rights in a post-*Dobbs* world. In Part II, this Comment recapitulates the basic principles, justifications, and approaches of the doctrine of *stare decisis*. Part III of this Comment first examines the jurisprudence of *stare decisis* in a chronological manner based on Justice Alito’s ascension to the bench; then, it analyzes Alito’s current jurisprudence in combination with his prior jurisprudence to demonstrate the inconsistency and discretion that pervades throughout. In Part IV, this Comment analyzes the various opinions in *Dobbs* through a lens of *stare decisis*. Then, in Part V, this Comment utilizes competing constitutional *stare decisis* standards to demonstrate how if precedential challenges to cases, such as *Lawrence v. Texas*¹⁶ and *Obergefell v. Hodges*,¹⁷ are brought before the Supreme Court, the Court’s “promising dicta” in *Dobbs* may dissipate before our eyes. Finally, Part VI of this Comment concludes by discussing a recommitment to *stare decisis* in the fight to protect the rights of LGBTQ+ individuals.

13. See generally *id.*

14. See discussion *infra* subpart III.C-D.

15. See discussion *infra* subpart III.C-D; *Stare Decisis*, BRITANNICA, <https://www.britannica.com/topic/stare-decisis> (last updated June 10, 2024).

16. 539 U.S. 558 (2003).

17. 576 U.S. 644 (2015).

II. *STARE DECISIS* IS FOUND IN LAW, NOT IN PERSONAL PROCLIVITIES

To properly examine how Justice Alito’s *stare decisis* jurisprudence is dismantling protections for substantive due process rights, it is essential to begin with a background of the doctrine. In analyzing how and why *stare decisis* legally operates, it is necessary to comprehend the varying justifications because the rationales have competing levels of importance based on the Justice implementing them. Finally, examining the law that expounds upon Justices choosing to either adhere or depart from *stare decisis* will demonstrate how Justice Alito was erroneous in *Dobbs*; Alito would rather go around the law instead of follow it.

A. *The Judicial Doctrine of Stare Decisis*

The doctrine of *stare decisis*¹⁸ derives its name from the first maxim of law, *stare decisis, et non quieta movere*—“to stand by things decided and not disturb settled points.”¹⁹ Judicial precedents are one of only two primary sources of law in the Anglo-American legal system.²⁰ The doctrine is not only a cornerstone of the Anglo-American legal tradition but has firmly held its place in Anglo-Saxon jurisprudence.²¹ The doctrine is simple: “it is the duty of judges and courts to follow established precedents, to adhere to settled law[,] [and] . . . to administer the law,” but it is not the judiciary’s duty to legislate.²² The Court must either follow or distinguish the controlling decisions of its predecessor;²³ therefore, when judges and courts go beyond the doctrinal statement to its reasons and

18. See Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 792 (2012) (explaining federal courts have employed *stare decisis* since the Founding).

19. Daniel H. Chamberlain, *The Doctrine of Stare Decisis: Its Reasons and Its Extent* 5 (1885); BRYAN A. GARNER ET AL., *THE LAW OF JUDICIAL PRECEDENT* 5 (2016); see James C. Rehnquist, Note, *The Power that Shall Be Vested in a Precedent: Stare Decisis, the Constitution, and the Supreme Court*, 66 B.U. L. REV. 345, 347 (1986).

20. See GARNER ET AL., *supra* note 20, at 1 (noting that the second primary source derives from constitutions and statutes); BRANDON J. MURRILL, *THE SUPREME COURT’S OVERRULING OF CONSTITUTIONAL PRECEDENT* 1 (2018), <https://crsreports.congress.gov/product/pdf/R/R45319> (noting that, by exercising its Article III powers, the Supreme Court has developed a large body of judicial decisions, or “precedents,” that interpret the Constitution). “Precedent” is defined as “a decided case that furnishes a basis for determining later cases involving similar facts or issues.” *Precedent*, BLACK’S LAW DICTIONARY (11th ed. 2019).

21. Chamberlain, *supra* note 19.

22. Chamberlain, *supra* note 19, at 6; see *Carroll v. Lessee of Carroll*, 57 U.S. 275, 286 (1853) (“[T]his court [in reaching its decision] has followed two rules, one of which belongs to the common law, and the other is a part of our peculiar judicial system. The first is the maxim of the common law, *stare decisis*.”).

23. GARNER ET AL., *supra* note 20, at 5-6.

applications, conflict and divergence result.²⁴ Despite the age and relevance of the Latin phrase, the doctrine as a whole is not well understood; contrarily, the application of *stare decisis* by the Court still endures as uncertain and discretionary.²⁵

B. *Legal Basis of Stare Decisis*

Because the Constitution does not mention the doctrine of precedent or *stare decisis*, many posit that *stare decisis* is not as much a doctrine as it is a method.²⁶ However, despite the lack of acknowledgment in our written law, the Supreme Court consistently reaffirms decisions on the grounds that they warrant deference as precedent.²⁷ Perhaps precedential respect is required for federal courts to exercise the “judicial power” bestowed upon them by Article III or to comply with constitutional commands such as due process.²⁸ Regardless, at a minimum, our system knows that by the founding, William Blackstone reported that abiding by former precedents was “an established rule” for English courts.²⁹ In the Federalist Papers, Alexander Hamilton emphasized the importance of precedent.³⁰ Former Supreme Court Justice Story maintained the “conclusive effect of judicial adjudications, was in the full view of the framers.”³¹

24. Chamberlain, *supra* note 19, at 6.

25. See, e.g., 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.”).

26. See generally Frederick Schauer, *Stare Decisis: Rhetoric and Reality in the Supreme Court*, 2018 SUP. CT. REV. 121 (2018).

27. See *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 789-91, 798 (2014) (reaffirming *Kiowa Tribe of Okla. v. Manufacturing Techs., Inc.*, 523 U.S. 751 (1998)); *Dickerson v. United States*, 530 U.S. 428, 431, 443-44 (2000) (declining to overrule *Miranda v. Arizona*, 384 U.S. 436 (1996)).

28. See Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV J.L. & PUB. POL’Y 23, 28-29 (1994).

29. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 69 (4th ed. 1765).

30. THE FEDERALIST NO. 78 (Alexander Hamilton) (“To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them . . .”).

31. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES BEFORE THE ADOPTION OF THE CONSTITUTION 270 (4th ed. 1873).

C. Doctrinal Justifications

Precedent is essentially about authority.³² Horizontal precedent—i.e., *stare decisis*—is a court’s obligation to follow the prior decisions of the same court.³³ Because the purposes of this judicial doctrine are crucial, it is vital to understand that the authority of precedent derives from the fundamental institutional values of the judiciary.³⁴ There are five core practical justifications. First, past precedent teaches valuable lessons worthy of respect; the doctrine is a vehicle for accumulating and passing down what past generations have learned.³⁵ *Stare decisis* respects the comprehensive wisdom, experience, and deliberations of all the Courts that came before them.³⁶ Second, cases are decided individually, and rules often slowly form from the accumulation and development of case-specific decisions pointing in the same direction.³⁷ Third, the doctrine is efficient.³⁸ Fourth, because the doctrine attempts to ensure consistency among decision-makers, *stare decisis* can simultaneously promote respect and legitimacy to the judiciary as the neutral branch of government it purports itself to be.³⁹ Fifth, respect for precedent advances reliance and notice interests.⁴⁰ Overall, adhering to precedent is poised to avoid arbitrary discretion, maintain consistency throughout judicial opinions, separate the judicial branch from the other two branches of government, and promote stability, predictability, and reliability within the legal system.⁴¹ And it is these enumerated facets of the doctrine that create the obligation lying at its heart.

32. See Schauer, *supra* note 26, at 123.

33. *Id.* at 125.

34. See *id.* at 126-29.

35. See *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

36. See *id.* at 449.

37. See generally FRANCIS LIEBER, ON CIVIL LIBERTY AND SELF-GOVERNMENT 336 (Theodore D. Woolsey ed., 3d ed. 1883).

38. See Robert von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409, 410 (1924) (noting that *stare decisis* “expedites the work of the courts by preventing the constant reconsideration of settled questions”).

39. See, e.g., Cass R. Sunstein, Commentary, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 782-83, 787 (1993).

40. See, e.g., *Hubbard v. United States*, 514 U.S. 695, 716 (1995) (Scalia, J., concurring in part & concurring in the judgment) (“The doctrine of *stare decisis* protects the legitimate expectations of those who live under the law, and . . . is one of the means by which exercise of ‘an arbitrary discretion in the courts’ is restrained.”).

41. See Morgan Johnson, Note, *Conservative Stare Decisis on the Roberts Court: A Jurisprudence of Doubt*, U.C. DAVIS L. REV. 1953, 1956-57 (2002) (citations omitted).

D. *Adherence and Departure*

As Justice Brandeis notoriously stated, *stare decisis* is not an “inexorable command.”⁴² In other words, the Court can overturn its own precedent.⁴³ However, *stare decisis* demands that such a step only be taken if there are strong reasons—i.e., “special justifications” for doing so.⁴⁴ In deciding which step to take when confronted with the question of overruling precedent, the Court has many options.⁴⁵ The Court can leave the challenged decision, as a whole, unscathed while limiting its holding to the unique factual circumstances of that decision.⁴⁶ In turn, the Court is free to decide differently for similar, but not factually identical, circumstances.⁴⁷ Consequently, *stare decisis* allows for flexibility and discretion in the Court regarding when the doctrine controls and when it does not.⁴⁸

When it comes to the issue of constitutional *stare decisis*, two general approaches dominate.⁴⁹ First, the “traditional approach” requires the Court to decide whether the challenged precedent was correctly decided and, if not, whether any weighty considerations favor adherence to the precedent.⁵⁰ Second, the “factor approach,” enumerated in *Casey*, transformed the *stare decisis* analysis into a factor-based test—*Casey* added the additional requirement of a special justification to overrule precedent.⁵¹ Under this approach, even if the Court is of the opinion the precedent’s reasoning is flawed, if there is no special justification, the Court should adhere to precedent.⁵²

42. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405-06 (1932) (Brandeis, J., dissenting) (“*Stare decisis* is not, like the rule of *res judicata*, universal inexorable command. ‘The rule of *stare decisis*, though one tending to consistency and uniformity of decision, is not inflexible.’” (quoting *Hertz v. Woodman*, 218 U.S. 205, 212 (1910))).

43. *See id.* at 406 (“Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided.” (quoting *Hertz*, 218 U.S. at 212)).

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

45. *See Johnson*, *supra* note 41, at 1957.

46. *Id.* (citing Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 98 (1991)).

47. *Id.* (citing Gerhardt, *supra* note 46).

48. *See id.*

49. *Id.* at 1957-58 (citing 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)).

50. *Id.* at 1958 (citing Emery G. Lee III, *Overruling Rhetoric: The Court’s New Approach to Stare Decisis in Constitutional Cases*, 33 U. TOL. L. REV. 581, 587 (2002)).

51. *Id.* at 1960 (first citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854-55 (1992), and then citing Starger, *supra* note 49, at 90-92).

52. *Id.* (citing Starger, *supra* note 49, at 92).

For the last fifty years, the debate over both the responsibility to follow precedent and what respecting *stare decisis* looks like has primarily centered itself around *Roe v. Wade* and its progeny.⁵³ Notably, when post-*Roe* abortion cases were before the Court, the issues were framed from the perspective of either upholding or overruling *Roe*.⁵⁴ Furthermore, during the Justices' confirmation hearings, they are always asked to share their views on *stare decisis* and precedent, which always indirectly implicates and leads to questions about ensuring *Roe*'s vitality.⁵⁵

III. THE EVOLUTION OF CONSTITUTIONAL *STARE DECISIS*: FROM BRANDEIS TO *ROE*, *ROE* TO *CASEY*, AND *CASEY* TO ALITO

As this Part demonstrates, the implementation of *stare decisis* generally followed the same paradigmatic form, and the Justices adhered to the same set of rules.⁵⁶ Eventually, the Court's approach to *stare decisis* evolved and transformed in the decisions of *Roe*, *Casey*, and *Lawrence*.⁵⁷ When Justice Alito was confirmed to sit on the bench, his *stare decisis* jurisprudence appeared seemingly analogous to the paradigmatic form and rules.⁵⁸ However, as his decisions in *Ramos v. Louisiana* and *June Medical Services v. Russo* demonstrate, he quickly departed from his self-professed doctrinal beliefs to manipulate legal decisions aligning with his personal proclivities.⁵⁹ Eventually, his incoherent and inconsistent doctrinal implementation came to a head when he was selected to write the *Dobbs* Majority.⁶⁰

A. *Stare Decisis in the Supreme Court Before Alito's Ascension to the Bench*

Overarchingly, the paradigmatic Supreme Court decisions overruling precedent present as follows:

53. See Michael Gentithes, *Concrete Reliance on Stare Decisis in a Post-Dobbs World*, 14 CONLAWNOW 4 (2022) (explaining *Casey* marked a critical growth in the jurisprudence of *stare decisis* by formalizing what other *stare decisis* decisions did not).

54. See e.g., *Casey*, 505 U.S. at 844.

55. See generally *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States Before the Comm. on the Judiciary*, 109th Cong. (2006).

56. See discussion *infra* Part III.

57. See discussion *infra* subpart III.B.

58. See discussion *infra* subpart III.C.

59. See discussion *infra* subpart III.D.

60. See discussion *infra* Part IV.

The issue presented in [the] case is whether X is unconstitutional; X was deemed constitutional in *The X Case*; *The X Case* failed to consider the following issues, which we now believe are core to understanding this issue; Thus, *The X Case* is no longer [in agreement] with our jurisprudence, [so] we overrule it.⁶¹

While this paradigm originated in the notorious dissent of Justice Brandeis in *Burnet v. Coronado Oil & Gas Co.*,⁶² this structure, albeit slightly varied at times, frequently dominated the Court's opinions throughout the twentieth century.⁶³ Pursuant to *Patterson v. McLean Credit Union*, absent some "special justification" to the contrary, *stare decisis* compels the Court to adhere to such an interpretation.⁶⁴ There is an exception to *stare decisis* where precedent presents as "outdated, . . . unworkable, or otherwise legitimately vulnerable to serious reconsideration."⁶⁵ As of 1991, the Court's "considered practice [had] not been to apply *stare decisis* as rigidly in constitutional cases as in [un]constitutional cases."⁶⁶

In further expounding on the doctrinal principle from *Payne v. Tennessee*, the Court reasoned that *stare decisis* is even more critical in cases involving constitutional rights and liberties because enforcement of the Bill of Rights and the Fourteenth Amendment typically require the Court "to rein in the forces of democratic politics."⁶⁷ In order to treat those rights and liberties with the paramount importance owed to them, the public must understand the Court is implementing "principles . . . founded in the law rather than in the proclivities of individuals."⁶⁸ While *Payne*

61. Michael G. Schietzelt, *Wrong Enough to Fix: Measuring and Weighing Wrongness in Ramos v. Louisiana*, 34 REGENT U. L. REV. 515, 518 (2022) (listing an example of this approach as *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 497 (1952)).

62. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405-08 (1932) (Brandeis, J., dissenting) ("The [Supreme] [C]ourt bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.").

63. See e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 555-57 (1985); *United States v. Scott*, 437 U.S. 82, 86-87, 100-01 (1978) (quoting *Burnet*, 285 U.S. at 406-08 (Brandeis, J., dissenting)); *Katz v. United States*, 389 U.S. 347, 349-53 (1967).

64. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)).

65. *Id.* at 190-191 (quoting *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986)).

66. *Payne v. Tennessee*, 501 U.S. 808, 842 (1991) (quoting *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962)). "But, even in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification.'" *Id.* (quoting *Rumsey*, 467 U.S. at 212).

67. *Id.* at 852-53 (referencing *Vasquez*, 474 U.S. at 265).

68. *Id.* (quoting *Vasquez*, 474 U.S. at 265).

was referred to as a classic case for weighing reliance heavily in favor of the earlier rule,⁶⁹ one year later, in *Casey*, Justice O'Connor extensively wrote about the importance of *stare decisis* and ultimately upheld *Roe* on this basis.⁷⁰

B. *Roe*, *Casey*, and *Lawrence*

According to the Court, “the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.”⁷¹ In turn, when the Supreme Court reconsiders a prior ruling, “its judgment is customarily informed by a series of prudential and pragmatic considerations designed to [balance] the consistency of overruling a prior decision with the ideal of the rule of law and, [additionally,] to gauge the respective costs of reaffirming and overruling a prior case.”⁷² While there are a multitude of “tests” and legal standards used in evaluating the weight of precedent, Justice O'Connor, in *Casey*, provided one of the firsts (“*Casey* Test”).⁷³ The four factors are: (1) “whether the rule has proven to be intolerable simply in defying practical workability,”⁷⁴ (2) “whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation,”⁷⁵ (3) “whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine,”⁷⁶ and (4) “whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.”⁷⁷ *Casey* is significant, not only for redefining *Roe*’s parameters, but also for its lengthy discussion of *stare decisis* in a constitutional interpretation and analysis.⁷⁸

In *Casey*, the Court provided an in-depth analysis of every factor in its *stare decisis* determination of the new prongs applied to *Roe*.⁷⁹ First,

69. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992); *Arizona v. Gant*, 556 U.S. 332 (2009).

70. See *infra* notes 87-102 and accompanying text.

71. *Casey*, 505 U.S. at 854; see BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149 (Yale Univ. Press, 1921).

72. *Casey*, 505 U.S. at 854.

73. See *infra* notes 80-84 and accompanying text.

74. *Casey*, 505 U.S. at 854 (citing *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965)).

75. *Id.* (citing *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924)).

76. *Id.* at 855 (citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 173-74 (1989)).

77. *Id.* (citing *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting)).

78. *Id.* at 854-90.

79. *Id.* at 854-901.

regarding *unworkability*, the Court was keen on clarifying that just because *Roe* represents a simple limitation beyond which a state law is unenforceable does not in any sense mean it was “unworkable.”⁸⁰ Basically, judicial assessment—of state laws affecting the exercise of choice guaranteed against government infringement—is required, not dispositive, in the *stare decisis* analysis.⁸¹

Second, in analyzing the *reliance interests* at stake, the Court clarified this inquiry examines “the cost of a rule’s repudiation . . . on those who have already relied reasonably on the rule’s continuous application.”⁸² *Payne* considered unworkability “where advance planning of great precision is most obviously a necessity.”⁸³ Even though some people will never have this reliance, the Court reasoned abortion invites some reliance before its actual exercise because abortion is typically an unplanned response to some consequence.⁸⁴ The only way to get around the reliance interests would be for people to stop engaging in sexual activity; but doing this would be refusing to face the reality that “for two decades of economic and social developments, people have organized intimate relations and [make] choices that define their views of themselves and their [belonging] in society.”⁸⁵ However, because “[t]he ability of women to participate equally in the economic and social life of [our] Nation has been [and will be] facilitated by their ability to control their reproductive [decisions and] lives,” the reliance on *Roe* cannot be measured, but it is definitely great.⁸⁶

Third, the Court found, in regards to any *development of related principles of law*, there has not been any development of constitutional law since *Roe* that either implicitly or explicitly left *Roe* as a surviving decision in a field of obsolete constitutional thinking.⁸⁷ *Roe* intersects at two lines of decisions: (1) those exemplified by *Griswold* and (2) those interpreting *Roe* as a rule of personal autonomy and bodily integrity.⁸⁸ *Roe* is not in jeopardy with respect to the first line of cases because

80. *Id.* at 855; see *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985).

81. See *Casey*, 505 U.S. at 855.

82. *Id.*

83. *Id.* at 855-56; see *Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991).

84. *Casey*, 505 U.S. at 856 (reasoning there are *de minimis* and unrealistic reliance interests only when the analysis is premised “on the assumption that no intercourse would have occurred but for *Roe*’s holding”).

85. *Id.*

86. *Id.* (citing ROSALIND P. PETCHESKY, *ABORTION AND WOMEN’S CHOICE: THE STATE, SEXUALITY, AND REPRODUCTIVE FREEDOM* 109, 133 n.7 (rev. ed. 1990)).

87. *Id.* at 857.

88. *Id.* (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

“subsequent constitutional [decisions] have [not] disturbed, nor . . . threaten[ed] to diminish, the scope of recognized protection [afforded] to the liberty relating to intimate relationships, the family, and decisions about whether to [have] a child.”⁸⁹ Additionally, *Roe* is not in jeopardy with respect to the second line of cases because of *Roe*’s “doctrinal affinity to cases recognizing [limitations] on governmental power to mandate medical treatment or to bar its rejection.”⁹⁰ *Roe* is not in jeopardy because even if one believes *Roe* is “*sui generis*,” “there clearly has been no erosion of its central determination” due to its status as the sole authority.⁹¹ Finally, the Court addressed how time overtook some of the factual assumptions in *Roe*.⁹² However, before concluding that “no change in *Roe*’s factual underpinning has left its central holding obsolete,” the Court clarified the changed facts only affect the time constraints placed on abortions.⁹³ Therefore, nothing about this factor supported an argument for overruling it.⁹⁴

In overruling *Bowers v. Hardwick*, the *Lawrence* Court reasoned that the holding in *Bowers* had not induced sufficient detrimental reliance; once there were compelling reasons justifying departure, there was no individual or societal reliance that could justify adherence to *Bowers* as precedent.⁹⁵ The Court found that *Bowers* caused uncertainty because the precedents that came before and after were contrary to its central holding.⁹⁶ In short, the two factors considered by the Majority (“*Lawrence* Factors”) are: (1) sufficiently compelling detrimental reliance, individual and societal, and (2) uncertainty of the challenged precedent.⁹⁷

However, Justice Scalia wrote a dissent to propose a new three-prong test (“Scalia’s *Lawrence* Factors”) for overruling an erroneously decided precedent (including an “intensely divisive” decision).⁹⁸ First, its foundations must have been “‘eroded’ by subsequent decisions.”⁹⁹

89. *Id.* at 857 (referencing *Carey v. Population Servs. Int’l*, 431 U.S. 678 (1977), and *Moore v. East Cleveland*, 431 U.S. 494 (1977)); see *Griswold*, 381 U.S. 479.

90. *Casey*, 505 U.S. at 857; see *Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261, 278 (1990); cf., e.g., *Riggins v. Nevada*, 504 U.S. 127 (1992).

91. *Casey*, 505 U.S. at 857.

92. *Id.* at 860.

93. *Id.*

94. See *id.*

95. *Lawrence v. Texas*, 539 U.S. 558, 577, 578 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

96. *Id.* at 577 (“The rational of *Bowers* does not withstand careful analysis.”).

97. See *id.*

98. *Id.* at 587 (Scalia, J., dissenting) (quoting *Casey*, 505 U.S. at 866-67).

99. *Id.* (quoting *id.* at 576).

Second, “it has been subject to ‘substantial and continuing’ criticism.”¹⁰⁰ Third, “it has not induced ‘individual or societal reliance’ [which] counsels against overturning.”¹⁰¹ Justice Scalia distinguished this novel standard from the *stare decisis* standard in *Casey* because the Court in *Casey* chose to base its decision on a different “sort” of reliance.¹⁰² He emphasized how, in *Casey*, the Court reasoned, “[p]eople . . . have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event contraception should fail.”¹⁰³ Thus, based on his three-prong *stare decisis* standard, Justice Scalia, dissenting, concluded the Majority erred in overruling *Bowers*.¹⁰⁴

C. Justice Alito’s Jurisprudence: Stare Decisis

During his confirmation hearings before the Senate Judiciary Committee, Justice Alito was repeatedly questioned about the intersection of *Roe* and *stare decisis*.¹⁰⁵ In an attempt to assure the Senate, Alito claimed to believe *Roe*, *Casey*, and *Griswold* were all precedent.¹⁰⁶ The questioning allowed him to elaborate on his dedication to *stare decisis*, which he classified as one of his primary tools of judicial philosophy.¹⁰⁷ When specifically asked about overruling precedent such as *Roe*, Justice Alito repeatedly responded by citing the *factors approach* rule, where overruling precedent, such as *Roe*, would require a “special

100. *Id.* (quoting *id.* at 576).

101. *Id.* (quoting *id.* at 577).

102. *See id.*

103. *Id.* at 591 (quoting *Casey*, 505 U.S. at 856).

104. *See id.* at 587-92.

105. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States Before the Comm. on the Judiciary*, 109th Cong. 318-19 (“I think the doctrine of *stare decisis* is a very important doctrine. It’s a fundamental part of our legal system, and it’s the principle that courts in general should follow their past precedents, and it’s important for a variety of reasons. It’s important because it limits the power of the judiciary. It’s important because it protects reliance interest, and it’s important because it reflect [sic] the view that courts should respect the judgments and the wisdom that are embodied in prior judicial decisions. It’s not an inexorable command, but it is a general presumption that courts are going to follow prior precedents . . .”).

106. *Id.* at 319 (“There needs to be a special justification for overruling a prior precedent.”).

107. *Id.* at 342 (“It has to follow the Constitution, and it has to follow the laws. *Stare decisis*, which I was talking about earlier, is an important limitation on what the Supreme Court does. And although the Supreme Court has the power to overrule a prior precedent, it uses that power sparingly, and rightfully so. It should be limited in what it does.”).

justification.”¹⁰⁸ In his first year on the bench, Justice Alito enshrined this viewpoint in *Hein v. Freedom from Religion Foundation, Inc.*, when he authored the Majority opinion.¹⁰⁹

Again, the Court was ready to overrule precedent in *Arizona v. Gant* because the Court reasoned “[t]he doctrine of *stare decisis* does not require [them] to approve routine constitutional violations.”¹¹⁰ To the contrary, Justice Breyer wrote a brief dissent because he felt as if *stare decisis* had to control due to the considerable reliance on the legal rule in question.¹¹¹ Nevertheless, he signed on to Justice Alito’s dissent.¹¹² Justice Alito found that because the Court substantially overruled *New York v. Belton* and *Thornton v. United States*, it had to explain why its departure from precedent was justified.¹¹³ He did not find the requisite “special justification” to justify departure from *stare decisis*.¹¹⁴ The relevant factors he identified from prior cases include: “whether the precedent has engendered reliance, whether there has been an important change in circumstances in the outside world, whether the precedent has proved to be unworkable, whether the precedent has been undermined by later decisions, and whether the decision was badly reasoned.”¹¹⁵ In Alito’s view, these factors (“Alito’s *Gant* Factors”) all weighed in favor of retaining the rule of *Belton*.¹¹⁶

In his *Obergefell* dissent, Justice Alito claimed the decision would have a fundamental effect on the Court and its ability to uphold the rule of law.¹¹⁷ He warned, “[i]f a bare majority of Justices can invent a new right and impose that right on the rest of the country, the only real limit on what future majorities will be able to do is their own sense of what those with political power and cultural influence are willing to tolerate.”¹¹⁸ In admonishing the Majority, Alito posited that he did not doubt the

108. *Id.* at 398-400 (“Factors that weigh in favor of *stare decisis* are things like what the initial vote was on the case, the length of time that the case has been on the book, whether it has been reaffirmed, whether it has been reaffirmed on *stare decisis* grounds, whether there has been reliance, the nature and the extent of the reliance, whether the precedent has proven to be workable. Those are all factors that have to be considered on an individual basis.”).

109. *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 592, 614-15 (2007).

110. *Arizona v. Gant*, 556 U.S. 332, 351 (2009).

111. *Id.* at 354-55 (Breyer, J., dissenting).

112. *See id.* at 355 (Alito, J., dissenting).

113. *Id.* at 358 (Alito, J., dissenting); *see also* *New York v. Belton*, 453 U.S. 454, 460 (1981); *Thornton v. United States*, 541 U.S. 615 (2004).

114. *Gant*, 556 U.S. at 358, 365 (Alito, J., dissenting).

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

116. *Id.* at 365.

117. *Obergefell v. Hodges*, 576 U.S. 644, 742 (2015) (Alito, J., dissenting).

118. *Id.*

Majority's sincerity in its assertion that the constitutional vision of liberty is one that aligns with their own, but this "sincerity," he emphasizes, "is cause for concern, not comfort."¹¹⁹

To the contrary, in writing for the Majority, in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, Justice Alito overruled *Abood v. Detroit Board of Education* on *stare decisis* grounds.¹²⁰ The test Alito utilized—a *factor-based approach*—vaguely directed that "[o]ur cases identify factors that should be taken into account in deciding whether to overrule a past decision."¹²¹ Notably, Alito did not reference a single case, nor did he provide a list of the possible factors; instead, he presented the five "most important" ("*Janus* Factors"): the quality of the precedent's reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision.¹²² After "analyzing" those factors, he concluded *stare decisis* did not require the Court to retain the challenged precedent.¹²³

Consequently, Justice Kagan and four other Justices wrote in dissent to emphasize how the Court's departure from precedent would have large-scale consequences.¹²⁴ Justice Kagan disagreed with the Majority on every factor cited by Alito; nevertheless, the premise of her dissent rests on the absence of any special justifications for reversing established precedent.¹²⁵ She reasoned the reliance interests in the challenged precedent were the strongest interests possible because the interests were deeply entrenched in the law and world, more than twenty states had statutory schemes built on the decision, and the relevant laws involved millions of individuals.¹²⁶ She criticized the Majority by claiming they were "[j]ust throw[ing] some gratuitous criticisms into a couple of

119. *Id.*

120. *Janus v. Am. Fed'n of State, Cnty., and Mun. Emps., Council 31*, 585 U.S. 878, 916-29 (2018); *see also* *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977).

121. *Janus*, 585 U.S. at 917.

122. *See id.* at 917, 921, 925, 926 ("In some cases, reliance provides a strong reason for adhering to established law.").

123. *Id.* at 917-29, 929-30.

124. *Id.* at 931 (Kagan, J., dissenting). Justice Sotomayor did write a brief, separate dissent. *Id.* at 930-31 (Sotomayor, J., dissenting).

125. *Id.* at 931-56, 932 ("Rarely if ever has the Court overruled a decision—let alone one of this import—with so little regard for the usual principles of *stare decisis*.").

126. *Id.* at 951-52 ("And in any event, one *stare decisis* factor—reliance—dominates all others here and demands keeping [the challenged precedent]. *Stare decisis*, this Court has held, 'has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision.'" (quoting *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 202 (1991)).

opinions and a few years later point[ing] to them as ‘special justifications.’”¹²⁷ Therefore, Justice Kagan concluded, “judicial disruption does not get any greater than what the Court does today” because “[r]especting *stare decisis* means sticking to some wrong decisions.”¹²⁸

Once again, one year later, Alito signed onto the Majority opinion in *Knick v. Township of Scott*, in which the Court overruled challenged precedent based on the *Janus* Factors.¹²⁹ Interestingly enough, the dissent by Justice Kagan would not have overruled precedent because “[a]dherence to precedent is ‘a foundation stone of the rule of law.’”¹³⁰ She insisted that even if five Justices believe a precedent is wrong, it is not enough to reverse course—such reversal demands a “special justification—over and above the belief that the precedent was wrongly decided.”¹³¹ Justice Kagan emphasized the Majority offered no qualifying reason.¹³²

D. Justice Alito in *Ramos* and *Russo* is Ridiculous and Recalcitrant

In 2020, Justice Alito continued the crusade against secular America while attempting to justify his hypocritical dissent in *Ramos v. Louisiana*.¹³³ While *Ramos* served the larger purpose of overturning Jim Crow juries, one vital component of the decision lies in the Justices’ individual opinions about *stare decisis*.¹³⁴ From a broad perspective, not only did Alito’s dissent in *Ramos* already pave a path of trouble for *Roe* and *Casey*, but Kavanaugh’s concurrence set forth the overarching outline of the *stare decisis* test Alito would come to utilize in *Dobbs* to eventually prevail in overruling *Roe*.¹³⁵ The Majority, in overruling challenged precedent, utilized the *Janus* Factors while emphasizing that the American people’s reliance on their individual constitutional liberties

127. *Janus*, 585 U.S. at 950.

128. *Id.* at 932, 948 (quoting *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455 (2015)).

129. *Knick v. Twp. of Scott*, 588 U.S. 180, 203-06 (2019).

130. *Id.* at 221 (Kagan, J., dissenting) (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014)).

131. *Id.* at 222 (quoting *Kimble*, 576 U.S. at 447).

132. *Id.*

133. *See generally*, 590 U.S. 83, 140-64 (2020) (Alito, J., dissenting).

134. *See* Thomas R. Newman and Steven J. Ahmuty Jr., *U.S. Supreme Court Debates Stare Decisis Principles*, N.Y. L.J. (May 5, 2020, 12:15 PM), <https://www.law.com/newyorklawjournal/2020/05/05/u-s-supreme-court-debates-stare-decisis-principles/>.

135. *See infra* notes 159-163 and accompanying text.

prevailed over whatever purported interest the two out of fifty states had in continuing to hold the challenged precedent as good law.¹³⁶

To the contrary, in concurring, Justice Kavanaugh did not agree with how his fellow conservative Justices on the Court applied *stare decisis*; instead, he set forth a three-factor test for determining when to overrule precedent (“Kavanaugh’s *Ramos* Factors”) with the goal of limiting judicial discretion in the process.¹³⁷ Justice Kavanaugh explained that the Court cannot depart from precedent simply because it believes it was wrongly decided; the Court must have a “special justification.”¹³⁸ Because he believed no consistent methodology had been established for the Court to utilize in analyzing various *stare decisis* factors, Justice Kavanaugh suggested “three broad considerations” to guide the Court’s decision in overruling precedent.¹³⁹ First, the precedent at issue must be “grievously or egregiously wrong.”¹⁴⁰ Second, the precedent must have caused “significant negative jurisprudential or real-world consequences.”¹⁴¹ Third, departing from precedent must not lead to an undue disruption of reliance interests.¹⁴² In short, the Court must first utilize a threshold test based on the wrongness of the decision by looking to the first two factors; then the Court must essentially engage in a totality of the circumstances analysis to consider both past and future impact.¹⁴³ Honorably, Justice Kavanaugh conceded to the limitations of his test by explaining that the test fails to eliminate disagreements between Justices about the same case.¹⁴⁴

Contrary to Kavanaugh’s concurrence, Justice Alito vehemently disagreed with the Majority’s analysis and treatment of the challenged

136. *Ramos*, 590 U.S. at 105-06, 110-111.

137. *Id.* at 115, 121-23 (Kavanaugh, J., concurring).

138. *Id.* at 120 (Kavanaugh, J., concurring) (quoting *Allen v. Cooper*, 589 U. S. 248, 259 (2020)).

139. *Id.* at 120-23 (Kavanaugh, J., concurring).

140. *Id.* at 121 (Kavanaugh, J., concurring). Justice explained that “the quality of the precedent’s reasoning, consistency and coherence with other decisions, changed law, changed facts, and workability” all may contribute to whether an opinion is wrong. *Id.* at 122. He further noted that a precedent “may be egregiously wrong when decided,” “unmasked” as wrong from later facts or developments, “or both.” *Id.*

141. *Id.* (Kavanaugh, J., concurring).

142. *Id.* at 122-23 (Kavanaugh, J., concurring) (asking questions—such as whether the precedent created issues of consistency and coherence or harmed the citizenry—to ferret out the harms, which must then be weighed against the “reliance interests” that overruling precedent might “unduly upset”).

143. See *supra* notes 138-142 and accompanying text.

144. See *Ramos*, 590 U.S. at 123-24 (Kavanaugh, J., concurring).

precedent, stating, “[t]he doctrine of *stare decisis* gets rough treatment in today’s decision.”¹⁴⁵ He continued to opine that

[l]owering the bar for overruling our precedents, a badly fractured majority casts aside an important and long-established decision with little regard for the enormous reliance the decision has engendered. If the majority’s approach is not just a way to dispose of this one case, the decision marks an important turn.¹⁴⁶

In finding the challenged decision elicited enormous and entirely reasonable reliance, Alito accused the Majority of falling prey to ad hominem rhetoric and warned the Court to not transform the doctrine of *stare decisis* “into a tool that favors particular outcomes.”¹⁴⁷ Therefore, according to Alito in *Ramos*, the Court must begin with the presumption that it will follow precedent, and if the Court decides to overrule, it has an obligation to explain its decision—to Alito, this logical pathway was ignored by the *Ramos* Majority.¹⁴⁸ Ironically, in *Dobbs*, Justice Alito cites to the *Ramos* Majority and utilizes the *stare decisis* test from Kavanaugh’s concurrence in *Ramos*.¹⁴⁹

As if *Ramos* was not enough of an opportunity for the Court to expound on *stare decisis*,¹⁵⁰ *June Medical Services L.L.C. v. Russo* raised questions of *stare decisis* before *Roe* or *Casey*, indicating *stare decisis* was an salient topic to the Court, which is particularly prevalent in its intersection with decisions regarding the right to privacy.¹⁵¹ Despite joining the plurality, Justice Roberts emphasized that he joined the dissent in *Whole Woman’s Health v. Hellerstedt*, and that he still thinks the case was wrongly decided.¹⁵² However, in *June Medical Services*, he was obligated to join the plurality because “[t]he legal doctrine of *stare decisis*

145. *Id.* at 140 (Alito, J., dissenting).

146. *Id.* (Alito, J., dissenting).

147. *Id.* at 140, 151, 158-59 (Alito, J., dissenting) (expressing concern that a significant number of defendants convicted of felonies in Louisiana and Oregon by nonunanimous juries would challenge their convictions, which would unduly burden those states because they would be forced to retry many of the pending cases).

148. *See id.* at 150-52 (Alito, J., dissenting).

149. *See infra* notes 159-163 and accompanying text.

150. *See Ramos*, 590 U.S. at 120 (Kavanaugh, J., concurring) (“To overrule, the Court demands a special justification or strong grounds.”).

151. *See June Med. Servs. L.L.C. v. Russo*, 591 U.S. 299 (2020). At issue was a challenge to Louisiana Act 620, requiring doctors to hold active admitting privileges at a local hospital to perform abortions; the Court found the Act unconstitutional. *Id.* at 307, 344.

152. *Id.* at 344 (Roberts, C.J., concurring) (citing *Whole Woman’s Health v. Hellerstedt*, 579 U.S. 582 (2016)).

requires us, absent special circumstances, to treat like cases alike.”¹⁵³ Therefore, because Louisiana’s law imposes “as severe” a burden on abortion access as the invalid Texas law in *Whole Woman’s Health*, Louisiana’s law “cannot stand under our precedents.”¹⁵⁴ Currently, Justice Alito’s Majority opinion in *Dobbs* is the most recent statement and decision regarding *stare decisis* from the Supreme Court.

IV. IN *DOBBS*, ACRIMONIOUS ALITO NARROWS THE ISSUE TO ABORT *STARE DECISIS*

As a threshold matter, it is critical to dive into this analysis with a proper understanding of what our substantive due process cases are truly about, because, in reality, these cases are all about the same thing: privacy. Narrowly, *Griswold*, *Eisenstadt*, *Roe*, and *Lawrence* are about the use of condoms, abortions, and sodomy.¹⁵⁵ At a middle level, those cases are about bodily autonomy.¹⁵⁶ And broadly, *Griswold*, *Eisenstadt*, *Roe*, and *Lawrence* are about privacy.¹⁵⁷ Understanding this gloss is vital when it is viewed in combination with how the Court analyzes our constitutional rights and liberties because, at the two broadest levels of analysis, these cases are all the same. Seeing how this jurisprudence only varies at the narrow level informs us as to how the Court is going to rule.

Typically, the Court describes these cases and the rights attached using the broadest terms; sometimes, the Court will even refer to the middle-level categorization when deriving and finding the constitutional right at issue.¹⁵⁸ However, the Court confines itself to the most narrow level when searching the Constitution for the right at issue.¹⁵⁹ Why? Because the Court and Alito know that if the right is viewed narrowly, it will never be found in the Constitution. And, in this sense, all privacy cases—including *Obergefell* and *Lawrence*—are the same.¹⁶⁰ Therefore, Alito’s Court explicitly chose to analyze the constitutional right at issue in *Roe*—privacy—as the constitutional right to abortion because Alito

153. *Id.* at 345.

154. *Id.*

155. *See generally* *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Roe v. Wade*, 410 U.S. 113 (1973); *Lawrence v. Texas*, 539 U.S. 558 (2003).

156. *See generally* *infra* note 162 and accompanying text.

157. *See* *infra* notes 162-142 and accompanying text.

158. *See generally* *infra* note 162 and accompanying text.

159. *See* *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022) (holding the right to an abortion unconstitutional).

160. *See* *infra* note 162 and accompanying text.

knew the right to abortion would never be found within our Constitution or its penumbras.¹⁶¹

In overruling *Roe*, Alito improperly utilized the *Casey* factors as a vehicle to validate his use of a two-prong test—a test that has only been utilized in the derivation, not destruction, of new rights.¹⁶² Notably, Alito ignored the tangible and intangible reliance factors that *Casey* requires consideration of, and unlike any past precedent, came to the unbelievable conclusion that there is not enough on *Roe*; instead, Alito used this test in a way that had never been done before.¹⁶³ In his confirmation hearings, Alito said overturning precedent, such as *Roe*, would require a “special justification;”¹⁶⁴ however, in finding insufficient reliance interests, the *Dobbs* opinion tells us the *Casey* factors do not counsel against overruling *Roe*, and *Roe* fails Alito’s two-prong test from *Washington v. Glucksberg*.¹⁶⁵

Ironically, the Majority opinion cites to *Ramos*, in which Alito wrote a scathing dissent in harsh criticism of the Majority.¹⁶⁶ So, is he implicitly indicating that his reasoning in *Ramos*, all of which was direly committed to the principles of *stare decisis*, was wrong? If not, which of his many differing doctrinal viewpoints should we follow? Or does he determine his judicial theory and constitutional interpretation based on what best supports his personal motivations at the present time? Either way, because he is weakening the doctrine of *stare decisis* on the Supreme Court, Justice Alito is seemingly weakening the legitimacy of the Court, in addition to how he is already weakening the rights of many.¹⁶⁷

Chief Justice Roberts narrowly concurred on the question of “[w]hether all pre-viability prohibitions on elective abortions are unconstitutional.”¹⁶⁸ He wrote out of concern because when “it is not necessary to decide more to dispose of a case, then it is necessary *not* to

161. See *Dobbs*, 597 U.S. at 231-32.

162. *Id.* at 237 (“[W]hether the right is ‘deeply rooted in our history and tradition’ and whether it is essential to our Nation’s ‘scheme of ordered liberty.’” (quoting *Timbs v. Indiana*, 586 U.S. 146, 150 (2019))).

163. See *supra* notes 71-111 and accompanying text.

164. Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States Before the Comm. on the Judiciary, 109th Cong., 319 (2006).

165. See *Dobbs*, 597 U.S. 215, 231-32; *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (“[T]he Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition,’ and ‘implicit in the concept of ordered liberty.’” (citations omitted)).

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

167. See generally *id.* at 302.

168. *Id.* at 347 (Roberts, C.J., concurring).

decide more.”¹⁶⁹ He clarified some cases warrant an exception but firmly believed this was not one of them.¹⁷⁰ Chief Justice Roberts complimented the Majority opinion as “thoughtful and thorough” but emphasized that those virtues cannot compensate for the fact that its opinion is unnecessary to decide the case before them.¹⁷¹ Similarly, Justice Kavanaugh concurred and applied his three-prong test enumerated in *Ramos* to conclude *Roe* should be overruled.¹⁷² Moreover, Justice Thomas concurred, not only because he was in complete agreement with the Majority, but because he does not believe in the jurisprudence of substantive due process and its rights.¹⁷³ In fact, he called for the Court to reconsider all substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.¹⁷⁴

In contrast, the dissent expounds on the inaccuracies and dangerous implications of the Majority’s opinion.¹⁷⁵ The Majority claims the right to an abortion is not deeply rooted in history; however, as the dissent points out, the same can be said for most of the rights the Majority claims it is not tampering with.¹⁷⁶ The primary evidence the dissent points to in accusing the Majority of threatening additional constitutional rights is its cavalier approach to *stare decisis* in overruling *Roe*.¹⁷⁷ In concluding that the Majority’s personal proclivities rule as it departs from its obligation to faithfully and impartially apply the law, the dissent emphasizes *stare decisis* “‘contributes to the actual and perceived integrity of the judicial process’ by ensuring that decisions are ‘founded in the law rather than in the proclivities of individuals.’”¹⁷⁸ Finally, the dissent questions the Majority by asking what the special justification validating precedential departure is; the dissent points out none was given, despite the Court’s and Alito’s apparent commitment to this basic rule.¹⁷⁹

169. *Id.* at 348.

170. *Id.*

171. *Id.* at 349.

172. *Id.* at 342 (Kavanaugh, J., concurring) (citing *Ramos v. Louisiana*, 590 U.S. 83, 120-23 (2020) (Kavanaugh, J., concurring in part)).

173. *Id.* at 332 (Thomas, J., concurring) (citations omitted).

174. *Id.*

175. *See id.* at 362-64 (Breyer, J., dissenting).

176. *Id.* at 363 (“Either the mass of the majority’s opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other.”).

177. *Id.* (“It is a doctrine of judicial modesty and humility.”).

178. *Id.* at 364 (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).

179. *Id.* at 388-90.

V. WITH(OUT) SORROW, ALITO TAKES ALL: FOR LGBTQ+ RIGHTS,
DOBBS IS NOT THE END

While Alito claims decisions such as *Lawrence* are “safe,” right-wing attorneys general are seemingly willing to defend laws opposing the Supreme Court’s decision in *Lawrence*.¹⁸⁰ For example, Ken Paxton, the Attorney General of Texas, said he’s willing to defend Texas’ law banning sodomy, even though the law was previously overturned by *Lawrence*.¹⁸¹ Ken Paxton already supported Texas Governor Greg Abbott by providing the legal underpinnings that first supported his executive order investigating parents of transgender children for child abuse and, subsequently, fighting the City of Houston in court over benefits for same-sex couples.¹⁸² In response to being asked if he would be comfortable enforcing a law banning sodomy, gay marriage, and birth control, Paxton responded, “‘Yeah, I mean, there’s all kinds of issues here, but certainly[,] the Supreme Court has stepped into issues that I don’t think there’s any constitutional provision dealing with. They were legislative issues, and [abortion] is one of those issues, and there may be more.’”¹⁸³ This is setting up the perfect segue for the Supreme Court to eviscerate federal constitutional fundamental LGBTQ+ rights while they are already on a roll. This is not a hypothetical situation—in *Dobbs*, Justice Thomas implicitly made it clear he wants the Court to revisit and overrule other substantive due process rights, such as *Lawrence* and *Obergefell*.¹⁸⁴

Moreover, many conservative leaders from other states have expressed support for Justice Thomas’s opinion in *Dobbs*.¹⁸⁵ For example, Utah Senate President Stuart Adams said he would support the Supreme Court’s reconsideration of same-sex marriage and, thus, the potential overruling of *Obergefell*, which is further evidenced by the fact that same-sex marriage is still legislated as unconstitutional in Utah.¹⁸⁶ Therefore, if *Obergefell* is overruled, there will be trigger-laws in places such as Utah

180. Paul Blest, *Texas AG Says He’s ‘Willing and Able’ to Defend a Ban on ‘Sodomy,’* VICE (June 29, 2022, 11:19 AM), <https://www.vice.com/en/article/akedna/texas-ag-ken-paxton-sodomy-laws>.

181. *Id.*

182. *Id.*

183. Virginia Chamlee, *Texas Attorney General Says He’d Defend Anti-Sodomy Laws if Supreme Court Revisits Ruling*, PEOPLE (June 30, 2022, 11:35 AM), <https://people.com/politics/texas-attorney-general-says-he-would-defend-anti-sodomy-laws-if-supreme-court-revisits-ruling/>.

184. *Dobbs*, 597 U.S. at 332 (Thomas, J., concurring).

185. Ariana Garcia, *Attorney General Ken Paxton Says He Will Defend Texas Sodomy Law if Supreme Court Revisits Lawrence vs. Texas*, CHRON (June 28, 2022, 6:06 PM), <https://www.chron.com/politics/article/Texas-abortion-ken-paxton-sodomy-law-gay-marriage-17271966.php>.

186. *See id.*

and Texas, just as there were in anticipation of the *Dobbs* decision.¹⁸⁷ Without *Obergefell*, most states would have same-sex marriage bans.¹⁸⁸ This is similar to how most states have abortion bans post-*Roe*.¹⁸⁹ Currently, thirty-five states ban same-sex marriage; therefore, these constitutional amendments are still on the books for these states, all of which will go into effect if *Obergefell* is overruled.¹⁹⁰

In referring to his *Obergefell* dissent, Thomas ends his opinion in *Davis v. Ermold* with a possible ultimatum: “By choosing to privilege a novel constitutional right over the religious liberty interests explicitly protected in the First Amendment, and by doing so undemocratically, the Court has created a problem that only it can fix.”¹⁹¹ This was Thomas’s and Alito’s view of *Dobbs*—the Court created an “egregious” problem with *Roe* from the day it was decided; therefore, the Court in *Dobbs* was fixing it.¹⁹² Thomas’s opinion almost implicitly calls (or hopes) for plaintiffs to bring new challenges to *Obergefell*.¹⁹³ And although Biden signed the Respect for Marriage Act into law,¹⁹⁴ if the Supreme Court ever decides to overturn *Obergefell*, marriage rights still could, and will be, rolled back around the entire country.¹⁹⁵ Biden’s new law does not prevent states from refusing to license the marriage unions.¹⁹⁶

For example, if a gay couple married in Illinois, then moved to Virginia—i.e., moved to a state banning same-sex marriage—their marriage will still be recognized due to the new federal law. However, if this same couple wanted to marry in Virginia or a similar state, they would have to travel out of state to get a marriage license. The Respect for

187. See Elizabeth Nash & Isabel Guarnieri, *13 States Have Abortion Trigger Bans—Here’s What Happens When Roe Is Overturned*, GUTTMACHER INST. (June 6, 2022), <https://www.guttmacher.org/article/2022/06/13-states-have-abortion-trigger-bans-heres-what-happens-when-roe-overturned>.

188. See Elaine S. Povich, *Without Obergefell, Most States Would Have Same-Sex Marriage Bans*, STATELINE (July 7, 2022, 12:00 AM), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/07/07/without-obergefell-most-states-would-have-same-sex-marriage-bans>.

189. See CTR. FOR REPRODUCTIVE RTS., *After Roe Fell: Abortion Laws by State*, <https://reproductiverights.org/maps/abortion-laws-by-state/>.

190. See Povich, *supra* note 188.

191. 141 S.Ct. 3, 4 (2020).

192. See generally *id.*

193. See *Obergefell v. Hodges*, 576 U.S. 644, 734 (2015) (Thomas, J., dissenting).

194. Respect for Marriage Act, Pub. L. No. 117-228, 136 Stat. 2305 (2022).

195. See Jasmine Aguilera, *What Will Happen to Same-Sex Marriage Around the Country if Obergefell Falls*, TIME (Dec. 14, 2022, 10:26 AM), <https://time.com/6240497/same-sex-marriage-rights-us-obergefell/>.

196. See Respect for Marriage Act.

Marriage Act requires states to recognize same-sex marriage but does not require states to actually issue the state's official marriage license; if they lived in one of these states, they cannot get legally married unless they travel to a different state.¹⁹⁷ Similar to the current post-*Dobbs* landscape, which bases women's access to abortion on their geographical location, the possible post-overturning of *Obergefell* will base access to same-sex marriage licenses on geography.

Couples who want to get married but cannot afford the costs of traveling to another state will be affected in adverse ways regarding the benefits attached to marriage, such as tax benefits, inheritance, and power of attorney, which includes the ability to make health care decisions for a spouse who cannot make the decisions themselves.¹⁹⁸

It would be a deep psychological and emotional blow to a lot of gay, lesbian, and bisexual people to be told that even if their state has to recognize a marriage formed out of the state, that their state nonetheless disapproves of their relationship and effectively considers them second class citizens.¹⁹⁹

There is a belief among scholars that because *Obergefell* was not simply decided on liberty grounds but, instead, on equal protection grounds, it is in less danger than *Roe* was of being overruled.²⁰⁰ Oftentimes, these individuals point to Alito's point-blank promise in *Dobbs* not to touch cases such as *Lawrence* and *Obergefell*.²⁰¹ However, as this Comment reveals, Justice Alito and his judicial decisions warn us not to take him at his word. Justice Samuel Alito has lost the privilege of being trusted. Therefore, the remainder of Part V illustrates how *Obergefell* can easily be overturned based on the various doctrinal approaches to *stare decisis* and precedent. Under the *Casey* approach, it is clear *Obergefell* should never be overturned; however, under competing approaches by various Justices, the result is not necessarily the same.

A. *Casey Test Applied to Obergefell*

Under Justice O'Connor's *Casey* Test, there are four factors to consider in overruling challenged precedent: (1) "whether the rule has proven to be intolerable simply in defying practical workability,"

197. *See id.*; Aguilera, *supra* note 195.

198. *See* Aguilera, *supra* note 195.

199. Aguilera, *supra* note 195.

200. *See id.*

201. *See generally id.*

(2) “whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation,” (3) “whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine,” and (4) “whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.”²⁰² Here, the rule of *Obergefell* protects same-sex couples’ constitutional right to marriage.

Has this rule proven intolerable in defying practical workability? No. The holding of *Obergefell* is not vague; it provides a categorical rule that provides constitutional protection to same-sex couples when it comes to marriage.²⁰³ Accordingly, “[a] substantial majority of the jurisdictions that imposed same-sex marriage proscriptions have seemingly implemented comprehensive marriage equality relatively expeditiously and smoothly. . . . [They] have thoroughly assessed their laws and modified any provisos that [previously] den[ied] full marriage equality. . . .”²⁰⁴ There is no evidence lower courts are incapable of adjudicating issues that may arise; for example, when the Kentucky clerk refused to issue same-sex marriage licenses, the district court ruled swiftly and decisively against her.²⁰⁵ Because a “substantial majority of the jurisdictions” that have “implemented comprehensive marriage equality . . . smoothly,” *Obergefell* cannot be characterized as unworkable.²⁰⁶

Has this rule been subjected to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity of the cost of repudiation? Yes. As *Obergefell* enumerates, same-sex marriage allows same-sex couples to reap the benefits of marriage in areas such as

taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers’ compensation benefits; health insurance; and child custody . . . rules.²⁰⁷

202. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854-55 (1992).

203. *Obergefell v. Hodges*, 576 U.S. 644, 680-81 (2015).

204. Carl Tobias, *Implementing Marriage Equality in America*, 65 DUKE L.J. ONLINE 25, 32 (2015).

205. *Yates v. Davis*, No. 15-62-DLB-EBA, 2017 WL 4111419, at *1, 9 (E.D. Ky. Sept. 15, 2017), *aff’d sub nom. Ermold v. Davis*, 936 F.3d 429 (6th Cir. 2019).

206. Tobias, *supra* note 204.

207. *Obergefell*, 576 U.S. at 670.

Before *Obergefell*, if a same-sex couple could not afford to obtain an attorney, the couple likely could not procure the same essential legal benefits afforded to same-sex couples.²⁰⁸ Overall, “the cost of . . . [*Obergefell*]’s repudiation as it would fall on those who have relied reasonably on . . . [its] continued application” would be substantial.²⁰⁹

Have related principles of law developed as to have left the rule no more than a remnant of abandoned doctrine? No. According to *Casey*, there are three primary inquiries under this factor: (1) whether subsequent developments in case law have disturbed the recognized constitutional interest; (2) whether the precedent, in conjunction with other holdings, represents a “rational continuum” of development in the specific area of law; and (3) whether the precedent has been tested and upheld,²¹⁰ all of which counsel against overruling *Obergefell*. The Court’s subsequent jurisprudence after *Obergefell* primarily includes *Bostock*, which only strengthens LGBTQ+ jurisprudence after extending “because of sex” to include sexual orientation in the employment discrimination context.²¹¹ This precedent represents a rational continuum, one which has been tested and upheld, just not in front of the current Court.²¹²

Have facts changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification? No. There is no evidence the institution of marriage has been harmed by marriage equality. Additionally, national support for same-sex marriage has grown since *Obergefell*; irrespective of traditional religious communities, almost all of America is now in support.²¹³ Therefore, the facts and circumstances surrounding marriage equality have only changed in a way that supports same-sex marriage; thus, the final factor also counsels against overruling *Obergefell*. However, as the remaining analysis demonstrates, *Obergefell*

208. See Christopher R. Leslie, *Dissenting from History: The False Narratives of the Obergefell Dissents*, 92 IND. L.J. 1007, 1041–42 (2017).

209. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992).

210. *Id.* at 834, 855, 858.

211. See generally *Bostock v. Clayton Cnty.*, 590 U.S. 644 (2020).

212. See *Pavan v. Smith*, 582 U.S. 563, 564 (2017) (reaffirming same-sex marriage as affording same-sex couples the entire “constellation of benefits that the States have linked to marriage”).

213. In 2015, the year *Obergefell* was decided, sixty percent of Americans supported same-sex marriage. See Justin McCarthy, *Record-High 60% of Americans Support Same-Sex Marriage*, GALLUP (May 19, 2015), <https://news.gallup.com/poll/183272/record-high-americans-support-sex-marriage.aspx>. By 2020, support had grown to seventy percent. Scottie Andrew, *70% of Americans Support Same-Sex Marriage—a New High—a New Survey Finds*, CNN (Oct. 22, 2020, 6:14 PM), <https://www.cnn.com/2020/10/22/us/same-sex-marriage-support-increases-trnd/index.html>.

is not safe from Justice Alito's crusade against secular America in a post-*Dobbs* world.

B. Lawrence Factors and Scalia's Lawrence Factors Applied to Obergefell

According to the *Lawrence* Majority, the two factors to consider in overruling challenged precedent are (1) sufficiently compelling detrimental reliance, individual and societal, and (2) uncertainty of the challenged precedent.²¹⁴ Here, in a post-*Dobbs* world, considering overturning *Roe* did not sufficiently compel detrimental reliance when *Roe* affected half the population, it is hard to argue the overturning of *Obergefell* will compel detrimental reliance that is sufficient to the current Court. Furthermore, *Obergefell* is uncertain precedent in light of the *Dobbs* decision eviscerating substantive due process rights; Justice Thomas's concurrence is a direct example.²¹⁵ Therefore, under the *Lawrence* factors, *Obergefell* is likely to fail.

According to Scalia's dissent in *Lawrence*, there are three factors that must be examined in deciding whether to overrule precedent: (1) its foundations must have been "'eroded' by subsequent decisions," (2) "it has been subject to 'substantial and continuing' criticism," and (3) "it has not induced 'individual or societal reliance' that counsels against overturning."²¹⁶ Here, the foundation of *Obergefell* has been eroded by the substantial decision of *Dobbs*.²¹⁷ *Obergefell* is a controversial decision and is still the subject to substantial and continuing legal and practical criticism,²¹⁸ especially considering the number of states that still have prior same-sex marriage bans on the books.²¹⁹ The criticism of *Obergefell* is so substantial and continuous, states are attempting to get the decision back in front of the current Supreme Court.²²⁰ Finally, as the above section demonstrates, *Obergefell* has definitely induced individual and societal reliance; however, it is unlikely it will be enough to the current Court.

214. See *Lawrence v. Texas*, 539 U.S. 558, 577 (2003).

215. See *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 332 (2022) (Thomas, J., concurring).

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

217. See *Dobbs*, 597 U.S. at 215.

218. See generally *Obergefell v. Hodges*, 576 U.S. 644 (2015); *Dobbs*, 597 U.S. at 332-33 (Thomas, J., concurring).

219. Rebecca Farmer, *Map Report: The National Patchwork of Marriage Laws Underneath Obergefell*, MOVEMENT ADVANCEMENT PROJECT, <https://www.lgbtmap.org/news/Marriage-Report-March-2022>.

220. See *id.*

C. *Alito's Gant and Janus Factors Applied to Obergefell*

In *Gant*, Justice Alito did not find the requisite “special justification” to justify departure from *stare decisis*.²²¹ The relevant factors he identified include: (i) whether the precedent has engendered reliance, (ii) whether there has been an important change in circumstances in the outside world, (iii) whether the precedent has proved to be unworkable, (iv) whether the precedent has been undermined by later decisions, and (v) whether the decision was badly reasoned.²²² This list is non-exhaustive; Alito simply listed the factors he found relevant and persuasive.²²³ Here, as discussed, it is unlikely reliance will be enough for the current Court to uphold *Obergefell* due to its decision that reliance on *Roe* was insufficient. In fact, there are arguments that *Obergefell* has proven to be unworkable in how it is undermined by *Dobbs* due to the entirety of the substantive due process jurisprudence being called into question.²²⁴

Finally, because Alito did not provide any information regarding the factors, the final one seems to encompass the personal proclivities of the justices. Therefore, because Justice Alito dissented from the *Obergefell* decision, it is likely that he, Justice Thomas, and Justice Coney Barret believe the decision was badly reasoned. Moreover, in *Gant*, Justice Alito included an additional factor of “whether there has been an important change in circumstances in the outside world.”²²⁵ Here, this factor can easily be manipulated by the current Court to counsel for overruling *Obergefell* because, to the current Court, outside circumstances have changed in so far as substantive due process is essentially moot and the composition of the Court is positioned in a way such that it will continue to attack substantive due process rights, especially for LGBTQ+ individuals. Thus, *Obergefell* could easily fail Alito’s *Gant* factors; and, in turn, *Obergefell* could be overruled by the current Supreme Court.

D. *Kavanaugh's Ramos Factors Applied to Obergefell*

In Kavanaugh’s *Ramos* and *Dobbs* concurrence, he clarified the Court cannot depart from precedent simply because it was wrongly

221. *Arizona v. Gant*, 556 U.S. 332, 358, 365 (2009) (Alito, J., dissenting).

222. *Id.* at 358.

223. *Id.*

224. See Cirrus Jahangiri, *What the Supreme Court's Dobbs Decision Means for LGBTQ+ Rights*, LEGAL AID AT WORK (Aug. 9, 2022), <https://legalaidatwork.org/what-the-supreme-courts-dobbs-decision-means-for-lgbtq-rights/>.

225. See *Gant*, 556 U.S. at 358 (Alito, J., dissenting) (citing *Randall v. Sorrell*, 548 U.S. 230, 244 (2006)).

decided;²²⁶ instead, there are “three broad considerations” the Court can look to in its search for a “special justification.”²²⁷ First, the precedent at issue must be “grievously or egregiously wrong.”²²⁸ Second, the precedent must have caused “significant negative jurisprudential or real-world consequences.”²²⁹ Third, departing from precedent must not lead to an undue disruption of reliance interests.²³⁰ In short, the Court must first utilize a threshold test on the wrongness of the decision using the first two factors; then the Court must essentially engage in a totality of the circumstances analysis to consider both past and future impact.²³¹

Here, based on how the current Court considers *Roe* to be egregiously wrong, it is not hard to see an argument or a decision reflecting the same belief regarding *Obergefell*. Depending on who is analyzing the issue, one could argue *Obergefell* has caused significant negative jurisprudential and real-world consequences based on how it promulgates substantive due process as a protective doctrine of rights and based on how many argue it interferes with freedom of religion, which is seemingly paramount to the current Court.²³² Finally, and as discussed, reliance interests are unlikely to prevail in any *stare decisis* analysis due to the fact that *Roe* was insufficient. Therefore, *Obergefell* can easily fail Kavanaugh’s novel *stare decisis*.

E. Alito’s Dobbs Factors Applied to *Obergefell*

Lastly, according to Alito’s most recent statement on *stare decisis*, assuming the *Casey* factors are not at play, there is a two-prong analysis: (1) “whether the right is deeply rooted in our [country’s] history and tradition,” and (2) “whether it is essential to our Nation’s scheme of

226. See *Ramos v. Louisiana*, 590 U.S. 83, 120 (Kavanaugh, J., concurring); *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 341-45 (2022) (Kavanaugh, J., concurring).

227. See *Ramos*, 590 U.S. at 121-23 (Kavanaugh, J., concurring).

228. *Id.* at 121-22 (Kavanaugh, J., concurring). Kavanaugh explained that “the quality of the precedent’s reasoning, consistency and coherence with other decisions, changed law, changed facts, and workability, among other factors,” all may contribute to whether an opinion is “grievously or egregiously wrong.” *Id.* He further noted that a precedent “may be egregiously wrong when decided,” later “unmasked” as wrong, “or both.” *Id.* at 122.

229. *Id.* (Kavanaugh, J., concurring).

230. *Id.* (Kavanaugh, J., concurring) (asking questions—such as whether the precedent created issues of consistency and coherence or harmed the citizenry—to ferret out the harms, which must then be weighed against the “reliance interests” that overruling precedent might “unduly upset”).

231. See *supra* notes 211-214 and accompanying text.

232. See Cirrus Jahangiri, *What the Supreme Court’s Dobbs Decision Means for LGBTQ+ Rights*, LEGAL AID AT WORK (Aug. 9, 2022), <https://legalaidatwork.org/what-the-supreme-courts-dobbs-decision-means-for-lgbtq-rights/>.

ordered liberty.”²³³ Here, the right to marriage is definitively rooted in our country’s history and tradition; however, only heterosexual marriage is rooted in history and tradition.²³⁴ Moreover, the opinion of whether same-sex marriage is essential to our Nation’s scheme of ordered liberty is up to the individual Justices, some of whom do not seem to favor adherence to *Obergefell*.²³⁵ Thus, under Alito’s test utilized in *Dobbs*, *Obergefell* is shaky.

VI. CONCLUSION

While the changes that are occurring due to *Dobbs* are drastic, its effect on future legal decisions will be catastrophic. Therefore, the Court must recommit itself to *stare decisis* in order to protect, not only the legitimacy of the Court itself, but to protect the individuals across this country who depend on the Court to fight for their fundamental rights.

As this Comment demonstrates, Justice Alito’s inconsistent and contradictory jurisprudence regarding the judicial doctrine of *stare decisis* is accelerating the Supreme Court’s direction toward a new precedent—one allowing Justices to overrule settled decisions based on their substantive disagreement rather than any “special justifications” required by law; one paving the way for the elimination of LGBTQ+ rights in a post-*Dobbs* world. While the reverberations of *Dobbs* will haunt our jurisprudence for centuries to come, one can only hope a world without *Lawrence* and *Obergefell* will never come to fruition. As we have seen, *Dobbs* fundamentally altered the doctrine of *stare decisis* by entrenching the practice of solidifying precedent as personal and advancing the belief that established precedent will never sanction reliance sufficient to please the current Court. Alito’s crusade against secular America is far from over. Alito’s crusade against LGBTQ+ people is far from over. Now, Alito can weaponize *Dobbs* in the race of his life—the race to overrule precedent.

233. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 237 (2022) (quoting *Timbs v. Indiana*, 586 U.S. 146, 150 (2019)) (internal quotation marks omitted).

234. *See Obergefell v. Hodges*, 576 U.S. 644, 671-72 (2015).

235. *See Dobbs*, 597 U.S. at 332 (Thomas, J., concurring).