WRONG ENOUGH TO FIX: MEASURING AND WEIGHING WRONGNESS IN *RAMOS V. LOUISIANA*

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INTRODUCTION

On December 1, 2021, the Court heard oral argument in *Dobbs v. Jackson Women's Health Organization*, one of the most anticipated cases in a generation.[1] In *Dobbs*, the State of Mississippi launched a direct attack on *Roe v. Wade*[2] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[3] asking the Court to recognize a state's interest in banning abortion before viability.[4] A generation of judicial debate—and popular-press handwringing—over the Court's precedent on precedent has centered around abortion. Whether the Court reaffirms,

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[1] Oral Argument, Dobbs v. Jackson Women's Health Org., No. 19-1392 (U.S. argued Dec. 1, 2021), https://www.supremecourt.gov/oral_arguments/audio/2021/19-1392.

[2] 410 U.S. 113 (1973).

[3] 505 U.S. 833 (1992).

[4] *See generally* Brief for Petitioners at 11–36, Dobbs v. Jackson Women's Health Org., No. 19-1392 (U.S. July 22, 2021) (presenting the stare decisis case against *Roe* and *Casey*).

overrules, or avoids *Roe* and *Casey*, stare decisis will be the defining issue of the October Term 2021.

Questions and inconsistencies riddle the Court's stare decisis doctrine. The Court often repeats the obligatory phrase: "*Stare decisis* is not an inexorable command."[5] Almost as often, the Court explains that overturning precedent requires "special justification"[6] or "strong grounds"[7] beyond the mere wrongness of the precedent. Wrongness itself is only a threshold question.[8]

But even this threshold question is ill-defined. During oral argument in *Dobbs*, the Chief Justice raised the standard by which we measure wrongness.[9] Whether a case is wrongly decided may depend upon whether we apply contemporaneous legal principles and doctrine or measure the precedent against our own understanding of constitutional interpretation. And once the Court concludes that a case is wrongly decided, how does that weigh into the calculus of whether a case should be overturned? Is wrongness alone a sufficient reason to overturn a case? Or merely a necessary predicate? The Court's precedent on precedent remains unclear on each of these points.

This Article focuses on the threshold stare decisis question of wrongness. Part I briefly summarizes stare decisis doctrine with particular attention paid to how the Court evaluates and weighs "wrong" precedents. Two radically different approaches to stare decisis appear in the Court's decisions over the last century. The first of these approaches often overturn precedent with very little discussion of external factors beyond wrongness; the second engages at length with factors such as real-world harm, institutional legitimacy, and reliance.

Parts II and III turn to the Court's most recent thorough exposition of stare decisis doctrine—*Ramos v. Louisiana*.[10] Few cases have exposed divisions on the wrongness question like *Ramos*, which yielded five different opinions among the Justices. Each opinion touches on wrongness, revealing dramatically different approaches. This Article divides the wrongness question into two subparts, both explored primarily through the opinions in *Ramos*: (1) how the Court measures wrongness (addressed in Part II); and (2) how the Court weighs wrongness alongside other factors (addressed in Part III).

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[5] *E.g.*, Payne v. Tennessee, 501 U.S. 808, 828 (1991); Lawrence v. Texas, 539 U.S. 558, 560 (2003); June Med. Servs. LLC v. Russo, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring in the judgment).

[6] *E.g.*, Kimble v. Marvel Ent., LLC, 576 U.S. 446, 456 (2015).

[7] *E.g.*, Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2478 (2018).

[8] *E.g.*, Minerva Surgical, Inc. v. Hologic, Inc., 141 S. Ct. 2298, 2309 (2021) (quoting *Kimble*, 576 U.S. at 455).

[9] Transcript of Oral Argument at 39, *Dobbs*, No. 19-1392 (2021).

[10] 140 S. Ct. 1390 (2020).

I. TWO APPROACHES TO STARE DECISIS (AND A BONUS FRAMEWORK)

Stare decisis has been a part of our legal tradition since the Founding, a policy we inherited from our British forebears. Blackstone wrote of the "established rule to abide by former precedents," in order to "keep the scale of justice even and steady, and not liable to waver with every new judge's opinion."[11] Two decades later, Alexander Hamilton explained how "strict rules and precedents" would bind "arbitrary discretion" within the "least dangerous" branch.[12] William Cranch, a circuit judge and the second Reporter of Decisions of the United States Supreme Court, noted that the rule of law requires limiting judicial discretion.[13] To Cranch, this was a key benefit of reporting decisions: "Whatever tends to render the laws certain, equally tends to limit that discretion; and perhaps nothing conduces more to that object than the publication of reports. Every case decided is a check upon the judge."[14]

A. Stare Decisis Before Roe *and* Casey

By the twentieth century, American stare decisis looked very different from its British counterpart. As Justice Brandeis observed in 1932, the British high court "strictly applied [stare decisis] to all classes of cases."[15] After all, "Parliament is free to correct *any* judicial error."[16] Not so in the case of our written Constitution, "where correction through legislative action is practically impossible."[17] Thus, the Supreme Court of the United States "bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function."[18]

At least, the Court bowed to those lessons for most of the twentieth century. Though Justice Brandeis declared that it was "more

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[11] *Id.* at 1411 (Kavanaugh, J., concurring in part) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *69).

[12] THE FEDERALIST NO. 78, at 592, 599 (Alexander Hamilton) (Sweetwater Press 2010).

[13] William Cranch, *Preface*, 1 Cranch iii (1804), *in* 4 THE FOUNDERS' CONSTITUTION 188, 188 (Philip B. Kurland & Ralph Lerner eds., 1987); *see generally William Cranch*, HIST. SOC'Y OF THE D.C. CIR., https://dcchs.org/judges/cranch-william/ (last visited Feb. 20, 2022) (providing a short biography on Judge Cranch).

[14] Cranch, *supra* note 13, at 188.

[15] Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 409–10 (1932) (Brandeis, J., dissenting).

[16] *Id.* at 410 (emphasis added).

[17] *Id.* at 406–07.

[18] *Id.* at 407–08 (footnote omitted).

important that the applicable rule of law be settled than that it be settled right,"[19] wrongness essentially controlled whether the Court felt bound to adhere to precedent. The paradigmatic case overruling precedent looks something like this:

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

Examples of this approach to stare decisis abound. In *Joseph Burstyn, Inc. v. Wilson*, the issue before the Court was whether censorship of motion pictures violated the First Amendment.[20] Decades earlier, *Mutual Film Corp. v. Industrial Commission of Ohio*, held that motion pictures were "not to be regarded . . . as part of the press of the country or as organs of public opinion."[21] In other words, motion pictures received no protection under the First Amendment. As the *Burstyn* Court explained, First Amendment decisions since *Mutual* cast doubt on that conclusion.[22] What's more: *Mutual* was a silent-film -era decision. The advent of the talkies eleven years after *Mutual* altered the First Amendment calculus.[23] Thus, the Court concluded, *Mutual* was "out of harmony with" the Court's modern view of both motion pictures and the First Amendment, and the Court would "no longer adhere to it."[24]

This structure, with slight variations, appeared frequently in the Court's opinions throughout the twentieth century.[25] At least once, the

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19 *Id.* at 406.

20 343 U.S. 495, 497 (1952).

21 236 U.S. 230, 244 (1915).

22 *Burstyn*, 343 U.S. at 500–02.

23 *Id.* at 502 n.12.

24 *Id.* at 502.

25 *E.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 555–57 (1985) (overruling *Nat'l League of Cities v. Usery*); United States v. Scott, 437 U.S. 82, 86–87, 100–01 (1978) (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–08 (1932) (Brandeis, J., dissenting)) (overruling *United States v. Jenkins*); Katz v. United States, 389 U.S. 347, 349–53 (1967) (overruling the Fourth Amendment trespass doctrine established in *Olmstead v. United States* and *Goldman v. United States*); Gideon v. Wainwright, 372 U.S. 335, 339, 342–45 (1963) (overruling *Betts v. Brady*); *see also* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 635–42 (1943) (centering the Court's discussion almost entirely around refuting key premises of the Court's decision in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940)).

Court summarily overruled "inconsistent" precedent in a footnote.[26] In many cases, wrongness—as determined by later jurisprudential developments, deviation from fundamental principles, etc.—was the primary justification given for overruling precedent.[27]

B. Contemporary Stare Decisis

Not so today. Unlike the comparatively simple analysis recounted above, the paradigmatic analysis now resembles a jazz standard, beginning with a recitation of the stare decisis tune and transitioning to an improvisational free-for-all before concluding.

First, the tune: stare decisis is a critically important policy. Precedents "warrant [the Justices'] deep respect as embodying the considered views of those who have come before."[28] The Justices "approach the reconsideration of [the Court's] decisions with the utmost caution."[29] Adherence to precedent is "a foundation stone of the rule of law,"[30] "promot[ing] the evenhanded, predictable, and consistent development of legal principles, foster[ing] reliance on judicial decisions, and contribut[ing] to the actual and perceived integrity of the judicial process."[31]

After recounting these principles, the tune reaches its bridge: As foundational as stare decisis may be, it is not "an inexorable command."[32] Some precedents are so wrong and so harmful that it is worse to keep them than to get rid of them. Stare decisis is especially weak when revisiting constitutional precedents,[33] though it is stronger

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[26] Craig v. Boren, 429 U.S. 190, 210 n.23 (1976).

[27] I do not argue that the Court did not weigh the "practical effects" of overruling precedent. *See generally* Robert H. Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A. J. 334, 334 (1944) (explaining that the Court considers the pragmatic consequences of reversing itself). I argue only that those effects weighed far less in the analysis than did the issue of wrongness in most cases.

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

[29] South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2096 (2018) (quoting Pearson v. Callahan, 555 U.S. 223, 233 (2009)).

[30] Kimble v. Marvel Ent., LLC, 576 U.S. 446, 455 (2015) (quoting Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 798 (2014)); *see also* Citizens United v. FEC, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring) ("[The stare decisis doctrine's] greatest purpose is to serve a constitutional ideal—the rule of law.").

[31] *E.g.*, Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2478 (2018) (quoting Payne v. Tennessee, 501 U.S. 808, 827 (1991)).

[32] *E.g.*, *Ramos*, 140 S. Ct. at 1405 (quoting Pearson v. Callahan, 555 U.S. 223, 233 (2009)); *id.* at 1412 (Kavanaugh, J., concurring in part); *id.* at 1432 (Alito, J., dissenting); *Janus*, 138 S. Ct. at 2478 (quoting *Pearson*, 555 U.S. at 233); *Wayfair*, 138 S. Ct. at 2096 (quoting *Pearson*, 555 U.S. at 233); *Kimble*, 576 U.S. at 455 (quoting *Payne*, 501 U.S. at 828); *see also Citizens United*, 558 U.S. at 377 (Roberts, C.J., concurring) (quoting Lawrence v. Texas, 539 U.S. 558, 577 (2003)).

[33] *E.g.*, *Janus*, 138 S. Ct. at 2478 (quoting Agostini v. Felton, 521 U.S. 203, 235 (1997)).

when revisiting statutory precedents.[34] Regardless of the context, however, "*stare decisis* isn't supposed to be the art of methodically ignoring what everyone knows to be true."[35]

Then back to the A-section: rule-of-law principles mean the Court cannot simply overrule precedent because it is wrong. That step requires "strong grounds"[36] or a "special justification"[37] beyond mere wrongness.

Having played through the tune, the Justices begin to improvise. To find a "special justification" (or a lack thereof), they draw on a wide collection of "somewhat elastic . . . factors"[38] in an ad hoc fashion with no "consistent methodology or roadmap"[39] for reassessing precedent. Justice Kavanaugh's recent non-exclusive catalogue of these factors included:

- the quality of the precedent's reasoning;
- the precedent's consistency and coherence with previous or subsequent decisions;
- changed law since the prior decision;
- changed facts since the prior decision;
- the workability of the precedent;
- the reliance interests of those who have relied on the precedent; and
- the age of the precedent.[40]

These factors need not be—and often are not—considered in every case. Instead, the Justices draw whichever factors they find relevant and apply them with whatever weight they deem necessary.

In other words, "special justification" is in the eye of the beholder. The varying weight placed on reliance interests illustrates the point. To some Justices, reliance interests provide the counterbalance to wrongness and workability issues.[41] This suggests that reliance

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[34] *E.g.*, *Kimble*, 576 U.S. at 456.

[35] *Ramos*, 140 S. Ct. at 1405.

[36] *E.g.*, *Janus*, 138 S. Ct. at 2478 (citing United States v. Int'l Bus. Machs. Corp., 517 U.S. 843, 855–56 (1996) and *Citizens United*, 558 U.S. at 377 (Roberts, C.J., concurring)).

[37] *E.g.*, *Kimble*, 576 U.S. at 455–56 (quoting Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 266 (2014)).

[38] *Ramos*, 140 S. Ct. at 1414 (Kavanaugh, J., concurring in part).

[39] *Id.*

[40] *Id.* Justice Kavanaugh's list excludes at least one factor—institutional legitimacy—explicitly considered by the Justices in the past. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864–69 (1992).

[41] *See, e.g.*, Knick v. Twp. of Scott, 139 S. Ct. 2162, 2179 (2019) (finding untenable any objections to overruling a precedent that generated no reliance interests); *see*

interests must be present to uphold a wrong precedent. But other Justices see reliance interests as only a "plus-factor"—they need not exist for the Court to stand by a previous error.[42] At least one Justice thinks the Court should not consider reliance interests at all.[43] And that doesn't begin to scratch the surface with the *types* of reliance interests the Court should consider.[44]

No bright temporal line marks the Court's shift from one approach to the other. But *Casey* serves as a clear inflection point. The Court occasionally considered reliance interests and workability issues before *Casey*.[45] And since *Casey*, the Court has occasionally overruled precedents without engaging in this elaborate modern dance.[46] Even *Casey* summarily overturned two precedents based on wrongness—after its dramatic consideration of extralegal factors with respect to *Roe v. Wade*.[47]

But it is no secret that the Court's abortion precedents lurk in the background of every case involving stare decisis.[48] *Roe* and *Casey* have become litmus tests for judicial appointees.[49] As one former clerk for

Jackson, *supra* note 27 (explaining that reliance interests have an effect in stare decisis matters).

[42] *Knick*, 139 S. Ct. at 2190 (Kagan, J., dissenting) (emphasis removed).

[43] *Ramos*, 140 S. Ct. at 1425 n.1 (Thomas, J., concurring in the judgment).

[44] *Compare, e.g.*, Montejo v. Louisiana, 556 U.S. 778, 809 (2009) (Stevens, J., dissenting) (arguing that requiring police interrogations to end once a defendant requests counsel created a public interest "in knowing that counsel, once secured, may be reasonably relied upon as a medium between the accused and the power of the State"), *with id.* at 793 n.4 (majority opinion) (rejecting this reliance interest).

[45] *E.g.*, Payne v. Tennessee, 501 U.S. 808, 828 (1991).

[46] *E.g.*, Edwards v. Vannoy, 141 S. Ct. 1547, 1559–60 (2021) (overruling the "watershed" rule articulated by *Teague v. Lane*, 489 U.S. 288 (1989), "that never actually applies in practice"); United States v. Cotton, 535 U.S. 625, 629–31 (2002); Agostini v. Felton, 521 U.S. 203, 235–36 (1997).

[47] *Compare* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–56, 860–61, 864–69 (1992) (going to extreme lengths to uphold precedent), *with id.* at 881–82 (overruling other precedents with ease).

[48] *E.g.*, Nina Totenberg, *Supreme Court Justices Continue to Struggle with Precedent*, NAT'L PUB. RADIO (June 26, 2019, 6:10 PM), https://www.npr.org/2019/06/26/736344189/supreme-court-justices-continue-to-struggle-with-precedent ("First and foremost, [stare decisis is] about Roe vs. Wade and the [C]ourt's other abortion precedents.").

[49] *See, e.g.*, JAN CRAWFORD GREENBURG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT 221 (2007) (explaining that the issue of abortion has "consumed Supreme Court nominations and confirmation proceedings"); *id.* at 232 ("The issue of abortion came to dominate Roberts's private meetings with senators [during his confirmation process]. In almost every session, with senators on both sides, the key question was about his views on abortion."); Melissa Murray, *The Symbiosis of Abortion and Precedent*, 134 HARV. L. REV. 308, 310 (2020) (observing that "every Supreme Court nominee [is] quizzed about her views on the role of precedent in decisionmaking and, indirectly, the continued vitality of *Roe*"); Stephen Carter, *The Confirmation Mess*, 101 HARV. L. REV. 1185, 1191 (1988) (noting

Roe's author observed, Senators "practically require that a judicial nominee sign on to logic that is, at best, questionable, and at worst, disingenuous and results-oriented."[50] And anxiety over abortion reaches fever pitch with each overruling.[51]

Judge Ken Starr has humorously compared the Court's modern handwringing over precedent to the titular hero in Shakespeare's *Hamlet*: "To overrule, or not to overrule?"[52] That is the question. When faced with the prospect of overruling precedent, the Court laments the wrongness and unfairness of the precedent but fears that overturning it might prove even worse. Or perhaps another soliloquy two scenes later in *Hamlet* provides the more apt analogy: "Now might we do it pat," the Court signals as it grants certiorari on the question of whether to revisit an oft-criticized decision.[53] But wait—perhaps this case is not the right vehicle.[54] Or maybe the reliance interests on the old decision are too strong.[55] And what if the public perceives a reversal as the Court buckling under political pressure?[56]

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that pro-abortion advocates have become focused on keeping at least five supportive Justices on the Supreme Court).

[50] Edward Lazarus, *The Lingering Problems with* Roe v. Wade*, and Why the Recent Senate Hearings on Michael McConnell's Nomination Only Underlined Them*, FINDLAW (Oct. 3, 2002), https://supreme.findlaw.com/legal-commentary/the-lingering-problems-with-roe-v-wade-and-why-the-recent-senate-hearings-on-michael-mcconnells-nomination-only-underlined-them.html.

[51] *E.g.*, Ruth Marcus, Opinion, *Why a Case About Jury Verdicts Could Spell Trouble for* Roe v. Wade, WASH. POST (Apr. 24, 2020), https://www.washingtonpost.com/opinions/why-a-case-about-jury-verdicts-could-spell-trouble-for-roe-v-wade/2020/04/24/2a3e2072-8660-11ea-878a-86477a724bdb_story.html (speculating about *Roe* and *Casey* in light of *Ramos v. Louisiana*); Noah Feldman, Opinion, *Supreme Court's Administrative Law War Previews Abortion Battle*, BLOOMBERG (June 26, 2019, 12:41 PM), https://www.bloomberg.com/opinion/ articles/2019-06-26/justice-roberts-stare-decisis-and-abortion-matter-in-kisor-case (speculating about *Roe* and *Casey* in light of *Kisor v. Wilkie*); Leah Litman, Opinion, *Supreme Court Liberals Raise Alarm Bells About* Roe v. Wade, N.Y. TIMES (May 13, 2019), https://www.nytimes. com/2019/05/13/opinion/roe-supreme-court.html (speculating about abortion in light of *Franchise Tax Board v. Hyatt*); Jay Willis, *The Supreme Court Just Outlined How It Might Get Rid of Abortion Rights*, GQ (May 13, 2019), https://www.gq.com/story/ supreme-court-hyatt-abortion-rights (same); *see also* Editorial Board, Opinion, *When Legal Precedent Is Discarded by the Supreme Court, Abortion Rights Are Threatened*, BALT. SUN (May 15, 2019, 6:00 AM), https://www.baltimoresun.com/opinion/editorial/bs-ed-0515-supreme-abortion-20190514-story.html (same).

[52] KEN STARR, RELIGIOUS LIBERTY IN CRISIS: EXERCISING YOUR FAITH IN AN AGE OF UNCERTAINTY 39 (2021).

[53] *Cf.* WILLIAM SHAKESPEARE, HAMLET act 3, sc. 3, l. 73 (Joseph Quincy Adams ed., 1992).

[54] *See* Fulton v. City of Phila., 141 S. Ct. 1868, 1877 (2021) ("[W]e need not revisit [*Employment Division v. Smith*] here. This case falls outside *Smith* . . . ."). The Court had granted certiorari on the question of whether to revisit *Employment Division v. Smith*, 494 U.S. 872 (1990). *Fulton*, 141 S. Ct. at 1887 (Alito, J., dissenting).

[55] Kimble v. Marvel Ent., LLC, 576 U.S. 446, 457–58 (2015).

[56] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 867 (1992).

This characterization may be uncharitable, but it is not altogether unfair. After all, a Court overly concerned with political pressure and reliance interests might not have possessed the fortitude to end school segregation or permit minimum wage laws.[57] Thankfully, the Court that decided *Brown v. Board of Education* was not so squeamish.

C. Justice Kavanaugh's Proposed Framework

In *Ramos v. Louisiana*, Justice Kavanaugh took a crack at outlining a consistent stare decisis framework for the Court. Surveying and categorizing the factors previously identified by the Court, Justice Kavanaugh suggests "three broad considerations" that can provide structure to the Court's search for a "special justification."[58] In other words, Justice Kavanaugh's roadmap is intended to limit judicial discretion when considering whether to overrule precedent.

The first of these considerations is wrongness. Not just any wrongness—the precedent must be "grievously or egregiously wrong."[59] Similar to the Court's stare decisis analysis throughout the twentieth century, Justice Kavanaugh explains that "the quality of the precedent's reasoning, consistency and coherence with other decisions, changed law, changed facts, and workability" all may contribute to an opinion's wrongness.[60] He further notes that a precedent "may be egregiously wrong when decided," later "unmasked" as wrong, "or both."[61]

The second consideration is whether "the prior decision caused significant negative jurisprudential or real-world consequences."[62] Has the precedent created issues of "consistency and coherence?"[63] Has it harmed the citizenry?[64] These harms must be weighed against the "reliance interests" that overruling precedent might "unduly upset."[65]

Justice Kavanaugh's framework takes seven or eight factors and condenses them to three. In that sense, the framework improves upon the modern body of law by simplifying the analysis. This simplification,

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[57] *See* Citizens United v. FEC, 558 U.S. 310, 377–78 (2010) (Roberts, C.J., concurring) (concluding that inflexible adherence to stare decisis would have protected *Plessy v. Ferguson*, 163 U.S. 537 (1896), and the jurisprudential descendants of *Lochner v. New York*, 198 U.S. 45 (1905)).

[58] Ramos v. Louisiana, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring in part).

[59] *Id.*

[60] *Id.* at 1414–15.

[61] *Id.* at 1415.

[62] *Id.*

[63] *Id.*

[64] *Id.* (citing Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954) and W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 630–42 (1943)).

[65] *Id.*

with additional refinement, likely will contribute to a more predictable stare decisis doctrine.

Ambiguities remain, however. The remainder of this Article focuses on two such ambiguities related to the first consideration—the methodology for measuring wrongness and the impact wrongness has on the stare decisis calculus. Nevertheless, the Court would move the doctrine in the right direction by adopting Kavanaugh's framework. Justices at the margins of the stare decisis spectrum likely will not accept it. A Justice who believes that reliance questions are not "susceptible of principled resolution" would probably reject any formula that weighs reliance interests.[66] A Justice on the other end of the spectrum who believes the Court should balance ill effects against other factors such as stability in the law—with reliance interests adding only a "plus-factor"—probably will not accept a calculus in which reliance provides the primary counterbalance.[67] But Justice Kavanaugh's framework seems to encapsulate the mainstream approach to stare decisis in an effective way.

II. MEASURING WRONGNESS

The issue of wrongness today may be divided into at least two subparts. The first subpart concerns what counts as wrong. Is a precedent wrong because it reached the wrong conclusion? That is, should the Court analyze the problem as if in the first instance and compare its answer to the precedent in question? Or should the Court focus on the reasoning—e.g., logical leaps or faulty premises—rather than the bottom line?

Both approaches have their benefits and drawbacks. The former approach, which we might call a *contemporary* approach, allows the Court to rely on modern interpretive methods that are more familiar. Textualist jurists, for example, can rely on canons of interpretation to determine what the "correct" answer is and compare that answer to the precedent.[68] The use of familiar tools provides a level of comfort for jurists when reassessing precedents that may have arrived at their

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[66] *Id.* at 1425 n.1 (Thomas, J., concurring in the judgment).

[67] Knick v. Twp. of Scott, 139 S. Ct. 2162, 2190 (2019) (Kagan, J., dissenting) (emphasis removed).

[68] J. HARVIE WILKINSON III, COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE 43–44 (2012) (explaining that jurists who rely primarily on textual meaning in constitutional interpretation can approach constitutional text as they would statutory text—a source of law with which jurists are accustomed and which they interpret on a near-daily basis); Anita S. Krishnakumar, *Textualism and Statutory Precedents*, 104 VA. L. REV. 157, 204–05 (2018) (discussing how textualist jurists analyze and interpret statutes to discern the proper meaning).

result by an unfamiliar path.

But the comfort level inherent in this approach comes at a cost. As judicial philosophy shifts—due to current events, changing membership, or the passage of time—more precedents may be called into question.[69] Unmitigated, this approach would undermine the rule-of-law principles like stability and predictability that stare decisis is intended to serve. This concern animated the Chief Justice's question about wrongness in *Dobbs*. "[I]f we look at [wrongness] from . . . today's perspective, it's going to be a long list of cases that we're going to say were wrongly decided."[70]

One can solve this conundrum by assuming the prior Court's unspoken premises about interpretation and adopting a *contemporaneous focus*. If a litigant asks the Court to revisit a precedent, the Justices should view the precedent through that precedent's own interpretive lens. By assuming the earlier Court's starting point was correct, the present Court can look at both the quality of the challenged decision's reasoning and its fit with contemporaneous decisions. Most modern invocations of stare decisis seem to take this latter approach when determining wrongness.[71] But occasionally, a bias toward contemporary interpretive methods creeps into the Court's analysis.[72]

Separate from the question of how to determine wrongness is the question of how wrongness impacts the stare decisis calculus. That is, once we determine a precedent is wrong, does that conclusion weigh in favor of overturning a precedent? Or does it merely permit the Court to consider whether other factors justify correcting the error? If the precedent *does* weigh into the calculus, is it possible that a precedent's wrongness can provide the *sole* justification for overturning it? This Part will describe the various approaches to these questions as they

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[69] *See* Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1506 (2019) (Breyer, J., dissenting) (criticizing the majority's decision to overrule precedent based on mere disagreement with the precedent); Litman, *supra* note 51 (expressing concerns that *Roe* will be overturned merely because some of the current Justices on the Supreme Court view the decision as simply erroneous); Willis, *supra* note 51 (same); Editorial Board, *supra* note 51 (same). *E.g.*, Lawrence v. Texas, 539 U.S. 558, 566–68 (2003) (noting, in overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), that individual privacy regarding sexual behavior is of greater importance than the *Bowers* Court had considered it).

[70] Transcript of Oral Argument at 40, Dobbs v. Jackson Women's Health Org., No. 19-1392 (2021).

[71] *E.g.*, Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2479–81 (2018); *see also* Harris v. Quinn, 573 U.S. 616, 635–38 (2014) (discussing *Abood v. Detroit Board of Education*'s, 431 U.S. 209 (1977), flawed reasoning and providing the basis for *Janus*'s analysis).

[72] *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1395–97 (2020) (beginning the opinion with an analysis of the Sixth Amendment's meaning at the time of its ratification).

appear in *Ramos*.[73]

A. Ramos v. Louisiana

A Louisiana jury convicted Evangelisto Ramos of second-degree murder by a vote of 10-2.[74] Mr. Ramos appealed this conviction all the way to the Supreme Court of the United States. The constitutional issue in *Ramos* is relatively straightforward: does the Sixth Amendment permit nonunanimous verdicts?[75] The wrinkle, however, is that the Court seemingly answered this question forty-eight years earlier in *Apodaca v. Oregon*.[76]

By a 5-4 vote, the *Apodaca* Court held that the Sixth Amendment did not require jury unanimity to obtain a conviction.[77] A four-Justice plurality explained that neither the text nor the drafting history of the Sixth Amendment indicated which elements of the common-law jury system were constitutionalized.[78] Instead, the plurality focused on "the function served by the jury in contemporary society."[79] Juries "prevent oppression by the Government by providing a 'safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.'"[80] Concluding that this function was served equally well by 10-2 and 11-1 verdicts, the plurality voted to uphold Oregon's nonunanimous jury rule.[81]

Justice Powell provided the critical fifth vote to affirm Mr. Apodaca's conviction, but his reasoning differed from the plurality. Justice Powell reasoned that, though the Sixth Amendment required jury unanimity to obtain a *federal* conviction, it need not require jury unanimity in *state* courts.[82] The issue with this theory, as Justice Powell recognized at the time, is that dual-track incorporation had already been rejected by the Court.[83]

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[73] The groupings that formed in *Ramos* are not fixed and tend to shift according to other extralegal considerations. *See generally* Kurt T. Lash, *The Cost of Judicial Error: Stare Decisis and the Role of Normative Theory*, 89 NOTRE DAME L. REV. 2189 (2014) (describing how normative interpretive theory can explain much of the Court's inconsistency on stare decisis).

[74] State v. Ramos, 231 So. 3d 44, 46 (La. Ct. App. 2017); *see Ramos*, 140 S. Ct. at 1393–94.

[75] *Ramos*, 140 S. Ct. at 1394.

[76] 406 U.S. 404 (1972). *Apodaca* was decided along with a companion case, *Johnson v. Louisiana*, 406 U.S. 356 (1972).

[77] *Apodaca*, 406 U.S. at 404–06.

[78] *Id.* at 407–10.

[79] *Id.* at 410.

[80] *Id.* (quoting Duncan v. Louisiana, 391 U.S. 145, 156 (1968)).

[81] *Id.* at 411, 414.

[82] Johnson v. Louisiana, 406 U.S. 356, 371, 375–76 (1972) (Powell, J., concurring).

[83] *Id.* at 375.

In *Ramos*, the Court's task was to determine whether stare decisis required affirming or rejecting *Apodaca*.[84] A majority of the Court concluded that *Apodaca* ought to be abandoned.[85] But the resulting five opinions reflect very different approaches to a precedent's wrongness and how it should impact the ultimate determination of whether to abandon or adhere to precedent.

B. The Court's Wrongness Benchmarks in Ramos

The *Ramos* majority applies a kitchen-sink approach to stare decisis that is, at times, somewhat difficult to pin down. On the question of how to measure wrongness, the *Ramos* majority vacillates between a contemporaneous focus and a contemporary focus. The Court criticizes the *Apodaca* plurality for deviating from the Court's repeated affirmations—in dicta—that the Sixth Amendment requires jury unanimity.[86] According to the *Ramos* majority, *Apodaca* was "an outlier on the day it was decided, one that's become lonelier with time."[87] The opinion attacks the Louisiana and Oregon laws for their racist origins,[88] and it faults *Apodaca* for failing to consider them.[89] And it denounces the *Apodaca* concurrence's reliance on a rejected theory of incorporation.[90] The opinion (commanding less than a majority at this point) even goes so far as to suggest that *Apodaca* may

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[84] Lurking in the background of *Ramos* was the question of which opinion in *Apodaca*—if either—provided the relevant precedent. *Compare* Ramos v. Louisiana, 140 S. Ct. 1390, 1403–04 (2020) (explaining why *Apodaca* does not apply) *with id.* at 1430 (Alito, J., dissenting) (explaining why *Apodaca* should apply). This question is ultimately irrelevant; each opinion that favored overruling *Apodaca* did so regardless of its reasoning, and the dissent seems to suggest that it would have reaffirmed *Apodaca* under either rationale.

[85] *Id.* at 1408.

[86] *Id.* at 1396, 1399 n.38 (majority opinion).

[87] *Id.* at 1408 (plurality opinion). Though only four justices joined this portion of the opinion, Justice Kavanaugh added a similar observation in his concurrence. *Id.* at 1416 (Kavanaugh, J., concurring in part) (explaining that *Apodaca* "was already an outlier in the Court's jurisprudence, and over time it has become even more of an outlier"); *see also id.* at 1406 (majority opinion) ("[C]alling *Apodaca* an outlier would be perhaps too suggestive of the possibility of company.").

[88] *Id.* at 1394 (majority opinion).

[89] *Id.* at 1405. The Court repeatedly opined about the necessity of grappling with the law's "uncomfortable past." *Id.* at 1401 n.44. But no member of the Court attempted to explain how this history was relevant to the Sixth Amendment's mandate. At least one member of the Court self-consciously nodded toward the legal tenuity of this argument, explaining that Mr. Ramos had not "br[ought] an equal protection challenge." *Id.* at 1410 (Sotomayor, J., concurring). Still, she explained, that "history is worthy of this Court's attention." *Id.* Another Justice attempted half-heartedly to tie it into other stare decisis factors. *Id.* at 1417–18 (Kavanaugh, J., concurring in part).

[90] *Id.* at 1398 (majority opinion).

have produced no precedent at all.[91] After all, if Justice Powell's concurrence were controlling, then "a single Justice writing only for himself has the authority to bind this Court to propositions it has already rejected."[92]

These criticisms generally reflect a contemporaneous view of wrongness. The Court's previous statements about the Sixth Amendment's unanimity requirement existed when *Apodaca* was decided.[93] The racist genesis of the nonunanimous jury rules occurred decades earlier.[94] And of course, Justice Powell knew that the Court had already rejected dual-track incorporation, even lamenting that his argument came "late in the day."[95]

But the *Ramos* Court often leans on a more contemporary focus. The opinion's analysis of the Sixth Amendment begins—in decidedly originalist fashion—with a discussion of the history and original public meaning attached to the phrase "jury trial."[96] According to the Court, this history definitively establishes the *correct* answer to the question presented: The Sixth Amendment demands jury unanimity.[97] Answer key in hand, the Court derides its predecessor for arriving at the wrong result. *Apodaca*'s reasoning was poor, the Court concludes, at least in part because "the plurality spent almost no time grappling with the historical meaning of the Sixth Amendment's jury trial right."[98] Its "functionalist" reasoning was no more than "a breezy cost-benefit analysis" that eroded a constitutional right.[99]

Justice Sotomayor challenged the majority's functionalism charge, noting that "[r]easonable minds have disagreed over time—and continue to disagree—about the best mode of constitutional interpretation."[100] She stopped short, however, of a complete disavowal, arguing only that the use of "different interpretive tools . . . is not a reason *on its own* to discard precedent."[101] Instead, Justice

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91 *Id.* at 1402–04 (plurality opinion).

92 *Id* at 1402.

93 *See id.* at 1425, 1431 (Alito, J., dissenting) (illustrating cases prior to *Apodaca* that discussed the Sixth Amendment).

94 *Id.* at 1426.

95 Johnson v. Louisiana, 406 U.S. 356, 375 (1972) (Powell, J., concurring).

96 *Ramos*, 140 S. Ct. at 1395–97 (majority opinion). The Court may have felt compelled to analyze this issue de novo because Louisiana insisted the Court had never definitively passed on the question. *Id.* at 1394–95. Nevertheless, the Court's opinion is not so cabined—the historical and original meaning analysis provides much of the basis of the Court's criticism of *Apodaca*. *Id.* at 1405.

97 *Id.* at 1397.

98 *Id.* at 1405.

99 *Id.* at 1401.

100 *Id.* at 1409 (Sotomayor, J., concurring). Nevertheless, Justice Sotomayor joined parts of the majority/plurality opinion that made these criticisms.

101 *Id.* (emphasis added).

Sotomayor attempted to guide the discussion back toward the contemporaneous wrongness of *Apodaca*. *Apodaca* was wrong because it was "a universe of one—an opinion uniquely irreconcilable with not just one, but two, strands of constitutional precedent well established *both before and after the decision*."[102]

The two other concurrences were, like the majority opinion, more equivocal about whether *Apodaca*'s interpretive tools could factor into the wrongness analysis. Justice Thomas, for instance, found "no need to prove the original meaning of the Sixth Amendment right to a trial by jury" to strike down Louisiana's nonunanimous rule.[103] Still, his opinion placed heavy emphasis on historical evidence of the meaning of the Sixth Amendment—at its ratification and at the ratification of the 14th Amendment—to establish that the Court's precedents requiring unanimity were "not outside the realm of permissible interpretation."[104]

Justice Kavanaugh similarly emphasizes original public meaning alongside the Court's other Sixth Amendment decisions to conclude that *Apodaca*'s holding was "egregiously wrong."[105] Three times in a single paragraph, Justice Kavanaugh points to "the original meaning and this Court's precedents" or "lines of decisions" as the benchmarks for assessing a case's wrongness.[106] But what benchmark applies when "the original meaning" of a constitutional provision conflicts with "this Court's precedents" interpreting that provision? Justice Kavanaugh doesn't say.

In a dissent authored by Justice Alito, three Justices analyzed *Apodaca*'s reasoning through a decidedly contemporaneous lens.[107] Discussing the *Apodaca* plurality, the dissenters acknowledge that they might not "have agreed either with" its conclusion or its rationale had they been on the Court.[108] That fact alone, however, did not render *Apodaca* indefensible. As the dissenters explain, the *Apodaca* Court had little need to address thoroughly the historical meaning of the Sixth Amendment—because it had done so two years earlier in *Williams v. Florida*.[109]

Far from a "breezy cost-benefit analysis," *Apodaca* was a

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[102] *Id.* (emphasis added).

[103] *Id.* at 1425 (Thomas, J., concurring).

[104] *Id.* at 1421–22. Justice Thomas circumvents *Apodaca*'s conclusion that the Sixth Amendment's unanimity requirement did not apply to the states by explaining that the opinions in *Apodaca* addressed only due process incorporation, a "demonstrably erroneous" theory. *Id.* at 1424.

[105] *Id.* at 1416 (Kavanaugh, J., concurring in part).

[106] *Id.*

[107] *Id.* at 1425 (Alito, J., dissenting).

[108] *Id.* at 1434.

[109] *Id.* at 1433 (citing Williams v. Florida, 399 U.S. 78, 92–100 (1970)).

continuation of the analysis in *Williams*, where the Court sought to identify the central features of the common-law jury right.[110] The *Ramos* dissenters did not substitute their own historical analysis for *Apodaca*'s. They did not engage in their own inquiry to uncover the jury trial's purpose. They did not, in other words, produce an answer key. Instead, they met the *Apodaca* Court on its own terms and worked backwards to determine whether *Apodaca*'s reasoning is defensible *on those terms*.[111]

So, too, with Justice Powell's concurrence. Though the dual-track incorporation theory had fallen out of favor in recent years, it was hardly an "idiosyncratic" position.[112] Indeed, the dissenters argued, that theory "has old and respectable roots."[113] In fact, some members of the *Ramos* majority had argued in favor of dual-track incorporation of the Second Amendment only ten years earlier.[114]

The varying analyses in *Ramos* laid bare the dichotomy between a contemporaneous approach and a contemporary approach to analyzing wrongness. Using modern interpretive philosophies to craft a measuring stick for an older precedent will often reveal significant "flaws" in the older precedent's reasoning. An originalist and a living constitutionalist will often disagree about rationale—even if they agree on a conclusion. Some jurists take a more active or engaged approach to assessing constitutionality, believing that they should "take alarm at the first experiment on our liberties."[115] Other jurists might subscribe to Oliver Wendell Holmes's famous "puke" test—a judge should uphold a statute as constitutional in all cases except where it makes them feel like vomiting.[116] Can there be any question that two philosophies would lead to radically different outcomes?[117] Under such

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[110] *Id.* at 1433–34.

[111] *Id.*

[112] *Id.* at 1434.

[113] *Id.*

[114] *Id.* at 1434–35, 1435 n.27.

[115] Engel v. Vitale, 370 U.S. 421, 436 (1962) (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments* (June 20, 1785), *in* 5 THE FOUNDERS' CONSTITUTION 82, 82 (Philip B. Kurland & Ralph Lerner eds., 1987)).

[116] Letter from Justice Oliver Wendell Holmes to Harold J. Laski (Oct. 23, 1926), *reprinted in* 2 HOLMES-LASKI LETTERS 887, 888 (Mark DeWolfe Howe ed., 1953). Though I struggle to reconcile these two approaches, some jurists have apparently adhered to both theories simultaneously. *Compare* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 599 (1940) (Frankfurter, J., for the Court) (explaining that the courts should interfere with "popular policy" only "where the transgression of constitutional liberty is too plain for argument"), *with* Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 41 (1947) (Rutledge, J., joined by Frankfurter, J., dissenting) (quoting Madison, *Memorial and Remonstrance*, *supra* note 115, at 82) (arguing that the Court should "not tolerate 'the first experiment on our liberties'").

[117] Such radical philosophical shifts on the Court are not unheard of. *Compare*

circumstances, the contemporary approach will more frequently justify revisiting precedent than the contemporaneous alternative.

In contrast, meeting the precedent on its own philosophical terms ensures that the Court revisits only those decisions that are *egregiously* wrong. If the goal of stare decisis is to "limit the number of overrulings and maintain stability in the law,"[118] that goal is probably better served by a contemporaneous approach to wrongness.

III. WEIGHING WRONGNESS

Unquestionably, the benchmark the Court uses to address wrongness is critically important to the stare decisis analysis. The Chief Justice would not have wasted precious time at oral argument on a frivolous question—especially not in a case of the magnitude of *Dobbs*.

But assuming the Court adopted a unified approach to assessing wrongness, there remains another, equally important question: how does that wrongness factor into the broader calculus? Is wrongness a mere permission slip to reevaluate precedent? Is it a factor that weighs in favor of overruling a precedent? Is it the *only* factor? Said differently, what is the intrinsic value of "correct answers"? Certainly, that intrinsic value is something greater than zero. After all, the Court does not concern itself with the negative effects that flow from correct interpretations of the law.[119]

The intrinsic value of "getting it right" lies at the heart of another colloquy during *Dobbs* oral argument, this one between Justice Alito and United States Solicitor General Elizabeth Prelogar. Justice Alito asked the Solicitor General a simple, utterly loaded question: can a precedent "be overruled simply because it was egregiously wrong?"[120] The Solicitor General answered that a litigant would have to offer "some kind of materially changed circumstance or some kind of

Gobitis, 310 U.S. at 597–600 (illustrating a Court that was hesitant to intrude upon the legislature's policy decisions regardless of the constitutional nature of the claim), *with* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943) (illustrating a different-minded Court that was comfortable protecting constitutional rights even when policy implications were involved).

[118] *Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring in part).

[119] *See, e.g.*, Minerva Surgical, Inc. v. Hologic, Inc., 141 S. Ct. 2298, 2309 (2021) (quoting Kimble v. Marvel Ent., LLC, 576 U.S. 446, 455 (2015)) ("[C]orrect judgments have no need for [stare decisis] to prop them up."); Gamble v. United States, 139 S. Ct. 1960, 1969–70, 1974, 1976–80 (2019) (analyzing and rejecting evidence of the precedent's wrongness without considering other stare decisis factors); *Kimble*, 576 U.S. at 455 ("Indeed, *stare decisis* has consequence only to the extent it sustains incorrect decisions.").

[120] Transcript of Oral Argument at 92, Dobbs v. Jackson Women's Health Org., No. 19-1392 (2021).

materially new argument."[121] Justice Alito followed: "So suppose Plessy versus Ferguson was re-argued in 1897, so nothing had changed. Would it not be sufficient to say that was an egregiously wrong decision on the day it was handed down and now it should be overruled?"[122] Ultimately, the Solicitor General argued that the Court has "never overruled" a case "based [solely] on a conclusion that the decision was wrong."[123]

As Josh Blackman pointed out the following day, this is not quite true.[124] Blackman points to two examples where the Court has overruled itself based solely on the precedent's wrongness.[125] The first, the *Legal Tender Cases*,[126] overruled a decision from the previous year that had held the Legal Tender Act unconstitutional.[127] The second, *Barnette*, overruled *Gobitis* in "one of the most stunning reversals in Supreme Court history."[128]

General Prelogar's normative view of stare decisis—that the Court should overrule precedent only when the impetus is something more than wrongness—is roughly consistent with mainstream thought, though it is probably much more protective than the median approach.[129] For instance, most people probably would not conclude that stare decisis should have shielded *Plessy* until we had more information on the harms caused by segregation. There are some decisions that are so "grievously or egregiously wrong" that they should not be allowed to stand.[130]

Most jurists conceive of stare decisis as a balancing test.[131] When

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[121] *Id.*

[122] *Id.*

[123] *Id.* at 95.

[124] Josh Blackman, *Yes, The Supreme Court Has Reversed A Precedent Based Entirely On Its Wrongness*, VOLOKH CONSPIRACY (Dec. 2, 2021, 11:58 PM), https://reason.com/volokh/2021/12/02/yes-the-supreme-court-has-reversed-a-precedent-based-entirely-on-its-wrongness/.

[125] *Id.* As I read Blackman's argument, it implicitly defines wrongness as being an incorrect legal interpretation—not merely a poor fit with related precedent. This Article's definition of wrongness is broader. *See supra* note 27 and accompanying text (explaining the scope of this Article). This definition is closer to Justice Kavanaugh's definition of wrongness. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1414–15 (2020) (Kavanaugh, J., concurring in part) (explaining the egregiously wrong requirement of stare decisis).

[126] 79 U.S. (12 Wall.) 457 (1871).

[127] *Id.* at 553 (overruling Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1869)).

[128] John D. Inazu, *The Four Freedoms and the Future of Religious Liberty*, 92 N.C. L. REV. 787, 803 (2014).

[129] *See* Transcript of Oral Argument, *supra* note 120 (arguing that, in addition to wrongness, material changes in the circumstances are necessary to overrule precedent); *see supra* Section I.C (labeling Justice Kavanaugh's framework as the mainstream approach).

[130] *Ramos*, 140 S. Ct. at 1414 (Kavanaugh, J., concurring in part).

[131] *See* Jackson, *supra* note 27, at 334 (opining that most lawyers do not regard stare decisis to be an absolute principle).

revisiting precedent, the Justices must appraise "the disadvantages of the innovation as well as those of the questioned case, a weighing of practical effects of one against the other."[132] The focus of this Part is whether the Court believes that wrong decisions by their very nature cause harm. Is wrongness *only* a threshold question—a condition precedent to the stare decisis analysis? Or does it provide additional weight in favor of overruling the precedent?

If wrongness provides only permission to weigh the factors, then the Court could not overrule a case simply because it was wrongly decided. Getting the "correct" legal answer has only negligible intrinsic value compared to the property, contract, and even the societal interests that arise in the wake of the wrong decision. In fact, no such interests need to be demonstrated in the absence of significant negative effects. Wrongness itself cannot justify overturning precedent.

This was the Solicitor General's overarching point at oral argument in *Dobbs*: Litigants must provide new evidence of "materially changed circumstance[s]" before the Court could overrule precedent.[133] This applies even to the cases that make up the anticanon. Under this approach, the Court could not legitimately overrule *Plessy* without the social science research that laid the foundation for *Brown*. Nor could it overrule *Lochner* without witnessing the ills of constitutionalized laissez-faire economics.

General Prelogar's view is not without proponents on the Supreme Court. Justice Kagan has adopted a rigid approach to stare decisis, repeatedly opposed overruling any precedent based solely on its wrongness.[134] Not only that—Justice Kagan has also argued that the Court should reaffirm a wrong opinion on the sole basis of stare decisis values such as "stability in the law."[135] By placing primacy on these values, Justice Kagan espouses a uniquely strict view of how "special" a justification must be for the Court to depart from stare decisis, making her far less likely to vote to overturn precedent than her

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[132] *Id.*

[133] Transcript of Oral Argument at 92, Dobbs v. Jackson Women's Health Org., No. 19-1392 (2021).

[134] *E.g.*, Knick v. Twp. of Scott, 139 S. Ct. 2162, 2190 (2019) (Kagan, J., dissenting) ("[T]he entire idea of *stare decisis* is that judges do not get to reverse a decision just because they never liked it in the first instance. Once again, they need a reason *other than* the idea 'that the precedent was wrongly decided.'" (quoting Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 266 (2014))); Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1506 (2019) (Breyer, J., joined by Kagan, J., dissenting) ("It is . . . dangerous to overrule a decision only because five Members of a later Court come to agree with earlier dissenters on a difficult legal question.").

[135] *Knick*, 139 S. Ct. at 2190 (Kagan, J., dissenting).

colleagues.[136]

Justice Thomas rests at the opposite end of this spectrum, viewing wrongness as the *only* relevant factor for whether to overturn precedent. "[T]he Court's typical formulation of the *stare decisis* standard does not comport with our judicial duty under Article III because it elevates demonstrably erroneous decisions—meaning decisions outside the realm of permissible interpretation—over the text of the Constitution and other duly enacted federal law."[137] Thomas argues that by weighing "stability," "reliance," and "judicial 'humility'" against wrong legal interpretations, the Court "invites conflict with its constitutional duty."[138] After all, as a former Justice once described his constitutional role, a Justice swears "to support and defend" the Constitution, "not the gloss which his predecessors may have put on it."[139] The question for Justice Thomas is relatively straightforward: is the precedent "demonstrably erroneous?"[140]

Both Justice Thomas's and Justice Kagan's approaches surely appeal to those of us who value consistency and transparency. "The Court's multifactor balancing test for invoking *stare decisis* has

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[136] Adam Feldman, *Empirical SCOTUS: Precedent: Which Justices Practice What They Preach*, SCOTUSBLOG (July 7, 2020, 2:35 PM), https://www.scotusblog.com/2020/07/empirical-scotus-precedent-which-justices-practice-what-they-preach/ ("Kagan has the lowest [vote-to-overrule] rate of all the justices during [the Roberts Court] period, at just over 33 percent.").

[137] Ramos v. Louisiana, 140 S. Ct. 1390, 1421 (2020) (Thomas, J., concurring in the judgment) (quoting Gamble v. United States, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring)); *see also* Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1925 (2017) ("[B]efore originalism recalled attention to the claim that the original meaning of the text constitutes binding law, no one worried much about whether adherence to precedent could ever be unlawful—as it might be if the text's original meaning constitutes the law and relevant precedent deviates from it.").

[138] *Gamble*, 139 S. Ct. at 1988.

[139] William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949). This is probably about as far as the agreement between Justices Thomas and Douglas would go on this particular point. Justice Douglas saw overruling precedent as an important means of facilitating the evolution of our Constitution. *Id.* at 739; *see also* Barrett, *supra* note 137, at 1925 & n.15 (explaining that our living Constitution must remain updated by overruling precedent as necessary).

[140] *See Ramos*, 140 S. Ct. at 1421 (Thomas, J., concurring in the judgment) (applying the Court's past statements about the need for jury unanimity under the Sixth Amendment because that "interpretation is not demonstrably erroneous"); *id.* at 1422 (explaining that Louisiana's argument about the drafting history of the Sixth Amendment "fails to establish that the Court's decisions are demonstrably erroneous"); *id.* at 1424 (Thomas, J., concurring in the judgment) ("Due process incorporation is a demonstrably erroneous interpretation of the Fourteenth Amendment. . . . I 'decline to apply the legal fiction' of due process incorporation." (quoting Timbs v. Indiana, 139 S. Ct. 682, 692 (2019))); *see also id.* at 1422 (noting that the precedents establishing jury unanimity as a requirement of the Sixth Amendment are "not outside the realm of permissible interpretation"); *id.* at 1424 ("Close enough is for horseshoes and hand grenades, not constitutional interpretation.").

resulted in policy-driven, 'arbitrary discretion.'"[141] Justice Thomas's approach has the benefit of eliminating those questions unsusceptible of "principled resolution,"[142] even though "there is room for honest disagreement, even as we endeavor to find the correct answer."[143] Justice Kagan's formulation employs some of the factors Justice Thomas decries, including plus factors and "superpowered" stare decisis.[144] Nevertheless, her approach to stare decisis ultimately comes down to how strong the reasons are for overruling existing precedent. To be sure, there is more wiggle room here than in the "demonstrably erroneous" test. But the approach is far more consistent than most, as Justice Kagan's voting record in stare decisis cases suggests.[145]

The majority opinion in *Ramos* suggests that the median approach to stare decisis places value on finding the right answer, though it's unclear how that weighs into the analysis. The opinion lists "the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision" as the factors that dictate whether to overrule *Apodaca*.[146] Three of these four factors—quality of the reasoning, consistency with other decisions, and its fit with later decisions—implicitly point toward the decision being wrong.[147]

And yet, the controlling opinion actually places greater weight on wrongness than it lets on. Even *reliance* is transformed into a question of wrongness. True, the majority acknowledged, hundreds of cases would need to be retried if the Court reversed *Apodaca*.[148] But there's another reliance interest at stake, a plurality argues—"maybe the *most important* one: the reliance interests of the American people."[149] It is a nifty maneuver by these four Justices. The interest in having the Constitution interpreted correctly—at least with regard to the scope of a textual right—is a reliance interest. Getting the "right answer" is a reliance interest.

And just like that, all *four* factors referenced in *Ramos* become various measuring sticks for correctness. After all, "*stare decisis* isn't supposed to be the art of methodically ignoring what everyone knows

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[141] *Gamble*, 139 S. Ct. at 1988 (Thomas, J., concurring) (quoting THE FEDERALIST NO. 78, at 599 (Alexander Hamilton) (Sweetwater Press 2010)).

[142] *Ramos*, 140 S. Ct. at 1425 n.1 (Thomas, J., concurring in the judgment).

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

[144] Kimble v. Marvel Ent., LLC, 576 U.S. 446, 458 (2015).

[145] Feldman, *supra* note 136.

[146] *Ramos*, 140 S. Ct. at 1405 (quoting Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1489 (2019)).

[147] *Id.* at 1405–07.

[148] *Id.* at 1406.

[149] *Id.* at 1408 (plurality opinion) (emphasis added).

to be true."[150] Nearly everyone *knows* that *Apodaca* was incorrect—including at least eight of the nine Justices on the Court at the time.[151] So, the majority concludes, the only defensible conclusion is that *Apodaca* must go. By placing emphasis on "the reliance interests of the American people," the Court adopts a position very similar to Justice Thomas's—wrongness is paramount to the analysis.[152]

Justice Kavanaugh's concurrence stakes out a position more toward the middle of the Thomas-to-Kagan wrongness spectrum. Justice Kavanaugh appears to separate the threshold finding of wrongness from the *egregious* wrongness that might count against a precedent in the final analysis. Repeatedly, this concurrence refers to "overrul[ing] erroneous precedent."[153] But while a "garden-variety error" may be enough to initiate the stare decisis analysis, it "does not suffice to *overrule*" a precedent.[154] Justice Kavanaugh's observations thus provide a principled alternative in between Justice Kagan and Justice Thomas. Wrongness matters, but only if it's egregious. And we still must look at other factors.

Where the controlling opinion is preoccupied with wrongness even while it pays lip service to counterbalances like reliance, Justice Kavanaugh attempts to shine some light into the stare decisis black box. Still, his proposal has shortcomings. By trying to separate out "wrongness" factors and "negative effects" factors to be weighed against reliance, this framework admittedly engages in some double counting.[155] Workability, for example, counts against a precedent as evidence of its wrongness and also as evidence of its subsequent negative effects.[156]

Whatever the answer may be, it is clear that the Court has not coalesced around a consistent approach to factor wrongness into the calculus. We can almost certainly expect shifting approaches and alignments when the Court issues its decision in *Dobbs*. Most everyone seems to admit that *Roe* and *Casey* were wrong when they were

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[150] *Id.* at 1405 (majority opinion).

[151] *Id.* ("Nine Justices (including Justice Powell) recognized this for what it was; eight called it an error.").

[152] *Id.* at 1408. It seems doubtful that each of the Justices in the majority would rule this way in every constitutional case. The analysis in *Ramos*—and the premium placed on a "correct" answer—was almost certainly a product of the constitutional civil liberty at stake. As I allude to in note 71, there are almost always other considerations—unstated, and often extralegal—that color these analyses. *See supra* text accompanying note 71.

[153] *E.g.*, *Ramos*, 140 S. Ct. at 1411, 1412 (Kavanaugh, J., concurring in part).

[154] *Id.* at 1414 (emphasis added).

[155] *Id.* at 1414–15 (acknowledging the overlap between the first and second considerations in the proposed stare decisis framework).

[156] *Id.*

decided.[157] How that wrongness factors into the analysis remains to be seen.

CONCLUSION

The Court has no clear, consistent methodology for approaching the questions of how to measure wrongness and how to factor it into the broader stare decisis framework. I do not expect one to emerge in *Dobbs*.

But the picture is not entirely bleak. Abortion precedent—and Justices' normative views on abortion precedent—has shaped the stare decisis doctrine for at least thirty years. It seems likely that *Dobbs* will largely settle that longstanding debate—either because it will overrule *Roe*'s central holding, or because it will further entrench that holding.[158] With that lurking monster out of the way, the Court may be poised to more soberly appraise the inconsistencies in its stare decisis doctrine and coalesce around a more consistent approach.

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[157] *See generally, e.g.*, JACK M. BALKIN, WHAT *ROE V. WADE* SHOULD HAVE SAID (2005); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 375 (1985); Laurence H. Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 7 (1973) ("[T]he substantive judgment on which [*Roe*] rests is nowhere to be found."); John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 947 (1973) ("[*Roe*] is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be.").

[158] It is possible the Court could circumvent stare decisis altogether by holding that the "viability line" declared in *Roe*, reaffirmed in *Casey*, was dicta. Transcript of Oral Argument at 18–20, Dobbs v. Jackson Women's Health Org., No. 19-1392 (2021) (Roberts, C.J.). That seems unlikely. *Id.* at 45 (Barrett, J.) (noting that stare decisis "is obviously the core of" *Dobbs*).