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IT’S TIME TO TURN THE TIDE: THE SUPREME COURT MUST MODERATE ITS STARE DECISIS APPROACH BEFORE IT’S TOO LATE FOR CASES LIKE PLYLER

Sabrina Rodriguez

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COMMENTS

IT’S TIME TO TURN THE TIDE: THE SUPREME COURT MUST MODERATE ITS STARE DECISIS APPROACH BEFORE IT’S TOO LATE FOR CASES LIKE PLYLER

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* St. Mary’s University School of Law, J.D., May 2023. Texas State University, M.A., May 2019. Texas State University, B.A., 2016. I wrote this piece to raise awareness about this trend in the Supreme Court’s application of stare decisis and its dangerous consequences—especially for marginalized and underrepresented communities. Through the lens of Plyler v. Doe, this piece highlights the delicate through-line that entwines our unenumerated constitutional rights. I hope my analysis underscores the way advocacy and support for Dreamers and Undocumented families is more crucial than ever.

This piece would not have been possible without my unwavering support system. I’d like to thank my parents, Jose and Teri Rodriguez, who cheered me on every step of the way. I’m proud of this piece, but I’m always most proud to be your daughter. (¡Chile, tomate, y cebolla!) I’d also like to thank Sam, Robert, Adam, and Glen, for contributing to this piece in immeasurable patience and kindness when the going got tough. Finally, I’d like to thank the Volume 25 and 26 Editorial Boards for making space to elevate this discussion.
INTRODUCTION

In May 2022, the public was stunned, and outcry erupted from all sides when a draft majority opinion of the United States Supreme Court’s Dobbs v. Jackson Women’s Health Organization decision leaked to the public.¹ People celebrated and mourned the Supreme Court’s decision to

overturn Roe and Casey—putting an end to the fundamental right to an abortion, but when the dust settled, one question remained: what other rights will be in the Court’s crosshairs next?²

The Dobbs decision calls to reexamine precedents, such as Plyler v. Doe, the Supreme Court’s 1982 ruling safeguarding undocumented students’ access to primary and secondary public education.³ In recognition of the role language plays in public perception of noncitizens and the often harmful relationship between terminology and implicit membership within the national membership narrative, this Comment refers to the undocumented students impacted if Plyler is overturned as “undocumented” unless referencing an authoritative source identifies the students differently.⁴

Disturbing Plyler could have a ripple effect on the way immigrants, regardless of legal status, are incorporated into the fabric of American society.⁵ Schools play a pivotal role in shaping the contours of immigrant children’s social membership, incorporation into the broader community, access to resources, and perspectives on deservingness, inclusion, and

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2. See Kenji Yoshino, After the Supreme Court’s Abortion Ruling, What Could Happen to Other Unwritten Rights?, WASH. POST, (Nov. 30, 2022, 5:34 PM), https://www.washingtonpost.com/magazine/interactive/2022/substantive-due-process-dobbs/ [https://perma.cc/DL7U-3N4G] (speculating what consequences the Supreme Court’s Dobbs decision could have on other rights recognized under the Fourteenth Amendment. Throughout history, unenumerated rights derived from the Fourteenth Amendment tend to empower historically oppressed or marginalized groups. These rights include the right to educate children in languages other than English, the right of parents to send their children to religious education institutions, the right to interracial marriage, the rights pertaining to contraception and abortion, and the right associated with same-sex intimacy and marriage).

3. See generally, e.g., Kevin R. Johnson, Systemic Racism in the U.S. Immigration Laws, 97 IND. L.J. 1455 (2022) (tracing the systemic racism woven into U.S. immigration law and policy since as early as the 1800s through policies such as the Chinese Exclusion Act. The author outlines the way U.S. immigration laws and policies embrace immigrants by creating residency or citizenship pathways when the country needs labor but treats immigrants as disposable or illegal once that need diminishes.).


5. See generally ROBERTO G. GONZALES, LIVES IN LIMBO: UNDOCUMENTED AND COMING OF AGE IN AMERICA (Univ. Cal. Press, 2016) (contrasting the manner in which local laws and practices serve as barriers for adult and children immigrants engaging in American society).
exclusion. Overturning a precedent of this nature—cutting off undocumented students’ access to public education—would impact hundreds of thousands of students across the country, and undoubtedly contribute to further stratification of American society based on access to education, as initially anticipated by Justice Powell’s concurrence in *Plyler*. For many, the Supreme Court’s *Dobbs* decision stood out as a controversial example of the Court overturning precedent—a rare occurrence but well within the Court’s authority. However, one must not perceive this decision as an isolated occurrence; instead, it forms part of a broader pattern with the potential to undermine our remaining unenumerated constitutional rights. For the purposes of this Comment, the substantive theory underpinning the Supreme Court’s *Janus* and *Dobbs* decisions is secondary; analysis is limited to the *stare decisis* approach advanced by these opinions. The Supreme Court’s modern approach to *stare decisis*—the judicial doctrine requiring courts to stand by precedent in order to promote consistent development of legal principles, foster reliance on judicial decisions, and promulgate the integrity of the judicial process—establishes a trajectory where decisions may be swayed by personal preferences, disregarding the foundational values upheld by *stare decisis*.  

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6. See generally id. (outlining the way adult immigrants typically assimilate into their community through their work or occupation, while for children, school primarily serves as their institutional introduction to their new lives as Americans).

7. *See Plyler v. Doe*, 457 U.S. 202, 241 (1982) (Powell, J., concurring) (concluding that the exclusion of undocumented students from schools would operate to the detriment of society at large because excluding these students would create a “subclass of illiterate persons”).


11. *See James Tilghman, Restoring Stare Decisis in the Wake of Janus v. AFSCME, Council 31, 64 N.Y.L. SCH. L. REV. 135, 135–39 (2019) (highlighting the manner in which the Court’s recent *stare decisis* decisions have contorted the doctrine and weakened the Court’s power by relying on subjective factors to overturn precedent).
This trend is traceable through the Court’s recent decisions such as *Citizens United*, *Janus*, and now *Dobbs*. We are standing in a pivotal moment for the Supreme Court. This Comment argues that the Court must take action to eliminate this trend by moderating its approach to the *stare decisis* analysis. Neglecting to undertake remedial measures—opting for a path of indifference—could potentially jeopardize American civil liberties.

I. HISTORY

A. Texas Education Code § 21.031

In May 1975, the Texas Legislature passed Texas Education Code § 21.031 (§ 21.031), which withheld state funds from local school districts for the education of children who were not “legally admitted” into the United States. This statute authorized local school districts to deny undocumented students access to public education. The passage of this statute occurred through a voice vote, devoid of public hearings, deliberation, or comprehensive studies to ascertain the number of affected students or the financial implications for the state.

B. Plyler v. Doe

After the implementation of § 21.031 in 1975, Tyler Independent School District (Tyler I.S.D.) continued to enroll undocumented students...
free of charge until the 1977–78 school year. However, Tyler I.S.D. amended its enrollment policy in 1977 to avoid becoming a “haven for illegal aliens.” In July 1977, Tyler I.S.D. revised its enrollment policy to require undocumented students to pay a “full tuition fee” of $1,000 for enrollment. This change meant that at the start of the 1977 school year, schools turned away children if they were unable to produce a birth certificate. This tuition scheme amounted to expulsion for most undocumented students, particularly those from families with multiple children, where most of the impacted students’ parents worked blue-collar jobs and earned approximately $4,000 annually.

Following enactment of § 21.031, policies akin to Tyler I.S.D.’s affected undocumented pupils throughout the state. In response to changes in admission policies, communities rallied together to organize free or low-cost alternatives, such as evening classes with volunteer teachers and enrolling qualifying students in religious schools, yet the barrier of accessibility hindered many from accessing these options. On September 6, 1977, in response to Tyler I.S.D.’s policy shift, impacted parents of school-age children filed a class action lawsuit in the United States District Court for the Eastern District of Texas seeking permanent injunctive relief—alleging, among other claims, that § 21.031 violated

19. See id. at 572–73 (detailing Tyler I.S.D.’s position that the impact of educating illegal immigrants on the educational system operates to the “detrim ent of the citizens [] and legally ad- mitted child[ren]”).
20. See id. at 572 (outlining the school district’s tuition scheme).
22. See generally id. (stressing the detrimental effects of Tyler I.S.D.’s admission policy).
23. See generally id. (highlighting the extensive reach that § 21.031 had on school districts across Texas).
24. See Texas Matters: Why Abbott Wants Plyler v. Doe Overturned, supra note 18, at 03:46 (describing the way different communities responded to § 21.031 policies); see also, e.g., Raul A. Reyes, A Landmark Case Ensuring Education to Undocumented Children Turns 40, NBC News, (June 13, 2022, 4:55 PM), https://www.nbcnews.com/news/latino/plyler-v-doe-undocumented-children-supreme-court-40-anniversary-rcna33064 [https://perma.cc/3MVB-QTVA] (illustrating the pressure and high stakes surrounding this litigation because the undocumented families would face harassment if their identities were discovered. For instance, the judge, cognizant of the vulnerable position of these families, scheduled their testimony in court as early as 6:00 AM, while some of the plaintiffs arrived at court in vehicles with their belongings, driven by the underlying fear of being instantly deported.).
their right to equal protection under the laws.25 The complaint identified the Superintendent and Board of Trustees of Tyler I.S.D. members as defendants, while the State of Texas (State) intervened as a party defendant.26

In its contemplation of the Plaintiffs’ motion for permanent injunctive relief, the district court made the following findings of fact: first, the challenged statute and subsequent policy had neither the purpose nor effect of keeping illegal aliens out of the state of Texas; instead, the policy sought to forestall the “potential drain on local educational funds” if Tyler I.S.D. continued to educate illegal aliens.27 Second, the court ascertained that the rise in school enrollment prior to 1975 and the attendant elevated cost of educating additional students were primarily attributable to the admission of children who were legal residents—not illegal alien students who comprised only a small percentage of the school district.28 Third, barring undocumented children from schools would conserve state resources but would not necessarily enhance the quality of public education in Texas because diminished enrollment would result in less state funding from the state’s Available School Fund.29 The court observed that such circumstances would place the school district in a predicament—compelling it to choose between augmenting its own contribution to sustain its present level of expenditures or curtailing programs as a consequence of reduced funding, ultimately resulting in no improvement in the quality of

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27. See Plyler, 458 F. Supp. at 575–76 (“Increasing numbers of Mexican nationals have emigrated into the United States in recent years. . . . This wave of migration has presented grave problems for the public schools in Texas. The mere increase in population . . . has meant that existing school facilities in the impacted areas are physically inadequate . . . result[ing] in overcrowding of school buildings and classrooms.”).

28. See id. at 577–78 (noting that the implementation of this policy would only result in the exclusion of around sixty students out of a total enrollment of 16,000, thereby rendering the economic savings negligible. “This case mainly concerns a very small sub-class of illegal aliens with very different characteristics, that is, entire families who have migrated illegally and for all practical purposes permanently to the United States.”).

29. See id. at 577 (emphasizing that the exclusion of undocumented children from the benefits of Texas’ Available School Fund does not translate to an improvement in educational quality for the remaining students. Such a syllogism, the court opined, is “unreliable, and often perverse in operation.”).
education. The court found that the impact of § 23.031 was borne primarily by families whose presence in the United States, though unlawful, was practically permanent—a circumstance distinguishable from the majority of illegal migrants whose temporary presence carries implications for the labor market in the United States. The court went on to note that studies demonstrate illegal aliens as a class—and especially those with permanent ties to the United States—do not produce a substantial drain on public services. Finally, the court found that withholding a public education from illegal aliens “today” could cause a poverty-stricken subclass of legal aliens “tomorrow.”

Based on these factual findings, the district court granted the permanent injunction against § 21.031 and Tyler I.S.D.’s amended policy, holding as a matter of law that the Plaintiffs merited protection under the Fourteenth Amendment, and that § 21.031 failed constitutional muster because it could not withstand even rational basis scrutiny. The Fifth Circuit affirmed the district court’s analysis, concluding that § 21.031 was “constitutionally infirm regardless of whether it was tested using the mere rational basis standard or some more stringent test.”

30. See id. at 577 (suggesting this policy would have the opposite effect, effectively crippling the school district by reducing available resources for remaining students despite its intent to avoid draining resources).

31. See id. at 578 (noting that the families impacted by § 21.031 are unlike most illegal immigrants, who are generally young adult males seeking employment opportunities and staying in the United States for short periods of time or sending earnings back to their dependents abroad. The policy does not impact this majority; rather, it targets a small class of illegal aliens who, “for all practical purposes,” have migrated to the United States permanently.).

32. See id. (refuting sweeping generalizations regarding the significant strain imposed by illegal aliens on public services, supported by studies indicating that such access could (1) risk exposure of their status and result in deportation; and (2) there is no welfare tradition in Mexico to which most illegal immigrants may have become accustomed. This is especially true for migrants such as those impacted by § 21.031 who have migrated permanently, because they access public services at a lower rate but still pay consumer taxes and Social Security taxes).

33. See id. at 577 (“The predictable effects of depriving an undocumented child of an education are clear and undisputed. Already disadvantaged as a result of poverty, lack of English-speaking ability, and undeniable racial prejudices, these children, without an education, will become permanently locked into the lowest socio-economic class”).

34. See id. at 585 (focusing on the “language [and] logic” of the Fourteenth Amendment to conclude that its protections extend to illegal aliens. Further, the statute fails constitutional muster because the State failed to articulate a rational basis for the statute or Tyler I.S.D.’s admission policy.).

35. See generally Doe v. Plyler, 628 F.2d 448, 458 (5th Cir. 1980) (concluding the State’s classification scheme barring undocumented students from accessing public education would not survive any level of judicial scrutiny).
C. In re Alien Children Education Litigation

Between 1978 and 1979, lawsuits challenging § 21.031 were filed across Texas in the United States District Courts for the Southern, Western, and Northern Districts of Texas. On November 16, 1979, Texas’ Judicial Panel on Multidistrict Litigation consolidated these claims against the state officials into a single action in the District Court for the Southern District of Texas. Upon review, the district court held that, “[T]he absolute deprivation of education should trigger strict judicial scrutiny, particularly when the absolute deprivation is the result of complete inability to pay for the desired benefit.” The court determined that the State’s concern for fiscal integrity was not a compelling state interest and that exclusion of these children was not necessary to improve education within the state.

Moreover, the educational needs of the children affected by the statute’s exclusionary provision did not diverge from those of the children who were not subject to such exclusion. The court therefore concluded that § 21.031 was “in no way carefully tailored or drawn to advance the state interest.”

While appeal of the district court’s In re Alien Children Education Litigation decision was pending, the Fifth Circuit rendered its decision in Doe v. Plyler. Drawing upon the persuasive authority of the Fifth Circuit’s Plyler decision, the appellate court expeditiously upheld the district court’s ruling in In re Alien Children Education Litigation, concluding the challenged statute was not sufficiently narrowly tailored to advance

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37. See generally id. (elucidating the procedural measures undertaken to consolidate the challenges to § 21.031).
38. See id. at 582 (determining strict scrutiny as the appropriate level of judicial scrutiny for the Plaintiffs’ challenge).
39. See, e.g., id. at 583 (finding the State’s asserted fiscal interest to be an insufficient justification for § 21.031, and the State failed to meet its burden to prove that § 21.031 was necessary to enhance education within the state).
40. See id. (determining the excluded pupils needs were not different from those unaffected by the statute).
41. See id. at 583–84 (deciding the statute failed constitutional muster).
42. See Plyler, 628 F.2d at 450 (holding § 21.031 violated the Equal Protection Clause whether evaluated under mere rational basis scrutiny or any more stringent standard).
the state’s interest appropriately, and the Court consolidated In re Alien Children Education Litigation with Plyler.\textsuperscript{43}

\textbf{D. Plyler in the Supreme Court}

The Supreme Court’s \textit{Plyler v. Doe} decision began by extending the protections of the Fourteenth Amendment to the Plaintiffs and undocumented immigrants, generally.\textsuperscript{44} The Fourteenth Amendment provides: “No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”\textsuperscript{45} The Court disagreed with the State’s argument that “undocumented aliens, because of their immigration status, are not ‘persons within the jurisdiction’ of the State of Texas” and are therefore not eligible for Fourteenth Amendment protections.\textsuperscript{46} Instead, the Court firmly asserted that an individual’s immigration status should not undermine their eligibility for Fourteenth Amendment protection, recognizing them as “surely a person in any ordinary sense of that term,” and the jurisdictional reference in the Fourteenth Amendment has a purely geographical connotation, referring to the physical territory of the state.\textsuperscript{47} The Court therefore concluded that all persons within the geographic boundaries of the state—regardless of immigration status—were “entitled to the equal protection of the laws that a State may choose to establish.”\textsuperscript{48}

The Court went on to select and apply the appropriate level of judicial review to evaluate state-imposed classification schemes such as

\begin{footnotesize}
\begin{enumerate}
\item See Plyler v. Doe, 457 U.S. 202, 210 (1982) (summarizing the consolidation of \textit{Plyler} and \textit{In re Alien Children Education Litigation}).
\item See id. at 215 (“That a person’s initial entry into . . . the United States, was unlawful . . . cannot negate the simple fact of his presence within the State’s territorial perimeter. . . . [U]ntil he leaves the jurisdiction . . . he is entitled to the equal protection of the laws.”).
\item U.S CONST. amend. XIV. § 1 (emphais added).
\item See Plyler, 457 U.S. at 210 (rejecting this argument on the basis that precedent on this issue supports aliens’ eligibility for Fourteenth Amendment protections).
\item See id. at 210 n.10 (citing United States v. Wong Kim Ark, 169 U.S. 649, 693 (1898)) (disposing of the State’s argument that the Fourteenth Amendment cannot recognize aliens as “persons within the jurisdiction” due to their citizenship status. The Court draws on \textit{United States v. Wong Kim Ark} to assert that the jurisdictional reference in Section One of the Fourteenth Amendment refers to the physical territory of the state and, therefore, has a purely geographical connotation.).
\item See id. at 215 (extending the reach of equal protection under the law to encompass all individuals within the jurisdiction of the United States).
\end{enumerate}
\end{footnotesize}
§ 21.031. The Court first explained the spectrum of judicial scrutiny, beginning with strict scrutiny, which is employed where: (1) a government action relies upon a classification that disadvantages a “suspect class”; (2) impinges upon the exercise of a “fundamental right”; or (3) is presumptively invidious (such as classifications upon race). Governmental classification schemes requiring strict scrutiny are only upheld where they have been “precisely tailored to serve a compelling governmental interest.”

The Court then turned to a less stringent form of judicial review, explaining how intermediate scrutiny is employed when government classifications are not facially invidious, but still “give rise to constitutional difficulties.” These classifications will only be upheld where the classification scheme “reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the State.”

The Court notably abstained from engaging in rational basis scrutiny, a standard applied to assess government actions when neither strict scrutiny nor intermediate scrutiny is deemed appropriate. Under rational basis scrutiny, government action will be upheld where it is “rationally related to a legitimate state interest.”

The Court refrained from applying strict scrutiny to the Plaintiffs’ challenge. The Court rejected the State’s claim that undocumented children comprise a “suspect class” eligible for a heightened scrutiny analysis.

49. See id. at 217 (explaining the tiers of strict and intermediate judicial scrutiny).
50. See id. at 216–17 (describing the circumstances under which strict scrutiny is employed by the courts).
51. See id. (setting out the criteria to survive strict scrutiny).
52. See id. at 217 (elucidating when intermediate judicial scrutiny is triggered).
53. See id. at 217–18 (explicating the criteria to survive intermediate scrutiny).
54. See generally City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985) (“The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.”).
55. See id. at 439–40 (demonstrating that government action fails rational basis scrutiny when the challenger fails to demonstrate that the government action is not reasonably related to the state’s legitimate interest. The Court concluded that because the record did not reflect any rational basis that a home for the mentally incapacitated would pose any unique threat to the city’s legitimate interests, the ordinance requiring a special use permit contravenes the Constitution.).
56. See, e.g., Plyler, 457 U.S. at 219 n.19 (declining application of strict scrutiny because the Court rejects the claim that “illegal aliens” comprise a suspect class).
57. See id. (repudiating the State’s arguments against considering aliens “people” as contemplated by the Fourteenth Amendment because: (1) entry into this class was “the product of voluntary action”; and (2) admission to this class constituted a federal crime, distinguishing it from recognized “constitutionally irrelevant” classifications meriting strict scrutiny).
The Court further rejected the application of strict scrutiny to this matter because “[p]ublic education is not a [fundamental] right,” and is ineligible for strict scrutiny.58

The Court instead elected to employ a form of heightened rational basis scrutiny.59 The Court utilized this level of scrutiny due to its recognition of the Plyler Plaintiffs as a “quasi suspect class.”60 The Court reasoned that although the Plaintiffs’ presence in the United States was unlawful, it was through the “fault” of their parents and not of their own accord.61 The Court recognized that, “[e]ven if the State found it expedient to control the conduct of adults by acting against their children, legislation direct[ing] the onus of a parent’s misconduct against his children does not comport with fundamental conceptions of justice.”62 The Court further justified employing a heightened form of rational basis scrutiny because of the “quasi-fundamental” nature of the right at stake—namely, the access to a free public education.63 The Court first acknowledged its San Antonio Independent School District. v. Rodriguez decision, where the Court held that public education is not a constitutional right.64 However,
the Court proceeded to enumerate a plethora of reasons delineating why public education surpasses other “governmental benefits.”

The Court posited that public education warrants additional safeguarding based on two justifications: (1) its “importance in maintaining our basic institutions”; and (2) the “inestimable toll of that deprivation on the social, economic, intellectual, and psychological well-being of the [child].”

Next, the Court addressed the State’s arguments in support of § 21.031. First, the Court dismissed the State’s contention that implied disapproval from Congress regarding the Plaintiffs’ undocumented status constituted a license for states to withhold benefits guaranteed to others. The Court clarified that although prior rulings acknowledged that states possess “some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal,” the Court observed that in this case, there was “no indication that the disability imposed by [§ 21.031] corresponded to any congressional policy.”

The Court subsequently examined the State’s economic rationale for § 21.031, contending that the categorization system advanced the State’s interest in the “preservation of . . . limited resources for the education of its lawful residents.” The Court found this argument unconvincing—emphasizing that the State failed to fulfill its obligation of presenting evidence to substantiate its claim that undocumented students impose a substantial “burden on the State’s economy.”

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65. See id. at 221–22 (elevating education among other governmental benefits because of its role in American society).

66. See id. (“We have recognized . . . public schools as a most vital civic institution for the preservation of a democratic system of government, . . . and as the primary vehicle for transmitting ‘the values on which our society rests.’”).

67. See id. at 224–27 (dismantling each of the State’s contentions in turn).

68. See id. at 225–26 (concluding there was “no indication that the disability imposed [by the statute] correspond[ed] to any identifiable congressional policy,” and the Court was unwilling “to impute to Congress the intention to withhold from these children . . . access to a basic education.”).

69. See id. (quoting DeCanas v. Bica, 424 U.S. 351, 361 (1976)) (distinguishing DeCanas from Plyler based on the differences between congressional policy underlying each challenge and the states’ respective interest in an educated populous).

70. See id. at 227–28 (navigating through the State’s argument that educating undocumented students diminishes the quality of education for lawful residents).

71. See id. at 228 (rejecting the State’s argument for lack of evidence. “To the contrary, the available evidence suggests that illegal aliens underutilize public services, while contributing their labor to the local economy and tax money to the state fisc.”).
unmoved by the State’s argument that § 21.031 would boost Texas’s economy by serving as a deterrent to illegal immigration; the Court instead adopted the district court’s factual finding that employment opportunities motivate illegal entry into the State of Texas—not to access free education.\footnote{72} Finally, the Court rejected Texas’s cited policy justifications for § 21.031.\footnote{73} The State claimed that excluding undocumented children from public schools would better position the State to provide high-quality public education.\footnote{74} The Court concluded the record did not support this claim.\footnote{75} The Court further rejected the State’s claim that undocumented students should be excluded from public schools because, by nature of their illegal status, they were “less likely than other children to remain within the boundaries of the State, and to put their education to productive social or political use within the State.”\footnote{76} The Court pointed out that the State has no assurance that any child will employ the education provided by the State within the State’s borders.\footnote{77} Moreover, the evidentiary record indicated that many of the undocumented children disabled by § 21.031’s categorization scheme will “remain in this country indefinitely, and that some will become lawful residents or even citizens of these United States.”\footnote{78} The majority concluded its opinion with the following observation:

It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment,
welfare, and crime. It is thus clear that whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation.\textsuperscript{79}

But even cloaked in the Court’s protection through \textit{Plyler}, undocumented students’ access to public education continues to come under attack.\textsuperscript{80}

\textbf{E. Plyler Under Fire}

1. Federal Legislation

Since the Supreme Court’s \textit{Plyler} decision in 1982, undocumented students’ access to public education has persisted as a political lightning rod amidst the United States’ already-turbulent attitude toward immigrants.\textsuperscript{81} In the 1990s, Congress enacted sweeping immigration reform measures aimed at reducing the number of immigrants admitted to the United States annually, slashing public benefits, such as education for immigrants, and proscribing mandatory deportation for legal permanent residents convicted of certain criminal offenses.\textsuperscript{82}

Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) in 1996.\textsuperscript{83} PRWORA barred provision of “state and local public benefits” to noncitizens who are “not lawfully in the United States” unless the state enacts legislation that “affirmatively

\textsuperscript{79} Id.


\textsuperscript{81} See \textit{generally id.} (reflecting on the restrictions imposed upon the civic participation of noncitizens in virtually all areas of the United States’ societal landscape due to the perceived “Immigration Crisis”); see Kevin R. Johnson, \textit{Fear of an “Alien Nation”: Race, Immigration, and Immigrants}, 7 \textit{STAN. L. & POL’Y REV.} 111 (1996) (casting light on noncitizens’ vulnerability because they are a politically weak demographic making this group a “convenient” and “tangible” target to blame for economic and societal grievances).

\textsuperscript{82} But see López, supra note 81, at 1374 (“These new restrictions on noncitizens, which have sparked a new civil rights movement—a so-called Immigrant’s Right Movement—touch areas as varied as driver’s licensing, workplace protections, access to healthcare, welfare benefits, and education, among others.”).

provides” for their eligibility. PRWORA brought an end to legal immigrants’ access to welfare benefits by restricting eligibility to all federally funded assistance programs through a stratification scheme designed to differentiate between citizens and noncitizens. Documented immigrants, including those who were already participating in public benefit programs such as financial aid or in-state tuition, became ineligible for most federally funded programs.

Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) shortly after passing PRWORA. IIRIRA bars states from providing “postsecondary education benefits” to aliens who are “not lawfully present” based on their residence in the state unless all United States citizens or nationals are eligible for such benefits, regardless of their residence. IIRIRA also strengthened immigration enforcement efforts, hardened penalties for unauthorized entry, and took the authority to review deportation challenges away from federal courts.

In 1996, the Gallegly Amendment was advanced as an amendment to IIRIRA. This amendment aimed to circumvent Plyler at the federal

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84. See generally Kate M. Manuel, Cong. Rsch. Serv., R43447, Unauthorized Aliens, Higher Education, In-State Tuition, and Financial Aid: Legal Analysis 8–13 (2016) (explaining permissible state restrictions on access to public education and where states may affirmatively provide state and local benefits to noncitizens).


86. See id. (exhibiting what PROWRA signaled to immigrants in the United States: “This exclusion—government sponsored—hastened a climate of confusion and fear within immigrant communities that had sweeping effects on immigrant behavior, including the use of benefits as well as migration and naturalization.”); see also Manuel, supra note 85, at 8–13 (reporting PRWORA’s shift in accessibility to public benefits had its largest impact on resources for undocumented students seeking financial aid and in-state tuition).


88. See generally Manuel, supra note 85, at 8–13 (describing permissible state restrictions on access to public education).

89. See Marshall Fitz, et al., Ctr. for Am. Progress, Triumphs and Challenges on the 30th Anniversary of Plyler v. Doe: A Landmark Supreme Court Case on Providing Education to Immigrant Children Under Threat 5–8 (Ctr. for Am. Progress 2012) (recounting the peripheral assaults on Plyler outside of directly challenging the ability of undocumented children to attend public schools).

90. See H.R. 4134 104th Cong. § 1 (1996) (proposing state authority to disqualify certain noncitizens not lawfully present in the United States from public education benefits); see generally
level by authorizing states to prohibit noncitizen children from attending public schools. The Amendment’s statement of policy purported that undocumented students’ access to public education “promotes violations of the immigration laws and because such a free public education for such aliens creates a significant burden on states’ economies and depletes states’ limited education resources.” The Gallegly Amendment was met with fierce opposition and eventually dropped but signaled the popular intent to erode undocumented students’ access to education. Had this amendment been successful, it would have denied a public education to approximately 700,000 undocumented students.

Taken together, these measures spotlight themes of xenophobia and anti-immigrant sentiments that have inundated federal legislation, despite Plyler’s protection. But these efforts to undercut undocumented students’ access to education have not been limited to the federal system.

2. State-Level Deterrents

Several states have tried to enact measures to sidestep Plyler. In 1994, California’s Proposition 187 came close to hitting the mark. Proposition 187 contained a provision denying undocumented students...
access to attend public schools. The proposition empowered schools when reasonably suspecting a student to be in violation of immigration laws and their immigration status could not be confirmed to notify the federal government. Proposition 187 was promptly struck down by the federal judiciary, as it contravened *Plyler*.

Next up to bat was Arizona’s Senate Bill 1070; this statute was not a direct attack on *Plyler* but demonstrates the uncertainty surrounding *Plyler*’s fate. In 2020, this Arizona statute criminalized the failure to carry immigration documentation, and even went so far as to grant law enforcement broad power to detain persons suspected of being unlawfully present in the United States. The Supreme Court struck down the elements of Senate Bill 1070 that were preempted by federal immigration law, but declined to strike down the controversial “show-me-your-papers” provision of the statute. Legislation like Senate Bill 1070

99. *See id.* (proposing to repeal multiple education codes in order to bar undocumented children from attending public schools).

100. *See id.* (requiring schools to report students that they reasonably suspect are in the United States in violation of immigration laws to the federal government if the school is unable to confirm the student’s status).

101. *See League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 787 (C.D. Cal. 1995) (holding section 7 of California’s Proposition 187 which denied public elementary and secondary education “conflicts with federal law as announced by the Supreme Court in *Plyler v. Doe* and is therefore preempted”); *but see Fitz, et al., supra note 90, at 5–6* (tracking the life and death of Proposition 187 and the way this proposition gave rise to similar state-level deterrents, such as the Gallegly Amendment).


103. *See ARIZ. REV. STAT. ANN. § 2, tit. 11, ch. 7 (2010)* (ramping up criminalization of immigrants by imposing steeper requirements to carry immigration documentation and expand law enforcement’s authority to detain people suspected of being unlawfully present in the United States).

104. *See Arizona v. United States*, 567 U.S. 387, 400–15 (2012) (concluding much of Senate Bill 1070 to be preempted by federal law because Congress has occupied the entire field of immigration. The Court also repealed the lower court’s preliminary injunction against a section of Senate Bill 1070—which required state officers conducting stops, detentions, or arrests to verify the person’s immigration status—concluding that the injunction was improper before the state courts had the opportunity to construe the statute and some showing that enforcement did, in fact, conflict with federal immigration law and its objectives. The Court elected to permit the “show-me-your-papers” provision of the statute to stand.); *see also Talk of the Nation, Court Upholds “Show Me Your Papers” In Arizona*, NAT’L PUB. RADIO, (June 25, 2012, 1:00 PM), https://www.npr.org/2012/06/25/155717375/-court-upholds-show-me-your-papers-in-arizona [https://perma.cc/27FF-WD2Z] (reporting the outcome of the Department of Justice’s Senate Bill 1070 challenge and the public’s impression of this policy).
epitomize the way state legislative measures targeting undocumented immigrants can serve as a springboard for the Supreme Court to revisit and overturn precedent despite judicial doctrines designed to safeguard precedent, such as *stare decisis*.  

Finally, and perhaps most chillingly, Alabama’s Beason-Hammon Alabama Taxpayer and Citizen Protection Act, House Bill 56, was enacted in 2011. Alabama state legislators modeled House Bill 56 after Arizona’s Senate Bill 1070, but took several additional steps to advance its objectives. House Bill 56 not only allowed police to check the immigration status of anyone law enforcement had reasonable suspicion of being undocumented, but further required public schools to verify and report on the legal status of students and their parents. Proponents of House Bill 56 recognized that the earlier state-level efforts to evade *Plyler* challenges lacked empirical evidence about the number of undocumented immigrants in schools to support their cause. House Bill 56 is in keeping with the immigration restrictionism playbook of “attrition through enforcement,” but also carries built-in data collection and reporting mechanisms for future *Plyler* challenges. House Bill 56 faced numerous challenges immediately, most notably by the U.S. Department of Justice, seeking declaratory and injunctive relief contending the law was preempted by federal immigration law, as well as numerous private

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105. *See generally Fitz, et al., supra*, note 90, (underscoring just how high the stakes are in protecting *Plyler* given the Supreme Court’s modern approach to reviewing precedent).

106. *See H.B. 56, Ala. 2011 Reg. Sess.,* ( Ala. 2011) (imposing stringent reporting requirements on schools and law enforcement where there is reasonable suspicion people are undocumented); *see generally Fitz, et al., supra* note 90, (walking through Alabama’s *Plyler* challenge through House Bill 56).

107. *See generally Fitz, et al., supra* note 90, (contrasting House Bill 56 and its Arizona predecessor Senate Bill 1070 to conclude that Alabama’s model went several steps further than Arizona’s did).

108. *See H.B. 56, Ala. 2011 Reg. Sess.,* ( Ala. 2011) (requiring proof of citizenship at the time of students’ enrollment, and if such proof is not furnished, school districts are required to report the student’s presumed unlawful status to the State Board of Education).

109. *See Fitz, et al., supra* note 90, at 9–10 (Ctr. for Am. Progress, 2012) (drawing out the underlying sinister motives behind House Bill 56, such as data collection to mount an attack on *Plyler*, by comparing the statute to similar state-level deterrents).

110. *See id.* at 10 (mapping the path that measures like House Bill 56 create for future attacks on *Plyler* further suggesting that these state-level deterrents aim to make life difficult for immigrants in the hope they will “self-deport” back to their home countries).
plaintiffs arguing the law was preempted by federal law, violated the equal protection, and compulsory process clauses of the constitution.\footnote{See United States v. Alabama, 691 F.3d 1269, 1282 (11th Cir. 2012) (holding most of the challenged provisions were preempted by federal immigration law, however, a preliminary injunction was not merited because the United States did not meet its burden to demonstrate a prima facie case of preemption); see also Hisp. Int. Coal. of Ala. v. Governor of Ala., 691 F.3d 1236, 1248–49 (11th Cir. 2012) (concluding that the challenged sections of House Bill 56 violated the Equal Protection Clause by interfering with undocumented school children’s right to elementary public education and the data collection component of the law was conceded to be unlikely to yield actionable data. Therefore, the equities favored preliminary injunction to enjoin enforcement of the law that required collection and reporting of students’ immigration status.); see generally S. POVERTY L. CTR., SPLC Victorious Against Alabama Anti-Immigrant Law, (Oct. 29, 2013) https://www.splcenter.org/news/2013/10/29/splc-victorious-against-alabama-anti-immigrant-law [https://perma.cc/3S25-QQ3J] (contextualizing the challenges to House Bill 56 and explaining the provisions that were struck down while also addressing the most notable provision of House Bill 56 that remains in effect requires employers to ensure their employees are documented).}

While Plyler has been widely regarded as well-decided law, surviving each of the previously mentioned challenges since its decision in 1982, the Court’s modern application of \textit{stare decisis} clouded the future for Plyler and other unenumerated rights.\footnote{See generally Yoshino, supra note 2, (walking through the way Dobbs revived the approach to protecting unenumerated rights where the Court declines to recognize those that are not “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty” despite being previously recognized under the Fourteenth Amendment).} The \textit{stare decisis} framework employed in the Supreme Court’s recent \textit{Dobbs} decision illustrates a larger trend to undermine the Fourteenth Amendment and moves the needle further away from recognizing the Court as an apolitical body.\footnote{See generally Tilghman, supra note 11, at 135 (cautioning that the doctrine of \textit{stare decisis} must be strengthened to reestablish the legitimacy of the Court).}

\section{II. Analysis}

\subsection{A. The Dobbs Leak Puts Plyler in Hot Water}

On May 2, 2022, an initial draft majority opinion of the Supreme Court’s \textit{Dobbs v. Jackson Women’s Health Organization} was leaked to the public, drawing criticism and speculation over what rights the Court will dispose of next.\footnote{See Litt, supra note 9, (epitomizing the danger posed by the Court’s application of \textit{stare decisis} as signaled by the Dobbs decision: “We are not just living in a moment without precedent. We are living in a moment without precedents. Such unprecedented times call for unprecedented reforms.”); see generally Ilya Shapiro, Dobbs Leak Is Biggest Threat to Court Legitimacy in Living Memory, NEWSWEEK, (May 18, 2022, 6:30 AM), https://www.newsweek.com/dobbs-leak-biggest-threat-court-legitimacy-living-memory-opinion-1707023 [https://perma.cc/2CYY-534Q]} The leaked \textit{Dobbs} draft signals a shift in the
Supreme Court’s approach to constitutional interpretation which—if left unchecked—will result in unpredictable judicial outcomes disposing of well-settled civil rights, ultimately undermining our democratic system of checks and balances.\(^\text{115}\)

The leaked *Dobbs* draft opened the door to speculation about what rights or personal freedoms would find themselves in the Supreme Court’s crosshairs next.\(^\text{116}\) It did not take long for *Plyler* opponents to step forward.\(^\text{117}\) In an interview with conservative radio show host Joe Pagliarulo, Texas Governor Greg Abbott suggested that in light of the opinions expressed in the *Dobbs* leak, the Supreme Court’s *Plyler* decision ought to be revisited.\(^\text{118}\) Abbott suggested that because “the expenses are extraordinary and the times are different” from the time *Plyler* was decided, the issue of educating undocumented students is ripe for review.\(^\text{119}\) In a later interview, Governor Abbott expanded on his remarks and pointed to the Supreme Court’s decisions in *Plyler* and on Arizona’s Senate Bill 1070 to assert that these two decisions read together violate the United States Constitution.\(^\text{120}\) These remarks spurred immediate

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\(^{115}\) See Litt, *supra* note 9, (cautioning against a future where the Supreme Court is bound only by the whims of judges: “We have only begun to reckon with what it means to live in a country whose most powerful judicial body no longer believes in judicial restraint.”).

\(^{116}\) See generally Yoshino, *supra* note 2, (contemplating the consequences of the Supreme Court’s modern application of *stare decisis*).

\(^{117}\) See Bill Chappell, *Texas Governor Says the State May Contest a Supreme Court Ruling on Migrant Education*, NAT’L PUB. RADIO, (May 6, 2022, 3:56 PM), https://www.npr.org/2022/05/06/1097178468/texas-governor-says-the-state-may-contest-a-supreme-court-ruling-on-migrant-education (describing Governor Abbott’s response to the *Dobbs* leak and its wider implications for the arena of civil rights).

\(^{118}\) See id. (recounting Governor Abbott’s suggestion that Texas should not have to provide public education to undocumented students, despite the Supreme Court’s long-standing precedent on the matter).

\(^{119}\) See id. (outlining Abbott’s claims that an influx of immigrants would place more of a burden on an already stressed education system).

\(^{120}\) See Kate McGee, *Gov. Greg Abbott Says Federal Government Should Cover the Cost of Educating Undocumented Students in Texas Public Schools*, TEX. TRIB., (May 5, 2022, 6:00 PM), https://www.texastribune.org/2022/05/05/greg-abbott- plyler-doe-education/ (stating Governor Abbott’s contention that the Federal government
responses from Plyler proponents who pushed back on Governor Abbott’s statements, characterizing them as empty threats aimed to boost underperformance in his gubernatorial race.\textsuperscript{121}

The loudest among the Plyler-proponent voices was the Mexican American Legal Defense and Educational Fund (MALDEF), the nation’s leading Latino legal civil rights organization that represented the original Plyler plaintiffs.\textsuperscript{122} MALDEF represented the Plyler plaintiffs because their § 21.031 challenge brought together various aspects of society where undocumented people were underrepresented—including education, community relations, and immigration status—to highlight where Latinos’ political powerlessness was evident even where they were the predominant population.\textsuperscript{123}

In response to Governor Abbott’s comments, Thomas A. Saenz, president and general counsel of MALDEF, expressed the organization’s should be more financially responsible for undocumented children within the Texas public school system).


position to safeguard *Plyler* in no uncertain terms.\textsuperscript{124} Saenz emphasized how baseless Abbott’s threats were by counteracting with truth to set the record straight.\textsuperscript{125} First, Saenz pointed out Governor Abbott’s misrepresentation of *Plyler*’s history.\textsuperscript{126} Contrary to Abbott’s statements, it was not the State of Texas that brought action in *Plyler*, rather, it was a group of disenfranchised students that fought against the State for permitting schools to exclude undocumented students from public schools.\textsuperscript{127} This is significant because misrepresenting *Plyler*’s history deemphasizes the undocumented students’ plight for access to public education.\textsuperscript{128}

Second, Saenz underscored Abbott’s mischaracterization of exactly whose rights are contemplated by *Plyler*.\textsuperscript{129} *Plyler* addressed the rights of undocumented children, not children of undocumented parents, as Abbott asserted.\textsuperscript{130} This factual difference is significant, because the rights of United States citizens who are the children of undocumented parents have never been questioned; United States citizen children whose parents

\textsuperscript{124} See Mexican Am. Legal Def. and Educ. Fund, *supra* note 123, (“Greg Abbott has once more distinguished himself as one of our most irresponsible and desperate politicians. His woefully ill-informed comment on *Plyler v. Doe* reported yesterday epitomizes the dangers of dog-whistle populism in the style of Donald Trump.”).

\textsuperscript{125} See id. (countering Governor Abbott’s argument by defending *Plyler* as well-established law).

\textsuperscript{126} See id. (suggesting that Governor Abbott receive remedial education to become more familiar with the facts of *Plyler*).


\textsuperscript{128} See generally Olivas, *supra* note 124, (preserving *Plyler*’s history to enshrine the progress that has been made for the Latino community and inspiring hope for continued progress).

\textsuperscript{129} See Mexican Am. Legal Def. and Educ. Fund, *supra* note 123, (correcting Governor Abbott’s remarks by recognizing whose rights were at stake in *Plyler*: undocumented children—not children of undocumented parents).

are undocumented enjoy the same rights regardless of their parentage. This is a fine distinction, but it is an important one: lumping all children of immigrants as being subject to the consequences of the reversal of *Plyler* dangerously suggests the creation of a subclass of citizens who were born in the United States to undocumented parents—such an assertion does not comport with well-established American immigration law and policy.

Next, Saenz echoed the Supreme Court’s *Plyler* decision to stress how excluding undocumented students from schools amounts to abysmal public policy. Saenz spotlighted *Plyler*’s dissent, where Chief Justice Burger recognized all nine Justices’ unanimous recognition of the “folly” in excluding certain kids from school. Chief Justice Burger wrote, “I would agree without hesitation that it is senseless for an enlightened society to deprive any children—including illegal aliens—of an elementary education.” Saenz points out that undermining *Plyler* would have the exact negative impact the Justices unanimously recognized.

Finally, Saenz addressed *Plyler*’s codification into federal statutory law. This statutory provision expressly indicates that Congress will not interfere with *Plyler*. Saenz concludes his statement by stating that Governor Abbott should not pursue bringing a challenge against *Plyler*.

131. See Immigration and Nationality Act of 1965 § 301(a), 8 U.S.C.§ 1401(a) (codifying the principle of *jus soli*—or citizenship by birth within the United States jurisdiction).

132. See generally id. (articulating U.S. immigration policy regarding citizenship by birth within the jurisdiction, which is foundational to U.S. immigration law and policy, meaning Governor Abbot’s remarks suggest much wider implications in the event *Plyler* is reversed).

133. See Mexican Am. Legal Def. and Educ. Fund, *supra* note 123, (referencing the Supreme Court’s *Plyler* decision where despite the Justices’ split on the constitutionality of the challenged Texas statute, all of the Justices agreed that excluding undocumented children from school was bad public policy).

134. See *Plyler*, 457 U.S. at 242 (Burger, C.J., dissenting) (relying on truancy problems to unanimously conclude that the exclusion of undocumented children from school was bad public policy).

135. *Id.* (Burger, C.J., dissenting).

136. See Mexican Am. Legal Def. and Educ. Fund, *supra* note 123, (“Abbott now seeks to inflict by intention the harms that nine justices agreed should be avoided 40 years ago.”).

137. See *id.* ("It is now incorporated into federal statutory law through a provision expressly indicating that Congress would not interfere with *Plyler* rights as it sought to restrict other rights of immigrants in the 1990s."); see also 8 U.S.C. § 1643(a)(2) (codifying *Plyler* into federal law).

138. See 8 U.S.C. § 1643(a)(2) (“Nothing in this chapter may be construed as addressing alien eligibility for a basic public education as determined by the Supreme Court of the United States under *Plyler* v. Doe.”).
because, unlike *Roe*, the Supreme Court’s *Plyler* decision is well-established.\(^{139}\)

While the quick response from MALDEF is encouraging, the day is not done.\(^{140}\) United States history demonstrates turning its back on immigrants’ rights when it is convenient, and, as previously demonstrated in *Dobbs*, the Supreme Court is capable of overturning well-established precedent.\(^{141}\)

**B. Dobbs Decided**

On June 24, 2022, the United States Supreme Court issued its decision in *Dobbs v. Jackson Women’s Health Organization*.\(^{142}\) In its final form, the Court’s 6-3 majority opinion largely stayed true to the leaked draft.\(^{143}\) Writing for the majority, Justice Alito overturned *Roe v. Wade* and *Planned Parenthood v. Casey*—two precedential decisions that guaranteed a right to abortion within certain parameters.\(^{144}\) This decision was predicated on a substantive due process theory, finding that the

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139. See Mexican Am. Legal Def. and Educ. Fund, *supra* note 123, (“The bottom line is that . . . Greg Abbott . . . should back away from following through on his . . . commentary yesterday.”).

140. See generally Johnson, *supra* note 3, at 1455 (portraying America’s attitude towards immigrant communities as a continuous battle despite encouraging victories).

141. See id. at 1455–62 (2022) (examining the racist underpinnings of U.S. immigration policy shifts throughout American history); see also *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 2228, 2244–58 (2022) (eliminating the fundamental right to abortion) *overruling* *Roe v. Wade*, 410 U.S. 113 (1973) (recognizing a woman’s right to choose to have an abortion as protected within the scope of the constitutional right to privacy) and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (affirming the central holding of *Roe* and advancing a framework to evaluate when state abortion regulations place an undue burden on a woman’s right to an abortion).

142. See *Dobbs*, 597 U.S., 142 S. Ct. at 2244–58 (2022) (holding the federal constitution does not provide a right to abortion and the authority to regulate abortion must be returned to the people and their elected representatives) *overruling* *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).


Constitution does not confer a right to abortion. The Supreme Court concluded that because the Constitution makes no reference to abortion, nor is abortion implicitly protected by any constitutional provision, including the Due Process Clause of the Fourteenth Amendment, the Supreme Court’s prior decisions to recognize such a right must be disposed.

The Fourteenth Amendment guarantees some rights that are not expressly mentioned in the Constitution, rather they emanate from the penumbras, or, “zones of privacy” guaranteed by the Bill of Rights. These penumbral guarantees were originally recognized in Griswold v. Connecticut, where the Supreme Court held that a Connecticut statute forbidding the use of contraceptives, as applied to married persons, violated the Fourteenth Amendment. Griswold stands for the notion that the government cannot permeate the zones of privacy created by the Bill of Rights without proper justification. Despite Griswold’s precedent, the Court in Dobbs diminished the Bill of Rights’ penumbral protections to include only rights “deeply rooted in this Nation’s history and tradition and implicit in the concept of ordered

145. See id. (determining that Casey’s controlling precedent was erroneously decided by relying on Roe through the application of stare decisis, and neither of these cases should have recognized a right to abortion conferred by the Constitution).

146. See id. at 2242 (“We hold that Roe and Casey must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of Roe and Casey now chiefly rely—the Due Process Clause of the Fourteenth Amendment.”).


148. See id. at 485–86 (holding a law forbidding the use of contraceptives offends the zone of privacy created by several fundamental constitutional guarantees).

149. See id. at 485 (stating a government regulation to control or prevent activity within the penumbral protection of the Bill of Rights may not be achieved by means that sweep unnecessarily broadly and invade protected liberties).

150. See generally BARRY A. LINDAHL, Constitutional Right of Privacy, in MODERN TORT LAW: LIABILITY & LITIGATION § 47:22 (2d ed. 2023) (summarizing the way Griswold broadened the concept of privacy. Griswold effectively moved privacy away from being limited to the right to be left alone and broadened privacy to protect the right of an individual to make decisions that affect one or one’s family. This decision is foundational to the Supreme Court’s later cases regarding rights grounded in history and tradition, including the right to interracial marriage, the right to possess obscene materials in one’s home, the right of unmarried and married persons to use contraceptives, and the right of a woman to have an abortion.).
liberty.” Finding no such right supporting the right to abortion steeped in our nation’s history, the Court overruled Roe and Casey.

Stare decisis requires adherence to past judicial precedent. The Dobbs Court recognized the important role stare decisis plays in American jurisprudence, and weighed the five stare decisis factors outlined in Janus v. American Federation of State, County and Municipal Employees, Council 31 to determine whether Roe and Casey should be upheld under this doctrine. In Janus, the Supreme Court held that government workers who opt out of membership in public unions cannot be forced to pay collective bargaining fees because it amounts to compelled speech. Writing for the majority, Justice Alito enumerated five factors that “should be taken into account in deciding to overrule a past decision” that articulates controlling case law: (1) the quality of precedent’s reasoning, (2) the workability of the rule it established; (3) its consistency with other related decision; (4) developments since the decision was handed down; and (5) reliance on the decision. The Dobbs Court relied on its Janus framework to conclude that the greater weight of these factors favored overruling Roe and Casey.

151. See Dobbs, 597 U.S., 142 S. Ct. at 2242 (quoting Wash. v. Glucksberg, 521 U.S. 702, 721 (1997)) (narrowing the Fourteenth Amendment’s penumbral protections to only extend to rights deeply rooted in American history).
152. Id. at 2242 (“The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of Roe and Casey now chiefly rely—the Due Process Clause of the Fourteenth Amendment.”).
153. Id. at 2237 (“The doctrine of stare decisis does not counsel continued acceptance of Roe and Casey.”); see generally Ehrlich & Rodenberg, supra note 10, at 57–58 (introducing the doctrine of stare decisis as a means to: promote evenhanded, predictable, and consistent development of legal principles; foster reliance on judicial decisions; and contribute to the actual and perceived integrity of the judicial process).
154. See id. at 2261–78 (contemplating the way the Janus stare decisis factors do not support continued acceptance of Roe and Casey).
155. Compare Janus v. Am. Fed’n of State Empls., 138 S. Ct. 2448, 2463–69 (2018) (concluding the law requiring non-union members to pay union dues is unconstitutional because the state’s statutory scheme is unnecessary to advance the state’s interest in functional unions), with Abood v. Detroit Bd. of Ed., 431 U.S. 209, 222–23 (1977) (requiring non-union members to help finance a union as a collective bargaining agent is justified by: the legislative assessment of the important contribution of the union and agency shop to the system of labor relation established by Congress), overruled by Janus, 138 S. Ct.
156. See Janus, 138 S. Ct. at 2478–79 (adopting a multi-factor framework for overturning precedent under the doctrine of stare decisis).
157. See generally Dobbs, 597 U.S., 142 S. Ct. at 2261–78 (evaluating each of the Janus factors to Roe and Casey to conclude they are unsupported by the doctrine of stare decisis).
The Court first reviewed the nature of the Court’s error in *Roe* and *Casey*, likening *Roe* to *Plessy v. Ferguson* to illustrate that *Roe* was wrong from the start because it exceeded the scope of constitutional provisions it claimed to be justified by. The Court similarly concluded that by deciding *Casey* based on its decision to stand by *Roe* under the doctrine of *stare decisis*, the Court further erred by “perpetuat[ing] *Roe*’s errors.” Further, the Court concluded this error also usurped the power to address a “question of profound moral and social importance” that the Constitution reserves for the people through their representatives.

The Court first reviewed the general quality of the reasoning underlying *Roe* and *Casey* at great length. The Court criticized its *Roe* decision, arguing this decision was not grounded in the constitutional text, history, or precedent, yet still imposed what resembles a statutory scheme with “little effort to explain how these rules could be deduced from any of the sources on which constitutional decisions are usually based.” Along this same vein, the Court found *Casey* to be insupportable under *stare decisis* because it upheld *Roe* based on *Roe*’s status as precedent without proper analysis of *Roe*’s underpinning reasoning.

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158. *See id.* at 2265 (“An erroneous interpretation of the Constitution is always important, but some are more damaging than others. . . . *Plessy v. Ferguson*, was one such decision. . . . *Plessy* was egregiously wrong on the day it was decided. . . . *Roe* was also egregiously wrong and deeply damaging.”); *see also* *Plessy v. Ferguson*, 163 U.S. 537, 538–40 (1896) (upholding the principle of racial segregation in public accommodations if the facilities were “separate but equal”, which provided legal justification for segregation on trains, buses, schools, and theaters for the next half-century).

159. *See Dobbs*, 597 U.S., 142 S. Ct. at 2265 (highlighting the Court’s error in standing by *Roe* under the doctrine of *stare decisis*).

160. *See id.* (concluding *Roe* and *Casey* were not grounded in proper authority).

161. *See id.* at 2265–72 (walking through the Court’s perceived failures in *Roe*, including *Roe*’s failure to survey state laws in effect in 1868; *Roe*’s conflation of the right to shield information from disclosure and the right to make personal decisions without government interference; *Roe*’s failure to distinguish itself from other precedent as dealing with “potential life”; the Court’s creation of a statutory scheme; and *Roe*’s creation of an arbitrary viability line).

162. *See id.* at 2266–67 (finding *Roe*’s proffered justifications insufficient to merit continued support under the Constitution).

163. *See id.* at 2272 (pointing out *Casey*’s failure to examine *Roe*’s reasoning and “prov[iding] no new support for the abortion right other than *Roe*’s status as precedent, [while] impos[ing] a new and problematic test without firm grounding in constitutional text, history, or precedent”).
The Court then turned to the workability factor. The Court concluded that *Casey*’s undue burden test “scored poorly on the workability scale” because states have had difficulty applying *Casey*’s rules, resulting in various Circuit conflicts. The Court then briefly examined the next factor, the effect of *Roe* and *Casey* on other areas of law, opining that these precedents have changed the landscape of constitutional law in such a way that distorts the development of law that *stare decisis* aims to promote.

Finally, the Court examined reliance interests, notably declining to find any concrete or intangible forms of reliance that *stare decisis* would support upholding. The Court found no concrete reliance interests because these interests arise where “advance planning of great precision is most obviously a necessity,” and because getting an abortion is generally unplanned and reproductive planning could be an intervention if states elected to ban abortions. The Court also found no intangible reliance despite *Casey*’s position:

People [had] 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 and 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.

Instead of adopting *Casey*’s proffered interests, the Court emphasized that courts are not equipped to evaluate intangible reliance interests.

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164. *See* Dobbs, 597 U.S., 142 S. Ct. at 2238, 2274–75 (concluding that continued adherence to *Casey*’s unworkable undue burden test would contravene the objectives of *stare decisis* because this rule has not generated “evenhanded, predictable, and consistent development of legal principles”).

165. *See id.* at 2274–75 (“The experience of the Courts of Appeals provides further evidence that *Casey*’s ‘line between’ permissible and unconstitutional restrictions ‘has proved to be impossible to draw with precision.’”).

166. *See id.* at 2274–76 (focusing on the Court’s abortion cases’ impact on subsequent facial constitutional challenges to conclude that *Roe* and *Casey*’s progeny contravene the doctrine of *stare decisis* by promoting unpredictable outcomes).

167. *See id.* at 2275–78 (finding no reliance interests implicated by overturning *Roe* and *Casey* despite the arguments raised in favor of reliance interests at stake for women and society at large).

168. *See id.* at 2276 (finding no concrete reliance interests at stake because reliance requires advance notice, and abortion care is generally unplanned).

because assessing “generalized assertions about the national psyche” is outside of its wheelhouse.\textsuperscript{170}

The majority’s opinion further addressed the public perception of over-ruling watershed opinions like \textit{Roe} and \textit{Casey}; highlighting that the Court’s role is to make decisions based on principle by “issuing opinions that show how a proper understanding of the law leads to the results” reached and not simply surrendering to political pressure.\textsuperscript{171} The majority concluded its opinion by imposing a rational-basis review standard on future abortion regulations that are constitutionally challenged, and declared the decisions and authority to regulate or prohibit abortion is returned to the people and their elected representatives.\textsuperscript{172}

\section*{C. Dobbs’ Reach}

Commentators who were concerned about how far-reaching the leaked Dobbs opinion would be found no reassurance in the Court’s published opinion.\textsuperscript{173} In its published opinion, the Court retained its position that Dobbs is limited in scope to abortion and “should not be understood to cast doubt on precedents that do not concern abortion.”\textsuperscript{174} But this caveat does not inspire confidence.\textsuperscript{175} As Justices Breyer, Sotomayor, and Kagan point out in their joint dissent, reading the majority’s decision as “a restricted railroad ticket, good for this day and train only” is misguided.\textsuperscript{176} The dissent highlights Justice Thomas’ concurrence, which illustrates

\begin{itemize}
  \item \textsuperscript{170} See id. at 2276 (declining to assess intangible forms of reliance—namely, the effect of abortion rights on society and in particular the lives of women—instead, opting to return the issue to legislative bodies).
  \item \textsuperscript{171} See id. at 2278 (“[W]e cannot exceed the scope of our authority under the Constitution, and we cannot allow our decisions to be affected by any extraneous influences such as concern about the public’s reaction to our work.”).
  \item \textsuperscript{172} See id. at 2283–84 (imposing a rational-basis review standard for future regulations or prohibitions of abortion and returning the “profound moral question” of abortion to the states).
  \item \textsuperscript{173} See generally Yoshino, supra note 2, (drawing attention to the way Dobbs could potentially reconfigure the civil rights landscape as we know it).
  \item \textsuperscript{174} See Dobbs, 597 U.S., 142 S. Ct. at 2277–78 (“[T]o ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.”).
  \item \textsuperscript{175} See generally id. at 2330–32 (Breyer, J., Sotomayor, J., & Kagan, J., dissenting) (explaining the way the majority’s decision will permeate all facets of American civil rights).
  \item \textsuperscript{176} Id. (quoting Smith v. Allwright, 321 U.S. 649, 669 (1944)) (rejecting the majority’s assertion that their position can be narrowly read to not disturb precedent that does not directly address abortion rights).
\end{itemize}
that he is not on-board with such a limited reading of *Dobbs*. Justice Thomas writes that while *Dobbs* did not present the opportunity to reject non-abortion precedents, in future cases “we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. The dissent observes that Thomas’ concurrence signals that, “at least one Justice is planning to use the ticket of today’s decision again and again and again.”

The dissent also makes plain that the majority’s negative finding of a liberty interest in *Roe* and *Casey* cannot be read in a silo, and is more likely to have repercussions across civil rights case law. The dissent criticizes the majority’s reliance on 19th century law which offered no protection to women’s choice is flawed because “[t]he law also did not then (and would not for ages) protect a wealth of other things.” The dissent makes examples of precedent such as *Lawrence*, *Obergefell*, *Loving*, *Griswold*, and *Skinner* to demonstrate that it is the Court’s practice

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177. *See id.* at 2300–02 (Thomas, J., concurring) (diluting the majority’s caveat by explaining that non-abortion precedents are not at issue in *Dobbs* but suggesting the Court should reconsider all its substantive due process precedents in future cases).

178. *Id.* (laying the groundwork to unravel civil rights).


180. *See id.* at 2332 (“[t] is impossible to understand (as a matter of logic and principle) how the majority can say that its opinion today does not threaten—does not even “undermine”—any number of other constitutional rights.”).

181. *Id.* at 2331–32 (opining that the *Dobbs* decision could be read broadly and lead to disastrous results for other civil rights).
to recognize rights that were not historically recognized as constitutional rights. 182 Dobbs places all precedent along this vein in jeopardy. 183

Nor, the dissent points out, can we simply take the Supreme Court’s majority at their word that Dobbs will only ever be read within the scope of abortion because there is a correlation between Court’s approach to stare decisis and the ideological composition of the Court. 184 The future significance of Dobbs remains to be decided because, as the dissent observes:

[The] law often has a way of evolving without regard to original intentions—a way of actually following where logic leads, rather than tolerating hard-to-explain lines. Rights can expand in that way . . . [But] logic and principle are not one-way ratchets. Rights can contract in the same way and for the same reason—because whatever today’s majority might say, one thing really does lead to another. 185

The current composition of the Supreme Court contributes to speculation about the role stare decisis analysis will have in future decisions. 186

182. Id. at 2331–32 (first citing Lawrence v. Texas, 539 U.S. 558, 564–65 (2003) (recognizing a protected right in individual decisions concerning the intimacies of their physical relationship under the Fourteenth Amendment); then citing Obergefell v. Hodges, 576 U.S. 644, 675–76 (2015) (recognizing a constitutional right to marry under the Due Process and Equal Protection Clauses of the Fourteenth Amendment); then citing Loving v. Virginia, 388 U.S. 1, 12–13 (1967) (recognizing state bans on interracial marriages as unconstitutional under the Equal Protection and Due Process Clauses of the Fourteenth Amendment); then citing Griswold v. Connecticut, 381 U.S. 479, 483–85 (1965) (recognizing an implied right to privacy in the Constitution’s Bill of Rights); and then citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (recognizing forced sterilization as unconstitutional under the Equal Protection Clause of the Fourteenth Amendment)) ("[The law] did not protect the rights recognized in Lawrence and Obergefell to same-sex intimacy and marriage. It did not protect the right recognized in Loving to marry across racial lines. It did not protect the right recognized in Griswold to contraceptive use. For that matter, it did not protect the right recognized in Skinner v. Oklahoma . . . not to be sterilized without consent.").

183. See generally Litt, supra note 9, (underscoring the way the Supreme Court’s Dobbs decision clears a path for future decisions to undermine civil rights not enumerated in the Constitution).

184. See Dobbs, 597 U.S. , 142 S. Ct. at 2332 (Breyer, J., Sotomayor, J., and Kagan, J., dissenting) (observing that we cannot simply trust that the Supreme Court will always toe the line of precedent as its authors intended because circumstances change as the law evolves, as evidenced in Dobbs itself).

185. Id. (Illustrating the uncertainty of precedent in light of Dobbs: “[W]e cannot understand how anyone can be confident that today’s opinion will be the last of its kind.”).

Even prior to the Court’s *Dobbs* decision, for many, Justice Amy Coney Barrett’s nomination to the Supreme Court signaled an uncertain future for individual and civil rights.\(^{187}\) Adding a fourth self-proclaimed originalist to the ranks of the Supreme Court would yield uncertain results with respect to precedent because squaring precedent with originalism raises many questions.\(^{188}\) Others took a moderate outlook on Justice Barrett’s appointment, acknowledging that while the bloc of originalist Justices was growing, individual and civil rights were not in jeopardy because three of the four originalist Justices signaled, in remarks and their respective confirmation hearings, that the judiciary’s “obligations to follow precedent are strongest where substantial reliance interests have taken root.”\(^{189}\) *Dobbs*, however, actualizes the former outlook and casts doubt on the future of other civil and individual rights under the Supreme Court’s approach to *stare decisis*.\(^{190}\)

Despite the majority’s efforts to stem the tide of *Dobbs*’ repercussions, there is no conceivable path forward where this decision’s impact is limited to abortion.\(^ {191}\) *Dobbs* demonstrates that the Court’s sitting majority approach to constitutional interpretation could potentially disrupt other rights previously recognized under the Constitution.\(^ {192}\) This, coupled with the widespread misconceptions about immigrants held by most

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187. *See generally id.* at 413 (analogizing the “growing originalist bloc” of Supreme Court Justices to a “Sword of Damocles” placing everything, from abortion access to marriage equality and civil rights to affordable healthcare, in jeopardy); *see also* Ian Millhiser, *Originalism, Amy Coney Barrett’s Approach to the Constitution, Explained*, VOX, (Oct. 12, 2020, 8:30 AM), https://www.vox.com/21497317/originalism-amyconey-barrett-constitution-supreme-court [https://perma.cc/GDF6-CMMX] (deconstructing the originalist approach to constitutional interpretation).

188. *See generally* Iacono, supra note 187, at 390–91 (identifying questions raised when reconciling originalism with precedent, such as: “What is the originalist judge to do when she encounters a demonstrably-erroneous precedent . . . Does fidelity to original meaning *always* require reversal, or does the Constitution permit—perhaps even *require*—adherence to erroneous precedent under certain circumstances?”).

189. *See id.* at 413–14 (opining that fears surrounding another originalist Justice to the Supreme Court are “largely misguided”).

190. *See Dobbs*, 597 U.S., 142 S. Ct. at 2275–78 (minimizing reliance interests by disregarding the Equal Protection arguments raised in favor of abortion access for women).

191. *See id.* at 2331 (Breyer, J., Sotomayor, J., and Kagan, J., dissenting) (“[T]he majority depicts today’s decision as ‘a restricted railroad ticket, good for this day and train only’ . . . [but] at least one [J]ustice is planning to use the ticket of today’s decision again and again and again.”).

192. *See generally Litt,* supra note 9, (contending the Court’s approach to constitutional interpretation through the lens of *stare decisis* could undermine all civil liberties emanating from the Fourteenth Amendment).
Americans, creates the genesis for a path capable of plunging undocumented students back into the uncertainty they faced before Plyler. 193

D. Stare Decisis, Generally

Stare decisis is the legal doctrine that demands adherence to judicial precedents and requires similar facts be given like treatment in courts of law. 194 Stare decisis intends to promote “the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” 195 As Justice Brandeis famously wrote: “[Adhering to precedent] is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right.” 196 Courts have grappled with stare decisis throughout history, attempting to strike a fair balance between safeguarding courts’ impartiality and undoing “precedents [that are] destructive to liberty and shocking to reason and humanity.” 197 There are two competing schools of thought within the doctrine of stare decisis. 198 First, there is the “weak” stare decisis tradition, which considers “poor reasoning” in a prior decision not a condition precedent to stare decisis analysis, but finds poor reasoning


196. See Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandis, J., dissenting) (opining that while stare decisis is not a “universal inexorable command,” it is generally the wise policy because it promotes consistency and uniformity of decision across the judiciary), overruled by Helvering v. Mountain Producers Corp., 303 U.S. 376 (1938).


is a substantive consideration that may itself justify a reversal. Next, there is the “strong” stare decisis tradition, which calls for precedent to stand unless there is some “special justification” to overrule it, regardless of the quality of the reasoning.

E. The Janus Stare Decisis Approach

The Supreme Court’s Janus v. American Federation of State, County and Municipal Employees, Council 31 stare decisis framework emerged as the new leading precedent on precedents and has widely been adopted to guide stare decisis analysis. In Janus, a public employee brought suit to challenge an Illinois law that required non-union members to pay dues to the exclusive bargaining union. The plaintiff alleged this statute violated his First Amendment free speech rights because he did not agree with the union’s speech. Justice Alito, writing for the Court’s majority, overturned then-controlling Abood v. Detroit Board of Education, ultimately concluding that government workers who do not join public unions cannot be compelled to pay for collective bargaining. In its analysis, the Court outlined a list of factors that have historically been considered when overruling precedent and used these factors to guide its analysis; these factors include: (1) the quality of precedent’s reasoning; (2) the workability of the rule it established; (3) its consistency with other

199. See generally id. (explaining the weak stare decisis tradition’s approach to evaluating “poor reasoning.” In the weak stare decisis tradition, “poor reasoning” will not trigger stare decisis analysis, but this tradition sanctions overruling challenged precedent if it was poorly reasoned.).

200. Id. (delineating the strong stare decisis tradition. In the strong stare decisis tradition, precedent will stand unless there is a “special justification” to overrule it. Quality of precedent’s reasoning is not sufficient to carry the day, rather, the Court prefers clearer “special justifications” such as changes in underlying facts that undermine precedent or alterations in prevailing views that render a prior decision an abandoned doctrine. Justifications like these will trigger stare decisis analysis in the strong tradition.).

201. Id. at 86 (recounting Janus’ rise to prominence and tracking the adoption of its stare decisis framework since its decision in 2018).

202. See generally Janus, 138 S. Ct. at 2460–63 (outlining the factual history underlying Janus).

203. See generally id. at 2463 (capturing the substantive due process claim underlying Janus).

204. Compare Janus, 138 S. Ct. at 2486 (concluding that the required agency fee imposed upon non-union members violates the First Amendment and Abood is not supported by stare decisis), with Abood, 431 U.S. at 222–23 (concluding that compelling employees to financially support collective-bargaining representation is a justifiable interference with individuals’ First Amendment rights).
related decisions; (4) developments since the decision was handed down; and (5) reliance on the decision.\textsuperscript{205}

The \textit{Janus} approach was in-line with the then-leading authority for \textit{stare decisis} analysis, \textit{Citizens United v. Federal Election Commission}.\textsuperscript{206} In \textit{Citizens United}, the plaintiff, a nonprofit corporation, challenged a federal statute prohibiting all corporations to expressly advocate for the election or defeat of political candidates within thirty or sixty days of a primary or general election, respectively.\textsuperscript{207} \textit{Citizens United} challenged this statute under the First Amendment’s protection of the freedom of speech, and the Court used \textit{stare decisis} factors such as workability, antiquity of the precedent, the reliance interests at stake, and whether the precedent was well reasoned to justify departure from earlier precedent.\textsuperscript{208} \textit{Janus} initially seems to adopt \textit{Citizens United}’s approach to \textit{stare decisis} analysis; however, some key differences in \textit{Janus}’ application of \textit{stare decisis} analysis distinguishes the \textit{Janus} approach from \textit{Citizens United}.\textsuperscript{209}

1. The \textit{Janus} Approach Over-Relies on the Quality of Precedent’s Reasoning

In \textit{Janus}, the Court gave great credence to its first factor: the quality of reasoning underlying the precedent at issue.\textsuperscript{210} The Court teased out the ways \textit{Abood} misapplied precedent and noted its failure to distinguish key

\textsuperscript{205} See \textit{Janus}, 138 S. Ct. at 2478–79 (setting forth a list of factors that have historically been used to evaluate precedent under the doctrine of \textit{stare decisis} to serve as a \textit{stare decisis} framework).

\textsuperscript{206} See \textit{Janus}, 138 S. Ct. at 2478 (2018) (“[The Court] will not overturn a past decision unless there are strong grounds for doing so.”) (citing \textit{Citizens United v. Fed. Election Comm’n}, 558 U.S. 310, 377 (2010)).

\textsuperscript{207} See generally \textit{Citizens United}, 558 U.S. at 239–22 (outlining the factual basis for \textit{Citizens United}’s claim).

\textsuperscript{208} Compare \textit{Citizens United}, 558 U.S. at 362–65 (departing from precedent through \textit{stare decisis} analysis to hold that the government may not suppress political speech on the basis of the speaker’s corporate identity), \textit{with Austin v. Mich. Chamber of Com.}, 494 U.S. 652, 668–69 (1990) (holding states may restrict corporations’ independent expenditures to support or oppose political candidates), \textit{overruled by} \textit{Citizens United}, 558 U.S.

\textsuperscript{209} See generally \textit{Gentithes}, supra note 199, at 103 (positing the broader implications of \textit{Janus}’ \textit{stare decisis} analysis as it inches further away from the doctrine’s traditional application); \textit{see also Tilghman}, supra note 11, at 143–45 (exploring the way \textit{Janus}’ \textit{stare decisis} analysis effectively weakens the doctrine of \textit{stare decisis}).

\textsuperscript{210} See \textit{Janus}, 138 S. Ct. at 2478–81 (calling the quality of reasoning factor “[a]n important factor in determining whether a precedent should be overruled”).
facts in its holding. By placing the “quality of reasoning” factor first and expounding on it at such length, the Janus Court suggests that in stare decisis analysis, the reasoning underpinning precedential decisions should be the focus of discussion when evaluating precedent.

Then, instead of evaluating each of the remaining factors on their merits, the Court pointed to poor reasoning to justify overturning Abood under each of the remaining factors. Thus, allowing the quality of reasoning discussion to pervade analysis of the remaining factors led Janus to overturn precedent based upon the Justices’ disagreement with its reasoning in a prior decision. Janus adopted Citizens United’s approach and took it further by weaving the quality of the reasoning analysis into its evaluation of the remaining stare decisis factors. By pivoting back to poor reasoning in its analysis of each of the stare decisis factors, Janus effectively provides an avenue for the Justices’ disagreement with the substantive reasoning of precedent to serve as grounds to depart from precedent, ultimately allowing their disagreement to carry the day.

211. See id. at 2479–81 (unraveling where the Court’s Abood decision was not well-reasoned).

212. See id. at 2481–86 (unpacking the Court’s perceived weaknesses in Abood’s reasoning); see generally Gentithes, supra note 199, at 103 (discussing how the Supreme Court’s Janus decision eroded the doctrine of stare decisis).

213. See Janus, 138 S. Ct. at 2481–86 (focusing on the “vagueness problem” presented by distinguishing chargeable and nonchargeable expenses that the Court suggests is created by poor reasoning when evaluating the workability of Abood. Then, turning back to poor reasoning to justify overturning Abood based on developments since Abood that the Court opines have “eroded” the case’s underpinnings and “left it an outlier among our First Amendment cases.” Then, finding subsequent reliance on Abood did not carry “decisive weight” due to Abood’s “uncertain status . . . the lack of clarity [the decision] provides, the short-term nature of collective-bargaining agreements, and the ability of unions to protect themselves if an agency-fee provision was crucial to its bargain.”).

214. See Gentithes, supra note 199, at 103 (mapping out the way the Court borrowed from both weak and strong stare decisis traditions in Janus to ultimately overturn precedent based on the Justices’ disagreement with the case’s underpinning reasoning).

215. See Janus, 138 S. Ct. at 2478–86 (finding the stare decisis factors weighed in favor of overturning Abood based on poor quality of reasoning, workability, change or development in circumstances, and reliance interests at stake).

216. See Gentithes, supra note 199, at 103 (dissecting the way Janus paved the way for the judiciary to overturn precedent based on Justices’ substantive disagreement with its reasoning through reliance on the quality of reasoning in its analysis of all stare decisis factors).
2. The *Janus* Stare Decisis Approach Weakens Traditional Reliance Interests

The Court’s analysis of reliance interests as a factor in *Janus*’ *stare decisis* analysis signals a shift in the Court’s valuation of this factor.217 The Court acknowledged that reliance interests should be considered when overturning precedent, but it dismissed *Abood*’s articulated reliance interests as insufficient to stand by *Abood* because—turning again to the quality of reasoning—the Court concluded *Abood* does not “establish the sort of reliance interest that could outweigh the countervailing interest that [nonmembers] share in having their constitutional rights fully protected.”218 Commentators point out that *Janus* is a case dealing with significant contract interests where potentially thousands of contracts were drafted in reliance on *Abood*, but the Court does not address this weighty reliance interest.219 On the contrary, the *Janus* Court decided reliance interests are actually reduced for the *Janus* plaintiffs because the unions involved in the suit should have been “on notice for years regarding [the] Court’s misgiving about *Abood*” due to the Court’s precedent.220 The Court’s disregard for articulated reliance interests in *Janus* paves the way for the Court to selectively embrace reliance interests it agrees with.221

3. *Janus* Fundamentally Changes the Stare Decisis Calculus

At first glance, the *Janus* *stare decisis* formula seems to fall within the “weak” *stare decisis* tradition, where poor reasoning is not a condition precedent for departing from established precedent, rather, departure can

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217. *See Janus*, 138 S. Ct. at 2484–86 (finding reliance interests did not carry “decisive weight” in *Janus*).

218. *See id.* at 2484 (minimizing reliance interests as insufficient to support standing by precedent).

219. *See generally* Tilghman, *supra* note 11, at 144–45 (exploring the way *Janus* weakened *stare decisis* calculus by disregarding the reliance interests at stake in *Abood*); *compare Janus*, 138 S. Ct. at 2484–86 (declining to find any reliance interests despite the numerous contracts drafted in reliance on *Abood*), *with Payne*, 501 U.S. at 828 (recognizing concrete reliance interests where “property and contract rights” are implicated).

220. *See Janus*, 138 S. Ct. at 2484–85 (shifting the onus to public-sector unions to understand that the constitutionality of nonmember fees was constitutionally “uncertain” based on similar challenges by stating: “During this period of time, any public-sector union seeking an agency-fee provision in a collective-bargaining agreement must have understood that the constitutionality of such a provision was uncertain.”).

221. *See generally* Tilghman, *supra* note 11, at 144–45 (warning against allowing courts to depart from *stare decisis* because allowing judges to make decisions based on their personal agendas erodes the legitimacy of our American legal system).

https://commons.stmarytx.edu/thescholar/vol26/iss1/2
be justified through evaluation of its five proffered factors.\textsuperscript{222} In application, however, \textit{Janus} employs this framework but also borrows from the strong \textit{stare decisis} tradition by returning to “poor reasoning” repeatedly to draw special justifications to overrule precedent.\textsuperscript{223} \textit{Janus’} hybrid \textit{stare decisis} approach leaves \textit{stare decisis} without the bite it needs to limit the furtherance of political agendas by the Court, and leaves the law susceptible to the whims of the Court’s majority.\textsuperscript{224}

Application of the \textit{Janus} \textit{stare decisis} framework puts precedent (and, arguably, the doctrine of \textit{stare decisis}) in jeopardy in two ways: first, by exclusively relying on poor reasoning of past decisions, the Court effectively opens the door to subjectively overturning decisions it considers unfavorable.\textsuperscript{225} This approach “opens the door for politically motivated actors to manipulate our law by placing partisan justices on the Court—causing further politization.”\textsuperscript{226} Second, \textit{Janus} significantly weakens the remaining traditional \textit{stare decisis} factors: specifically, the reliance interest factor, by side-stepping reliance analysis, and instead leaning on poor reasoning to argue that poor reasoning countervails any remaining factors at stake.\textsuperscript{227} Most jurists agree that reliance interests should be considered when evaluating precedent, but \textit{Janus} takes a misguided step away from this notion.\textsuperscript{228}

\begin{itemize}
\item \textsuperscript{222} See \textit{Janus}, 138 S. Ct. at 2478–79 (recounting the factors that should be taken into account in deciding whether to overrule a past decision).
\item \textsuperscript{223} See Tilghman, supra note 11, at 144–45 (tracing the way \textit{Janus’} \textit{stare decisis} approach weakens the doctrine through over-reliance on the quality of precedent’s reasoning and minimizing the weight of the remaining \textit{stare decisis} factors).
\item \textsuperscript{224} See \textit{id.} at 145 (borrowing from both \textit{stare decisis} traditions to dilute this doctrine while also undermining the legitimacy of the Court).
\item \textsuperscript{225} See generally \textit{id.} at 143–45 (summarizing the way the Court’s \textit{Janus} framework weakened \textit{stare decisis} through focus on the merits of the reasoning of past decisions).
\item \textsuperscript{226} See \textit{id.} at 143–45 (cautioning against “re-litigating the merits of important precedent” as it “undermines the Court’s image as an apolitical body”).
\item \textsuperscript{227} See \textit{id.} (illustrating the way the Court’s \textit{Janus} framework weakened \textit{stare decisis} by failing to recognize reliance interests even where there are clearly implicated contract and property rights).
\item \textsuperscript{228} See Gentithes, supra note 199, at 117 (noting the impact the \textit{Janus} \textit{stare decisis} approach will have on reliance interests. Finding no reliance interests at stake in \textit{Janus} is especially shocking because reliance interests have traditionally been “at their acme” in cases involving contracting rights, like \textit{Janus}).
\end{itemize}
The Janus stare decisis framework application is flawed. However, the framework has potential. Providing jurists and advocates with a clear map to support or evaluate precedent would be a helpful tool as courts have grappled with this slippery stare decisis doctrine throughout history. A reliable framework could remedy the inconsistent manner in which stare decisis is applied, but this is only possible if it is applied objectively and evenly.

F. Rough Seas Ahead: The Intersection of Janus, Dobbs, and Plyler

The Court’s stare decisis framework applied in Janus and again in its Dobbs variation casts uncertainty on which unenumerated rights the Court will safeguard. The Court’s Dobbs decision returned to its Janus framework with very little change. If Dobbs is any indication of how the Court will approach future challenges to unenumerated rights—such as Plyler’s central holding that denial of public education to students not legally admitted into the country violates the Equal Protection Clause—

229. See generally Ilya Shapiro & Aaron Barnes, Janus: Why It Was Proper (and Necessary) to Overturn Old Precedent, CATO INST., (June 28, 2018, 10:02 A.M.) (stating generally that the judicial doctrine of stare decisis is an imperfect approach and while, in theory, it allows the perception of evenhandedness, there is a need for a more uniform and objective approach).

230. See id. ("[T]he newly elucidated Janus framework has the potential to advance [stare decisis’] noble objectives by providing both judges and practitioners with a stable, logical system for determining when adherence to the Constitution mandates abandoning erroneous precedent.").

231. See generally Ehrlich & Rodenberg, supra note 10, at 126 (illustrating the way precedent evolves due to its varied application).

232. See generally BRANDON J. MURILL, CONG. RSCH. SERV., LSB10678, THE MODES OF CONSTITUTIONAL ANALYSIS: JUDICIAL PRECEDENT 2–3 (2021) (explaining the role of precedent in constitutional analysis and how unpredictable its results are in practice: “Although the Court routinely purports to rely on precedent, it is unclear how often precedent has actually constrained the Court’s decisions because the Justices have latitude in how broadly or narrowly they choose to construe their prior decision.”).

233. See, e.g., Yoshino, supra note 2, (walking through the way Dobbs revived the approach to protecting unenumerated rights where the Court declines to recognize those that are not “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty” despite being previously recognized).

234. See Dobbs, 597 U.S. , 142 S. Ct. at 2261–78 (applying a variation of the Janus stare decisis framework to evaluate the following factors and ultimately determine that these factors weigh in favor of overturning Roe and Casey: (1) the nature of the Court’s error; (2) quality of the precedent’s reasoning; (3) workability of the precedent; (4) the effect on other areas of law; and (5) reliance interests).
this will likely lead to unfavorable outcomes for undocumented students across the country.\(^{235}\)

1. The Janus-Dobbs Framework’s Over-Reliance on Poor Reasoning Could Leave Plyler to the Court’s Whims

In Dobbs, the Court modified the Janus stare decisis approach by: (1) introducing another factor to its analysis: the nature of the Court’s error; and (2) consolidating Janus’ “consistency with other areas of law” factor and the “developments since the decision was handed down” factor.\(^{236}\) But the Dobbs stare decisis approach otherwise tracks Janus’ approach with little deviation.\(^{237}\) Dobbs’ modifications to its stare decisis analysis achieve the same end.\(^{238}\) By front-loading its analysis with the nature of the Court’s error and the quality of the precedent’s reasoning, the Court’s analysis begins with extra emphasis on the Court’s agreement with the precedent, as opposed to balancing reasons for following the precedent against rejecting it.\(^{239}\)

Dobbs’ analysis then largely follows in Janus’ wake, relying heavily on the poor quality of reasoning in Roe and Casey to conclude they were incorrectly decided.\(^{240}\) In Dobbs, the Court devoted an equal number of

\(^{235}\) See, e.g., Yoshino, supra note 2, (“[I]t’s not fearmongering to be concerned about the continued life of the constitutional rights [spanning] same-sex marriage, to same-sex sexual intimacy, and to contraception.”).

\(^{236}\) Compare Dobbs, 597 U.S., 142 S. Ct. at 2242 (using the Janus precedent to establish a pathway for modifying stare decisis), with Janus, 138 S. Ct. at 2477 (examining the value of consistency when questioning stare decision).

\(^{237}\) See Dobbs, 597 U.S., 142 S. Ct. at 2265 (introducing the nature of the Court’s error in Roe and Casey as a factor in stare decisis analysis); Compare Dobbs, 597 U.S., 142 S. Ct. at 2275–76 (examining what effects overturning precedent like Roe), with Janus, 138 S. Ct. at 2478–80 (evaluating whether overturning precedent would be consistent with other related decisions and developments since the decision was handed down).

\(^{238}\) See Dobbs, 597 U.S., 142 S. Ct. at 2265 (beginning stare decisis analysis with evaluation of the nature of the court’s error in Roe and Casey to determine these cases were decided wrong from the start); see also Janus, 138 S. Ct. at 2478/9 (beginning stare decisis analysis with poor reasoning).

\(^{239}\) See generally Frederick Schauer, Stare Decisis-Rhetoric and Reality in the Supreme Court, 2018 Sup. Ct. Rev. 121, 137–38 (2018) (“[T]he majority [in Janus] not only avoided confronting the admittedly challenging but arguably more honest process of weighing the reasons for following a precedent against the reasons for rejecting it, but also, and potentially more importantly, appeared to reaffirm that any of the reasons for rejecting a precedent might be available in future cases.”).

\(^{240}\) See Dobbs, 597 U.S., 142 S. Ct. at 2265–72 (expounding why the quality of reasoning in Roe and Casey did not incline the Court to stand by its precedent because (1) the right to abortion is not grounded in constitutional text; (2) the trimester framework was legislating from the bench;
pages to the quality of the reasoning factor compared to the four remaining factors combined. Given the length of analysis devoted to this second factor, it emerges as Dobbs’ leading rationale for disposing of Roe and Casey, the same way the Court relied on this factor to dispose of Abood in Janus.

These trends suggest that if the Court reviewed Plyler under the doctrine of stare decisis, a Janus-Dobbs approach would yield an outcome that rests with the Justices’ subjective agreement or disagreement with the substantive reasoning at Plyler’s foundation. This would have devastating consequences for undocumented students and American society, generally, because cutting off access to education would likely create a subclass of persons, as predicted by the Plyler court.

Overturning Plyler would also have serious consequences for the Court. Disposing of Plyler would undermine the application of stare decisis, which has long demanded the Supreme Court stand by its own precedent, and only to depart from its decisions when a precedent’s rationale no longer withstands careful analysis. Stare decisis aims to promote legal stability, legitimacy, and strength of settled law. Stare decisis also plays a critical role in our American legal system, acting as an “agenda-limiting function” that guards against sitting Justices advancing their own intentions through judicial opinions. Leaving stare decisis analysis to the subjective agreement or disagreement of sitting

(3) history does not agree with Roe and Casey’s constitutional interpretation of the “right of personal privacy”; and (4) the arbitrary viability line is not supported by philosophers and ethicists).

241. See id. at 2265, 2265–72 (quality of the reasoning analysis); see also id. at 2265, 2265, 2272–78 (analysis of remaining factors: quality of the court’s error, workability, effect on other areas of law, reliance interests).

242. See generally id. at 2265–72 (quality of the reasoning analysis); compare with Janus, 138 S. Ct. at 2479–86 (assessing the quality of the reasoning analysis).

243. See generally Soleimani, supra note 60, at 223 (predicting what outcome a Plyler challenge would yield before a conservative-leaning court like the sitting Court).

244. See id. at 207 (examining the consequences of overturning Plyler).

245. See generally Tilghman, supra note 11, at 136 (explaining the way the Supreme Court’s modern stare decisis approach undercuts the Court’s integrity).

246. See generally, e.g., Arizona v. Gant, 556 U.S. 332, 348 (2009) (declining to stand by precedent simply for precedent’s sake, and instead, employing careful review to determine whether precedent should be followed as required by the doctrine of stare decisis itself).


248. See, e.g., Tilghman, supra note 11, at 136 (suggesting that stare decisis is too weak to negate that the Court is politically motivated, at least in part, to further political ends).
Justices hiding behind the poor reasoning factor dilutes stare decisis’ core purpose and weakens the Court’s legitimacy.\textsuperscript{249} Further, the inevitable corollary of additional decisions along the Janus-Dobbs vein will further erode the legitimacy of our judicial system by casting the judiciary as a political body.\textsuperscript{250}

2. The Janus-Dobbs Framework Subverts the Value of the Remaining Stare Decisis Factors

In Dobbs, the Court’s analysis of the remaining stare decisis factors—workability, effect on other areas of law, and reliance interests—is modeled after Janus.\textsuperscript{251} The Court draws a line through its analysis of these factors and focuses on its disagreement with Roe and Casey, instead of delivering balanced rationale for ruling for or against overturning this precedent.\textsuperscript{252}

First, the Court evaluates the workability of Casey, ultimately concluding that this precedent “scores low on the workability scale” because it is difficult to apply and has resulted in circuit splits across jurisdictions.\textsuperscript{253} The Court reaches this decision by highlighting its perceived shortcomings in Casey’s “undue burden” test, but its analysis is notably devoid of any evaluation of reasons to maintain Casey.\textsuperscript{254} This is likely because the analysis of the workability calculus in stare decisis is not guided by any clear authority on what makes precedent unworkable, but rather, it is a broad label applied to a majority judgment about how a legal rule has

\textsuperscript{249} See id. (advocating to strengthen the doctrine of stare decisis despite its history of being wielded inconsistently and seemingly randomly. The author suggests that to promote judicial integrity, we must bolster this doctrine to reestablish the public’s faith that the Court will exercise independent judgment in deciding the law.).


\textsuperscript{251} See Dobbs, 597 U.S., 142 S. Ct. at 2272–76 (analyzing workability, effect on other areas of law, and reliance interests through the lens of poor reasoning to determine whether the Court should stand by Roe and Casey); see also Janus, 138 S. Ct. at 2479–81 (spotlighting poor reasoning as the primary reason for effectively overturning Abood through each of the stare decisis factors).

\textsuperscript{252} See Dobbs, 597 U.S., 142 S. Ct. at 2272–76 (returning to poor reasoning to justify overturning Roe and Casey under the guise of the remaining stare decisis factors).

\textsuperscript{253} See id. (taking issue with the way Casey’s “undue burden” test was created and declaring the precedent unworkable because the test resulted in litigation).

\textsuperscript{254} See id. at 2275 (declaring Casey’s “undue burden” test unworkable because it “seems calculated to perpetuate give-it-a-try litigation”).
impacted the Court, the judiciary, legislators, and other stakeholders.\textsuperscript{255} Without standardized parameters for determining workability, this factor’s value is diminished, and instead, serves as an extension of the poor reasoning factor by permitting judges to subjectively decide whether to deem precedent workable.\textsuperscript{256}

Second, \textit{Dobbs} evaluates the effect of overturning precedent on other areas of law.\textsuperscript{257} The Court ticks down the ways that abortion cases have changed the jurisprudential landscape, such as their dilution of strict scrutiny and disregard for \textit{res judicata} principles.\textsuperscript{258} The Court concludes that because \textit{Roe} and \textit{Casey} have “led to the distortion of many important but unrelated doctrines,” these decisions should be overruled.\textsuperscript{259} What is, again, absent from the Court’s analysis is evaluation of the other side of the coin: what effect will overturning \textit{Roe} and \textit{Casey} have on other areas of law?\textsuperscript{260} Absent complete analysis of this factor, its weight in the \textit{stare decisis} formula is defective and consequently undervalued.\textsuperscript{261}

Finally, \textit{Dobbs} turns its attention to the final \textit{stare decisis} factor: reliance interests.\textsuperscript{262} The Court expresses clear preference for tangible reliance interests, such as those that arise in cases involving “property and

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  \item \textsuperscript{255} See generally Clarke D. Forsythe \& Rachel N. Morrison, \textit{Stare Decisis, Workability, and Roe v. Wade: An Introduction}, 18 AVE MARIA L. REV. 48, 50–57 (2020) (surveying workability decisions as they are decided on case-by-case analysis without clear or comprehensive guidance).
  
  \item \textsuperscript{256} See generally Gentithes, supra note 199, at 83–85 (demonstrating the way the \textit{stare decisis} workability factor can serve as an extension of the poor reasoning factor, thus weakening the doctrine of \textit{stare decisis} by not promoting well-rounded analysis and predictable judicial outcomes).
  
  \item \textsuperscript{257} See \textit{Dobbs}, 597 U.S. , 142 S. Ct. at 2275–76 (considering the effect that overturning \textit{Roe} and her progeny would have on other areas of law: “Members of this Court have repeatedly lamented that ‘no legal rule or doctrine is safe from . . . nullification . . . when an occasion for its application arises in a case involving state regulation of abortion.’ ”).
  
  \item \textsuperscript{258} See \textit{id.} (pinning overturning \textit{Roe} and \textit{Casey} on (1) their dilution of the strict scrutiny standard; (2) ignoring the Court’s third-party standing doctrine; (3) disregarding \textit{res judicata} principles; (4) disregarding rules on the severability of unconstitutional provisions; and (5) distorting First Amendment doctrines, generally).
  
  \item \textsuperscript{259} See \textit{id.} (delivering a laundry list of ways the Court’s abortion cases have shaped privacy jurisprudence and declaring they support overturning this precedent).
  
  \item \textsuperscript{260} See generally Tilghman, supra note 11, at 143–144 (noting the consequences of imbalanced \textit{stare decisis} analysis).
  
  \item \textsuperscript{261} See \textit{id.} at 143–144 (analyzing the effect of weakening the importance of traditional \textit{stare decisis} analysis factors).
  
  \item \textsuperscript{262} See \textit{Dobbs}, 597 U.S. , 142 S. Ct. at 2276–78 (finding no discernable reliance interests on \textit{Roe} and \textit{Casey} to conclude that this factor weighs in favor of overturning these precedents).
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contractual rights.” The Court declines to evaluate Casey’s stated intangible reliance interests in access to abortion care if contraception should fail, because evaluation of this kind of interest would require expertise outside the Court’s wheelhouse. Here, the Court changed its approach from engaging one-sided analysis to no analysis at all. The Court spells out how thorny reliance interests are under Roe and Casey, detailing the conflicting arguments brought by Roe and Casey’s respective proponents, but ultimately, the Court cleans its hands of weighing this factor in its stare decisis calculus by declaring this issue is a matter for state legislative bodies. By punting the issue of reliance interests to the states, the Court is sending a clear signal that this factor needs to be given minimal weight, if any at all.

The Janus-Dobbs stare decisis approach has displaced traditional stare decisis factors such as workability, effect on other areas of law, and reliance interests as factors in its calculus by shifting focus away from complete and balanced analysis of each factor. This signals that the Court’s stare decisis analysis will reflect whatever outcome is most in-line with the Court’s majority, rather than a well-rounded analysis of issues presented to the Court. If the Supreme Court maintains its stare decisis

263. See generally id. at 2276 (citing Payne, 501 U.S. at 828) (focusing on the intangible nature of the reliance interests stated in Casey—such as the reliance on access to abortion if contraception should fail—to find no reliance interests).

264. See id. at 2277 (“[W]eighing of the relative importance of the fetus and mother represent a departure from the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies . . . . Our decision returns the issue of abortion to those legislative bodies.”).

265. See id. at 2276–78 (declining to analyze the reliance interests articulated in Roe and Casey, instead opting to return abortion to legislatures).

266. See id. at 2267–77 (concluding that because the Court is “ill-equipped to assess generalized assertions about the national psyche” underlying Casey’s intangible reliance interests, no reliance interests exist; further, because assessment of the effect of the abortion right on society, and in particular, on the lives of women, would depend on “empirical [evidence] that is hard for anyone—and in particular, for a court—to assess,” it is a matter for the states).

267. See generally Tilghman, supra note 11, at 143–44 (addressing the Court effectively diminishing traditional stare decisis factors through incomplete or one-sided analysis of reliance interests).

268. See generally id. (emphasizing the way incomplete analysis of traditional stare decisis factors undermines the doctrine of stare decisis).

269. See generally Tilghman, supra note 11, at 143–45 (unpacking the way the Court weakened the importance of reliance interests in Janus by dismissing reliance interests through its conclusion that such poor reasoning countervailed such interests. The Court’s approach leaves stare decisis “lacking the teeth necessary to ensure it limits the furtherance of political agendas in the Court.”); see also Dobbs, 597 U.S. , 142 S. Ct. at 2272–78 (perpetuating Janus’ approach to
III. SOLUTION

The catastrophe the Court fears already happened.\textsuperscript{271} The \textit{Janus-Dobbs} approach to \textit{stare decisis} adds to the already-eroded public perception of the Court’s legitimacy.\textsuperscript{272} The importance of the judiciary staying in its lane as judges and not dictating public policy is essential, as Supreme Court Justice Elena Kagan cautions, because the contrary would be a “dangerous thing for democracy.”\textsuperscript{273} Justice Kagan also observes that the Court retains its legitimacy and fosters public confidence “by acting like a court [and] doing the kinds of things that do not seem to people

disposing of \textit{stare decisis} factors through: (1) incomplete balancing, as seen in the Court’s workability and effect on other areas of law analysis; and (2) altogether disposing of reliance interests as being counteracted by poor reasoning without examination of articulated reliance interests).

\textsuperscript{270} See generally Litt, supra note 9, (emphasizing the implications of the Court’s approach to \textit{stare decisis} in \textit{Dobbs}: “[Through] \textit{stare decisis}, [J]ustices recognize that the Court is bigger than the people who . . . serv[ ] on it . . . . The judiciary is supposed to be informed by historical memory, and guided by more than its members’ whims . . . . Without [\textit{stare decisis}], the judiciary is just a collection of opinionated people.”).

\textsuperscript{271} See generally Cillizza, supra note 251, (marking the public’s trust in our American judicial system at an all-time low).

\textsuperscript{272} See generally, e.g., Wayne Batchis, \textit{The Supreme Court has a Clarence Thomas (and Ginni Thomas) Problem}, NBC NEWS, https://www.nbcnews.com/think/opinion/supreme-court-clarence-thomas-ginni-thomas-problem-ncna1292351 [https://perma.cc/EV9P-S4LR] (Mar. 25, 2022) (observing the difference between ideologically informed interpretation and abusing the Court’s position to advance political agendas in light of the news that Ginni Thomas, wife of Supreme Court Justice Clarence Thomas, exchanged text messages urging the White House Chief of Staff to overturn the 2020 election results) (“[I]f it becomes “normal” to see the Court as a potential collaborator in undermining our core democratic institutions, we may have reached a point of no return.”); see also Chief Justice John Roberts Defends the Supreme Court—As People’s Confidence Wavers, NPR, (September 10, 2022) https://www.npr.org/2022/09/10/1122205320/chief-justice-john-roberts-defends-the-supreme-court-as-peoples-confidence-waver [https://perma.cc/49Q7-PBJN] (delicating Chief Justice John Roberts’ concern about critics questioning the legitimacy of the Court) (“If the Court [does not] retain its legitimate function of interpreting the constitution, I’m not sure who would take up that mantle. You [do not] want the political branches telling you what the law is, and you [do not] want public opinion to be the guide [either].”).

political or partisan.”

Further, Justice Kagan notes that justices have to be consistent when implementing their judicial philosophies, and they cannot abandon that approach when it will not result in their preferred outcome.

Despite the Court’s Janus-Dobbs stare decisis trend of overreliance on poor reasoning and undervaluing the remaining factors, there is still time to rehabilitate the public’s faith in Court’s judicial independence if the Court moderates its approach. Eliminating the quality of reasoning factor from the stare decisis calculus and standardizing application of the stare decisis analysis are actionable avenues to stay true to the doctrine of stare decisis’ objectives while promoting a more balanced review of precedent compared to the Janus-Dobbs approach.

A. Eliminate the Quality of Reasoning Factor from Stare Decisis Calculus

As previously discussed, the Court’s Janus-Dobbs stare decisis analysis borrows from both the weak and strong stare decisis traditions. The weak tradition overturns precedent if it was poorly reasoned. The strong tradition submits that precedent shall remain undisturbed unless there is a special justification to overturn the decision among recognized factors, regardless of the quality of the precedent’s reasoning. The Janus-Dobbs approach marries the weak and strong stare decisis traditions by evaluating the factors recognized by the strong tradition but leans heavily on the sitting court majority’s valuation of the quality of

274. See id. (recognizing how crucial judicial restraint is in order to safeguard our democracy).
275. See id. (emphasizing the importance of consistent and evenhanded application of jurisprudential philosophies regardless of whether the outcome aligns with individual political or personal preferences).
276. See generally Tilghman, supra note 11, at 145–48 (advancing solutions to strengthen stare decisis in the wake of recent decisions such as Janus and Citizens United).
277. See generally Gentithes, supra note 199, at 87–88 (outlining a path to restore faith in the Court’s independence as an apolitical body).
278. See generally id. at 87–89 (contrasting the weak and strong stare decisis traditions and how Janus made the weak version of stare decisis “even weaker”; see also Schauer, supra note 240, at 121 (explaining that Janus did not engage in balanced inquiry regarding whether precedent should or should not be followed for each of the stare decisis factors can be relied upon for rejecting precedent in the future).
279. See generally Gentithes, supra note 199, at 87–88 (summarizing the weak stare decisis tradition).
280. See id. (interpreting the strong stare decisis tradition).
reasoning in each of these factors.\textsuperscript{281} This hybrid approach vests a great deal of power in the sitting Court’s agreement or disagreement with precedent and opens the door to politically motivated agendas being advanced by the Court.\textsuperscript{282}

Eliminating poor reasoning from the \textit{stare decisis} calculus would bring a more balanced \textit{stare decisis} analysis.\textsuperscript{283} While this factor should no longer be weighed in \textit{stare decisis} analysis to overturn precedent, poor reasoning should continue to trigger \textit{stare decisis} analysis.\textsuperscript{284} This change would shift focus away from the Justices’ agreement or disagreement with the merits of a decision by re-litigating the merits of the precedent and instead, hold space for balanced \textit{stare decisis} review.\textsuperscript{285} Further, commentators have observed this change would conserve judicial resources by eliminating re-litigation of the merits of an argument to be subjectively weighed by the Court.\textsuperscript{286}

\textbf{B. Standardize Stare Decisis Methodology}

Standardizing the way \textit{stare decisis} factors are balanced would also bolster this doctrine and its underpinning objectives.\textsuperscript{287} \textit{Stare decisis} has long been regarded as a flexible policy instrument—not an inexorable

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\item \textsuperscript{281} See generally Tilghman, supra note 11, at 143–45 (unpacking the way the Court weakened the weak \textit{stare decisis} tradition in \textit{Janus} by focusing on the sitting Court’s substantive dissonance with precedent); see also Dobbs, 597 U.S., 142 S. Ct. at 2272–78 (sustaining the \textit{Janus} approach of focusing on the Court’s substantive disagreement with precedent. \textit{Dobbs} goes further to undermine the value of the remaining traditional \textit{stare decisis} factors recognized by the strong tradition by failing to analyze and balance the remaining factors.).
\item \textsuperscript{282} See generally Tilghman, supra note 11, at 143 (sounding the alarm that the danger of overturning precedent on the merits of its reasoning paves the way for politically motivated actors to influence the Court).
\item \textsuperscript{283} See generally id. at 145–46 (advocating for the eradication of the poor reasoning factor in \textit{stare decisis} analysis because these arguments are “simply vehicles which may be used by Justices to overrule decisions based on personal disfavor or political views”).
\item \textsuperscript{284} See id. at 139 (charting a path forward from the \textit{Janus} and its progeny to include poor reasoning as a factor to trigger \textit{stare decisis} analysis without allowing it to control the analysis).
\item \textsuperscript{285} See, e.g., Citizens United, 558 U.S. at 409 (Stevens, J., concurring in part) (“[R]estating a merits argument with additional vigor does not give it extra weight in the \textit{stare decisis} calculus.”).
\item \textsuperscript{286} See Tilghman, supra note 11, at 145–46 (advocating for restructuring \textit{stare decisis} to do away with soundness of reasoning).
\item \textsuperscript{287} See generally Morgan Johnson, Conservative \textit{Stare Decisis} on the Roberts Court: A Jurisprudence of Doubt, 55 U.C. DAVIS L. REV. 1953, 1985 (2022) (opining that the Supreme Court should adopt a unified approach to \textit{stare decisis} because the pluralistic approach taken by Justices yields inconsistent results in practice).
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formula which is binding on the courts. This flexibility, however, means the Court has not articulated or applied *stare decisis* with uniform methodology. Thus, we now see individual Supreme Court Justices applying the doctrine differently and reaching unpredictable results. This, of course, contravenes the doctrine’s intent and undermines the stability of judicial outcomes. For example, in *Ramos v. Louisiana*, both Justices Gorsuch and Alito concluded that reliance interests were implicated in their *stare decisis* calculus, but each Justice relied on distinct facets of reliance (without overlap) to reach their respective decisions. Without consistent *stare decisis* methodology set forth by the Supreme Court, this doctrine will persist in being wielded inconsistently.

CONCLUSION

On its face, the Supreme Court’s *Dobbs* decision looks like an isolated departure from precedent, but beneath the surface, it is part of a dangerous trend. The Supreme Court’s *Dobbs* decision is the culmination of a pattern that will continue to erode at the doctrine of *stare decisis* and undermine the legitimacy of the Supreme Court as an apolitical arm of our government. To bolster the judiciary and safeguard our civil liberties,

288. See, e.g., Helvering v. Hallock, 309 U.S. 106, 119 (1940) (“[*Stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision.”).
289. See *Ramos v. Louisiana*, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring in part) (observing the absence of “consistent methodology or roadmap” for how to analyze all the *stare decisis* factors).
290. See Johnson, *supra* note 288, at 1963–72 (surveying the variations in application of *stare decisis* analysis among the Supreme Court’s conservative majority).
291. See id. at 1974 (illustrating the way variations in the application of *stare decisis* leads to no reliable way to predict judicial outcomes).
292. See *Ramos*, 140 S. Ct. at 1408, 1436–40 (illustrating the way two Justices can apply the same factors, and their analysis can yield opposite results).
293. See Murill, *supra* note 233, at 2–3 (highlighting how imprudent it is for a doctrine, which is supposed to promote judicial consistency, to be employed in such an inconsistent manner) (“[I]t is unclear how often precedent has actually constrained the Court’s decisions because the Justices have latitude in how broadly or narrowly they choose to construe their prior decisions.”).
294. See generally Johnson, *supra* note 288, at 1950–60 (illustrating the variations across the Supreme Court’s conservative majority’s approach to *stare decisis*. Absent a clearer course, the Court’s *stare decisis* analysis will largely depend on the individual Justices’ personal agreement or dissonance with precedent.).
the Supreme Court must chart a more moderate course for its application of *stare decisis* by (1) eliminating the quality of reasoning factor from *stare decisis* analysis, and (2) standardizing *stare decisis* methodology.\(^{296}\) Failure to interrupt the Supreme Court’s modern *stare decisis* trend cuts two ways: without intervention, this trend could come at the already-too-high price of marginalized groups’ civil liberties, such as undocumented students’ access to public education; this trend could further destabilize the judiciary’s apolitical role in American government.\(^{297}\)

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\(^{296}\) See generally Tilghman, *supra* note 11, at 145-48 (proposing a course to ameliorate the Court’s modern *stare decisis* trend).

\(^{297}\) See generally Greenhouse, *supra* note 296, (predicting possible outcomes should the Supreme Court fail to moderate its *stare decisis* approach).