

Appendix 3. Extra Reading on Stare Decisis – from *Roe* to *Dobbs* (Addition to Chapter 3, Section III.B.)

In Chapter 3, Section III.B., the book explains that stare decisis, which generally promotes stability in case law, nonetheless permits a court to overturn its own precedent when stringent conditions are met.

For a brief discussion of those conditions, Section III.B. summarizes the Supreme Court's overturning its earlier recognition of a federal constitutional right to abortion, first established in *Roe v. Wade*, 410 U.S. 113 (1973). For those interested in the evolution of the Supreme Court's views on this issue, following is a more thorough discussion of this line of cases.

In *Roe v. Wade*, by a vote of 7-2, the Supreme Court held that a right to privacy implied in the Constitution, previously recognized in other contexts, extended to a woman's decision whether to abort her fetus. Balancing this interest in control over one's body against a state's compelling state interest in protecting the mother's health and the life of a viable fetus, the Court held that a state could regulate abortion only minimally during the first trimester of pregnancy, could regulate further in the second trimester, and could prohibit abortion in the third trimester unless ending the pregnancy was necessary to protect the health or life of the mother. *Id.* at 154-65.

The majority's reasoning in *Roe v. Wade* drew criticism from some scholars and likely would not have attracted the vote of more conservative Justices who later joined the Court, if they had participated in the 1973 decision in *Roe*. Subsequent cases that challenged abortion rights in the Supreme Court required deference to *Roe* under stare decisis. But the deference required is not absolute, raising the question whether a newly constituted Supreme Court would find that the demanding standards for overturning the precedent were met. In the half century after *Roe* was decided, the Supreme Court twice addressed stare decisis in the context of *Roe v. Wade*, with different results each time.

In the 1992 decision of *Planned Parenthood of S.E. Penn. v. Casey*, 505 U.S. 833 (1992), a closely divided Supreme Court replaced *Roe*'s trimester analysis with an "undue burden" test, but it refused to abandon the "central holding" of *Roe v. Wade*. *Id.* at 875-79. The Court stated that the continuity favored by stare decisis must give way to correction when "a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed." *Id.* at 854. Under stare decisis, reasoned the Court, the determination whether to overrule its own precedent is informed by "a series of prudential and pragmatic considerations," such as whether:

1. "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine"; or
2. "facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification"; or
3. "the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation"; or
4. "the rule has proved to be intolerable simply in defying practical workability."

Id. at 854-55.

In *Casey*, the Court found that overturning *Roe* was not warranted under the first, second, and fourth considerations: The central rule of *Roe* had not proved unworkable and had not been eroded by changes in facts or in related principles of law. *Id.* at 855, 857-60. The Court conceded that the third consideration of public reliance on a precedent—which supports retention of the precedent—weighs most heavily in commercial contexts, “where advance planning of great precision is most obviously a necessity.” *Id.* at 855-56. However, even in the noncommercial contexts of reproduction and sexual equality, reliance could not be discounted:

[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The 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. . . . The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed.

Id. at 256.

The Court added an additional concern that was especially salient to the controversial issue of regulation or prohibition of abortion: To protect the legitimacy of the Court, an extraordinarily divisive issue may call for a ruling that is sufficiently durable to erase all doubts about its vulnerability to continuing political pressures. *Id.* at 865-66. According to *Casey*, this second consideration is present

whenever the Court’s interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.

The Court is not asked to do this very often But when the Court does act in this way, its decision requires an equally rare precedential force to counter the inevitable efforts to overturn it and to thwart its implementation. . . . [O]nly the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure and an unjustified repudiation of the principle on which the Court staked its authority in the first instance.

Id. at 867.

In the context of extraordinary national division over abortion rights, the Court feared that a dramatic change in course of constitutional law might fan the flames of controversy by suggesting that continued strife could inspire further changes in course:

The Court’s duty in the present case is clear. In 1973, it confronted the already-divisive issue of governmental power to limit personal choice to undergo abortion, for which it provided a new resolution based on the due process guaranteed by the Fourteenth Amendment. Whether or not a new social consensus is developing on that issue, its divisiveness is no less today than in 1973, and pressure to overrule the decision, like pressure to retain it, has grown only more intense. A decision to overrule *Roe*’s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court’s legitimacy, and to the Nation’s commitment to the rule of law.

Id. at 868-69.

Because the Supreme Court in *Casey* had not only retained the central holding of *Roe* but had invoked *stare decisis* to underscore the importance of staying the course, one might have viewed the matter as settled. In 2022, however, a newly constituted Supreme Court overruled both *Roe* and *Casey* in *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

Under *Dobbs*, state regulation or restriction of abortion is subject only to the minimal “rational-basis review” applied to health and safety standards and not to the heightened scrutiny applied to restrictions on fundamental rights. *Id.* at 237, 300. *Dobbs* “returns the issue of abortion to those legislative bodies” and the political process. *Id.* at 289.

After reviewing the general contours of *stare decisis*, *id.* at 263-68, the majority opinion in *Dobbs* identifies five factors relevant to “this case” that “weigh strongly in favor of overruling *Roe* and *Casey*: the nature of their error, the quality of their reasoning, the ‘workability’ of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance.” *Id.* at 268.

Regarding the first two factors, the majority was unsparing: it found that *Roe* was “egregiously wrong and deeply damaging,” *id.*, and “stood on exceptionally weak grounds,” *id.* at 270. It further stated that the *Casey* plurality had replaced *Roe*’s test with an “arbitrary” one based on undue burden, and had applied an “exceptional version of *stare decisis*” to retain *Roe*’s essential holding. *Id.*

The majority next found that ambiguity in *Casey*’s undue-burden test rendered it unworkable when applied to state restrictions on terminating a pregnancy. *Id.* at 280-86. Applying the factor of disruptive effects, the majority further found that *Roe* and *Casey* “led to the distortion of many important but unrelated legal doctrines.” *Id.* at 286.

Applying its final listed factor, reliance, the majority discounted the personal and economic autonomy facilitated by *Roe* and *Casey*, characterizing it as leading to reliance that was “intangible” rather than concrete, a form of reliance that the Court was “ill-equipped” to assess. *Id.* at 288. The majority also addressed *Casey*’s suggestion that retaining the essential holding of *Roe* could help quell the contentious debate on the abortion issue and uphold the legitimacy of the Court by dispelling suspicions that a change in membership on the Court could by itself lead to overturning precedent. The *Dobbs* majority responded that ending division in the country – which *Casey* had not achieved in any event – was not an appropriate role for the Court, whose legitimacy would be furthered by the strength of its decisions and not by announcing an end to its assessment of a precedent. *Id.* at 290-92.

In addition to joining the majority opinion, Justice Kavanaugh wrote separately to advance a three-prong *stare decisis* test, which he viewed as satisfied in *Dobbs*: “a constitutional precedent may be overruled only when (i) the prior decision is not just wrong, but is egregiously wrong, (ii) the prior decision has caused significant negative jurisprudential or real-world consequences, and (iii) overruling the prior decision would not unduly upset legitimate reliance interests.” *Id.* at 342 (Kavanaugh, J., concurring).

Justice Roberts joined the majority only in its judgment that the statute in issue should be upheld as a constitutional prohibition of abortion after the fifteenth week. *Id.* at 348-49 (Roberts, C.J., concurring in the judgment). Applying “basic principles of *stare decisis* and judicial restraint,” *id.* at 357, he would have overruled the viability test of *Roe* and *Casey*

without further addressing the scope of constitutional limits on state regulation of abortion. “A narrower decision rejecting the misguided viability line would be markedly less unsettling, and nothing more is needed to decide this case.” *Id.*

In dissent, Justices Breyer, Sotomayor, and Kagan noted that “[w]hen overruling constitutional precedent, the Court has almost always pointed to major legal or factual changes undermining a decision’s original basis.” *Id.* at 394 (Breyer, J., Sotomayor, J., and Kagan, J., dissenting). They argued that nothing had changed since *Roe* and *Casey* except the composition of the Court:

One piece of evidence on that score seems especially salient: The majority’s cavalier approach to overturning this Court’s precedents. *Stare decisis* is the Latin phrase for a foundation stone of the rule of law: that things decided should stay decided unless there is a very good reason for change. It is a doctrine of judicial modesty and humility. Those qualities are not evident in today’s opinion. The majority has no good reason for the upheaval in law and society it sets off. *Roe* and *Casey* have been the law of the land for decades, shaping women’s expectations of their choices when an unplanned pregnancy occurs. Women have relied on the availability of abortion both in structuring their relationships and in planning their lives. The legal framework *Roe* and *Casey* developed to balance the competing interests in this sphere has proved workable in courts across the country. No recent developments, in either law or fact, have eroded or cast doubt on those precedents. Nothing, in short, has changed. Indeed, the Court in *Casey* already found all of that to be true. *Casey* is a precedent about precedent. It reviewed the same arguments made here in support of overruling *Roe*, and it found that doing so was not warranted. The Court reverses course today for one reason and one reason only: because the composition of this Court has changed. *Stare decisis*, this Court has often said, “contributes to the actual and perceived integrity of the judicial process” by ensuring that decisions are “founded in the law rather than in the proclivities of individuals.” *Payne v. Tennessee*, 501 U. S. 808, 827 (1991); . . . Today, the proclivities of individuals rule. The Court departs from its obligation to faithfully and impartially apply the law. . . .

Id. at 363-64.

In addition to emphasizing the traditional *stare decisis* factor of changed law or circumstances, the dissenting Justices sought at length to rebut the majority’s analyses of its listed *stare decisis* factors. Perhaps its most passionate rebuttal related to the majority’s dismissal of reliance on *Roe* and *Casey* as “intangible” and insufficiently “concrete.” The dissenting Justices asserted that “[t]he interests women have in *Roe* and *Casey* are perfectly, viscerally concrete.” *Id.* at 410. “[T]he expectation of reproductive control is integral to many women’s identity and their place in the Nation.” *Id.* at 408.

To allow a State to exert control over one of “the most intimate and personal choices” a woman may make is not only to affect the course of her life, monumental as those effects might be. . . . It is to alter her “views of [herself]” and her understanding of her “place[] in society” as someone with the recognized dignity and authority to make these choices. . . . Women have relied on *Roe* and *Casey* in this way for 50 years. Many have never known anything else.

Id. at 409.

Questions to Ponder:

- (1) What is the stare decisis test for retaining or overruling precedent? What factors does the test consider? Do different factors sometimes apply according to the nature of the issue that the Court is asked to reconsider? Is a change in the law or facts a necessary predicate to overturning precedent or just a helpful but nonmandatory factor?
- (2) Do you believe that stare decisis strikes a principled balance between stability in the law and facilitating necessary change? Or do you agree with the *Dobbs* dissent that a change in the composition of the Court provides a better explanation for an abrupt change in the course of the law? If the latter, does that undermine the legitimacy of the Court or is it a natural consequence of presidential elections and presidential nomination of a Justice when a vacancy must be filled?