

THE ROLE OF RELIANCE IN STARE DECISIS DOCTRINE

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The U.S. Supreme Court's recent treatment of reliance interests in stare decisis doctrine is in flux. The Court has overruled long-standing precedent such as Roe v. Wade and Planned Parenthood of Southeastern Pennsylvania v. Casey with scant analysis as to how reliance interests factor into stare decisis doctrine, despite continuing to name reliance as a factor that should be considered. Arguments for whether and how reliance interests deserve protection are inherently challenging because it cannot be the case that every precedent should stand. Using Dobbs v. Jackson Women's Health Organization as a case study, this Note analyzes the Court's claim that only concrete reliance typically found in private law counts in a stare decisis analysis. And this Note assesses the Court's claims as to the absence of concrete and inconcrete reliance on Roe and Casey. In that context, this Note critically evaluates two pieces of recent scholarship that retheorize the protection of reliance interests—Professor Seana Shiffrin's disadvantaged group-inequity argument for concrete reliance and Professor Nina Varasava's autonomy-dignity grounds for intangible reliance.

Ultimately, this Note proposes a new framework for the analysis of reliance interests in stare decisis doctrine. When the Court considers whether to uphold or overrule precedent pertaining to individual rights, a proper reliance interest analysis should recognize that reliance can be both psychological—including intangible harms—and diffuse, that is, reliance can encompass persons beyond the bearers of the right. This Note grounds the diffuse, psychological reliance framework proposed in Professor Ronald Dworkin's theory of integrity, arguing that integrity places a procedural demand on the Court to conduct a good-faith inquiry that accounts for the ways people and society may have been transformed as a result of access to the right at stake. And to eliminate the risk of concealing moral claims underneath claims that reliance is not present, the Court must weigh the

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value of the planned conduct, explicitly stating the outcome of its assessment. Strengthening stare decisis in this way is critical as the Court continues to overrule long-standing precedent without meaningful consideration of reliance interests.

INTRODUCTION	199
I. STARE DECISIS: UNDERPINNINGS, VALUES, AND INTERESTS	
PROTECTED	202
A. <i>Stare Decisis: Integrity and Legitimacy</i>	202
B. <i>Stare Decisis and the Rule of Law</i>	205
II. RELIANCE ACCORDING TO <i>DOBBS</i>	208
A. <i>The Dobbs Approach to Concrete Reliance</i>	209
1. Whether Private Law Reliance Corresponds to Reliance in a Stare Decisis Analysis.....	211
2. Whether Concrete Reliance on <i>Roe</i> and <i>Casey</i> Was Present.....	213
B. <i>The Dobbs Approach to Intangible Reliance</i>	215
1. Whether Stare Decisis Doctrine According to <i>Casey</i> Was Anomalous	216
2. Whether Intangible Reliance on <i>Roe</i> and <i>Casey</i> Was Present.....	218
C. <i>Whether Reliance Is Measurable</i>	221
III. TOWARD A PROPER CONCEPTION OF RELIANCE.....	223
A. <i>Rule of Law and Integrity: A Potent Stare Decisis</i> <i>Doctrine</i>	223
B. <i>Reconceptualizing Reliance</i>	226
1. Individual Rights Are Integral and Reliance Can Be Psychological.....	226
2. Reliance Is Diffuse	228
3. Diffuse, Psychological Reliance Is Already Used.....	229
4. Diffuse, Psychological Reliance Is Not Overinclusive	230
C. <i>The Limiting Principle: Assess the Value of the Planned</i> <i>Conduct</i>	231
D. <i>Objections</i>	234
CONCLUSION.....	236

INTRODUCTION

The majority in *Dobbs v. Jackson Women's Health Organization*¹ abruptly overturned nearly fifty years of precedent that had been set in *Roe v. Wade*² in 1973 and reaffirmed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*³ in 1992. In a single opinion, the U.S. Supreme Court extinguished a woman's constitutional right to abortion, a result even the petitioners did not anticipate.⁴ In its stare decisis analysis, the *Dobbs* Court analyzed reliance interests—whether people and society had structured their lives and made plans on previously settled law—in a very different way than it had in *Casey*.⁵ *Dobbs* nearly eschewed reliance altogether, despite the fact that people had been able to count on abortion as a lawful option in the face of an unplanned or unhealthy pregnancy for half a century.⁶

Dobbs does not exist in a vacuum; rather, it can be placed along a string of overturned precedents that have occurred during the tenure of the Court's "newly-consolidated conservative majority."⁷ Woven into the opinions that accompany the overrulings is a hefty debate on the doctrine of stare decisis.⁸ In addition to *Dobbs*, which promulgated a list of stare decisis factors,⁹ at least two cases—*Janus v. American Federation of State, County, and*

1. 142 S. Ct. 2228 (2022).

2. 410 U.S. 113 (1973), *overruled by Dobbs*, 142 S. Ct. 2228.

3. 505 U.S. 833 (1992), *overruled by Dobbs*, 142 S. Ct. 2228.

4. *See* Petition for a Writ of Certiorari at 5, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392) ("To be clear, the questions presented in this petition do not require the Court to overturn *Roe* or *Casey*.").

5. *See infra* Part II.

6. William N. Eskridge Jr., *Reliance Interests in Statutory and Constitutional Interpretation*, 76 VAND. L. REV. 681, 684 (2023) ("[T]he Court held that these reliance interests were not sufficiently 'concrete' to perpetuate what the majority considered 'egregiously wrong' and harmful precedents." (quoting *Dobbs*, 142 S. Ct. at 2265, 2276–77)).

7. Russell A. Miller, *The Purpose and Practice of Precedent: What the Decade Long Debate over Stare Decisis Teaches Us About the New Roberts Court*, 51 U.C. L. CONST. Q. 231, 233 (2024). Professor Russell A. Miller states that the U.S. Supreme Court's conservative majority has "chip[ped] away at precedent with an increasing number of reversals," doubling the rate of reversals in the last five years compared to the preceding ten years. *Id.* at 233 nn.8–9. This trend continues apace. In *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), the Court overruled *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See Table of Supreme Court Decisions Overruled by Subsequent Decisions*, CONST. ANNOTATED, <https://constitution.congress.gov/resources/decisions-overruled/> (on file with the *Fordham Law Review*) (last visited May 14, 2026).

8. *See* Miller, *supra* note 7, at 231.

9. The *Dobbs* Court identified five stare decisis factors, including "the nature of [the precedential] error, the quality of [the precedent's] reasoning, the 'workability' of the rules . . . imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance." *Dobbs*, 142 S. Ct. at 2265. Compare Judge Joseph A. Greenaway, Jr., *Reflections on Stare Decisis*, 83 MD. L. REV. 1, 4 (2023) (identifying the same five factors), with Russell A. Miller, *Dobbs and the New Doctrine of Stare Decisis*, 33 WM. & MARY BILL RTS. J. 811, 832 (2025) (adding a sixth factor, namely a concern for whether overruling would affect the Court's integrity). Professor Miller later downgrades this point from a "factor" to a "concern" that was contained within the Court's rebuttal argument. *See id.* at 833.

*Municipal Employees*¹⁰ and *Ramos v. Louisiana*¹¹—likewise list stare decisis factors. But these lists are not identical,¹² and, in particular, clarity on how and when reliance interests should count is elusive, confounding even the most esteemed practitioners of law.¹³ Despite the *Dobbs* majority’s conclusion that reliance was not present, reliance interests remain a factor that the Court states explicitly should be considered.¹⁴ And yet, the Court simultaneously appears to dismiss reliance interests for different reasons.¹⁵ Even when the Court implicitly overrules long-standing precedent, such as it did with race-conscious admissions policies at universities in *Students for Fair Admissions v. President and Fellows of Harvard College*¹⁶ (*SFFA*), it still tackles stare decisis¹⁷ and wrestles with reliance¹⁸ in particular.

10. 138 S. Ct. 2448 (2018). *Janus* lists five stare decisis factors: the quality of the precedent’s reasoning, whether the rule established is workable, whether the rule established is consistent with related decisions, developments since the precedent was decided, and reliance on the decision. *Id.* at 2478–79. In its analysis of the developments factor, the Court described “developments” as both “factual and legal.” *Id.* at 2482.

11. 140 S. Ct. 1390 (2020). *Ramos* analyzes the same factors identified in *Janus* except for the workability of the established rule. *See id.* at 1405.

12. *See supra* notes 9–11; *see also* Greenaway, *supra* note 9, at 4 (explaining that “Justice Gorsuch applied a slightly different test” in *Ramos*, which did not include the workability of the rule).

13. *See* Greenaway, *supra* note 9, at 8 (“I must admit I do not know what to do with reliance.”).

14. *See supra* notes 9–11; *see also* Eskridge, *supra* note 6, at 684.

15. For a detailed discussion of *Dobbs*’s treatment of reliance, *see infra* Part II. In *Janus*, which held that state-imposed union fees infringed on union members’ right to free speech, the Court considered whether unions’ reliance on the prior precedent—*Abood v. Detroit Board of Education*, 431 U.S. 209 (1977)—counseled in favor of upholding that precedent. But the Court did not perform a reliance analysis as much as it simply listed reasons why any reliance should not count: *Abood* was unclear, the Court had previously put public sector unions on notice that it had “misgivings” about *Abood* and, besides, collective bargaining agreements were short-term and would come up for negotiation soon enough. *See Janus*, 138 S. Ct. at 2484–86. In *Ramos*, the Court overruled precedent that allowed nonunanimous jury verdicts. *Ramos*, 140 S. Ct. at 1410. There, the Court performed a partial analysis, but curiously, it invoked the *absence* of typical reliance arguments. *Id.* at 1406. Justice Gorsuch noted that neither Louisiana nor Oregon (the two states that had permitted nonunanimous jury verdicts) argued “anything like the prospective economic, regulatory, or social disruption litigants seeking to preserve precedent usually invoke.” *Id.* Instead, the Court stated that the right of all Americans to rely on Sixth Amendment protections was the reliance that counted. *Id.* at 1408; *see also infra* notes 190–91 and accompanying text.

16. 143 S. Ct. 2141 (2023).

17. For example, Chief Justice Roberts, in the majority opinion in *SFFA*, stated that the dissent “surely cannot claim the mantle of stare decisis,” while Justice Sotomayor, in her dissent, wrote that “[i]t is a disturbing feature of today’s decision that the Court does not even attempt to make the extraordinary showing required by stare decisis.” *Id.* at 2174, 2239.

18. Both Chief Justice Roberts in the majority opinion and Justice Kavanaugh in a concurrence referenced the time-limited nature of reliance on *Grutter v. Bollinger*, 539 U.S. 306 (2003), *abrogated by SFFA*, 143 S. Ct. 2141. *SFFA*, 143 S. Ct. at 2175 n.9 (“*Grutter* itself limited the reliance that could be placed upon it by insisting, over and over again, that race-based admissions programs be limited in time.”). And, according to Justice Kavanaugh, affirmative action was limited by *Grutter* to only one generation. *Id.* at 2225 (Kavanaugh, J., concurring). But Justice Sotomayor, referencing reliance interests, argued that eliminating race-conscious admissions policies would “upset[] settled expectations and throw[] admissions programs nationwide into turmoil.” *Id.* at 2239 (Sotomayor, J., dissenting).

There is something inherently challenging in arguing for a principled stand on reliance. Arguments for reliance must establish that reliance interests can be valid grounds for upholding precedent in certain circumstances while maintaining limiting principles that do not allow every precedent to stand. As Professor Jeremy Waldron puts it, “we know that argument about precedent is one of these unsettling modes of argument.”¹⁹ Perhaps this is why one scholar writes that reliance is “undertheorized” and calls for scholars to develop more robust theories.²⁰ Nevertheless, Justice Thomas suggested in his *Dobbs* concurrence that other long-established precedents should now be up for debate.²¹ And the current presidential administration appears intent on governmental upheaval.²² The Court may thus face numerous cases where it must rule on other long-standing precedents.²³ The consideration of reliance interests in a stare decisis context, while unsettling, is therefore especially appropriate.

Accordingly, this Note proposes a new framework for the analysis of reliance interests in stare decisis doctrine. It argues that, when the Court considers whether to uphold or overrule precedent pertaining to individual rights, a proper reliance interest analysis recognizes that reliance can be both psychological—including intangible harms—and diffuse, that is, reliance can encompass persons beyond the bearers of the right. In order to theorize reliance interests, it is first necessary to gain a deeper understanding of stare decisis doctrine. Part I grounds reliance in its wider context by investigating the interests stare decisis is said to protect and the values it upholds. This entails an exploration of Professor Scott Hershovitz’s scholarship on Professor Ronald Dworkin’s theory of integrity. Additionally, Part I evaluates scholarship that explains specific reliance theories as connected to stare decisis, which argue for and against reliance interests being protected.

Part II uses *Dobbs* as a case study. This part dissects the *Dobbs* Court’s approach to the analysis of reliance interests when faced with the decision to

19. Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 13 (2012).

20. Brannon P. Denning, *Privacy and Autonomy Post-Dobbs*, 93 MISS. L.J. 1029, 1045 (2024). Professor Brannon P. Denning asserts that now is the time to come up with new strategies to defend other substantive due process cases like *Roe* lest the Court overrule them. *Id.* at 1031.

21. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2301–02 (2022) (Thomas, J., concurring); see also Denning, *supra* note 20, at 1041 (arguing that, even though Justice Alito wrote that the *Dobbs* decision does not implicate other substantive due process cases, Justice Thomas’s assertion to the contrary is the “more honest assessment of *Dobbs*’ implications”).

22. See *Tracking Regulatory Changes in the Second Trump Administration*, BROOKINGS (Mar. 31, 2026), <https://www.brookings.edu/articles/tracking-regulatory-changes-in-the-second-trump-administration/> [https://perma.cc/T3JR-UMV8].

23. See Ann E. Marimow, *Supreme Court Denies Request to Revisit Same-Sex Marriage Decision*, N.Y. TIMES (Nov. 10, 2025), <https://www.nytimes.com/2025/11/10/us/politics/supreme-court-same-sex-marriage.html> (on file with the *Fordham Law Review*). The article notes that advocates vow to continue their work to overturn the decision in *Obergefell v. Hodges*, 576 U.S. 644 (2015), to legalize same-sex marriage because it was “egregiously wrong from the start.” Marimow, *supra*.

uphold or overrule *Roe* and *Casey*. And it devotes special attention to the consideration of reliance in private law contexts (property and contract, for example, which concern disputes between private parties) versus public law contexts (constitutional liberties, for example, which concern the relationship between the government and all citizens), concluding that reliance in private law is ill-suited to a stare decisis analysis. Part II further investigates whether concrete and intangible reliance on *Roe* and *Casey* were present. Part III argues that a proper theory of reliance should include interests beyond those traditionally considered “material” and that reliance is rightfully thought of as diffuse, encompassing more stakeholders than those who are directly able to access the right at stake. Part III grounds this framework in the Dworkinian conception of integrity presented in Part I and then applies the framework using several case examples. Finally, Part III offers a limiting principle and entertains objections to the arguments proposed.²⁴

I. STARE DECISIS: UNDERPINNINGS, VALUES, AND INTERESTS PROTECTED

Theorizing the role of reliance interests cannot be accomplished without an understanding of what stare decisis is supposed to do. Part I examines the doctrine of stare decisis, concluding that justifications for the doctrine fall into two strands. First, upholding precedent can legitimize the Court in the eyes of citizens.²⁵ Second, upholding precedent supports rule-of-law values, such as stability, predictability, and fairness so that citizens can count on the law.

Black’s Law Dictionary defines stare decisis as “the doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation.”²⁶ Why should a court do this? Part I.A explores an argument for the practice of stare decisis broadly, grounded in Professor Dworkin’s theory of integrity.

A. *Stare Decisis: Integrity and Legitimacy*

Stare decisis is an English common law concept that, like many other aspects of the common law, carried over to American law.²⁷ To promote justice and to prevent laws from changing with “every new judge’s

24. In discussing categories of reliance interests, this Note uses the terms “concrete” and “tangible” interchangeably. Concrete reliance interests are those often referred to in property and contract cases—what one scholar describes as “classic reliance interests.” Eskridge, *supra* note 6, at 683. However, as this Note demonstrates, concrete reliance can occur outside such traditional contexts. *See infra* Part II.A. Similarly, this Note uses the terms “inconcrete” and “intangible” interchangeably. Inconcrete reliance interests refer to “thwarted expectations at both the individual and societal level.” Nina Varsava, *Precedent, Reliance, and Dobbs*, 136 HARV. L. REV. 1845, 1873 (2023).

25. This Note uses the term “citizen(s)” interchangeably with the term “people” to refer to all individuals to whom the law applies.

26. *Stare Decisis*, BLACK’S LAW DICTIONARY (12th ed. 2024).

27. Mortimer N. S. Sellers, *Legal History and Legal Theory: The Doctrine of Precedent in the United States of America*, 54 AM. J. COMP. L. 67, 67–70 (2006).

opinion,”²⁸ courts should abide by precedent. The Supreme Court has stated as much.²⁹ When the public perceives the Court to be acting in accordance with principles like stare decisis, the Court and its authority are seen as legitimate.³⁰ But when the Court overrules precedent, particularly in an unprincipled fashion, it opens itself to questions about how it reached its decision.³¹ This can “undermine[] the Court’s legitimacy.”³²

Legitimacy is a key piece of Professor Dworkin’s theory of integrity.³³ Any “conception of law,” argues Professor Dworkin, “must explain why law is legitimate authority for coercion.”³⁴ Government cannot expect citizens to accept the obligations the law places on them unless it is seen as legitimate.³⁵ Accordingly, when government accepts “integrity as a[n] . . . ideal, [it] has a better case for legitimacy”³⁶ because integrity demands coherence in the law.³⁷ Professor Hershovitz builds on these assertions, arguing that they provide a strong justification for the doctrine of stare decisis.³⁸

Relying on Professor Dworkin’s recognition that integrity is critical to understanding legal institutions, Professor Hershovitz states that the central demand placed on courts by stare decisis is “that courts engage with the past and act with integrity.”³⁹ For Professor Dworkin, integrity is not necessarily about being “right,” rather integrity is a “distinct political virtue” that requires the law to be coherent.⁴⁰ Sometimes, integrity will support a just and fair outcome, and sometimes integrity will conflict with justice and fairness.⁴¹ What is important is that one should abide by “genuine convictions about what the right way to act is”⁴² so that one’s actions can be looked at on the whole and a “coherent and defensible moral view”

28. *Id.* at 71 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *69).

29. *See Vasquez v. Hillery*, 474 U.S. 254, 265 (1986) (“[Stare decisis] permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals.”).

30. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2350 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) (“[T]he legitimacy of the Court [is] earned over time.” (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 868 (1992), *overruled by Dobbs*, 142 S. Ct. 2228)).

31. *See infra* notes 147, 235, 237–40 and accompanying text.

32. *Dobbs*, 142 S. Ct. at 2350. The *Dobbs* dissenters feared that overruling long-standing precedent based on little more than a change in the Court’s composition “would invite the view that ‘this institution is little different from the two political branches of the Government.’” *Id.*

33. RONALD DWORKIN, *LAW’S EMPIRE* 191–92 (1986).

34. *Id.* at 192.

35. *Id.* at 191.

36. *Id.* at 191–92.

37. *Id.* at 217–18.

38. Scott Hershovitz, *Integrity and Stare Decisis*, in *EXPLORING LAW’S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN* 103, 104 (Scott Hershovitz ed., 2006).

39. *Id.* at 113.

40. DWORKIN, *supra* note 33, at 176.

41. *Id.* at 176–78.

42. Hershovitz, *supra* note 38, at 113.

emerges.⁴³ To maintain such coherence, one has no choice but to engage with the past because that is relevant to what one should do in the present.⁴⁴ Just like an individual, a court can display integrity.⁴⁵ Professor Hershovitz explains:

A court displays integrity when its decisions reflect a commitment to a coherent and defensible view of the rights and duties people have under the law. Such a commitment can only be displayed by a pattern of decisions across time. If a court's rulings change capriciously, if it fails to pay heed to its own pronouncements, we will doubt that it has any genuine commitment to the views it expresses. On the other hand, if the court takes seriously what it has said in the past and it displays consistency and coherence in action, we will believe that the court acts on the basis of genuine convictions about the content of the law.⁴⁶

On Professor Hershovitz's view then, when faced with a case that demands a review of precedent, a Court can uphold it, distinguish it, or overrule it.⁴⁷ The key point is that the Court must be genuine as it works toward consistency and coherence. Integrity does not demand repudiation or rejection, rather, integrity demands a principled engagement with the past.⁴⁸

Professor Andrei Marmor, on the other hand, offers an alternate view of integrity and whether what it demands of courts is realistic. Professor Marmor argues that Professor Dworkin's view of integrity does not help us because it mandates that courts speak in one voice, with no room for deviation.⁴⁹ Further, Professor Marmor asserts that such a mandate is impossible and incompatible with pluralism.⁵⁰ Disagreement is widespread, and the idea that a court could speak with one voice that reaches people whose views are deeply at odds is "laughable."⁵¹

It is true that Professor Dworkin confines his views on integrity to the world as it is—"messy, fragmented, and often deeply divided," as Professor Marmor says.⁵² But the suggestion that integrity requires speaking with one voice that is amenable to citizens with opposing views seems an extreme interpretation of what Professor Dworkin advocates.⁵³ If the law has to be justifiable to everyone, this is a false hope. Moreover, integrity is not necessarily about reaching the "right" result because people disagree about

43. *Id.* at 114; accord DWORKIN, *supra* note 33, at 176 (noting that the adjudicative principle of integrity "instructs that the law be seen as [morally] coherent").

44. Hershovitz, *supra* note 38, at 114.

45. *Id.* at 115.

46. *Id.*

47. *Id.* at 116.

48. *Id.*

49. Andrei Marmor, *Integrity in Law's Empire* 14 (Corn. L. Sch., Research Paper No. 19-28, 2019).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* Professor Marmor discusses how the court speaking in one voice could not "possibly incorporate the values that are fundamentally important to" members of different religions or to those who disagree on economic and political matters. *Id.*

what is right. Integrity is about a principled engagement with the past that results in a coherent and defensible view of the law.⁵⁴ Professor Hershovitz captures the spirit of what Professor Dworkin was saying more accurately, namely that courts should act with integrity by looking at the whole body of law.⁵⁵ When a court acts with integrity, it establishes its legitimacy.⁵⁶

Legitimacy is but one of several values that scholars routinely connect with the practice of stare decisis.⁵⁷ Part I.B continues this discussion by focusing on rule-of-law values.

B. Stare Decisis and the Rule of Law

Scholarship on precedent is replete with references to the connection between rule-of-law values and stare decisis.⁵⁸ Professor Nina Varsava asserts that when the Court overruled *Roe* and *Casey*, it “undermin[ed] basic rule of law values that stare decisis is meant to protect.”⁵⁹ Just what are these rule-of-law values? Upholding precedent promotes the stability, certainty, and predictability “integral to the rule of law.”⁶⁰ Pointedly, Professors John C.P. Goldberg and Benjamin C. Zipursky state that stare decisis plays an “ineliminable role in ensuring stability” and “lawfulness.”⁶¹ Citizens can order their affairs because they can rely on settled law.⁶²

Professor William N. Eskridge Jr. directly connects rule-of-law values to the consideration of private and societal reliance interests.⁶³ Private reliance “enables individuals and institutions to rely on a stable, predictable legal regime when they make their plans and structure their activities.”⁶⁴ Societal reliance refers to the ability of social groups to act in accordance with settled law, which “reinforces the rule of law value of long-standing precedents.”⁶⁵

54. See *supra* note 46 and accompanying text.

55. DWORKIN, *supra* note 33, at 167 (explaining that integrity in adjudication “explains why judges must conceive the body of law they administer as a whole rather than as a set of discrete decisions that they are free to make or amend one by one”).

56. *Id.* at 191–92.

57. See *infra* Part I.B.

58. See, e.g., Waldron, *supra* note 19, at 4 (“[J]ustifications . . . for stare decisis do resonate with rule-of-law ideas.”). Likewise, Professor Miller notes that, even as the Court’s conservative majority has chipped away at the power of precedent, it still “concede[s] the value of the doctrine of *stare decisis* for the rule of law.” Miller, *supra* note 7, at 279.

59. Varsava, *supra* note 24, at 1846.

60. *Id.* at 1849.

61. John C.P. Goldberg & Benjamin C. Zipursky, *The Roberts Court Paradox*, 94 *FORDHAM L. REV.* 1, 47 (2025); accord Sebastian Lewis, *On the Nature of Stare Decisis*, in *PHILOSOPHICAL FOUNDATIONS OF PRECEDENT* 35, 40 (Timothy Endicott, Hafsteinn Dan Kristjánsson & Sebastian Lewis eds., 2023) (arguing that “*stare decisis* is a distinctive means for advancing” stability and reliability).

62. Waldron, *supra* note 19, at 9 (explaining that when people face a novel legal situation, stare decisis allows them to see how courts have handled similar situations in the past and act accordingly); see also Varsava, *supra* note 24, at 1849 (stating that when the law is stable and predictable, it “encourag[es] and enabl[es] us to form reasonable and reliable expectations about our future legal rights and duties”).

63. Eskridge, *supra* note 6, at 687.

64. *Id.*

65. *Id.* at 688.

Being able to count on settled law likewise fosters equal application of the law, which Professor Sebastian Lewis states “should be understood as a moral constraint on the exercise of lawful discretion by judges.”⁶⁶ Fairness demands that courts “treat . . . litigants in like cases alike.”⁶⁷ Thus, when the Supreme Court rules, it does not matter in which state one resides or whether that ruling is a decade old.⁶⁸ The law applies to all citizens.

But arguments for fairness cut both ways when accounting for reliance interests. It is true that the consideration of how citizens have relied on the law can prevent imprudent change, but as numerous scholars point out, such interests can likewise prevent change when it is most needed.⁶⁹ *Plessy v. Ferguson*⁷⁰ and *Korematsu v. United States*⁷¹ illustrate that sometimes stare decisis can “entrench unfair results”⁷² and prevent social progress and needed change. This works against fairness as a reason to uphold precedent. At a minimum, fairness may not be enough on its own to justify the doctrine of stare decisis.

Professor Eskridge points out that, because the Court has repeatedly accepted societal (or “cultural”) reliance,⁷³ when the Court subsequently dismisses such reliance as it did in *Dobbs*, it is consequential to rule-of-law values and to the public’s confidence in the Court.⁷⁴ Professor Randy J. Kozel, on the other hand, argues that the Supreme Court’s approach to reliance interests consistently reflects a “pronounced ambivalence.”⁷⁵ Reliance interests are too uncertain to be persuasive as a basis for upholding precedent.⁷⁶ Professor Kozel maintains that the Court’s attitude toward reliance is so flexible that rational actors should take this into account when

66. Lewis, *supra* note 61, at 40.

67. Hershovitz, *supra* note 38, at 112.

68. Miller, *supra* note 9, at 840 (noting that when the public alters its affairs to conform to the law, a sudden change in the law is “unjust”).

69. See Eskridge, *supra* note 6, at 769 (“[R]eliance interests do often stand in the way of needed reform.”); see also Seana Valentine Shiffrin, *Reliance Arguments, Democratic Law, and Inequity*, 14 JURIS. 317, 319 (2023) (noting that if all legal decisions were upheld, this would “impede the potential for democratic change and moral progress”); Waldron, *supra* note 19, at 8 (stating that “stare decisis can be the servant as well as the opponent of the rule of law”).

70. 163 U.S. 537 (1896) (holding that segregation was legal), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

71. 323 U.S. 214 (1944) (upholding President Franklin D. Roosevelt’s Executive Order authorizing the exclusion of Japanese American citizens), *abrogated by* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

72. Hershovitz, *supra* note 38, at 112.

73. Eskridge, *supra* note 6, at 687–88.

74. *Id.* at 691 (asserting that the public’s confidence is “exploded” when the Court casually dismisses “massive reliance interests”). The Court has likewise casually dismissed reliance interests in other recent cases. See, e.g., Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2272 (2024) (“Given our constant tinkering with and eventual turn away from *Chevron*, and its inconsistent application by the lower courts, it instead is hard to see how anyone—Congress included—could reasonably expect a court to rely on *Chevron* in any particular case.”). But see *id.* at 2307 (Kagan, J., dissenting) (“Lower courts have applied the *Chevron* framework on thousands upon thousands of occasions.”).

75. Randy J. Kozel, *Precedent and Reliance*, 62 EMORY L.J. 1459, 1471 (2013).

76. *Id.*

they consider whether to rely on precedent.⁷⁷ Rather than organize their affairs in response to precedent, stakeholders “should be expected to tailor their behaviors based on the possibility of adjudicative change.”⁷⁸

Dismissing arguments for fairness and certainty, Professor Kozel likens the predicament of a citizen who struggles to estimate the likelihood of a particular precedent being upheld or overruled to the risk a person takes when they own a home and must decide whether to purchase insurance to mitigate a possible severe weather event.⁷⁹ How, according to Professor Kozel, should one deal with the fact that insurance is not available to protect against the Court overruling itself? Stakeholders should “restrict the extent to which they make affirmative and calculated choices to exploit favorable judicial decisions.”⁸⁰ Moreover, Professor Kozel puts the onus on stakeholders to take account of the Court’s composition and its members’ backgrounds and ideologies when deciding to rely or not,⁸¹ noting that these factors can be at least partially determinative when it comes to adjudicative change.⁸²

On Professor Kozel’s view, people should not rely on precedent, or if they do, reliance should only happen after a detailed and careful risk assessment that includes learning each justice’s jurisprudential, and even political, leanings.⁸³ Reliance interests do not matter because it is the individual’s duty to predict the likelihood of upholding or overruling when they decide whether to rely on precedent. The Court is not responsible for how its decisions to uphold or overrule precedent impact the citizens to whom the law applies.⁸⁴ While this may be plausible with respect to statutory law—tax law, for example, where it would be unwise to assume tax rates are stable and will not change—this seems unworkable for individual rights cases in constitutional law. There are compelling reasons for citizens to place greater reliance on judicial interpretation of the Constitution.⁸⁵

Justifications for stare decisis fall into two main categories. First, scholars recognize that the practice of stare decisis communicates something about the Court.⁸⁶ If the Court acts with integrity and ensures the law is coherent, it gains legitimacy.⁸⁷ Second, upholding precedent supports rule-of-law values.⁸⁸ Practically speaking, this means one can count on settled law.⁸⁹

77. *Id.* at 1472.

78. *Id.* at 1473.

79. *Id.* at 1476.

80. *Id.* at 1477.

81. *Id.* at 1482.

82. *Id.* at 1482–83.

83. *Id.* (arguing that a rational stakeholder will “view the path of precedent as bound up with judicial identity”).

84. *Id.* Professor Kozel argues that, as long as the Court is able to overrule precedent, the makeup of the Court will “remain a driver” of judicial change, thus downgrading reliance as a factor in whether the Court decides to uphold or overrule precedent. *See id.*

85. *See* U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.”).

86. *See supra* Part I.A.

87. *See supra* note 30 and accompanying text.

88. *See supra* note 61 and accompanying text.

89. *See supra* note 62.

Because citizens can count on the law, they should be able to make predictions that inform their actions and then execute those actions with the knowledge that such actions are warranted.⁹⁰ In other words, individuals and society can *rely* on legal decisions.⁹¹ But this brings to mind the conundrum stated at the outset: if stare decisis is absolute, change and progress may be impeded.⁹² Thus, it does not follow that, even if reliance interests are present, stare decisis must be absolute.⁹³ In some way, stare decisis has to be limited to account for times the Court has made a mistake. Recall that, according to Professor Hershovitz, there are times when it may be just as important for the Court to overrule precedent in order to be seen as adjudicating with integrity.⁹⁴ A theory of reliance must account for the Court's genuine conviction about having made a mistake, and in those circumstances, reliance interests must give way to correction.

II. RELIANCE ACCORDING TO *DOBBS*

The issue of how reliance is characterized in a stare decisis analysis recently played out in the context of abortion rights when the *Dobbs* Court was faced with the decision to uphold or overrule *Roe* and *Casey*.⁹⁵ The *Dobbs* majority's analysis of reliance claimed to be based on *Casey*'s reliance analysis in three respects: concrete reliance, inconcrete reliance, and the measurability of reliance.⁹⁶ For its concrete reliance argument, *Dobbs* also relied on *Payne v. Tennessee*.⁹⁷ Part II examines the majority opinion's tangible and intangible reliance analyses in *Dobbs*. This part investigates the underlying authorities—*Casey* and *Payne*—in order to compare how they treated reliance interests with how *Dobbs* presented the reliance analyses in those cases. Finally, Part II probes the claims made by the *Dobbs* majority as to the measurability of tangible and intangible reliance.

Part II.A addresses *Dobbs*'s first major premise underlying its reliance interest analysis. Relying on *Casey* and *Payne*, the *Dobbs* majority stated that the only proper reliance interests are concrete ones, like the kind found in property and contract cases.⁹⁸ Part II.A first addresses the issue of concrete reliance vis-à-vis these three cases. Part II.A.1 proceeds by investigating whether concrete reliance in a private law context is equivalent to concrete reliance in a public law context. Finally, Part II.A.2 considers whether concrete reliance on *Roe* and *Casey* was present in the decades preceding *Dobbs*.

90. See *supra* note 62 and accompanying text.

91. See *supra* notes 63–65 and accompanying text.

92. See *supra* note 69 and accompanying text.

93. See Waldron, *supra* note 19, at 13 (“[T]he principle of stare decisis seems to introduce its own distinctive uncertainty into the law, particularly insofar as it does not operate as an absolute.”).

94. See *supra* note 47 and accompanying text.

95. See *supra* notes 1–3 and accompanying text.

96. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2276–77 (2022).

97. 501 U.S. 808 (1991); *Dobbs*, 142 S. Ct. at 2276.

98. See *infra* notes 99–102 and accompanying text.

A. The Dobbs Approach to Concrete Reliance

First, *Dobbs* states that *Casey*'s "controlling opinion conceded that those traditional reliance interests [where advance planning is a necessity] were not implicated because getting an abortion is generally" not a planned activity.⁹⁹ Moreover, the Court "agree[d] with the *Casey* plurality that conventional, concrete reliance interests are not present here."¹⁰⁰ The Court went on to note that its cases demonstrated that reliance interests worthy of protection are "very concrete."¹⁰¹ Quoting *Payne*, it defined concrete reliance interests as those that "develop in 'cases involving property and contract rights.'"¹⁰²

Contrary to the majority's assertion in *Dobbs*, *Casey* did not dismiss the possibility of concrete reliance. Acknowledging traditional reliance interests, *Casey* stated, "it is no cause for surprise that *some* would find no reliance worthy of consideration in support of *Roe*."¹⁰³ But *Casey* refused "to eliminate the issue of reliance that easily" because "one would need to limit cognizable reliance to specific instances of sexual activity."¹⁰⁴

When the *Dobbs* Court claimed there had been no concrete reliance on fifty years of precedent set by *Roe* and *Casey*, it did so without any robust legal analysis.¹⁰⁵ It is possible that the Court "obfuscated" on this point.¹⁰⁶ Or, *Dobbs* may have rested its analysis on *Casey*, but not on the plurality opinion, rather on Chief Justice William H. Rehnquist's partial dissent.¹⁰⁷ There, the Chief Justice explained that reliance was "truly at issue" when legal decisions "have formed the basis for *private* decisions."¹⁰⁸ But if *Roe* were overturned, "reliance interests would not be diminished."¹⁰⁹ The implication—in how the *Casey* dissent and the *Dobbs* majority treated reliance—is that reliance is not a "legitimate concern."¹¹⁰ The inconsistent references to *Casey* by the *Dobbs* majority opinion raise confusion where clarity is needed instead.

Similarly important to the *Dobbs-Casey* discrepancy is a distinction between how the *Payne* Court approached reliance and how the *Dobbs* Court characterized *Payne*. In *Payne*, the Court overruled two previous cases that held "the Eighth Amendment bar[red] the admission of victim impact evidence during the penalty phase of a capital trial"—what the Court there

99. *Dobbs*, 142 S. Ct. at 2276.

100. *Id.*

101. *Id.*

102. *Id.* (quoting *Payne*, 501 U.S. at 828).

103. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992) (emphasis added), overruled by *Dobbs*, 142 S. Ct. 2228.

104. *Id.* *Casey* immediately proceeded to a discussion of an intangible and societal form of reliance. See *id.* at 856–57; see also *infra* Part II.B.

105. See *supra* notes 99–102 and accompanying text.

106. Varsava, *supra* note 24, at 1867.

107. *Id.* at 1865.

108. *Casey*, 505 U.S. at 956 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (emphasis added).

109. *Id.*

110. Varsava, *supra* note 24, at 1865.

labeled a “procedural and evidentiary rule[.]”¹¹¹ The *Payne* Court stated that “[c]onsiderations in favor of *stare decisis* are at their *acme* in cases involving property and contract rights, where reliance interests are involved,” but “the opposite is true in cases such as the present one involving procedural and evidentiary rules.”¹¹² The *Payne* Court concluded that neither reliance interests nor *stare decisis* prevented overruling precedent.¹¹³

By contrast, *Dobbs* pertained to neither a property or contract right nor to a procedural or evidentiary rule; rather, the issue at stake was a constitutional liberty.¹¹⁴ Moreover, when *Payne* stated that *stare decisis* considerations were at their height in property and contract cases due to reliance interests, this is not the same thing as stating that it is *only* in such cases that reliance counts.¹¹⁵ The fact that *stare decisis* considerations are at their height in certain contexts affirmatively implies that they exist *outside* those contexts.

Scholars disagree on whether the *Dobbs* Court created a concreteness requirement. Professor Michael Gentithes posits that the Court’s *stare decisis* reliance analysis now includes a “novel concreteness requirement.”¹¹⁶ Professor Varsava suggests otherwise, stating that the Court “did not go so far as to claim that only [property and contract] cases implicate cognizable reliance.”¹¹⁷

It is even more challenging to say with certainty why the *Dobbs* Court referenced reliance in *Payne*. At best, by referencing property and contract cases in the context of a procedural case, we are left wondering how and when reliance should count in the context of a constitutional liberty case. Two conclusions are apparent. First, the Court’s mischaracterization of *Casey*’s reliance analysis¹¹⁸ and its obfuscation of reliance in *Payne*¹¹⁹ resulted in a faulty reliance analysis. Second, the uncertainty surrounding concreteness demands consideration of whether property and contract reliance is well suited to a *stare decisis* reliance analysis, that is, whether an

111. *Payne v. Tennessee*, 501 U.S. 808, 811, 828 (1991).

112. *Id.* at 828 (emphasis added).

113. *See id.* at 827–30.

114. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2244 (2022).

115. The *Dobbs* dissent noted this distinction. *See id.* at 2346 (Breyer, Sotomayor & Kagan, JJ., dissenting) (“While many of this Court’s cases addressing reliance have been in the ‘commercial context,’ none holds that interests must be analogous to commercial ones to warrant *stare decisis* protection.” (citation omitted) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992))).

116. Michael Gentithes, *Concrete Reliance on Stare Decisis in a Post-Dobbs World*, 14 CONLAWNOW 1, 6 (2022) (positing that, in penning the *Dobbs* majority opinion, Justice Alito “suggest[ed] that only ‘very concrete’ interests count”); *see also* Eskridge, *supra* note 6, at 734 (explaining that “*Dobbs* was flat wrong to say that only classic private (contract and property) reliance” forced the Court to uphold precedent).

117. Varsava, *supra* note 24, at 1864. Professor Varsava explains that the Court seemed to accept that reliance can take “noneconomic forms.” *Id.* Nevertheless, Professor Varsava seems to waver on this point, noting that, because the Court credited reliance only for women pregnant when *Dobbs* was decided, this could mean the Court intended that only concrete interests, such as economic and physical ones, would count in a reliance analysis. *Id.* at 1864–65 n.85.

118. *See supra* notes 99–100, 103–04 and accompanying text.

119. *See supra* notes 112–15 and accompanying text.

analysis of a single party's reliance on a contract, for example, is comparable to an analysis of reliance on a legal decision that guarantees an individual right to all citizens.

1. Whether Private Law Reliance
Corresponds to Reliance in
a Stare Decisis Analysis

The *Dobbs* majority stated that proper reliance interests are concrete, such as those that relate to property and contract rights.¹²⁰ Part II.A.1 compares reliance in a private law context—contract, for instance—alongside reliance in a public law setting—here, a stare decisis analysis concerning a constitutional liberty. This section examines recent scholarship on the topic of concrete reliance on a personal liberty, concluding that the two types of analyses are not comparable to each other.

It is true that standard accounts of reliance interests most frequently occur in property or contract law.¹²¹ For example, a party, such as a franchisor, makes certain representations to another party related to the opening of a grocery store.¹²² Relying on the franchisor's representations, the franchisee sells a smaller grocery store and a bakery and moves.¹²³ If the franchisor subsequently reneges, the franchisee can claim they relied on the franchisor's representations.¹²⁴ This is considered concrete reliance in contract law.¹²⁵ There is an identifiable party who makes a claim.¹²⁶ That party took specific steps in reliance on promissory representations or on a contract.¹²⁷ Because they did so, they are now at a material loss if the deal does not come to pass.¹²⁸

Professor Seana Shiffrin asserts that reliance arguments are “more straightforwardly wielded when it comes to” cases like the franchisor example because such “interactions [are] regulated by the private law.”¹²⁹ But Professor Shiffrin maintains that reliance arguments “concerning legal decisions” are more complex.¹³⁰ Reliance does not “merely” concern two parties to a case; rather, it concerns “laws applicable to all” that may affect and alter public decision-making and other behaviors.¹³¹

120. See *supra* notes 101–02 and accompanying text.

121. See Eskridge, *supra* note 6, at 683.

122. See *Hoffman v. Red Owl Stores, Inc.*, 133 N.W.2d 267, 274 (Wis. 1965).

123. *Id.*

124. *Id.* at 274–75.

125. But see, e.g., Rachel Bayefsky, *Tangibility and Tainted Reliance in Dobbs*, 136 HARV. L. REV. F. 384, 385 (2023). “[T]he line between ‘concrete’ and ‘intangible’ is not nearly as clear as it was presented in *Dobbs*.” *Id.* Thus, “these categories cannot be straightforwardly employed as benchmarks for the type of reliance interests that should count in the judicial calculus, and the type of reliance interests that should not.” *Id.*

126. Shiffrin, *supra* note 69, at 318–19.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 319.

131. *Id.*

Moreover, the parties in a public law setting have a different relationship to each other than do two parties in private law.¹³² In a property case, for example, the parties “have no special relation to one another, whether in terms of power or responsibility.”¹³³ An argument of reliance by the aggrieved party changes the relationship so that the other party may be asked to take responsibility for the aggrieved party’s reliance.¹³⁴ By contrast, in a public law setting where the government is a party, the dynamic of power and responsibility is different, that is, the government starts out with an underlying responsibility to the public to function in the public interest.¹³⁵ A reliance argument here has to show something different than it does in private law, namely that “special deference”—beyond the government’s inherent mandate to consider the needs of all citizens—is owed to at least some members of the public.¹³⁶

The *Dobbs* Court does not account for the differences between reliance in public law and reliance in private law.¹³⁷ The Court does not acknowledge, for example, that reliance may be present but arise in different ways in each context.¹³⁸ The Court performs no analysis that makes a distinction between a single party’s reliance and the reliance of all citizens.¹³⁹ And the opinion does not account for the unique relationship between public law and the citizens to whom that law applies.¹⁴⁰

Thus, when the Court states in a single sentence¹⁴¹ that concrete reliance interests on *Roe* and *Casey* are not present, scholars characterize this analysis as “unsatisfyingly cursory and dismissive,”¹⁴² a “narrow conception of reliance,”¹⁴³ and as the Court having “trivialize[d] massive reliance interests.”¹⁴⁴ The *Dobbs* dissent attributed the majority’s unprecedented claim that concrete reliance only mattered in property and contract cases to a “radical claim to power.”¹⁴⁵ Because the Court declined to engage in such an analysis, scholars are left to surmise the Court’s motives for its limited discussion of concrete reliance. One scholar asserts that the Court’s limiting of reliance only to concrete property and contract reliance was designed to reduce the effect of the reliance factor in stare decisis analyses overall.¹⁴⁶

132. *Id.* at 329.

133. *Id.*

134. *Id.* at 330.

135. *Id.* at 329.

136. *Id.* at 330.

137. *See supra* notes 99–102 and accompanying text.

138. *Id.*

139. Shiffrin, *supra* note 69, at 323–26.

140. *Id.* at 328–30.

141. *See supra* note 100 and accompanying text.

142. Shiffrin, *supra* note 69, at 318.

143. Varsava, *supra* note 24, at 1863.

144. Eskridge, *supra* note 6, at 691.

145. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2346 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) (explaining that, in discounting “broad swaths” of reliance, the Court gave itself authority to overrule long-standing precedent with no regard for the “costs of its decisions for the individuals who live under the law”).

146. Gentithes, *supra* note 116, at 1, 6.

Other scholars contend that the Court was hiding its true motives, namely that it did not want to reveal that such a perfunctory analysis rested “on moral grounds.”¹⁴⁷ That is, the Court’s true objection was to abortion itself rather than to the presence or absence of reliance on the abortion right.¹⁴⁸ If this is true, then the Court can hardly be said to be presenting a coherent and defensible view of constitutional law as it pertains to abortion rights.¹⁴⁹

The reliance analysis from the franchisor-franchisee example may very well be a proper analysis in a private law dispute between two parties.¹⁵⁰ But to limit reliance in a stare decisis context solely to concrete interests, as the *Dobbs* Court did, seems inappropriate to meet the gravity of what it means for the constitutional right to abortion—a matter of public law on which many citizens relied—to be overruled half a century later. Given the *Dobbs* Court’s refusal to conduct a concrete reliance inquiry and its insistence that no concrete reliance existed, adducing whether concrete reliance on *Roe* and *Casey* was present is a task left to scholars.

2. Whether Concrete Reliance on *Roe* and *Casey* Was Present

Scholars vary in their analyses of whether concrete reliance interests on *Roe* and *Casey* existed. For example, Professor Gentithes argues that precedents like *Roe* and *Casey* are “unlikely to produce ‘concrete’ reliance interests” because “the rights at issue are inherently less economic in nature.”¹⁵¹ Professor Gentithes identifies the push toward concreteness in reliance as part of a larger trend¹⁵² that “prioritize[s] economic interests.”¹⁵³ This trend gives the Court license to change doctrine more freely and in a way that favors such interests, which Professor Gentithes asserts will ultimately weaken precedents pertaining to individual rights.¹⁵⁴

But Professor Varsava writes that when the majority in *Dobbs* dismissed concrete reliance, it essentially meant that six months after overruling, all reliance would cease because “no one could have gotten pregnant as a result

147. Varsava, *supra* note 24, at 1868; see Shiffrin, *supra* note 69, at 324 (suggesting that the “majority’s perceptible distaste toward abortion made it . . . unimaginable or intolerable” to think that women relied on the abortion right not just as a reaction to an unexpected pregnancy, but that women planned their behavior in reliance on the availability of abortion in the future); see also *infra* Part III.D.

148. See *infra* Part III.C (arguing that the Court should not be able to disguise such judgments by claiming reliance does not exist or that it cannot be measured).

149. See *supra* Part I.A.

150. But see Varsava, *supra* note 24, at 1889 n.213 (noting that, even in contract cases, parties can recover if they do not prove or claim reliance damages because the most common method of recovery is expectation, that is, when damages are measured “according to ‘the value of the promised performance’” (quoting L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 57 (1936))).

151. Gentithes, *supra* note 116, at 7.

152. Professor Gentithes explains that the Court has similarly imposed a more definitive view of concrete reliance in Article III standing cases. *Id.* at 9.

153. See *id.*

154. See *id.* at 7, 9–10.

of relying on a legal right to abortion.”¹⁵⁵ As Professor Varsava points out, at the same time the *Dobbs* Court dismissed concrete reliance, the Court also implicitly acknowledged it, stating that “reproductive planning could take *virtually* immediate account of any sudden restoration of state authority to ban abortions.”¹⁵⁶ In other words, there were certainly some people pregnant at the time of overruling who were now undeniably and “tangibly worse off than they would have been had” *Roe* and *Casey* never existed at all, thus indicating acknowledgement of at least some concrete reliance.¹⁵⁷ Beyond the Court’s implicit recognition, however, scholars identify a multitude of ways that people had tangibly relied on abortion precedent.

Professor Shiffrin, along with Professor Varsava, suggests that there is a myriad of ways that people have tangibly relied on the right to abortion, including in making career, education, and relationship choices;¹⁵⁸ choosing to immigrate to the United States; and deciding where to direct political efforts.¹⁵⁹ Accordingly, Professor Shiffrin proposes to ground a reliance argument in fairness.¹⁶⁰ She argues that when an already disadvantaged subset of the population—here, women—will be disproportionately burdened by the overruling of precedent, and when there is a risk that burden will “generate or reinforce a persistent inequity,”¹⁶¹ precedent should stand.¹⁶² A reliance argument in the abortion right context is akin to a reliance argument in a same-sex intimacy right context.¹⁶³ Both circumstances involve historically disadvantaged groups for whom overruling precedent will no doubt reinforce inequity.¹⁶⁴ Professor Shiffrin distinguishes cases where that same reliance argument does not work. For example, reliance is unworthy of the same protection in the context of gun rights or freedom of contract because those rights are not “dominantly directed at a discrete segment of the population that has been traditionally oppressed.”¹⁶⁵

One way to reconcile scholars’ observations is to conclude that specifying precise economic harm for people who have relied on public law that guarantees an individual right is more difficult than particularizing such harm for a party in a contract dispute.¹⁶⁶ But there are still concrete and tangible ways in which people have relied on a constitutional liberty like the right to

155. Varsava, *supra* note 24, at 1865.

156. *Id.* at 1866 (quoting *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2276 (2022)).

157. *Id.* at 1867.

158. Shiffrin, *supra* note 69, at 323–25.

159. Varsava, *supra* note 24, at 1868–71.

160. Shiffrin, *supra* note 69, at 326.

161. *Id.* at 330.

162. *Id.* at 336.

163. *Id.* at 332.

164. *Id.* at 333.

165. *Id.* at 332.

166. *See supra* Part II.A.1.

abortion. For five decades, the abortion right was settled law.¹⁶⁷ Citizens may have relied on the legality and availability of abortion in choosing where to direct their political efforts.¹⁶⁸ Women relied on *Roe* and *Casey* to make choices based on the availability of abortion in the event of an unplanned or unhealthy pregnancy.¹⁶⁹ These choices likely included type of career, who and how to date, sexual activity, contraception, when to start a family, family size, type of healthcare, and so on. But, as Professor Varsava states pointedly, “[t]he majority opinion does not even allude” to “ways in which people have tangibly relied on the right to abortion.”¹⁷⁰

*B. The Dobbs Approach
to Intangible Reliance*

Part II.B addresses the second major premise underlying *Dobbs*’s reliance interest analysis, which is that intangible reliance on *Roe* and *Casey* may have been present, but those interests do not count in a reliance analysis.¹⁷¹ For this premise, the opinion relied on *Casey*’s discussion of intangible reliance. Part II.B.1 examines the *Dobbs* Court’s statements characterizing *Casey*’s version of intangible reliance as an anomaly. Part II.B.2 considers whether intangible reliance on *Roe* and *Casey* was present prior to *Dobbs*.

After the Court concluded that concrete reliance on *Roe* and *Casey* was not present,¹⁷² it considered intangible reliance. The Court found this inappropriate in a stare decisis analysis for several reasons.¹⁷³ The Court reasoned that *Casey*’s stare decisis analysis was “an exceptional version of *stare decisis* that . . . this Court had never before applied and has never invoked since.”¹⁷⁴ Thus, *Dobbs* made a dual claim regarding *Casey*’s approach to intangible reliance: (i) the Court had not previously (to *Casey*) taken account of intangible reliance;¹⁷⁵ and (ii) that *Casey*, because it accounted for intangible reliance, remained an anomaly.¹⁷⁶

Casey’s clarification of this type of reliance primarily occurred in three statements. First, to limit reliance to specific instances of sexual activity, the Court averred, would be “to refuse to face the fact that for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their

167. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2350 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting).

168. Varsava, *supra* note 24, at 1870.

169. *See supra* notes 158–59 and accompanying text.

170. *Id.* at 1868.

171. *See infra* notes 173–76 and accompanying text.

172. *See supra* note 100 and accompanying text.

173. *Dobbs*, 142 S. Ct. at 2276–77.

174. *Id.* at 2266.

175. *Id.* at 2277 (describing the *Casey* plurality opinion’s use of intangible reliance as “novel”).

176. *Id.* at 2276 (“*Casey*’s notion of [intangible] reliance thus finds little support in our cases.”).

places in society, in reliance on the availability of abortion in the event that contraception should fail.”¹⁷⁷

Second, the *Casey* Court wrote that “[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”¹⁷⁸ Third, the Court stated, “[a]n entire generation has come of age free to assume *Roe*’s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions.”¹⁷⁹ But the *Casey* Court did not expand much further than these statements, a fact that scholars have suggested enabled the *Dobbs* Court’s easy dismissal of intangible reliance interests.¹⁸⁰ Furthermore, the *Casey* Court’s limited intangible reliance analysis makes the clear articulation of a workable standard all the more important.

1. Whether Stare Decisis Doctrine According to *Casey* Was Anomalous

Professor Varsava documents numerous instances that demonstrate the falsity of the *Dobbs* Court’s averments as to *Casey*’s anomalousness.¹⁸¹ Professor Varsava shows that the Court had, previous to *Casey*, taken account of intangible reliance¹⁸² and that *Casey* was not an anomaly because its framework was subsequently used in numerous cases.¹⁸³ For a pre-*Casey* example, in *Flood v. Kuhn*,¹⁸⁴ the Court appeared concerned with “upsetting societal expectations” if it overturned previous precedent exempting the sport of baseball from antitrust statutes.¹⁸⁵ In *Flood*, the Court noted how “millions of fans” followed baseball with “fervor and pride”¹⁸⁶ and that baseball had “a unique place in our American heritage.”¹⁸⁷

For a post-*Casey* example, Professor Varsava points to *Ramos*, which considered and overruled an earlier case—*Apodaca v. Oregon*¹⁸⁸—that permitted nonunanimous jury verdicts.¹⁸⁹ In the majority opinion, Justice

177. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992), *overruled by Dobbs*, 142 S. Ct. 2228.

178. *Id.*

179. *Id.* at 860.

180. *See infra* notes 204–07 and accompanying text.

181. *See Varsava, supra* note 24, at 1873–81.

182. *Id.* at 1873–76.

183. *Id.* at 1876–81. For example, Professor Varsava points to *Dickerson v. United States*, 530 U.S. 428 (2000), where the Court considered whether to uphold the practice of *Miranda* warnings, stating that such warnings had become “part of our national culture.” *Id.* at 1876 (quoting *Dickerson*, 530 U.S. at 443).

184. 407 U.S. 258 (1972).

185. Varsava, *supra* note 24, at 1875.

186. *Flood*, 407 U.S. at 266 (quoting *Flood v. Kuhn*, 309 F. Supp. 793, 797 (S.D.N.Y. 1970)).

187. *Id.* The *Flood* opinion quotes the trial court, opining extensively on the importance of baseball to the country. “Baseball’s status in the life of the nation is so pervasive that it would not strain credulity to say the Court can take judicial notice that baseball is everybody’s business.” *Id.* (quoting *Flood*, 309 F. Supp. at 797).

188. 406 U.S. 404 (1972).

189. Varsava, *supra* note 24, at 1877.

Gorsuch criticized the dissent for failing to consider “the most important” reliance interest, namely that of “the American people . . . in the preservation of our constitutionally promised liberties.”¹⁹⁰ As Professor Varsava points out, this language is “strongly reminiscent” of how the *Casey* Court framed intangible reliance.¹⁹¹

In these cases and others, Professor Varsava’s argument is that the Court has protected abstract, intangible reliance.¹⁹² *Casey*’s analysis of intangible reliance was at least partially abstract¹⁹³ and, in that fashion, the Court has embraced intangible reliance both before and after *Casey*. Likewise, sometimes the Court employs the language of intangible reliance in other contexts. For example, when the Court emphasizes history and tradition¹⁹⁴ as factors to consider in whether a contemporary law passes constitutional muster, it uses similar language. In its most literal iteration, the Court looks to history and tradition for a law or a right analogous to the law or right in question.¹⁹⁵ In *Dobbs*, for example, the Court found no historical protection of an abortion right and used this as justification for overruling *Roe* and *Casey*.¹⁹⁶

In *Obergefell v. Hodges*¹⁹⁷—the case holding that the Constitution protects same-sex marriage—the dissent invoked history and tradition to support the notion that marriage was a right belonging only to one man and one woman.¹⁹⁸ In this reasoning, Chief Justice Roberts used the language of intangible reliance. For example, he expressed alarm that states’ expectations—to define for themselves what marriage is—would be upset by

190. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1408 (2020); *see also supra* note 15. Likewise, in *Janus*, Justice Alito was concerned with protecting intangible reliance on the right of free speech—another constitutionally protected liberty. There, the Court found no reliance on *Abood*—the case that had previously made state-imposed union fees lawful—that justified upholding it. *Janus v. Am. Fed’n of State, Cnty. & Mun. Emps.*, 138 S. Ct. 2448, 2484–85 (2018). The Court prioritized union members’ reliance on the right of free speech over any reliance interests that unions could claim on their ability to collect fees. *Id.* (“[I]t would be unconscionable to permit free speech rights to be abridged in perpetuity in order to preserve contract provisions that will expire on their own in a few years’ time.”). One scholar thus concludes that both *Ramos* and *Janus* recognized the kind of intangible reliance that *Dobbs* claimed was novel. Gentithes, *supra* note 116, at 8.

191. Varsava, *supra* note 24, at 1877.

192. *Id.* at 1873–74.

193. *See supra* notes 177, 179 and accompanying text.

194. *See generally* Dov Fox & Mary Ziegler, *The Lost History of “History and Tradition,”* 98 S. CAL. L. REV. 1 (2025) (explaining the evolution of the Court’s appeal to history and tradition in determining the constitutionality of the law at stake).

195. *Id.* at 7 (explaining that the most “salient” feature of the history-and-tradition test is whether the right in question was part of “a pattern of practice” related either to the Bill of Rights or the Civil War Amendments).

196. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2246–48 (2022); *accord* Samantha Mitchell, Note, *First Amendment Speech Protections in a Post-Dobbs World: Providing Instruction on Instructional Speech*, 91 FORDHAM L. REV. 1521, 1526 (2023) (“The Court found that the right to abortion was not so rooted [in the nation’s history and tradition], and thus could not stand.”).

197. 576 U.S. 644 (2015).

198. *See id.* at 686–92 (Roberts, C.J., dissenting).

the legalization of same-sex marriage.¹⁹⁹ He was likewise concerned with “the transformation of a social institution that has formed the basis of human society for millennia.”²⁰⁰ In another case, *Town of Greece v. Galloway*,²⁰¹ the Court considered the practice of legislative prayer, noting that “legislative prayer has become part of our heritage.”²⁰² There, the Court used the same language that it used in *Flood*, even though in *Flood*, the inquiry was one of reliance.²⁰³ It is true that tradition may present a reason distinct from reliance for maintaining a certain law. Nevertheless, the Court’s use of history and tradition demonstrates that the Court is willing to reason based on abstract notions of what it means for citizens to live under previously settled law.

Part II.B explained that *Dobbs* treated *Casey*’s analysis of intangible reliance as if it were an anomaly. Part II.B.1 showed that the Court has, in other recent cases in which it analyzed reliance, protected intangible reliance. And in its references to history and tradition, the Court seems more than at ease deploying the language of intangible reliance. Accordingly, this puts the Court’s claim of *Casey*’s anomalousness in question. Moreover, given *Dobbs*’s refusal to conduct an intangible reliance inquiry and its insistence that *Casey*’s intangible reliance claims had no legal support, determining whether intangible reliance on *Roe* and *Casey* was present is a task left to scholars.

2. Whether Intangible Reliance on *Roe* and *Casey* Was Present

This section evaluates *Casey*’s intangible reliance claims, competing arguments as to whether intangible reliance on *Roe* and *Casey* was present, and whether such reliance should count in a stare decisis analysis. *Casey*’s invocation of intangible reliance interests could have been clearer. Professor Shiffrin explains that the *Dobbs* Court likely treated reliance interests in such a cursory fashion because of *Casey*’s “thin articulation”²⁰⁴ of the reliance

199. *Id.* at 686 (“The fundamental right to marry does not include a right to make a State change its definition of marriage.”).

200. *Id.* at 687.

201. 572 U.S. 565 (2014).

202. *Id.* at 587.

203. See *supra* notes 184–87 and accompanying text. This Note does not claim that each time the Court relies on history and tradition, it is the equivalent of an intangible reliance analysis. When the Court looks for an analogous historical law as it did in *Dobbs*, it seems to conduct an explicit inquiry into a historical legal framework that would provide a basis for the current law. See *supra* note 196. But sometimes in history and tradition analyses, the Court uses language that is strongly evocative of the language it uses in intangible reliance analyses. See *supra* notes 199–200, 202 and accompanying text.

204. Shiffrin, *supra* note 69, at 318. Professor Shiffrin states that, in *Casey*, the Court seemed to think it was obvious that reliance on the abortion right had occurred and so the Court “did little to elaborate on how an argument from reliance should operate in constitutional contexts, generally, or specifically, as applied to abortion.” *Id.*; accord Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 451–52 (2010) (footnote omitted) (stating that, even though *Casey* invoked reliance broadly, the Court did not take the “next step” of “delving into . . . [w]hat exactly those interests consisted of, how widely they were shared, [and] how severe the disruption would be” if *Roe* were overruled).

argument.²⁰⁵ Some women who had relied on the abortion right, whether they actually accessed it or not, probably knew exactly what Justice Sandra Day O'Connor meant when she wrote that people had "define[d] their views of themselves and their places in society"²⁰⁶ based on abortion being an option. But a more explicit discussion of exactly what it means to define oneself based on the availability of a constitutional right would have been appropriate.²⁰⁷

Professor Shiffrin makes a strong case for the presence of concrete reliance on *Roe* and *Casey*.²⁰⁸ As to intangible reliance, Professor Shiffrin acknowledges that such reliance exists, for example, that a right holder's "social mindset" can be transformed, because bearing the right changes their "conception[] of themselves and their role in society."²⁰⁹ But Professor Shiffrin does not explicitly state whether she believes people intangibly relied on *Roe* and *Casey*. She makes two main points on the possible presence of intangible reliance interests. First, when a legal decision affects a person's attitude or social mindset—an intangible form of reliance—this may relate back to how a person concretely relied on that legal decision.²¹⁰ Second, she suspects that the true source of "betrayal" people feel when a decision is overturned is what she calls the "unfair *political* bait and switch."²¹¹ She thus differentiates intangible reliance interests, suggesting that they support only "general arguments for adhering to precedent."²¹²

Professor Shiffrin's approach seems unnecessarily limiting. It reduces the consideration of reliance only to members of "discrete, identifiable"²¹³ groups who have been marginalized and who must show that preexisting inequality will be reinforced.²¹⁴ It considers only members of the group with specific and direct access to the right in question as those who may properly

205. See Shiffrin, *supra* note 69, at 318.

206. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

207. To some degree, this Note offers a framework for how *Casey*'s broad intangible and societal reliance claims can be explained.

208. See *supra* note 158 and accompanying text.

209. Shiffrin, *supra* note 69, at 337.

210. See *id.* at 338 ("[C]hanges in mindset arise first as downstream products of successful iterations of material or concrete reliance.").

211. *Id.* at 339. By this, Professor Shiffrin means that when a constitutional decision is rendered by the Court, parties perceive this as having settled the issue and are thus able to move on from it. *Id.* When that decision is subsequently overturned, the opportunity for the expenditure of political energy to effect change (for example, securing abortion access legislatively) is now lost. See *id.*

212. *Id.* at 338 ("I am less convinced that these forms of inconcrete reliance by themselves underwrite a persuasive, *independent* ground for a fairness-based specific reliance argument."). On balance, Professor Shiffrin seems to accept the notion of women's intangible reliance on *Roe* and *Casey*. *Id.* at 337–39. Ultimately, however, she does not factor intangible reliance into her reliance framework. *Id.*

213. *Id.* at 339.

214. See *supra* notes 161–62 and accompanying text.

invoke a reliance argument.²¹⁵ Furthermore, her argument is based on concrete reliance, and it fails to argue for any other forms of reliance.²¹⁶

Where Professor Shiffrin focuses on concrete reliance, Professor Varsava embraces the concept of intangible reliance—what she describes as “thwarted expectations at both the individual and societal level.”²¹⁷ By this, Professor Varsava means that people formed “beliefs, attitudes, intentions, hopes, and dreams around an imagined future with” the abortion right in it.²¹⁸ This is intangible reliance.²¹⁹ Courts have a responsibility to recognize such reliance because upsetting it undermines individual independence and autonomy and is an affront to one’s dignity.²²⁰ Moreover, Professor Varsava sees such forms of reliance as connected to effective self-government because self-government requires the ability to form reasonable beliefs about important aspects of our futures.²²¹ When a court abandons precedent and upends expectations, self-government is threatened, and a person’s autonomy and dignity are harmed.²²² For Professor Varsava, these “particularly grave” intangible harms are embodied in the Court’s decision to abandon *Roe* and *Casey*.²²³

Professor Varsava asserts that women intangibly relied on abortion. Women’s position in society was “informed by the right to abortion.”²²⁴ The right to abortion was directly traceable to gender equality.²²⁵ And the upsetting of reliance on the abortion right resulted in harm to “women’s future status.”²²⁶

This conception of reliance interests comes closer to explaining what Justice O’Connor probably meant when she penned the plurality opinion in *Casey*.²²⁷ Nevertheless, there is something left unsaid here. There are no illustrations of what this kind of reliance may look like in real life. Moreover, Professor Varsava neglects to say whether persons other than women may have beliefs, attitudes, hopes, and dreams at stake.²²⁸ In the abortion right

215. Professor Shiffrin does consider some third-party interests, such as those of men, but mostly from the perspective of men who would *not* want a partner to get an abortion because they want to become parents. Shiffrin, *supra* note 69, at 337. She correctly relegates those interests behind women, whose inequity will persist if the right is eliminated and whose interests form the basis of her argument. *Id.* Crucially, Professor Shiffrin does not examine the interests of others, besides the right holders, who may have relied on the right. *Id.* at 336–37.

216. See Shiffrin, *supra* note 69, at 323–25; see also *supra* notes 209–12 and accompanying text.

217. Varsava, *supra* note 24, at 1873.

218. *Id.* at 1885.

219. *Id.*

220. *Id.* at 1861.

221. *Id.* at 1887.

222. *Id.*

223. *Id.* at 1861.

224. *Id.* at 1884.

225. *Id.*

226. *Id.*

227. See *supra* notes 177–79 and accompanying text.

228. In her discussion of concrete reliance, Professor Varsava briefly references the reliance of healthcare professionals and “citizens,” contemplating at least some third-party

context, it is possible that others—closely intertwined and intimately connected with women—may also have relied on this right. Part III explores this possibility in greater depth.

C. *Whether Reliance Is Measurable*

Finally, the *Dobbs* Court raised the issue of measurability of reliance in two ways. First, it stated that the Court could always measure concrete reliance interests.²²⁹ Second, referring to the dissenting opinion in *Casey*, the Court stated that intangible reliance could not be measured in the way that traditional, concrete reliance could be measured.²³⁰ To assess intangible reliance, that is, the “effect of the abortion right on society and in particular on the lives of women”²³¹ was too difficult, especially for the Court.

It is true that the *Casey* plurality opinion acknowledged that reliance could not be “exactly measured.”²³² Importantly, however, the *Casey* Court pointed out that there was a “certain cost of overruling *Roe* for people who [had] ordered their thinking and living around” *Roe* and that cost could not be measured either.²³³

Professor Varsava disputes the *Dobbs* Court on this point too, explaining that the Court is not well positioned even to measure more tangible forms of reliance.²³⁴ And Professor Rachel Bayefsky notes that the *Dobbs* Court “cast itself as aspiring to neutrality”²³⁵ when it refused to settle the dispute that appeared in amici curiae briefs as to precisely how abortion rights affected women’s lives.²³⁶ But Professor Bayefsky argues that the Court’s discounting of intangible reliance interests, ostensibly because it was ill-equipped to assess such reliance, was far from neutral.²³⁷ To the contrary, she argues that the Court’s refusal to acknowledge or evaluate any intangible reliance had normative underpinnings, that is, that “the legal availability of

reliance. Varsava, *supra* note 24, at 1869–70. For an expanded discussion of who may properly invoke a reliance claim according to Professor Varsava, see *infra* note 279.

229. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2277 (2022) (“When a concrete reliance interest is asserted, courts are equipped to evaluate the claim.”).

230. *Id.* at 2276–77. Borrowing a phrase from Chief Justice Rehnquist in his partial dissent in *Casey*, *Dobbs* claimed the Court is “ill-equipped to assess ‘generalized assertions about the national psyche.’” *Id.* at 2276 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 957 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part)), *overruled by Dobbs*, 142 S. Ct. 2228).

231. *Id.* at 2277.

232. *Casey*, 505 U.S. at 856.

233. *Id.*

234. See Varsava, *supra* note 24, at 1871. Even when tangible, economic reliance is at stake, the Court must rely on the facts found at trial, but lower courts do not “gather or assess facts with the stare decisis analysis in mind.” *Id.* To overcome this limitation, parties and amici can (and do) present information relevant to reliance interests in their briefs, and the Court may research legislative facts, but, according to Professor Varsava, these methods “do not typically (if ever) yield any precise or reliable accounting of the reliance costs of overruling.” *Id.*

235. Bayefsky, *supra* note 125, at 387.

236. *Id.*; *Dobbs*, 142 S. Ct. at 2277.

237. Bayefsky, *supra* note 125, at 384.

abortion was wrong.”²³⁸ On this view, the Court’s assertion that it could not assess reliance interests was a smokescreen—a cover so that it could overrule *Roe* and *Casey* because of abortion’s “moral taint.”²³⁹ Other scholars likewise suggest that the Court’s reliance analysis was not neutral, either because the Court hid its moral objections toward abortion behind other claims, or because its intent was to weaken individual rights.²⁴⁰ For the Court to regard abortion as morally objectionable, but hide this claim underneath a claim that reliance is immeasurable, has implications not only for whether reliance is measurable, but also for whether precise measurements are necessary in order for reliance to be protected.²⁴¹

Part II has laid out the *Dobbs* reliance analysis regarding concrete reliance, inconcrete reliance, and the measurability of reliance. This part has demonstrated that, in the already scant space²⁴² the *Dobbs* majority devoted to a reliance analysis, the Court mischaracterized how *Casey* and *Payne* treated reliance.²⁴³ Furthermore, even though the Court claimed that *Casey*’s treatment of reliance was novel,²⁴⁴ this part showed that *Casey*’s articulation of reliance interests *had* been used before and after *Casey*.²⁴⁵ Moreover, the Court’s recent trend toward finding historical and traditional analogs to modern laws frequently uses the language of intangible reliance.²⁴⁶

Part II assessed Professor Shiffrin’s disadvantaged group-inequity argument for concrete reliance and Professor Varsava’s autonomy-dignity grounds for intangible reliance. And Part II showed that the Court’s claims of immeasurability of reliance may have been a covert statement against abortion. What emerges, then, is a *stare decisis* reliance analysis undertaken by the *Dobbs* Court that creates confusion about the role of *stare decisis* broadly and produces uncertainty about how and when reliance should count.²⁴⁷

238. *Id.* at 401.

239. *Id.* Professor Bayefsky posits two possible ways in which abortion was morally tainted for the Court—either that the Court thinks “abortion is murder” or that the Court believes that legalized abortion is indicative “of a society that devalues childrearing.” *Id.*

240. *See, e.g.,* Varsava, *supra* note 24, at 1868 (the justices “didn’t want to reveal that their reliance analysis rested on moral grounds, so they instead concluded by fiat that ‘reliance interests are *not* present.’” (quoting *Dobbs*, 142 S. Ct. at 2276)); *see also* Gentithes, *supra* note 116, at 7 (explaining that even though the Court’s reliance analysis in *Dobbs* appears “content neutral,” its practical effect is that it will “significantly weaken precedents that protect individual rights”).

241. Measurability is discussed in greater detail in conjunction with objections to the theory of reliance this Note proposes. *See infra* Part III.D.

242. In total, the majority devoted less than two pages of a lengthy opinion to an inquiry into how women and society had relied on fifty years of precedent. *Dobbs*, 142 S. Ct. at 2276–77.

243. *See supra* Part II.A.

244. *See supra* notes 174–76 and accompanying text.

245. *See supra* Part II.B.1.

246. *See supra* Part II.B.1.

247. One scholar describes the Court’s analysis as “the most superficial of *stare decisis* analyses” with a “stilted, one-sided” discussion of reliance. Wilfred U. Codrington III, *Is It Time to Scrap Stare Decisis?*, 2025 U. ILL. L. REV. ONLINE 49, 57–58.

III. TOWARD A PROPER CONCEPTION OF RELIANCE

To clarify this confusion, Part III proposes a new framework for the consideration of reliance interests in cases involving individual rights grounded in the Dworkinian theory of integrity.²⁴⁸ This part argues that, when the Court considers whether to uphold or overrule precedent pertaining to individual rights, a proper reliance interest analysis recognizes that reliance can be both psychological—including intangible harms—and diffuse, that is, reliance can encompass persons beyond the bearers of the right. Using *Dobbs* as a case study, Part III applies this framework in the context of abortion rights. It concludes by offering a limiting principle and considering objections to this framework.

A. Rule of Law and Integrity: A Potent Stare Decisis Doctrine

Much has been written of rule-of-law values as a basis for upholding precedent.²⁴⁹ Professor Kozel seems to dismiss these values rather quickly.²⁵⁰ In his view, the burden is on individuals to do a risk assessment every time they contemplate whether to rely on the law, including considering the composition and ideology of the Court's sitting justices.²⁵¹ But if this is true, the law is arguably not settled and citizens cannot, or should not, rely on the law at all. It is unlikely and unrealistic that citizens think about the law this way.²⁵² Moreover, what Professor Kozel's account seems to show is how important reliance interests are. If one must contemplate mitigating harms that follow from overruling, like a homeowner seeking to mitigate harm to their home through the purchase of insurance, perhaps reliance is more central than Professor Kozel asserts.

After *Dobbs*, women have been forced to contemplate the legal landscape in ways they probably had not done previously.²⁵³ But that is due to the *upsetting* of reliance interests as a result of *Dobbs*, rather than a task women have voluntarily taken on.²⁵⁴ It seems that values like stability and

248. See *supra* Part I.A.

249. See *supra* Part I.B.

250. See *supra* notes 75–80 and accompanying text.

251. See *supra* notes 81–82 and accompanying text.

252. See Andrei Marmor, *Presumptive Reasons and Stare Decisis*, in PHILOSOPHICAL FOUNDATIONS OF PRECEDENT 255, 266 (Timothy Endicott, Hafsteinn Dan Kristjánsson & Sebastian Lewis eds., 2023) (stating that, even if “professionally well informed” potential litigants know the Court may overrule precedent, “they can hardly rely on changes that have not yet occurred and may never materialize”).

253. See, e.g., Molly Cook Escobar, Amy Schoenfeld Walker, Allison McCann, Scott Reinhard & Helmuth Rosales, *171,000 Traveled for Abortions Last Year: See Where They Went*, N.Y. TIMES (June 13, 2024), <https://www.nytimes.com/interactive/2024/06/13/us/abortion-state-laws-ban-travel.html> (on file with the *Fordham Law Review*).

254. See *id.* (explaining the extreme steps women with unhealthy or unplanned pregnancies have taken to receive abortion care, including traveling hundreds or thousands of miles, taking time off work, and managing medical care by themselves without the benefit of doctors).

predictability in the law are worth striving for,²⁵⁵ and that people deserve to count on the law to a greater degree than Professor Kozel acknowledges. The concept of integrity, paired with rule-of-law values, provides a robust foundation for stare decisis reliance analysis.

Integrity makes certain demands of courts.²⁵⁶ Courts should not act capriciously; rather, courts should act unhypocritically so as to present a coherent and defensible view of the law.²⁵⁷ In order to do that, courts must engage in a principled inquiry into the past²⁵⁸ because what courts have done previously matters in the present. Judicial decisions should not be siloed. Instead, the law should be looked at as a whole.

We might consider, however, that looking to the past warrants some skepticism. The *Dobbs* Court offered a peculiar, and now seemingly customary,²⁵⁹ alternative to the consideration of reliance interests. Instead of a robust inquiry into whether people had relied on *Roe* and *Casey*, the majority stated that the proper consideration was whether the abortion right was deeply rooted in the nation's history.²⁶⁰ In considering *Roe*, the Court focused this inquiry on the 1868 enactment of the Fourteenth Amendment, which had provided the basis in *Roe* for a constitutional right to abortion.²⁶¹ Finding no historical analog for the protection of abortion, the Court stated that *Roe* and *Casey* must be overruled.²⁶²

255. See Miller, *supra* note 9, at 818–19 (referencing the Rehnquist Court's development of stare decisis doctrine, highlighting values such as predictability and stability).

256. Note that one aspect of integrity—legitimacy—is an important strand of justification for stare decisis doctrine. See *supra* Part I.A. Nevertheless, this Note's proposed framework sets aside legitimacy to focus on rule-of-law values and integrity.

257. See *supra* notes 40–43, 46 and accompanying text.

258. See *supra* notes 39, 44–45, 48 and accompanying text.

259. See, e.g., *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2129–30 (2022) (“We reiterate that the standard for applying the Second Amendment is as follows: When the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation.”). But see *United States v. Rahimi*, 144 S. Ct. 1889, 1897–98 (2024) (explaining that the Court’s previous Second Amendment rulings do not require “a law trapped in amber,” and that the Second Amendment can allow for modern gun laws in addition to those in existence at the Founding).

260. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2246 (2022).

261. See *id.* at 2248, 2252–54.

262. *Id.* at 2242–43. When fidelity to the Constitution’s original meaning and following precedent are in tension, whether original meaning or precedent should prevail is a matter subject to debate. Justice Thomas argues that the Court’s “duty to interpret the law requires adherence to the original meaning of the [Constitution’s] text.” *Gamble v. United States*, 139 S. Ct. 1960, 1989 (2019) (Thomas, J., concurring). Justice Kagan, on the other hand, is an ardent defender of stare decisis. See *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2307 (2024) (Kagan, J., dissenting) (“Adherence to precedent is ‘a foundation stone of the rule of law.’” (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014))). And Justice Scalia has opined that, if an originalist outcome was a “medicine . . . too strong to swallow,” then “almost every originalist would adulterate it with the doctrine of *stare decisis*.” See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861 (1989). This debate is important, but it is beyond the scope of this Note.

Moreover, the earlier analysis of reliance interests in stare decisis doctrine reveals its own reason to be skeptical of a practice that roots the law in the past. If reliance interests always serve as grounds for upholding precedent, then progress and change may be hindered when they are needed most.²⁶³ But integrity can require looking to the past without becoming entrenched in it by analyzing reliance interests as if they are absolute.

Principled engagement with the past does not necessarily entail entrenchment in the past—it requires a genuine and meaningful consideration of the precedent at stake.²⁶⁴ That should be especially true when a precedent pertains to judicial interpretation of the Constitution because the Constitution is the foundation for everything else and because its principles are specifically designed to endure.²⁶⁵ Professor Hershovitz does not propose specific parameters that define what it means for the Court to engage with the past in a principled way or that clarify how the Court should go about identifying and remaining faithful to legal principles.²⁶⁶

This Note thus argues that *integrity places a procedural demand on the Court*. Because the overriding mandate of integrity is for the Court to engage in a principled inquiry into what it has done previously, this demand requires a process conducted in good faith. A good-faith process should include a legitimate inquiry into the types of reliance that precedents engendered and the full breadth of people who relied. In *Dobbs*, the Court should have acted with integrity and engaged with *Roe* and *Casey* in a way that considered the constitutional liberty at stake and the reliance that five decades of those precedents engendered, and it should have performed that analysis in good faith. Together, this would have resulted in a truly defensible view of the Court's ultimate decision.

But *Dobbs* is not faithful to the underlying legal principle—substantive due process—that animated *Roe*, creating arguable incoherence in the law.²⁶⁷ And as Part II makes clear, the Court in *Dobbs* took a dismissive approach to reliance interests in its stare decisis analysis as applied to *Roe* and *Casey*.²⁶⁸

263. See *supra* note 69 and accompanying text.

264. See *supra* Part I.A.

265. See *supra* note 85 and accompanying text.

266. See generally Hershovitz, *supra* note 38.

267. Disagreement in the competing concurrences of Justices Thomas and Kavanaugh demonstrates this point. Justice Thomas seemed to acknowledge incoherence when he explicitly argued for the overruling of other substantive due process cases, including *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Obergefell v. Hodges*, and *Lawrence v. Texas*, 539 U.S. 558 (2003), and stated that they are “demonstrably erroneous decisions.” *Dobbs*, 142 S. Ct. at 2301–02 (Thomas, J., concurring). Meanwhile, Justice Kavanaugh seems not to accept that there is incoherence. Referencing the same cases, he stated that “[o]verruling *Roe* does *not* mean the overruling of those precedents, and does *not* threaten or cast doubt on those precedents.” *Id.* at 2309 (Kavanaugh, J., concurring). This outcome is illustrative of what Professor Abner S. Greene, recalling Professor Dworkin, labels a “checkerboard solution[,]” which “treat[s] people differently when no principle can justify the distinction.” ABNER S. GREENE, *AGAINST OBLIGATION: THE MULTIPLE SOURCES OF AUTHORITY IN A LIBERAL DEMOCRACY* 69–70 (2012) (quoting DWORKIN, *supra* note 33, at 180). This inconsistency is beyond the scope of this Note.

268. See *supra* Parts II.A–B.

The Court did not engage with the past in a principled way, and a coherent and defensible view of the law did not result.

B. Reconceptualizing Reliance

In the *Casey* framework, the Court referred to women's relationships and choices.²⁶⁹ But the Court failed to give a framework that could be readily deployed for reliance.²⁷⁰ Moreover, legal scholarship, too, in an apparent aim to create an intelligible principle that has broad application, misses the mark when it refrains from making clear how that application works in specific instances.²⁷¹ It is the very nature of the reliance at stake that requires scholars to be precise.²⁷² Thus, in addition to conceptualizing a workable reliance interest analytical framework, this Note aims to add to the discussion an explicit rendering of what such a framework means in the individual rights context.

In *Casey*, the Court appears to link the advances women had made between *Roe* in 1973 and *Casey* twenty years later—in educational attainment, pay, promotion to leadership positions, and so on—with women being able to rely on an abortion right.²⁷³ Women gained autonomy as a result of having control over their reproductive decision-making. Women could obtain an education, participate in the workforce, or raise the number of children of their choosing, secure in the knowledge that, in the event of an unplanned or unhealthy pregnancy, they could access abortion. But another way to look at the statements in *Casey* is to see that the Court was trying to put its finger on something less concrete. What does it mean, for example, to “come of age free to assume *Roe*’s concept of liberty” defined a woman’s capacities?²⁷⁴

1. Individual Rights Are Integral and Reliance Can Be Psychological

On October 26, 2022, a listener phoned in to a radio show discussing abortion rights to complain to a Republican member of Congress visiting the show.²⁷⁵ The representative mocked the woman for having an opinion on abortion rights because she was elderly.²⁷⁶ This Note will refer to the caller as Leila and will assume she was seventy years old and thus beyond the age

269. See *supra* note 177 and accompanying text.

270. See *supra* notes 204–07 and accompanying text.

271. See generally Varsava, *supra* note 24; Shiffrin, *supra* note 69. See also Denning, *supra* note 20, at 1031 (calling for scholars to “more thoroughly theorize reliance interests”).

272. See Denning, *supra* note 20, at 1051 (imploring advocates to “put some meat on the bones of spare phrases like ‘reliance interests’” when arguing for individual rights).

273. See *supra* notes 177–79 and accompanying text.

274. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 860 (1992), *overruled by* Dobbs v. Jackson Women’s Health Org., 142 S. Ct. 2228 (2022).

275. See generally THE YOUNG TURKS, *The Young Turks Live* (YouTube, Oct. 26, 2022), <https://www.youtube.com/watch?v=HQJ-foPvLWU> (on file with the *Fordham Law Review*).

276. *Id.* at 00:14, 01:06 (“Ma’am, are you having children anytime soon? That’s my question. I’m asking a legitimate question . . . I don’t think you’re having children anytime soon.”).

at which she could become pregnant. Incensed, Leila said: “You talk about women’s rights My body is my body, and I don’t want the government telling me what I can do with my body.”²⁷⁷ Why would an elderly woman, who is beyond the age at which she can be pregnant, identify with such certainty with a right she likely cannot and will not access? This Note proposes that the answer is this: *some rights are so integral, so embedded in our political, social, economic, and cultural lives and consciousness, that we intangibly perceive them as ours anyway. When the right is subsequently lost through overturned precedent, we experience harm.*

In 1973, the year of *Roe*, Leila was twenty-one. In 1992, when *Casey* affirmed *Roe*, Leila was forty. For nearly half a century, the constitutional right to abortion was part of Leila’s life. It was part of her psyche. Its loss was thus deeply concerning to her. It did not matter to Leila whether she could become pregnant. Nor did it matter that she did not need access to abortion. Because the constitutional right to abortion was so embedded in how Leila saw herself, its elimination appeared to cause profound and possibly lasting psychological harm.

Such harm reaches beyond people like Leila. Consider, for instance, couples living in states without abortion access. One couple knows they have a genetic marker for a disease but desperately wants to start a family. Another couple in a romantic relationship knows they cannot afford to raise a child and is afraid of their birth control method failing. Or, imagine an emergency room doctor who cannot provide the necessary care when faced with a patient in dire need of an emergency abortion, potentially leading to a disastrous outcome.

In these cases, people who relied on long-standing legal precedent, now overruled, may feel fear, anxiety, overwhelm, and a disorienting sense of cognitive dissonance because they are forced to make decisions and act in ways that are disconnected from their thinking, values, and goals. People psychologically relied on the abortion right. Its overruling caused psychological harm. This harm can be so consuming as to be considered material—because a judicial decision legalizing a right that afforded liberty, privacy, and autonomy is stripped away, leaving restrictions, bans, and harm in its wake. Where the *Dobbs* majority complained that it could not assess what *Casey* referred to as the “national psyche,”²⁷⁸ this is one way to interpret the harm *Casey* envisioned.

When a court aims to undertake a principled engagement with the past in order to provide a coherent and defensible view of the law, good faith engagement is necessary. Good faith engagement with how that precedent shaped people and society, with the full breadth of the ways in which people relied, and with the harm they may suffer from overruling, is an essential task of a court that adjudicates with integrity. If a court finds that a precedent has engendered overwhelming reliance, this suggests that the precedent stems

277. *Id.* at 00:01, 00:09.

278. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2276 (2022); *see also supra* note 230 and accompanying text.

from a fundamental and enduring legal principle that meets the first-order demand integrity places on courts—to identify and remain faithful to such principles.

2. Reliance Is Diffuse

Thinking about reliance in the more expansive way proposed here leads to an understanding that stakeholders may be present outside the directly impacted group. Abortion rights inherently belong to women and pertain to women's bodies, and women are the sole arbiters of what happens to their bodies. But practically speaking, the availability of abortion to women was relied on by people who were not women. Scholarship that discusses reliance in the abortion rights context, however, focuses on women's reliance.²⁷⁹ These accounts are unnecessarily narrow. There are many parties besides women who are materially worse off because they, too, relied on abortion right precedents.

Part III.B.1 considered examples of how people had psychologically relied on *Roe* and *Casey*. Imagine again that the couples from those examples live in states without abortion access. First, there is the couple who wishes to start a family, knowing they have a genetic marker for a disease. Second, there is the couple who knows they cannot, under any circumstances, afford to raise a child, and are afraid of their birth control method failing. In the first example, the couple may decide not to get pregnant because they cannot access abortion if testing reveals the pregnancy is unhealthy. Both partners thereby close off the option of raising a family. In the second example, the couple may decide to move to a state with abortion access because they cannot access abortion where they live if their birth control method fails. Both partners may leave behind family, friends, homes, communities, and jobs.

On this view, a kind of *multilayered reliance* emerges. Not only is reliance psychological, but it is also *diffuse*. It encompasses more people than the bearers of the right. In these examples, individuals are not only affected by their partner's loss of the right to abortion; rather, they are materially worse off because abortion is no longer an option. In the first case, both partners forgo the opportunity to raise children and expand their family because one partner—the right bearer—cannot terminate an unhealthy pregnancy should that become necessary. In the second scenario, both partners make a dramatic life choice that separates them from their work, family, and friends.

279. See *supra* Part II.A.2. Professor Shiffrin explicitly refers to women “and other impregnable people.” Shiffrin, *supra* note 69, at 318; see *supra* Part II.B.2. Professor Varsava briefly references the reliance of healthcare professionals and “citizens,” contemplating at least some third-party reliance. Varsava, *supra* note 24, at 1869–70. Generally, however, she refers to “people” or “individuals” relying. For example, she notes that the fact that “millions of people have obtained abortions . . . suggests that abortion has played a major part in planning activity.” *Id.* at 1883. She writes that “women’s roles in society had been informed by the right to abortion . . . and that terminating that protection would upset expectations regarding women’s future status in this society.” *Id.* at 1884. In these statements and in general, she means women or others who can get pregnant. *Id.* at 1862 n.72.

They both experience the loss of all the things one can expect to gain from work and proximity to family and friends, such as income, stability, support, comfort, and commiseration, because one partner cannot terminate an unwanted pregnancy.

Whereas psychological reliance can be explicitly thought of as intangible, diffuse reliance can be seen as both tangible and intangible. The couples in the examples can certainly be said to have relied concretely on the abortion right when contemplating decisions as to their sexual activity, use of contraception, genetic testing, family planning, or relocation to a different state to secure access to abortion. But when we consider that they have also psychologically relied on the availability of abortion access to inform their conceptions of themselves as parents or as childless, we can see that their reliance is also intangible. In reality, the line between tangible and intangible reliance is not as clear as the *Dobbs* Court made it out to be.²⁸⁰

3. Diffuse, Psychological Reliance Is Already Used

In some respects, this argument is hardly novel. The Court, in its appeals to history and tradition, uses intangible reliance language without using the word “reliance.”²⁸¹ Similarly, parties and amici routinely make appeals to multilayered reliance claims in their briefs. For example, amici curiae briefs in *Dobbs* argued that reliance on the abortion right allowed women to make choices concerning their autonomy, professional advancement, economic empowerment, and equality, and that overruling the right would cause harm by obliterating these gains.²⁸² Advocates explained that women could make choices to “invest more in their human capital and careers, . . . improve their labor force participation, and secure their economic independence,” thereby standing “as equal members of society.”²⁸³ The use of intangible reliance language is not limited to the abortion rights context.²⁸⁴ Former Supreme

280. See *supra* note 125.

281. See *supra* Part II.B.1.

282. See Brief of Amici Curiae Nat’l Women’s L. Ctr. et al. in Support of Respondents at 10–12, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392); see also Brief of Amici Curiae Economists in Support of Respondents at 14–15, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392) (arguing that families are “shaped” by access to legal abortion and the “circumstances into which children are born” have been informed by such access). Moreover, reliance on the abortion right was diffuse. As a result of the availability of legalized abortion, when “children of the *Roe* era grew into adulthood, . . . they had higher rates of college graduation, lower rates of single parenthood, and lower rates of welfare receipt.” *Id.* at 14.

283. See Brief of Amici Curiae Nat’l Women’s L. Ctr. et al., *supra* note 282, at 10–11.

284. In the affirmative action context, students and alumni of Harvard College “testified that they would have been less likely to apply to or would have had reservations about attending Harvard if it did not consider race in admissions.” See Brief for Students and Alumni of Harvard Coll. as Amici Curiae in Support of Respondent at 12, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023) (No. 20-1199). Because students relied on race-conscious admissions policies and attended a diverse college, they experienced a reduction in isolation and a breaking down of racial stereotypes. *Id.* at 6, 8–9. In the case of same-sex marriage, advocates argued that same-sex marriage bans do not just harm same-sex couples. See Brief of PFLAG, Inc. as Amicus Curiae

Court Justice Anthony M. Kennedy recently invoked the kind of multilayered reliance suggested in this Note when asked to comment on the possibility that *Obergefell* be overruled. Justice Kennedy said that the “tremendous amount of reliance” that same-sex couples and their families had placed on this legal decision was a “powerful argument against” overruling it.²⁸⁵ In one respect then, this Note makes explicit and suggests boundaries for what the justices are already doing in their opinions and what litigants and friends of the Court are already doing in their briefs.

4. Diffuse, Psychological Reliance Is Not Overinclusive

Understanding the role of reliance as described in this Note, it is clear that *Dobbs* did not adequately protect reliance interests. For reliance interests to be properly regarded in a stare decisis analysis, such interests rightfully include the dimensions of reliance this Note proposes. When the Court overturns precedent that guaranteed an individual and integral right, people experience harm. The Court should strive to adjudicate with integrity so that it renders a coherent and defensible view of the law. Presenting a coherent view of the law requires a good faith process that accounts for the ways people and society may have been transformed because of access to the right. Such an engagement with the past should include a consideration of the kind of psychological, not just concrete, reliance this Note describes. When this more expansive view of reliance is considered, we can see that reliance extends beyond the right holders. Thus, it is proper for the Court to consider diffuse, psychological reliance when it decides to uphold or overrule long-standing precedent.

Nevertheless, this reliance framework is not overinclusive. For example, in *Loper Bright Enterprises v. Raimondo*,²⁸⁶ the Court overruled *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,²⁸⁷ another long-standing precedent. *Chevron* authorized courts to defer to administrative agency interpretations of ambiguous federal statutes.²⁸⁸ *Loper Bright* considered whether the authority to interpret such statutes

in Support of Petitioners at 3–4, *Obergefell v. Hodges*, 576 U.S. 644 (2015) (Nos. 14-556, 14-562, 14-571, 14-574). In addition, all those connected to the couples—children, parents, and siblings—experience harm and are made to feel “inferior and that their families are not entitled to equal dignity under the law.” *Id.* The arguments in *Obergefell* were not made vis-à-vis reliance—they were against state bans on same-sex marriage. *See id.* Nevertheless, it is reasonable to imagine, in a hypothetical revisiting of *Obergefell*, that these are precisely the arguments parties and amici who support same-sex marriage would make. *See infra* Part III.D.

285. Adam Liptak, *Justice Kennedy, Off the Bench but Still Rendering Opinions*, N.Y. TIMES (Oct. 8, 2025), <https://www.nytimes.com/2025/10/08/us/politics/justice-kennedy-inter-view-memoir.html> (on file with the *Fordham Law Review*).

286. 144 S. Ct. 2244 (2024).

287. 467 U.S. 837 (1984), overruled by *Loper Bright*, 144 S. Ct. 2244.

288. *Id.* at 866 (holding that “[t]he responsibilities for assessing the wisdom of [administrative agency] policy choices and resolving the struggle between competing views of the public interest are not judicial ones,” rather the Constitution leaves that responsibility to the legislative and executive branches).

should rest with the judicial branch instead. The question was a constitutional one, though it did not pertain to an individual right.²⁸⁹ By overruling *Chevron*, the Court held that the power rested with the judicial branch.²⁹⁰ Reliance analysis figured prominently in three *Loper Bright* opinions.²⁹¹

In her dissent, Justice Kagan wrote that stare decisis “enables people to order their lives in reliance on judicial decisions.”²⁹² She discussed the reliance of Congress, administrative agencies, regulated entities, and even members of the public who may have made important decisions based on how agency rules impacted them.²⁹³ But it is hard to see how a diffuse, psychological reliance framework is applicable here. Like the earlier example of taxation,²⁹⁴ it is unlikely that the average citizen internalized the *Chevron* doctrine to the point that it became embedded in their political, social, economic, and cultural life. Imagine, for instance, an individual making a claim that they relied on a certain agency interpretation of the Clean Air Act²⁹⁵ to breathe clean air. This hypothetical seems too attenuated from the legal issue before the *Loper Bright* Court to justify a diffuse, psychological reliance argument in the Court’s stare decisis analysis.

Even stipulating that structural constitutional cases like *Loper Bright* are not amenable to a diffuse, psychological reliance argument, this still leaves a wide range of cases that could be subject to the reliance framework advanced here, potentially leaving laws in place that hinder change when it is critical. Accordingly, this Note proposes a further limiting principle.

C. *The Limiting Principle: Assess the Value of the Planned Conduct*

Reliance interests in stare decisis doctrine can be weighty outside of the typical material reliance interest considerations that are undertaken in property or contract cases.²⁹⁶ Still, an objection arises that if the Court must consider diffuse, psychological reliance, there is no precedent that could ever be overturned. The Court will always be able to find such reliance. Social change and progress would thus be stymied, permanently entrenching

289. See *Loper Bright*, 144 S. Ct. at 2254.

290. See *id.* at 2272–73.

291. See *supra* note 74. For the third opinion, see Justice Gorsuch’s concurrence, where he writes: “Far from engendering reliance interests, the whole point of *Chevron* deference is to upset them.” *Loper Bright*, 144 S. Ct. at 2287–88 (Gorsuch, J., concurring).

292. *Loper Bright*, 144 S. Ct. at 2307 (Kagan, J., dissenting).

293. See *id.* at 2310 (indicating that people have made economic, medical, and educational decisions in response to the way administrative agencies have interpreted statutes). For a more expansive discussion of the concrete ways in which parties arguably relied on *Chevron*, see Brief for the Respondents at 32–33, *Loper Bright*, 144 S. Ct. 2244 (No. 22-451), where the government avers that parties relied on *Chevron* by “making investment decisions and entering into contracts informed by agency interpretations upheld under *Chevron*.”

294. See *supra* note 85 and accompanying text.

295. 42 U.S.C. § 7401 *et seq.*

296. See *supra* Part II.A.1.

outcomes like that of *Plessy*.²⁹⁷ Notwithstanding that reliance interests are but one of many factors²⁹⁸ that the Court balances when it undertakes a stare decisis analysis, returning to the discussion of integrity is illuminating.

Professor Hershovitz writes that “[a] lack of integrity signifies a lack of a commitment to act morally” and that rigidly refusing to change “moral convictions in the face of new information is not a sign of integrity.”²⁹⁹ Southerners in the time of *Plessy* were able to order their affairs in reliance on the Court having legalized segregation.³⁰⁰ But, as Professor Hershovitz notes, the “value of the activities planned . . . was hardly sufficient to warrant continued adherence” to precedent.³⁰¹ Professor Marmor adds that when people’s expectations in upholding precedent are not “legitimate to begin with, there is no moral cost to an abrupt . . . departure from the past.”³⁰² Thus, to adjudicate with integrity, the Court should assess the value of the planned conduct, which can mitigate the potential for the entrenchment of unfair results.³⁰³

An analysis of the value of the planned conduct means that the Court should evaluate the proposed activity. *Korematsu* and *Plessy*, as noted, could not withstand such an analysis.³⁰⁴ As one scholar puts it, “[w]hen reliance interests are tainted by moral injustice . . . they should not count.”³⁰⁵ When the Court undertakes an analysis of the planned conduct, it should explicitly state its conclusion. For example, when Chief Justice Roberts wrote for the majority in *Trump v. Hawaii*³⁰⁶ that *Korematsu* was wrongly decided, he stated: “The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and . . . morally repugnant.”³⁰⁷ And in *Brown v. Board of Education*,³⁰⁸ the Court reexamined the soundness of the “separate but equal” doctrine, concluding that nothing counseled in favor of upholding it.³⁰⁹ Chief Justice Earl Warren explicitly stated the outcome of the Court’s analysis and held that segregated public education “has no place” in the law.³¹⁰

In *Dobbs*, such an analysis would force the Court to determine the value of the planned conduct, that is, to analyze what the constitutional right to abortion meant to any party who can be said to have relied on that right.³¹¹ Assessing the value of the abortion right would necessarily entail an

297. See *supra* Part I.B.

298. See *supra* notes 9–11.

299. Hershovitz, *supra* note 38, at 114.

300. *Id.* at 111.

301. *Id.*

302. Marmor, *supra* note 49, at 15.

303. See Hershovitz, *supra* note 38, at 112.

304. See *id.* at 111.

305. Bayefsky, *supra* note 125, at 401.

306. 138 S. Ct. 2392 (2018).

307. *Id.* at 2423.

308. 347 U.S. 483 (1954).

309. *Id.* at 491–95.

310. *Id.* at 495.

311. *But see Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2277 (2022) (specifically declining to undertake such an analysis).

analysis—beyond cursory—of what reproductive freedom has meant to women and the full breadth of the ways in which women and those intimately connected to women relied on the precedents in *Roe* and *Casey*.³¹² Integrity demands that the Court undertake such a genuine and principled engagement with the past.³¹³

But it may be argued that such an analysis should also consider the interest against which the value of the planned conduct might be balanced. Opponents of the abortion right identify that interest as one of potential life.³¹⁴ It is a fair criticism of the reproductive rights movement that it consistently fails to acknowledge that a competing interest exists at all. Advocates, however, can choose whether to acknowledge the competing interest of potential life, but the Court should not allow itself to be in that position, and it should not be able to eliminate such an analysis. Adjudicating with integrity in stare decisis doctrine thus means at least two things.

First, when the Court undertakes an analysis of the reliance interests factor in a stare decisis analysis, it must assess the value of the planned conduct, properly counting reliance interests that are both psychological and diffuse.³¹⁵ The Court must then balance such findings against the competing interest, clearly stating the outcome of such an analysis. If the Court finds that the competing interest outweighs reliance on the abortion right, for example, then it must state that. Here, that would mean the Court would acknowledge the vast reliance on *Roe* and *Casey* but then prioritize the interest of potential life. The Court would have to state that it believes abortion is wrong, that it is repugnant and cannot be tolerated no matter how much reliance *Roe* and *Casey* engendered.

Or, in a hypothetical overruling of *Obergefell*, the Court would likewise assess the value of the conduct—the right to same-sex marriage—and the reliance that conduct has produced. That would have to be balanced against what same-sex marriage opponents have identified as the competing interest, namely the right for marriage to be seen as a union occurring only between one man and one woman.³¹⁶ If the Court finds that the competing interest (marriage limited to opposite-sex couples) outweighs diffuse, psychological reliance on the planned conduct (same-sex marriage), then the Court must directly address the moral claim. This means the Court should state that it believes same-sex marriage is wrong no matter how much reliance existed.

What the Court should not be able to do in a reliance interests analysis is disguise normative claims—that abortion or same-sex marriage are moral wrongs—as claims that reliance is not present or that it cannot be measured or that only specific property or contract reliance counts in a stare decisis

312. See *supra* Parts III.B.1–2.

313. See *supra* notes 39, 44–45, 48 and accompanying text.

314. See generally Paul Benjamin Linton & Maura K. Quinlan, *Does Stare Decisis Preclude Reconsideration of Roe v. Wade?: A Critique of Planned Parenthood v. Casey*, 70 CASE W. RES. L. REV. 283 (2019). These scholars go further, stating that fetuses are “actually alive.” *Id.* at 330.

315. See *supra* Parts III.B.1–2.

316. See *supra* notes 198–200 and accompanying text.

analysis.³¹⁷ Limiting a stare decisis diffuse and psychological reliance framework in this way at least obliges the Court to undertake such an analysis, which did not occur in *Dobbs*.³¹⁸

D. Objections

Two other objections merit discussion. The first objection is that this Note's proposed reliance framework could result in removing the focus from the right holder. In many cases, the bearer of the right may be part of a historically disadvantaged group.³¹⁹ Professor Shiffrin argues, after all, that "fundamental constitutional and social values" are served when a precedent that induced reliance by a disadvantaged group, which would deepen inequity if overruled, is upheld instead.³²⁰ The *Dobbs* result will reinforce persistent inequity for women. But that is not a reason to stop the reliance analysis there. Limiting reliance in this way excludes the full scope of reliance—both in who relied and how those who relied did so.

This point can be illustrated with *Obergefell*—another substantive due process case.³²¹ Professor Shiffrin argues that this case falls within her disadvantaged group-inequity argument.³²² The LGBTQ community, a historically disadvantaged and marginalized group, would be severely impacted by overruling.³²³ And reliance interests that remain focused on all those presently in same-sex marriages could underscore the gravity of the right for that particular group.³²⁴

But a diffuse, psychological reliance analysis would capture all those who relied on that right even if they did not directly access it. For example, a diffuse, psychological reliance analysis in *Obergefell* would reveal that same-sex families may be forced to change their state of residence to ensure protection of their right to marry, and that children in same-sex marriage families would be materially worse off if the right to same-sex marriage were eliminated.³²⁵ And, it is not hard to see that the same-sex marriage right

317. See *supra* Part II.

318. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2261 (2022) ("Our opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth.").

319. See *supra* Part II.A.2.

320. Shiffrin, *supra* note 69, at 340.

321. See generally *Obergefell v. Hodges*, 576 U.S. 644 (2015) (holding that the Due Process Clause and the Equal Protection Clause protect the right of same-sex couples to marry).

322. See Shiffrin, *supra* note 69, at 343.

323. *Id.* at 333 n.48 (arguing that an already disadvantaged group would be rendered "significantly more vulnerable" to various forms of discrimination if *Obergefell* were overruled).

324. *Id.* at 346 ("[O]ur foundational commitments to achieving equal status for all of our citizens and their democratic empowerment should drive our understanding of how and whether reliance arguments should constitute a special ground for adhering to precedent in constitutional jurisprudence.").

325. See Denning, *supra* note 20, at 1044 (referencing, for example, the possible detrimental impacts on families and children who rely on *Obergefell*, should *Obergefell* be overruled).

could be as embedded (like the abortion right was for Leila) in the political, social, economic, and cultural lives and consciousness of those who may not directly access the right—so much that they perceive the right as theirs anyway. Rather than remove the focus from the disadvantaged group, then, a diffuse, psychological reliance analysis accurately reveals the true extent of how that group and all those intimately connected to it relied on the precedent at stake.³²⁶

Likewise, in *Dobbs*, it is true that abortion rights are women's rights and focusing on that identity can illuminate and clarify the import of abortion rights to women. And keeping women as the focal point enables litigants to develop other legal bases for abortion rights, such as equal protection arguments. But expanding the analysis to include diffuse, psychological reliance helps account for all those who will necessarily be materially worse off if women are forced to carry unhealthy or unintended pregnancies to term. An expansion of the inquiry to include the true scope of reliance interests at stake serves to enrich a stare decisis analysis at a time when the Court shows a penchant for overruling long-standing precedent in unprincipled ways.³²⁷

Finally, there is the question of measurability and whether the diffuse, psychological reliance framework proposed in this Note can be measured. Recall that the *Dobbs* Court raised two points related to its ability to measure reliance.

First, the Court said there had been no concrete reliance on *Roe* and *Casey*.³²⁸ The Court then asserted that when concrete reliance is involved, courts can evaluate it.³²⁹ Since the Court found no concrete reliance, it did not reach the issue of measurability. Thinking of the concrete aspect of diffuse reliance proposed in this Note, however, both the right bearers,³³⁰ as well as individuals intimately connected to women,³³¹ concretely rely in ways that seem amenable to measurement. Amicus briefs in *Dobbs* used statistics to show that women's progress in educational attainment, pay, and promotion over the last half-century was traceable to their ability to control reproductive decision-making.³³² And it is likely possible to track metrics on abortion access, medication usage, decisions on starting families, family size, and use of genetic testing, as well as other statistics, that help identify and assess reliance on the part of those intimately connected to women.

The more challenging issue posed by measurability relates to the psychological aspect of the framework proposed in this Note because this reliance is intangible. Chief Justice Rehnquist's *Casey* opinion referenced

326. This is argued in amicus briefs in *Obergefell*. See *supra* note 284.

327. See *supra* Part II.

328. See *supra* notes 99–100 and accompanying text.

329. See *supra* note 229 and accompanying text.

330. See Varsava, *supra* note 24, at 1883–84 (explaining that the fact that millions of women have obtained abortions indicates that abortion figures prominently in women's planning activities and that reliance interests can be proven without identifying specific individuals or precise measurements).

331. See *supra* Part III.B.2.

332. See *supra* notes 282–83 and accompanying text.

the Court's inability to assess intangible harms to the national psyche,³³³ and in *Dobbs*, the majority said it could not measure "the effect of the abortion right on society and in particular on the lives of women."³³⁴ The *Dobbs* Court opined that it was "ill-equipped" to measure this kind of reliance and that it had "neither the authority nor the expertise" to do so.³³⁵ But as Professor Varsava notes, "the fact that systemic effects are 'inchoate' does not make them any 'less real.'"³³⁶ To the contrary, it was the "massive and widespread" nature of intangible reliance that made it hard to measure in the first place.³³⁷

Finally, as scholars point out, the Court's disclaimer on its ability to assess intangible reliance was more likely a covert statement against abortion.³³⁸ As this Note argues, however, the Court should not be able to transmogrify a moral claim into an immeasurability claim.³³⁹

It was "readily apparent"³⁴⁰ when *Dobbs* was decided that there was a strong connection between a woman's right to abortion and gender equality.³⁴¹ And as this Note has shown, reliance was diffuse, psychological, and encompassed more than the right bearers. Even in matters of contract, it is only when there is uncertainty about any real loss that immeasurability results in no recovery. When consequences are certain but cannot be precisely measured, greater protection is available.³⁴² Here, claims of immeasurability are a distraction from the widespread concrete and inconcrete reliance engendered by *Roe* and *Casey*.

CONCLUSION

Reliance interests in stare decisis doctrine deserve far greater consideration than the Court gave such interests in *Dobbs* when it proclaimed there had been no reliance on *Roe* and *Casey*. Reliance interests analyses in property or contract law fall short of the analysis called for in a personal liberties context. Reliance on legal decisions pertaining to constitutional liberties requires a different analysis because of the unique relationship between the government and its citizens. Using the abortion right at stake in *Dobbs* as a case study, this Note has shown that reliance interests are multidimensional and that they can encompass both the right bearers and people intimately connected to them. Such reliance can be thought of as *diffuse, psychological reliance*.

333. See *supra* notes 230, 278 and accompanying text.

334. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2277 (2022).

335. *Id.* at 2276–77.

336. Varsava, *supra* note 24, at 1882 (quoting Kozel, *supra* note 75, at 1497).

337. *Id.* at 1884 (explaining that it was "perverse" for the Court to treat such pervasive reliance "as if it did not exist at all").

338. See *supra* notes 235–41 and accompanying text.

339. See *supra* Part III.C.

340. Varsava, *supra* note 24, at 1884.

341. See Brief of Amici Curiae Economists, *supra* note 282, at 4 (presenting evidence "that *Roe* is causally connected to women's advancements in social and economic life").

342. See *supra* note 150.

On the one hand, this argument is novel in that it urges the Court to explicitly account for this form of multilayered reliance. But the concept of diffuse, psychological reliance already informs how parties think about and make reliance arguments, how the Court at times opines on reliance without naming it, and how even members of the public consider themselves to have relied on legal decisions.

Chief Justice Roberts has said that the Court writes opinions “because [it has] to justify the anti-democratic position [it is] in.”³⁴³ He meant that, whereas the President and Congress are elected and can be voted out of office, justices are appointed with lifetime tenure.³⁴⁴ In contrast to elected officials, the Court, according to the Chief Justice, “interpret[s] the law and [does] not impos[e] [its] own views.”³⁴⁵ But as scholars observe, the reliance analysis in *Dobbs* calls that into question. The Court dismissed concrete reliance entirely and stated that *Casey*’s depiction of inconcrete reliance was novel and could not be measured—claims this Note has shown are unsound. In place of a proper reliance analysis, the Court likely substituted its own opinions on abortion. This contradicts Chief Justice Roberts’s statement that the Court does not impose its own views on the judicial process.

Guided by Professor Hershovitz’s view on the Dworkinian conception of integrity, this Note urges that when the Court undertakes a stare decisis analysis, it has a duty to engage with the past in a genuine and principled way in order to present a coherent view of the law in the present. This kind of principled engagement obliges the Court to undertake a good-faith process, which includes considering the full extent of those who relied and how they did so. The Court should not be able to hide moral judgments behind claims that reliance does not exist or that it is not measurable. Instead, the Court must weigh the value of the planned conduct, explicitly stating the outcome of its assessment. It is essential to strengthen stare decisis doctrine as the Court continues to overrule long-standing precedent without meaningful consideration of reliance interests.

343. *Inside the Supreme Court*, at 28:17 (C-Span, Feb. 3, 2016), <https://www.c-span.org/video/?404131-1/discussion-chief-justice-john-roberts&start=1628> (on file with the *Fordham Law Review*).

344. *See id.* at 28:28.

345. *Id.* at 29:05.