2022

Redundant Reliance and The Supreme Court's Application of Stare Decisis

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Redundant Reliance and The Supreme Court's Application of Stare Decisis

Submitted to
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For
Senior Thesis
Spring 2022
04/25/22

Acknowledgements

Thank you Professor Miller for your mentorship, instruction, and guidance, not just in writing this thesis, but also in classes, career plans, and my law school endeavors.

Thank you to my parents (and Arlene teacher, my second mom). I do not know what I would do without you guys and your prayers.

Thank you Soojee, Jefferson, D.Wang, Karina, Jaden, and Abi for putting up with me throughout this process.

Thank you God. For everything.

Abstract

When the Supreme Court invokes the doctrine of stare decisis in their opinions, they are appealing to the fundamental principle that precedents have authority by virtue of being a precedent. However, they also recognize other concerns that come with the decision to defer to precedents or to overturn them. In pursuit of maintaining the rule of law, the Court uses various legal tests to guide them through sometimes competing concerns of precedential authority, including what is called reliance interests: the consideration of whether the precedent has engendered a reliance to the said precedent, to the extent that overturning it would cause significant harm. Because reliance interests are the basis for consequential Supreme Court decisions regarding fundamental constitutional rights, it is important to have a clear understanding of why it is used, how it is used, and whether it should be used in the judicial process. These are the questions I aim to answer in this thesis. Ultimately, I find that reliance interest considerations are redundant as part of stare decisis deliberations, and I further argue that because of its potential to be harmful, that redundancy may not justify its use. For the Court's application of stare decisis to be more robust, a solution other than reliance interests may be needed.

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INTRODUCTION

To defer to precedents or to overturn them – these two choices often fall before the nation's highest court. It is a choice between upholding a certain interpretation of the law, sustained and maintained by a reiteration of previous decisions or departing from them, in pursuit of a more "correct" decision, evaluated based on metrics that are themselves debated and evolving. When highly contentious and controversial issues such as abortion rights and gun control reach the Supreme Court, that metric becomes an especially salient part of the cases. Whatever the decision may be, it is always a monumental and enormously consequential one, with the potential to define whether the Court was on the "right" side of history, celebrated for generations to come for their apt reasoning, or one that will be made as an example of unfortunate error. Amidst the intense scrutiny and attention, there are several guiding doctrines that the Court invokes in their effort to carry out their institutional duty and function, the most fundamental of them being stare decisis: follow the precedent, *because* it is a precedent.

Stare decisis is fundamental because it serves as a base, background, and the default upon which other legal reasoning or principles are introduced and deliberated against. The deference to precedent is the given ideal for upholding the "rule of law" until other considerations arise that challenge whether deference is the best course of action. In order to gauge the weight of stare decisis against sometimes competing interests, the Court has utilized several legal tests, such as determining whether or not a precedent is workable, whether there is a change in understanding of the facts, etc. However, stare decisis as a doctrine, along with how it is practiced, has been subject to criticism;

incoherencies in logic, inconsistencies in application, ambiguity, and soundness of the legal tests to name several.

To reconcile these problems, another legal test that is different from the aforementioned has been offered as a solution – the consideration of reliance interests in stare decisis. Reliance interests contends that the extent to which stakeholders have come to rely on a precedent should be taken into account in stare decisis deliberations. A wide variety of viewpoints are represented in literature regarding this issue, from some arguing that reliance interests should be the only consideration for weighing precedents, to some arguing that reliance interests should not be considered at all. It is clear that the debate is relevant. For example, the legal basis for protection of abortion rights depends on the doctrine of reliance interests. The most recent hearing of the case regarding abortion has also devoted a substantial amount to the discussion of reliance, which involved defining it, arguing about its existence, and disagreeing about its relevance to stare decisis. Given the stakes and the way reliance can play a pivotal role in many consequential legal decisions, a more nuanced and robust understanding of reliance is necessary.

This thesis aims to contribute to the debate and development of stare decisis and reliance. I will argue that reliance interests as a legal test used in stare decisis deliberations is redundant, because the justifications and the purpose of its use are already fulfilled by the nature of what stare decisis is and what *its* justification and goals are in the first place. Furthermore, I will argue that while the redundancy of reliance interest considerations by itself may not be a problem, the fact that the doctrine may actually harm the goals of stare decisis suggests that it should not be used as a separate legal test.

This thesis is broken down into three chapters. In chapter one, I explain stare decisis, including how it is currently practiced, its legal justifications, and its problems, laying out the context that undergirds discussions about reliance. In chapter two, I explain reliance, its appeal, its criticisms, and my argument. In chapter three I end with concluding thoughts. All of the discussions will revolve around the Supreme Court.

CHAPTER I. STARE DECISIS

A. Definition

Stare Decisis, as defined by the Black's Law Dictionary, means to "stand by decided cases; to uphold precedents; to maintain former adjudications."[1] It is one of the most central and fundamental guiding legal principles in American jurisprudence, where points of litigation are determined according to precedent.[2] Although it sounds simple enough, exactly what it means to stand by precedent, the feasibility of standing by precedent, the justifications of stare decisis, the weight of stare decisis relative to other important jurisprudence principles, and more, are all questions that have not been entirely settled and the answers for which continuously change form in both academia and in actual practice in the courts. Accordingly, there is an immensely large body of work devoted to the doctrine of stare decisis.[3] It is not trite to examine how stare decisis exists currently as a modern doctrine, as the main points of contention and concerns surrounding the topic also undergirds the debates surrounding a more specific stare decisis consideration of which this paper is primarily about: the idea of reliance.

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[1] Black's Law Dictionary, "What is STARE DECISIS," The Law Dictionary, https://thelawdictionary.org/stare-decisis/.
[2] Randy J. Kozel, "Stare Decisis as Judicial Doctrine," *Washington and Lee Law Review* 67, no. 2 (2010): 412-413.
[3] Hillel Y. Levin, "A Reliance Approach to Precedent," *Georgia Law Review* 47 (2013): 1037.

Therefore, this examination will provide the context for determining how to frame the question of the value of reliance in the Supreme Court's jurisprudence.

B. Stare Decisis in Practice in the Supreme Court

Supreme Court cases appealing to the doctrine of stare decisis are inumerable, but there are key decisions that are often referenced by scholars that aim to elaborate and articulate not only what stare decisis is but how the Court has shaped the principle in theory and in practice.

There are two overall ways that the Court seems to apply the doctrine of stare decisis through their decisions: that it is non-binding and that it is one concern to balance among others.

B.1. Precedent as Non-binding

First is that the deference to precedent is not a promise, and it is not binding – the Court is not obligated to indefinitely follow precedent in the absolute sense. In *Helvering v. Hallock*, the Court decided the laws regarding transfer of property, particularly related to the provisions of 302(c) of the Revenue Act of 1926.[4] The matter of conflict was regarding the inclusion of trust property in the gross estate calculations of a decedent by the Commissioner of Internal Revenue.[5] This raised questions regarding taxes that the petitioners of the case had to pay, and it is this cause for which they protested through the District Court for the Eastern District of Pennsylvania, the Circuit Court of Appeals for the Third Circuit, the Board of Tax Appeals, and the Circuit Court of Appeals for the Second Circuit.[6] The Supreme Court decided to take the case up, mainly because of the

[4]Helvering, Commissioner of Internal Revenue v. Hallock Et Al., Trustees, 309 U.S. 106, (Jan. 29, 1940).
[5] Ibid.
[6] Ibid, 108.

disagreements among the lower courts, and a previous Supreme Court case that many of the decisions among these lower courts relied on: *Klein v. United States*. Justice Frankfurter recognized the rationale behind conclusions that the case came to and ultimately wrote that the said conclusion was wrong in its refusal to "subordinate the plain purposes of modern fiscal measure to wholly unrelated origins of the recondite learning of ancient property law."[7]

However, Justice Frankfurter also recognized that the opinion is one that diverges from the principles of stare decisis. His answer to this concern importantly reveals, or perhaps makes more confusing, how the Court views the extent of the Court's commitment to precedent:

> We recognize that stare decisis embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychological need to satisfy reasonable expectations. But stare decisis is a *principle of policy* and not a mechanical formula of adherence to the latest decision.[8]

The idea that the Supreme Court sees the doctrine of stare decisis as a "principle of policy" has been reiterated many times.[9] Adherence to precedent is not one that is like a "mechanical formula," in which the simple fact that a precedent exists regarding an issue surrounding similar factual development by itself requires a commitment to that precedent.

In *Payne v. Tennessee*, the jury's conviction of Pervis Payne for murdering Charisse Christopher and her daughter Lacie Christopher was called into question because it was based on the testimony of the Charisse's mother – which explained the

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[7] Ibid, 112.
[8] Ibid, 119 (emphasis added).
[9] Randy J. Kozel, "Stare Decisis as," 411.

impact of the trauma on the victim's family members.[10] Payne's lawyers petitioned that it was wrong for the prosecution to use testimonial evidence to comment on the continuing effects of the murder on the victim's family when it came to sentencing capital punishment, because it was a violation of the Eigth Amendment.[11]

The relevant Supreme Court precedents that were appealed to, and ultimately rejected by the majority opinion, were *Booth v. Maryland* and *South Carolina v. Gathers*.[12] Justice Rehnquist writing for the majority pointed out that these two cases were decided on the premise that "evidence relating to a particular victim or to the harm caused a victim's family does not, in general, reflect on the defendant's 'blameworthiness,' and that only evidence of 'blameworthiness' is relevant to the capital sentencing decision.[13] As a result, there were "infirmities" in the rules created by the two cases, and these rules gave the capital defendant an unfair advantage over the prosecution, because the defendant has no limits on providing relevant mitigating evidence regarding his circumstances, while the prosecution cannot present counteracting evidence, despite having a legitimate reason for being able to do so.[14]

Regarding the rejection of precedents established by two Supreme Court cases, and therefore a departure from the doctrine of stare decisis, Justice Rehnquist wrote this:

> The doctrine is not an inexorable command. The Court has never felt constrained to follow precedent when governing decisions are unworkable or badly reasoned, *Smith v. Allwrite,* 321 U. S. 649, 321 U. S. 655, particularly in constitutional cases where correction through legislative action is practically impossible.[15]

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[10] Payne v. Tennessee, 501 U.S. 808, (June 27, 1991).
[11] Ibid, 808.
[12] Booth v. Maryland, 482 U.S. 496, (June 15, 1987); South Carolina v. Gathers, 490 U.S. 805, (June 12, 1989).
[13] Payne v. Tennessee, 817.
[14] Ibid, 827.
[15] Ibid, 809.

The practice of maintaining former adjudications is not an inexorable command. In other words, the Courts have the ability to renege on their prior decisions when they have determined that such a course of action is the better one after considering other factors that Justice Rehnquist has alluded to, such as workability or outdated/unacceptable reasoning.

In fact, the idea of discretion by the Supreme Court in terms of stare decisis is clearly articulated by Justice Lurton in *Hertz v. Woodman*: "The rule of *stare decisis* tends to uniformity and consistency of decision but it is not inflexible, and it is within the discretion of a court to follow or depart from its prior decisions."[16]

B.2. Stare Decisis as One Element of Factors to "Balance"

A paradigmatic example that illustrates another way the Court approaches stare decisis is the case *Burnet, Commissioner of Internal Revenue v. Coronado Oil & Gas Co.*[17] In this case, the concern was about the profit that the state of Oklahoma had made from leasing federally granted land to the Coronado Oil and Gas Company. Under the lease, the State received a portion of the profit from the gross production of oil and gas.[18] This land was granted by Congress to the State on the condition that they would use the lands for the establishment of a public school system, and "to keep the same for the uses and purposes for which they were granted."[19] The Oklahoma legislature directed the gains to the public fund for the benefit of the public schools. The Commissioner of Internal Revenue imposed taxes on this profit, and it was this action that became the point

[16] Hertz v. Woodman, 218 U.S. 205, (May 31, 1910).
[17] Burnett, Commissioner of Internal Revenue v. Coronado Oil and Gas Co., 285 U.S. 384, (Apr. 11, 1932).
[18] Ibid
[19] Ibid, 398.

of conflict. Under the conclusions of *Gillespie v. Oklahoma*, the Court held that "Coronado Company was an instrumentality of the State for the utilization of lands dedicated to the support of public schools and that to tax the fruits of the lease would burden her in performance of the governmental function of maintaining such schools."[20] The Court wanted to adhere to precedents that held that instruments of governmental function should be immune from the taxing power of another.

Disagreeing with the majority, Justice Brandeis expressed a logic that resembles viewing stare decisis as a balancing act:

> Stare Decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. Compare *National Bank v. Whitney,* 103 U.S. 99, 102. This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. . .The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.[21]

The Court therefore sees stare decisis as an important judicial principle, of which they are not bound to, and of which can be subject to scrutiny as soon as other judicial principles of interest to the institution of the Court might arise. Yet, clearly, there must be some superior preference that stare decisis has, since it is "usually the wise policy," and it is the default unless noted otherwise by the Court. The question that then follows is, what exactly are the values of or the justification for adhering to stare decisis? If stare decisis can conflict with other persuasive legal forces, why does the Supreme Court care about it as fundamental to the judicial system in the first place? What obligates the institution to stick to its own precedents, whenever possible?

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[20] Ibid.
[21] Ibid, 406.

C. Justifying Stare Decisis

Examining the reasons for deferring to precedential authority illuminates how and why the Court holds values of stare decisis against other concerns, including why the Court considers reliance. There are four main reasons that have been identified as justifications for stare decisis: it promotes faith in the judiciary, it promotes predictability, it is conducive to equality, and it promotes judicial efficiency. All of these values contribute to the pursuit of another, higher level value, which is the rule of law. Perhaps closely related to the first justification is that stare decisis promotes the proper rule of law. According to the American Bar Association, "the rule of law is a set of principles, or ideals, for ensuring an orderly and just society. Many countries throughout the world strive to uphold the rule of law where no one is above the law, everyone is treated equally under the law, everyone is held accountable to the same laws, there are clear and fair processes for enforcing laws, there is an independent judiciary, and human rights are guaranteed for all."[22] It is the Court's main function to uphold the rule of law, and since stare decisis promotes values that are conducive to the rule of law, stare decisis is a fundamental principle in the Court's jurisprudence.

C.1. Stare Decisis Promotes Faith in the Judiciary

The first reason often invoked for justifying stare decisis is that it promotes the *public* faith in the judiciary. Because judges are sticking to what they have authoritatively declared in the past, there is less likelihood of the institution of the Court being perceived as constantly changing its "mind." If the judges in the highest court are constantly retracting or reneging on what their decisions have been, the public perception of their

[22] American Bar Association, "Rule of Law," American Bar Association, https://www.americanbar.org/groups/public_education/resources/rule-of-law/.

"wisdom, authoritativeness, and neutrality," would cease to exist.[23] The result is that the judiciary, and especially the Supreme Court, would no longer be seen as the final authority on what the law is and how it should be interpreted. The goal is for the Court to be seen as an integral institution of American society, with an influence that shapes what society should look like, precisely because it is an *institution* that operates with permanence and significance beyond whoever is occupying the seats of the Court at the time. One of the best ways to achieve this goal, to communicate that the Court is beyond the few humans that make up it, is adhering to what the public perceives the Court to be; and what the public perceives the Court to be is an institution of American democracy.[24]

To maintain that perception, "in the long run," there must be judicial "restraint in decision making and respect for decisions once made." These are the "keys to preservation of an independent judiciary and public respect for the judiciary's role as a guardian of rights."[25]

Another way to think about institutional legitimacy is institutional strength – the power of the decision making institution. Stare decisis gives power to the judiciary because the American judicial system derives power from the faith that the public has in it. Since "internal consistency strengthens external credibility," the appearance of a standardized internal consistency increases credibility.[26] The increased credibility gives the Court more power because it gives more institutional legitimacy.

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[23] Hillel Y. Levin, "A Reliance Approach," 1045.
[24] Martin Shapiro, "Toward a Theory of 'Stare Decisis,'" *The Journal of Legal Studies* 1, no. 1 (January 1972).
[25] Lewis F. Powell, Jr., "Stare Decisis And Judicial Restraint," *Washington and Lee Law Review* 47, no. 2 (Spring 1990): 290.
[26] Frederick Schauer, "Precedent," *Stanford Law Review* 39, no. 3 (February 1987): 600.

Related to such a goal is the goal of wanting the Court to appear isolated from other, outside political forces. If the Court were to dismiss judicial restraint and overturn decisions everytime a new set of justices with different ideologies appointed by different political forces take the seats, the Court would appear to be simply another instrument of politics. This is something that the Court, from its very founding, has made explicit that it does not want to do. It must be perceived to be an authority above the fray of politics, guided only by sound legal reasoning – it has neither the purse nor the sword.[27] Stare decisis preserves this perception. Justice Sotomayor has expressed concern for the Court to take on controversial cases that already have precedents settling the questions at hand. For example, she described the case *Dobbs v. Jackson Women's Health Organization* as having the "stench" of politics, because it was being used as a vehicle to overturn *Roe v. Wade,* and the Court can easily be seen as politically opportunistic if a decision that did so were to be made as soon as there was a "conservative" majority on the Court: "Will this institution survive the stench that this creates in the public perception that the Constitution and its reading are just political acts? I don't see how it is possible."[28]

C.2. Stare Decisis Promotes Predictability

Secondly, stare decisis, by nature of promoting consistency, is closely related to the ability for an individual or all related parties to predict the Court's decisions. The ability to predict future outcomes is generally understood to be good for society because it allows society to organize around a reasonably predictable future, which is important

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[27] Alexander Hamilton, James Madison, and John Jay, *Federalist No. 78*, vol. 78, *The Federalist Papers*.
[28] John Kruzel, "Sotomayor suggests court wouldn't 'survive the stench' if abortion rights undercut," The Hill, last modified December 1, 2021, accessed April 21, 2022, https://thehill.com/regulation/court-battles/583814-sotomayor-suggests-court-wouldnt-survive-stench-if-abortion-rights/.

for society to function at all. For example, let's say that the Court decides that a certain key statute regarding real estate law is to be interpreted in a certain way. The day after, the Court decides that its previous ruling regarding the issue was wrong and that it is actually supposed to be interpreted in another completely different way. The appeal to predictability expresses the notion that without a commitment to stare decisis, there would be no reason to believe that the Court would behave in one way or another, and therefore one would lose the ability to organize their business, livelihood, etc, around a reliable rendering of the real estate law. The scope of the issue becomes more serious if the Court's decisions inform questions of fundamental Constitutional rights, which in many ways serve as the basis for the entire American legal system: "Because each court is free to reject the rules announced in prior decisions, inferior courts and people generally will be unable to predict future decisions with much security. . .this unpredictability and insecurity may produce a state of affairs a stronger doctrine of precedent would produce."[29]

The importance of bowing to precedential authority is because of the necessary assumption that predictability is good and that consistency provides that predictability: "the ability to predict what a decisionmaker will do helps us plan our lives, have some degree of repose, and avoid the paralysis of foreseeing only the unknown. As a value, predictability is neither transcendent nor free from conflict with other values. Yet predictability plainly is, *ceteris paribus,* desirable."[30]

C.3. Stare Decisis as Conducive to Equality

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[29] Larry Alexander, "Constrained by Precedent," *Southern California Law Review* 63, no. 1 (November 1989): 17.
[30] Frederick Schauer, "Precedent," 597.

Related to predictability is the value of equality that is promoted as a result of stare decisis. The basic idea is that because judges adhere to precedent, they treat similar cases in a similar manner. This promotes equality, and equality is a moral good of the rule of law. Because of stare decisis, under the law, everyone is treated fairly equally, subject to the same guidance of precedent and the way it has been done. Judges cannot change their rulings when a similar case appears before them simply because of certain biases or personal beliefs they may have against the stakeholders. It promotes "fairness through the consistent treatment of different parties across time."[31]

Another way to frame the argument is that it is an argument from justice. When one does not treat a like case in a like manner, what is left is arbitrarily rendered decisions, and arbitrary treatment by the law is unjust: "equality and precedent are thus, respectively, the spatial and temporal branches of the same larger normative principles of consistency."[32] Why consistency or equal treatment means justice or fairness, as Schauer notes, is derived from philosophical underpinnings that define justice, such as works by Kant and Rawls.[33]

In some ways, the idea is similar to the previous reasons. All three discussed so far have an element that tries to treat legal decisions by the Court as a product of something that transcends individual biases and policy preferences of human judges. That promotes an ideal state of the law, or the rule of law.

C.4. Stare Decisis Promotes Efficiency

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[31] Randy J. Kozel, "Precedent and Reliance," *Emory Law Journal* 62, no. 6 (2013): 1467.
[32] Frederick Schauer, "Precedent," 596.
[33] Ibid.

Another prevalent justification for stare decisis is that it promotes decision making efficiency, which is helpful for advancing pragmatic institutional goals. The idea is that if a case were to present entirely new questions, with an entirely new set of circumstances that do not have any significant precedence to look to, the Court must consider the case in full, deliberating everything with new jurisprudence and legal reasoning. Without precedential constraint, the Court would be responsible for looking at every case as unique and in isolation, regardless of precedent, because an appeal to precedent is not an informative argument, since the value of precedential authority does not exist.

Thus, the argument goes, the practical ramifications of a legal system without stare decisis would be detrimental: "The labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."[34] In other words, judges physically do not have the time and resources to not rely on the ability to defer to precedent and let past judgements speak to many similar cases at hand.

Therefore, stare decisis promotes judicial efficiency. It allows judges to conserve judicial resources without being expected to come up with a new reasoning for every case that comes before them, giving them the ability to quickly dismiss lawsuits by referring to precedents.[35] They need not engage with high scrutiny in every case. It also promotes judicial efficiency by providing the Court legitimate reason to not even consider or hear

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[34] Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven, CT: Yale University Press, 1921): 149.
[35] Taylor v. Sturgell, Acting Administrator, Federal Aviation Administration, Et Al., No. 07-371, slip op. (June 12, 2008).

many cases, appealing instead to precedents that have already settled the questions being litigated on. The doctrine of precedent allows the Court to signal that it will not hear cases of settled questions and encourages litigants to resolve their cases outside of the courts.[36]

These are the interests that stare decisis supposedly protects. The values of faith in the judiciary, predictability, equality, and efficiency are all preserved by placing an importance on adherence to precedents. Justice Sotomayor summarized these points in *Alleyne v. United States*: "we generally adhere to our prior decisions, even if we question their soundness, because doing so 'promotes the evenhanded, predictable, and consistent development of principles. . .and contributes to the actual and perceived integrity of the judicial process.'"[37]

The question that follows then, is the question of what qualifies stare decisis as a "generally" held principle, and in which instances it must be abandoned. The following lays out the different mechanisms via which the Court weighs its commitment to precedent against other considerations. This will complete the examination of stare decisis as the Court understands it and practices it. This allows the paper to discuss concerns that arise from this conception of stare decisis, which provides the foundations for my argument regarding reliance.

D) Mechanisms for Stare Decisis Consideration

Thus far, we've discussed how the Court defines stare decisis and the justifications given for following it. However, because it is a principle of policy, and not

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[36] Thomas R. Lee, "Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court," *Vanderbilt Law Review* 52, no. 3 (April 1999).
[37] Alleyne v. United States, No. 11-9335, slip op. at [1-2] (June 17, 2013).

an inexorable command, the Court has the authority also to overturn it. To navigate this balancing act, the Court has pointed to several mechanisms that let them evaluate their concern for upholding precedent against their concern for other "forces of better reasoning"; to adhere to precedential authority or choose to overturn it. These are a series of "prudential and pragmatic considerations designed to test the consistency of overruling the holding with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case."[38]

D.1. Workability

First is the idea of *workability*. If a decision is too difficult to work with in the practical sense, whether it be for the lower court or other attorneys, then it gives reason for the court to overturn the precedent, beyond a simple argument that the ruling may have been erroneous. The majority opinion of *Casey* also speaks to this – that a test of whether a ruling is workable or not should be applied, and that because *Casey* does not present this type of problem, the argument to overturn the ruling is weakened: "Although *Roe* has engendered opposition, it has in no sense proven 'unworkable,' representing as it does a simple limitation beyond which a state law is unenforceable."[39]

The Court does not seem to define explicitly what workability is however.[40] A rubrik of how to determine whether something is workable or not workable is not clearly laid out. One way to think about workability in the minds of the justices is the litmus test of consistency and whether or not the precedent can be consistently applied. In *Brenda Patterson Petitioner v. McLean Credit Union*, the petitioner sought to appeal her case that

[38] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 854 (June 29, 1992).
[39] Ibid, 855.
[40] Lauren Vicki Stark, "The Unworkable Unworkability Test," *New York University Law Review* 80, no. 5 (November 2005).

claimed racial harassment against her employer, McLean Credit Union.[41] Brenda Patterson was a black woman who worked for the credit union as a teller and file coordinator for 10 years. When she was laid off, she brought this action to the district court as a violation of 42. U.S. Code § 1981 - Equal Rights under the law. She argued that McLean Credit Union had harassed her, abstained from promoting her, and fired her, because of her race. The district court ruled that her claims of racial harassment are not valid under § 1981 and did not ask the jury to consider this part of the case.[42] Consequently, the court ruled against her, and the Court of Appeals reaffirmed this judgement.[43]

When Patterson's case reached the Supreme Court, the Court made a previous case, *Runyon v. McCrary*, a central part of their decision. A precedent regarding the interpretation of this statutory law exists, and that precedent is *Runyon v. McCrary*. This ruling held that § 1981 does indeed prohibit racial discrimination in the making and enforcement of private contracts. Therefore, since a precedent that informs this case already exists, the deliberation will be about whether this precedent should be overturned. The Court ruled that it should not, and overturned the decisions of the lower courts.[44]

Their main reasoning was that Stare decisis compels the Court to follow the precedent, unless there was substantial special justification. One of the ways to figure out whether there is substantial justification was whether the precedent was unworkable:

> Another traditional justification for overruling a prior case is that a precedent may be a positive detriment to coherence and consistency in the law, either because of inherent confusion created by unworkable decisions

[41] Brenda Patterson, Petitioner v. McLean Credit Union, 491 U.S. 164, (June 15, 1989).
[42] Ibid, Syllabus.
[43] Ibid.
[44] Ibid.

> or because the decision poses a direct obstacle to the realization of important objectives embodied in other laws. In this regard, we do not find *Runyon* to be unworkable or confusing.[45]

According to the Court, the test for determining what is workable or not is whether the ruling promotes consistency and coherence, especially in the lower courts, of its application. A symptom of a ruling that does not promote consistency and coherence is confusion among the lower courts. Using this definition of workability then, the Court balances the concern for adhering to precedential authority with the "pragmatic and prudential" concern of promoting workability, otherwise known as consistency and coherency among lower courts.

D.2. Change in Facts

Another test is regarding the development of new and important societal understanding of relevant facts of the case. In *Casey*, the majority opinion noted that when deciding to overturn precedent, they must consider "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."[46] The court has appealed to two examples in its judicial history to justify overruling opinions that are based on antiquated facts.

In *West Coast Hotel v. Parrish*, a Washington state law allowed the Industrial Welfare Committee and Supervisor of Women in Industry to set a minimum wage of $14.50 for each work week of 48 hours.[47] Elsie Parrish was an employee of the West Coast Hotel Company, and she was compensated less than the set minimum wage. When she brought the suit against her employer, she demanded that the differences between the

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[45] Ibid.
[46] Planned Parenthood v. Casey, 855 (June 29, 1992).
[47] West Coast Hotel Co. v. Parrish, 300 U.S. 379, (Mar. 29, 1937).

wages that she was paid and the wages that she should have received per the state law be recovered and paid to her. The lower courts ruled in favor of West Coast Hotel Company, citing clear precedents that stipulated that such minimum wage laws were unconstitutional because it violated employers' freedom to contract protected by the Fourteenth Amendment's Due Process Clause. The particular precedent appealed to was *Adkins v. Children's Hospital (1923)*.

Therefore, *West Coast Hotel* centered around the question of whether or not the Court should overrule these precedents protecting the freedom to contract. In a 5-4 decision, the Court answered in the affirmative, leading to a reversal of the precedents set forth by what many people call the "Lochner" era:

> The economic conditions which have supervened, and in light of which the reasonableness of the exercise of the protective power of the state must be considered, make it not only appropriate, but we think imperative, that in deciding the present case the subject should receive fresh consideration. . .There is additional and compelling consideration which recent economic experience has brought into strong light. The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage. . .[48]

The "recent economic experience" referred to in this opinion is the experience of the Great Depression. According to the Court, the Great Depression has brought about circumstances that were radically different, enough that the precedents of the Lochner era were no longer relevant. In other words, the facts and the context which served as the premises of those decisions are foreign enough to be uninformative to the current issue at hand. The concern for stare decisis loses its force in light of new information. Just how grave or novel the information must be to have judicial force outweighing the force of prudential authority is not clarified. The necessary assumption when the Court reasons in

[48] West Coast Hotel Co. v. Parrish, 300 U.S. 379, 390 (Mar. 29, 1937).

this manner – specifically appealing to significantly novel and relevant facts – is that the information at hand renders departure from precedent less harmful than sticking to it. The other notable example that *Casey* appeals to is *Oliver Brown, et al v. Board of Education of Topeka, et al. Brown*, which reexamined the "factual" underpinnings of *Plessy v. Ferguson*, through which racial segregation was upheld. The Court argued that *Plessy* incorrectly understood that separate can be equal and that it did not take into account societal understanding of the effects of racial discimination that the Court now has access to.[49] Hence, *Casey* pointed to both *West Coast Hotel* and *Brown* as the justification for using new factual developments as another mechanism to gauge other priorities against stare decisis.

D.3. Reliance

Third is reliance. Reliance as part of stare decisis considerations argues that when deciding to overturn precedent, whether and how much stakeholders have become reliant on a precedent should be taken into account, and the degree to which this has happened should influence the decision to overturn. This consideration argues that the obligation for the Court to defer to precedent becomes more forceful when overturning the precedent would undermine "the reliance interests that the public has justifiably developed based on those precedents."[50] This means that judges are asked to consider the repercussions of overturning precedent, even if they believe the precedent was wrong and even if it was an interpretation of the law that they would otherwise reject.[51]

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[49] Brown Et Al. v. Board of Education of Topeka Et Al., 347 U.S. 483, (May 17, 1954).
[50] Hillel Y. Levin, "A Reliance Approach," 1054.
[51] Randy J. Kozel, "Precedent and Reliance," 1460.

The Court has repeatedly recognized this as a legitimate part of their jurisprudence, holding that "reliance upon a square, unabandoned holding of the Supreme Court is *always* justifiable reliance (though reliance alone may not always carry the day)."[52] An example case that demonstrates reliance consideration in practice is *United States v. Title Insurance & Trust Company*.[53] In this case there was conflict regarding land rights between Native Americans and Title Insurance. The United States argued on behalf of the Native Americans, asking that the court establish a "perpetual right of Mission Indians to use, occupy and enjoy part of a confirmed Mexican land grant in California," because their right to the land existed before the grant.[54] The central question of the case came down to whether or not the Court should overturn a precedent that the respondents of the case were appealing to. The majority declined to do so, because of the idea of reliance:

> The question whether that decision shall be followed here or overruled admits of but one answer. The decision was given twenty-three years ago and affected many tracts of land in California, particularly in the southern part of the State . In the meantime there was continuous growth and development in that section, land values have enhanced and there have been many transfers. Naturally, there has been reliance on the decision. The defendants in this case purchased it fifteen years after it was made. It has become a rule of property, and to disturb it now would be fraught with many injurious results.[55]

Because stakeholders have become visibly and reasonably reliant on a precedent, and because overturning it would have had a detrimental effect on those reliant, with that consideration alone, the Court has deferred to its past decision.

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[52]Quill Corp. v. North Dakota, by and through Its Tax Commissioner, Heitkamp, 504 U.S. 298, 321 (May 26, 1992).
[53] United States v. Title Ins. and Trust Co., 265 U.S. 472, (June 9, 1924).
[54] Ibid, 473.
[55] Ibi, 487.

In this way, the reliance approach provides another mechanism for the Court to evaluate stare decisis considerations. If reliance interests are at stake, then "stare decisis has added force," because "the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations."[56] Note that when reliance interests are invoked, the soundness of the reliance is not questioned. In other words, the fact that an identified stakeholder has relied on it is much more important, and the consideration that their reliance is good or bad is discussed minimally, if at all. According to Justice Scalia, the purpose of it all is "to protect the legitimate expectations of those who live under the law."

E. Criticisms

As simple and sound this process of jurisprudence may appear to be on the surface – that the Court considers stare decisis a matter of guiding principle of policy to follow unless there are other factors that outweigh the considerations of precedential authority – it is not so clear cut in practice. And it is shaky as a matter of logic and reasoning as well.

E.1. Balancing as Paradoxical

First, this reduction of stare decisis as a balancing act is an amorphous concept. It is not clear how much weight to give to stare decisis in comparison to the weight the courts give to "the force of better reasoning," if, as Justice Brandeis argues, stare decisis is usually the "wise policy," even when the error is serious. It is a paradoxical statement; the doctrine of stare decisis is not simply a description of the tendency for the judicial

[56] Hilton v. South Carolina Public Railways Commission, 502 U.S. 197, 202 (Dec. 16, 1991).

system to adhere to its previous rulings. It is a normative view on how the judicial system *should* work in order to promote certain values that make a "good" legal system. One *should* follow precedent, *because* it is precedent, and that reason alone should suffice. When appealing to stare decisis, it is not a re-evaluation of the precedent on the merits. It is an appeal to the intrinsic value of following the precedent irrespective of its wrongfulness. When the inherent value of stare decisis then is intimately tied to not considering the previous cases on the merits, it is unclear how the appeal to stare decisis is evaluated against other factors that do exactly that – consider the merits of the previous case. Consider my articulation of the problem in the following:

Option 1: We should do A *because* we have done A before, without considering whether the act of A was good or bad. This promotes values a, b, and c.
Option 2: We should not do A because we have done A before, and it was bad for several reasons.

Let us say that a judge decides to pick Option 1, after considering both options, because the judge decided that action A was not bad enough to pick Option 2. This would mean the judge did not truly pick Option 1, because the act of even considering Option 2 requires that the judge do something Option 1 forbids – evaluate action A and let that evaluation be the determining factor of choosing Option 1 or Option 2; hence, the paradoxical nature of Justice Brandeis' statement that purports to balance the "usually wise policy" of Option 1 with the consideration of Option 2. The takeaway here is that although stare decisis can be seen as something like the most ideal principle of policy to

follow until other considerations that must be balanced arise, there are incoherencies in the logic. The values of stare decisis that justify the doctrine as a way to promote the rule of law is dependent on the fact that stare decisis is adhered to genuinely; it is not enough to make an appearance of respecting precedent because it is precedent whilst in reality respecting precedent because the Court of the time finds the precedent agreeable enough. The justifications to stare decisis do not make sense if it is not an appeal to precedent alone, without the merits.

In fact, even the most recent Court seems to struggle with the lack of clarity with regard to navigating this contradictory logic in stare decisis. In the oral argument that the Court heard for the case *Dobbs v. Jackson Women's Health Organization*, the questions asked by the justices, as well as the answers given by the attorney, revealed that all of the parties had interpretations of stare decisis that were in not aligned with the others', and the main cause of this can be described by the problem that I had just laid out in the previous paragraph.

For example, Justice Sotomayor asks the petitioner's lawyer on what grounds he has to ask the Court to overturn the precedent regarding abortion.[57] The petitioner proceeds to lay out his reasoning on why the past rulings have been wrong or unfounded according to his interpretation of the Constitution. To this, Justice Sotomayor responds by saying "You think it did it wrong. That's your belief. . .And you haven't added much to the discussion in your papers as to the errors that Casey made, other than 'I disagree with Casey.'"[58] In other words, the merits of the previous decisions were not up for debate for

[57] "Dobbs v. Jackson Women's Health Organization Oral Argument - December 01, 2021," audio, Oyez, December 1, 2021, https://www.oyez.org/cases/2021/19-1392.
[58] Ibid.

Justice Sotomayor. It was a curious response. Through this line of questioning, she was essentially trying to narrow down the scope of the debate to precedential concerns, with the assumption that precedents must be adhered to, regardless of what the merits may be.

Yet, there may be legitimate concerns regarding the precedent, and should not the doctrine of stare decisis be balanced with those legitimate concerns? That is what Justice Alito seemed to believe, when he questioned Solicitor General Prelogar on her philosophy regarding precedential authority. He asked, "So there are circumstances in which a decision may be overruled, properly overruled, when it *must* be overruled simply because it was egregiously wrong at the moment it was decided?"[59] He gave monumental rulings that overturned precedents to make his point: Plessy v. Ferguson, Brown v. Board of Education, etc." For Justice Alito, as revealed through his line of questioning, stare decisis is more like that of the balancing act. When there are blatantly wrong decisions that must be corrected, the concerns of stare decisis becomes secondary to the "force of better reasoning."

Yet Ms. Prelogar answered in the negative to the question.[60] According to her, the Court has never overturned precedent without special justification outside of the merits of the case: "This Court, no, has never overruled in that situation just based on a conclusion that the decision was wrong. It has always applied the stare decisis factors and likewise found that they warrant overruling in that instance. . .If stare decisis is to mean anything, it has to mean that kind of extensive consideration of all of the same arguments for

[59] Ibid.
[60] Ibid.

whether to retain or discard a precedent itself is an additional layer of precedent."[61] A decision must constitute something more than just being wrong for it to be discarded.

Specifically, the aforementioned various legal tests that were developed by the Court to decide overturning a precedent, namely workability and the consideration of change in relevant facts, are all a consideration of the merits of the case. Deliberating on the workability of a precedent means that one must determine if the ruling of the case was good or bad, based on the value that it was workable or not. It is equivalent to saying that because the ruling is unworkable, it is badly reasoned, and therefore should be tossed out. That is a consideration of the merits, which is problematic for the purposes of stare decisis, if workability is to be a significant part of the Court's current practice of stare decisis. The same problem arises when the Court includes a change in relevant facts as part of stare decisis.

These arguments show the tension that exists between stare decisis, and the "force of better reasoning." There does not seem to be a consensus on how much weight to give it in this balancing act, and if the balancing act is even a feasible way to go about it.

E.2. Stare Decisis is Nebulous

There is no clarity as to when precedent should be binding and when it should not be. There are disagreements about how stare decisis should be interpreted. The scope and weight of precedential authority is ambiguous. Values and legal justifications surrounding the appeal to stare decisis seem to be in conflict at many times. Because of the lack of concretely articulated practice of the doctrine and the often ambiguous and unresolved tension in the balancing act of stare decisis, it has been subject to the criticisms that the

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[61] Ibid.

concept is nebulous and thus subject to abuse: “the resulting uncertainty of application has caused some commentators to argue that the doctrine is politically charged and subject to easy manipulation.”[62] For example, there is no clear guiding test to determine when a stare decisis reasoning is valid and when it is less so, critics have argued that the Court could hide behind this doctrine for decisions that have been rendered for a different reason. The criticism assumes a more cynical view that justices have an agenda that is masked by a disingenuous invoking of stare decisis.

Justice Scalia seems to allude to this in *Lawrence v. Texas*, which contested a state law criminalizing two persons of the same sex engaging in sexual conduct. The question at hand was whether or not such laws, especially the one in this specific case, called the Texas “Homosexual Conduct” law, violated the Due Process Clause of the Fourteenth Amendment.[63] In doing so, should the Supreme Court overrule an earlier precedent called *Bowers v. Hardwick*, which held that there is no Constitutional protection for a fundamental right to engage in a homosexual act that would invalidate laws of states that made such acts illegal?[64] In a 6-3 ruling, the Court overruled the precedent and held in *Lawrence v. Texas* that such laws convicting consensual sexual intimacy of homosexual adults violated the right to people’s liberty and privacy as protected by the Due Process Clause of the Fourteenth Amendment. Therefore, as a case that centered around precedential questions, the doctrine of stare decisis once again came up. In his dissenting opinion, Justice Scalia scathingly criticized how conveniently malleable stare decisis seemed to be in the Court’s practice:

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[62] Jill E. Fisch, "The Implications of Transition Theory for Stare Decisis," *Journal of Contemporary Legal Issues* 13 (2003): 94.
[63] Lawrence et al. v. Texas, 539 U.S. 558, (June 26, 2003).
[64] Ibid.

> I do not myself believe in rigid adherence to *stare decisis* in constitutional cases; but I do believe that we should be consistent rather than manipulative in invoking the doctrine. . .To tell the truth, it does not surprise me, and should surprise no one, that the Court has chosen today to revise the standards of *stare decisis* set forth in *Casey*. It has thereby exposed *Casey's* extraordinary deference to precedent for the result-oriented expedient that it is.[65]

This has led to the skepticism that questioned whether stare decisis truly matters in practice, whether there is anything substantive about stare decisis that can "explain how we know which precedents to follow and which to reverse," and whether "pontificating about 'stare decisis' is really about nothing."[66]

E.3. Problems with the Legal Tests of Stare Decisis

Aside from the fact that the workability and change in facts tests are a paradoxical part of stare decisis considerations, each by itself, outside of the concerns for stare decisis, have been subject to criticism.

First, "as a result of failing to define unworkability, the Court can and does use the doctrine selectively."[67] As briefly mentioned earlier, the Court has never explicitly defined what is workable or not. The definition seems to be subject to change, often being "muddled" with other reasons for overruling. Shrouded in ambiguity, the ill-defined definition of unworkability makes it appear as though there is an unprincipled application of this legal test. The result is that the very test via which the Court tries to promote the consistent and coherent application of law,
is itself inconsistent and incoherent.

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[65] Ibid, 587.
[66] Randy E. Barnett, "The Seinfeld Hearings," Wall Street Journal, last modified July 14, 2009, https://www.wsj.com/articles/SB124744026183929741.
[67] Lauren Vicki Stark, "The Unworkable," 1674.

Another flaw in the workability doctrine is that the Court often uses it as a "makeweight – that is, something of little independent value thrown in to add weight to the Court's conclusion that the precedent was wrong."[68] While there may be nothing inherently wrong with this, it seems to contribute to the argument that workability may not be a useful nor a legitimate part of the Court's jurisprudence in general, let alone a part of the stare decisis deliberation.

Secondly, the doctrine of changed facts as defined by *Casey* has a potential to lead to sweeping logical conclusions: "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."[69] According to this definition, not only would the change in the facts themselves justify an overturning of precedent, but also the mere change in the perception of facts, or how the facts have come to be viewed. The example that *Casey* appeals to, *Brown v. Board of Education,* is an articulation of the latter – that the social facts have "come to be seen so differently." The *understanding* of the facts and implications of segregation changed, and this "understanding of the implication of segregation was the stated justification for the Court's opinion."[70]

The fact that a determination of what constitutes the correct interpretation of the Constitution becomes dependent on current social understandings and views.[71] To view the Constitution through the lens of prevailing social understandings is an inherently biased view of constitutional interpretation. There may well be those that see the

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[68] Ibid, 1681.
[69] Planned Parenthood v. Casey, 855 (June 29, 1992).
[70] Ibid, 862.
[71] Michael Stokes Paulsen, "Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis," *North Carolina Law Review* 86, no. 5 (June 1, 2008).

Constitution in this way – that it is a document subject to changing societal views. The criticism is less targeted toward the view specifically, but more towards the fact that this subjective view is inherently embedded in the test of changing facts.

It is important to note that these concerns and criticisms do not advocate that the doctrine of stare decisis should be completely rigid in the Court's jurisprudence. They do not automatically lead to the extreme that because of the stated reasons, the Court should *always* defer to its precedents, shutting out all other considerations. Such a maneuver would be detrimental and nonsensical in terms of the function of the American judicial system.

In fact, it can be argued that it even endangers fundamental Constitutional rights of American citizens. For example, there is a concern that stare decisis in its "rigid application – when it effectively forecloses a litigant from meaningfully urging error-correction – stare decisis unconstitutionally deprives a litigant of the right to a hearing on the merits of her claims."[72] In other words, being inflexible can endanger one's rights guaranteed by the Due Process Clause, because the inflexibility acts in a way that in effect denies the person a proper hearing before depriving the person of fundamental rights. This is because strict adherence to stare decisis principles put in place insurmountable barriers for those that argue for errors to be corrected.

All in all, the takeaway is that in addition to the institutional concerns of stare decisis, the question of the limits of precedential authority involves a Constitutional one. There are legitimate concerns for getting it "right." To this end, the rest of this thesis' discussion centers around the doctrine of reliance interests.

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[72] Amy Coney Barrett, "Stare Decisis and Due Process," abstract, *University of Colorado Law Review* 74 (2003).

CHAPTER II. RELIANCE

Again, the arguments regarding reliance are best understood within the context of the debates surrounding stare decisis as I have laid out.

That is, the application of stare decisis as a legal principle is maintained by considering various legal tests that determine whether or not deference to precedent, as opposed to reconsidering the precedent, best preserves the rule of law. Various legal tests, such as "workability" and "changing facts" aim to measure this. This way of applying stare decisis in the Court is in tension with the justifications and values the application of stare decisis purports to promote, making it subject to criticism. The idea of deference to precedent for the sake of precedent is where stare decisis derives its value. Yet the application of stare decisis via these legal tests undermine that effort. Furthermore, these legal tests have problems of their own that are harmful to the considerations of the rule of law, beside the fact that they undermine stare decisis' goals. For example, the "changing facts" test suggests that the meaning of the Constitution depends on the prevailing social understandings and views of the time.

We are now ready for the discussion of reliance. Reliance has been thus offered as a solution to the conundrums that permeate stare decisis considerations. As mentioned earlier, reliance, like "workability" and "changing facts" is one of the legal tests that are used in determining whether or not the Court should abide by precedent. There are several arguments that advocate for factoring in reliance as part of the Court's stare decisis considerations. All of these enjoy immunity from the criticisms that previously mentioned legal tests are prone to. I also point out that it may seem to offer a solution to the logical difficulties of stare decisis.

A. Arguments in Favor of Reliance Interests

A.1. Reliance as Unique Legal Test in Stare Decisis

The two differences between reliance and the other legal tests for stare decisis is that reliance affirms stare decisis, and it is not a de facto consideration of the case on the merits.

Unlike "workability" and "changing facts," reliance as a test bolsters the cause for deferring to precedent rather than challenging it. If a stakeholder adequately proves that interested parties have become heavily reliant on a certain precedent, the argument that is made is to uphold that very precedent. However, in the case of workability, if a stakeholder adequately shows that the precedent in question is unworkable, and the judge decides that it is, then the case for deferring to precedent becomes weaker. The test of workability aims to be an obstacle that must sufficiently be overcome in order to legitimize continuing with the precedent.

In a similar vein, the test of "change in facts" serves a deterring function when it comes to the impulse of deference to precedent. If the Court can determine that there is a significant change in facts – or societal understanding in facts – to render the precedent no longer relevant, then the Court may legitimately deny precedents its precedential authority.

In other words, the two tests ask the stakeholders to prove that they should *not* overturn precedent as the default. The tests are inherently biased toward the assumption that precedent ought to be overturned, *unless* such and such requirements are met.

Another point is that reliance is distinctly not a consideration of the merits, and unlike the the other two legal tests for stare decisis, cannot effectively be reduced as a de facto consideration of the merits.

The test of workability for example essentially boils down to considering whether or not the precedent is a bad one, measured by how workable it is among the judicial system. If a precedent is unworkable, then it is not good, therefore it should be abandoned. Although it is not explicitly about whether the precedent was badly reasoned, it is still an evaluation of the merits of the precedent, based on the rubrik of workability. If it is workable, good; if it is not workable, bad. There is nothing inherent about workability that connects it to stare decisis, other than the fact that an unworkable precedent is a bad one – an argument of merits. The principle of stare decisis and its justifications would logically demand that despite the negative qualities of an "unworkable" precedent, for all its intents and purposes, that precedent should be adhered to. This is not to say that workability should be outside the concerns of the Supreme Court. There is an undeniable value in promoting a coherent and consistent body of precedents that inform lower courts. The question is whether it is appropriate to categorize it as something separate from a consideration of the merits, and therefore something that can be used in stare decisis deliberations.

The test of evolving facts or changing understandings of relevant facts falls victim to the same problem. In effect, arguing that a precedent should be abandoned because of a consequential change in relevant facts that has rendered it no longer tenable is arguing that the precedent should be abandoned because it is based on incorrect reasoning. This is because challenging the premises of an argument is a form of challenging the reasoning

of an argument. In this case, the premise is challenged by revealing that it was based on incorrect facts. Again, the aim is not to doubt the importance of taking into consideration society's evolving standards. The aim is to doubt whether this is truly different from a merits argument and whether it can be a part of stare decisis considerations

Unlike these legal tests however, reliance does not suffer the same problems. Reliance cannot be reduced to a merits argument, and therefore at the onset is seemingly more compatible with stare decisis and adoptable as part of its deliberations. Reliance is simply a question of how much people have come to rely on a particular precedent and whether the precedent should be preserved or abandoned depending on the answer to this question. It does not consider the reasoning of the argument. It does not evaluate past legal decisions based on standards of soundness. It does not appeal to precedent or dissuade against following a certain precedent based on the validity of past legal opinions of the Court

It asks that regardless of whatever the Court sees as the correct decision during its time, that they follow the precedent, because people have come to rely on it. In fact, the Court seems to explicitly argue that reliance may have a strong appeal, *despite* the wrongfulness of the decisions. Simply put, *although* the precedent may be wrong, because overturning it would be detrimental to the many who've become heavily reliant on it, the Court should continue to preserve the precedent. This seems to be more in line with the logic of stare decisis.

The fact that reliance is different in these ways from "workability" and "change in relevant facts" makes it worthy of consideration as a possible solution to the conundrums of the Court's application of the stare decisis doctrine. That is the appeal and reason

behind the main arguments made in favor of reliance as the superior solution to this practice of ciphering the ambiguous legal ground of precedential authority.

A.2. Reliance is Deduced From a Moral Obligation of the Court

Another argument is that, considering how stakeholders have come to rely on the precedent, it is mandatory – due to the Court's moral obligations and their unique position in the American government – that the Court's consideration of reliance take up the bulk of stare decisis concerns. In fact, it would be immoral even for the Court to neglect reliance.[73]

The Court effectively decides how society should understand the laws, providing guidance to those who are governed by those bodies of laws. The Court interprets what the laws require and expect of the citizens, how to solve disputes, and consequently how to organize one's lives around these laws: "members of society take action based on understandings generated from judicial opinions."[74]

Because of this function, the Court is positioned to have an extensive and substantial influence over the lives of the citizens. The Supreme Court's position as the last word on the law allows them to shape how the law affects its citizens. In this power lies their moral obligation to not only consider reliance, but to protect the reliance interests of the public. To have such control in the lives of the governed obligates those with the control to wield their power with responsibility.

Another way of looking at this is how it would be *immoral* for the Court to not consider reliance. This is because the way the Court system has come to defer heavily on its prior opinions and precedents. They have effectively forced the public to organize and

[73] Hillel Y. Levin, "A Reliance Approach to Precedent," *Georgia Law Review* 47 (2013): 1054.
[74] Ibid.

behave their lives around expectations that the Court would continue to adhere to those same rulings. If the Court were to suddenly change their decisions contrary to those precedents, it would be analogous to committing a fraud.[75]

Levin uses the example of a woman relying on the way the Social Security System is organized. It is very conceivable that one organizes and plans their entire livelihood based on the security and promise of the Social Security System. This person makes investing strategies and financial plans with the expectation that she has security in retirement partly derived from this Social Security. The integrity of the way the Social Security system is currently organized, the same structural organization that allows this woman to plan her life around it, is a result of various Supreme Court decisions. These decisions from various legal tender cases made way for Congress to set up the system as it is. It "permitted financial markets to develop in a way that makes investments in retirement accounts possible."[76] If the Court were to retroactively say these precedents are no longer valid, and therefore institutions built around such precedents no longer tenable, it would devastate the woman's life, nullifying all of her important decisions immediately.

One important point to note is that Congress can alternatively be seen as a solution, since Congress creates legislation. They should be the body mainly concerned with reliance, and the Court should adhere to a strict definition of its function; therefore, they would be able to avoid having to interfere with Constitutional correctness for the sake of reliance interests generated, since each institution can now focus on their delegated true purpose and function. The Court would no longer need to work within an

[75] Ibid, 1055.
[76] Ibid, 1056.

artificial dichotomy of having to choose Constitutional soundness versus protecting reliance interests.

However, it is unclear in the first place whether there are clear distinctions between what the Court ought to do and what Congress ought to do, at least in terms of defining the law. Often, both institutions have overlapping areas of jurisdiction in this way. Even if there was somehow a way to clearly define the roles, it would be more of an abstraction rather than a practically useful one. Congress often uses intentionally broad language when legislating about a certain topic, delegating a significant portion of fleshing out the law to administrative agencies, such as the Department of Health and Human Services. Disputes about regulatory details implemented by these agencies, with broad and ambiguous initiatives given by Congress, are resolved via the authority of the judicial system. This relationship makes it difficult to conclude that such a response is an effective challenge to the answer regarding this issue. Another reason is that Congress often does not need to look at reliance interests because they are much better equipped to examine and apply policy questions, implications, and solutions to mitigate the effects of changing statutory law. The only tool that the Supreme Court has for maintaining the same type of stability is deferring to the precedent.

This is why reliance initially appears to be such a compelling measurement/legal test of stare decisis. It speaks to whether or not the Court is carrying out its function and upholding a *moral* obligation it has to those that are governed by its monumental decisions. The most extreme conclusion of the analysis of reliance can even be that protecting the legitimate expectations that people have come to rely on is the *sole* concern of stare decisis. Since “public certainty, expectations, and reliance concerning the law”

have a central place "in the development of a just legal order," concern for reliance would seem to cover in broad strokes all of those said goals.[77]

B. Reliance is Redundant

Despite all of these appeals to reliance, there are debates about its merit, and whether it should even be considered as a legitimate part of the Supreme Court's jurisprudence. To contribute to the debate, within the frameworks of consideration that I've laid out throughout this thesis, I argue that the appeal to considerations of reliance interests as it is practiced in the Supreme Court is a redundant affair. Ultimately, the purpose of reliance interests as a separate legal test in stare decisis deliberations is to make these deliberations more robust for achieving the ideal goal of stare decisis: the rule of law. The rule of law consists of several sub-values. As examined earlier, the Court views and practices stare decisis as a "principle of policy" that is to be balanced with other concerns. It was noted that there were legal tests (workability, etc) that acts as proxies for these other concerns, with reliance being one of them. However, the arguments advocating for the use of reliance appeal to the very same values that are already inherently pursued by stare decisis. Therefore, reliance does not contribute in a meaningful way to evaluating stare decisis concerns, because it does not make more robust the Court's intricate act of "balancing" stare decisis with other concerns – there is no novel element to be "balanced" that is brought up. It is simply another way of articulating stare decisis concerns.

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[77] Ibid, 1066

Stare Decisis: Defer to precedent because it achieves a, b, and c, which make up the rule of law.

Reliance: Defer to precedent because people have relied on it. It is important to consider that people have relied on it because it achieves a, b, and c, which make up the rule of law.

Here, values a, b, and c are already pursued by emphasis on stare decisis – that is deference to precedent – without the need for a separate legal test of reliance. Therefore, saying that reliance interests should be added to the Court's discussion because of the same values a, b, and c is redundant. Further, I argue that while redundancy by itself may not be harmful, because reliance has the potential to undermine the values it aims to promote and achieve, it may not be worth accepting it as part of the Court's stare decisis analysis, as it is practiced.

B.1. Redundancy in Stability and Predictability

One of the values of reliance interests often mentioned is that thinking about reliance is important for stability and predictability.[78] Simply put, judges will promote stability and predictability in the judicial system if the fact that people are relying on precedents is part of their decisions. This of course is one of the main reasons why precedents should have deferential authority, as discussed previously. Stare decisis values of institutional integrity and faith in the judiciary is premised on stability and predictability. In other words, it is already part of stare decisis calculus to think about stability and predictability, present in one of the main justifications for the doctrine.

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[78] Hillel Y. Levin, "A Reliance Approach to Precedent," *Georgia Law Review* 47 (2013).

B.2. Redundancy in the Moral Components of Reliance

Advocates of reliance put forth compelling arguments about normative moral values that are upheld by it. A key moral value as noted for example is the idea of fairness. Because precedents generate reliance, it would be unfair for the Court to renege on a decision that by virtue of its authority on the law, so many people have been induced into organizing their lives around, therefore being critically dependent on. However, this too is already a concern inherent in the justification of the stare decisis doctrine. This is simply looking at the same arguments at a lower level. One of the espoused values of deferring to a precedent because of its precedential status is that it promotes faith in the judiciary. As articulated earlier, faith in the judiciary is maintained by the legitimacy given to it by the people that collectively decide to adhere to it because they trust it. The people cannot trust a judiciary system that is repeatedly unfair at a massive scale. Therefore, stare decisis inherently already concerns itself with fairness, when one of its chief objectives is to promote faith in the judiciary. Again, reliance is redundant in this way. It is a micro-articulation of one of the premises of a higher level value.

Additionally stare decisis assigns another moral burden that goes beyond than reliance interests would concern itself with, further dissipating the need for reliance to be part of stare decisis: equality.

B.3. The Redundancy Comes at a Cost

Essentially, while reliance interests seem promising initially because of the fact that it is not subject to the same criticisms of other stare decisis considerations, its chief points of appeal is what also makes it unnecessary. However, as mentioned earlier, the difficulty lies in not the redundancy itself, but that the redundancy is not worth the

potential harms of a reliance test, since it does not provide the Supreme Court with any new factors of consideration while having the ability to perhaps undermine the goals of stare decisis.

First is that using reliance to promote its redundant values already present in stare decisis actually weakens the case for those values. If there is an argument that calls into question whether or not it is justified for the public to rely on precedent, then the case that compels the Court to consider the use of reliance – along with the values promoted by the vehicle of reliance – is weakened. That weakens the goals of stare decisis, which, again, are overlapping with the goals and values of reliance.

That argument is that the Court has repeatedly announced that it is not obligated to indefinitely adhere to precedent and that it reserves the right to change course. The Court makes clear that although the principle of stare decisis is a beneficial one as a matter of "policy," it is also flexible, and there is no promise it makes to never overrule its prior precedent. It has been made clear that it is the Court's prerogative if they decide to defer to overturn their *own* prior decisions. Therefore, it does not "subvert anyone's reasonable expectations" when the Court decides to do exactly that – overturn their own rulings.[79]

In this regard, the Court should not feel obligated to surrender its prerogative when it comes to precedents, because a public's reliance on precedent is based on an unwarranted assumption and expectation – therefore, a public's reliance on precedent is an irrational decision, one that that the Court should not be bound to or held accountable for: "Y will refrain from behaving as though X's course of conduct is guaranteed. . .Later,

[79] Randy J. Kozel, "Precedent and Reliance," 1473.

if X really does deviate from her initial intentions, Y will not have any compelling claim for redress. . .And if Y did not take precautions, any compensation would reward him for what was either carelessness or a calculated gamble."[80]

That is the prima facie argument against reliance. Therefore, tying the goals of stare decisis to equivalent values of reliance interest has the potential to actually weaken the claim that the Court should pay attention to those goals and values.

Second reason that reliance might harm the interests of stare decisis is that reliance itself suffers some critical flaws, especially the type of reliance that is often invoked in the Supreme Court. These flaws directly threaten the very ideals of stare decisis reliance is supposed to promote, albeit in a highly redundant way. Academics have referred to the type of reliance that is referenced in the Court as "societal reliance."[81] Societal reliance refers to the type of reliance in which the Court considers whether "the public or culture-at-large has come to rely on a particular precedent."[82] However, because of this conception of societal reliance, it cannot be measured or concretely weighted by the judiciary. This in turn "reduces the predictability and certainty of outcomes."[83] There is no concrete definition about what "society" constitutes. There is no standard that limits or empowers justices to conceptualize the "society" in a certain way. Societal reliance in practice can be subject to assumptions and biases of whichever justice that invokes a sense of reliance that the "society" – or the American people-at-large – has come to have.

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[80] Ibid.
[81] Kozel, Stare Decisis as Judicial Doctrine
[82] Tom Hardy, "Has Mighty Casey Struck Out: Societal Reliance and the Supreme Court's Modern Stare Decisis Analysis," *Hastings Constitutional Law Quarterly* 34, no. 4 (Summer 2004): 592.
[83] Alexander Lazaro Mills, "Reliance By Whom? The False Promise of Societal Reliance In Stare Decisis Analysis," *New York University Law Review* 92, no. 6 (December 2017): 2111.

The cloudy and ambiguous nature of societal reliance is made clear when examined with other types of more concrete reliance, such as specific reliance. Specific reliance is a quantifiable concept, with the Court considering "which individuals, corporations, or other entities" have taken tangible steps in reliance of a precedent.[84] In the case of specific reliance, it is far more conducive to quantifying and defining in a tangible way what exactly is at stake as a result of reliance on this precedent. As a result, the decisions that judges make on the basis of the denial or affirmation of reliance is relatively easier to track and consequently predict: "while there may be disagreement about how best to calculate these costs, at a bare minimum, the costs of tangible and immediate harms to those who reasonably relied must be taken into account."[85]

In contrast, societal reliance by definition is antithetic to robust ways of weighing exactly what is at stake as a result of reliance. What is often invoked is equivalent to the Justice's evaluation of the national psyche, and how society might be "generally" impacted by the decision of stare decisis at hand. This is counterproductive to the purported values of reliance that in turn promote stare decisis goals as a proxy. The evaluation of societal reliance is far more vulnerable to subjective perceptions/notions held by Justices, and this is far less predictable. It is worth noting that Justices are aware of this problem when it comes to advocating for deferring to precedent on the basis of reliance interests. In *Dobbs v. Jackson Women's Health Organization,* Justice Kagan asked for clarification regarding exactly what reliance is at stake, as the respondents have appealed to in their briefs and oral arguments, commenting that their claims seemed

[84] Ibid.
[85] Ibid, 2113

"airy."[86] The opinion in *Casey* remarked that "the effect of reliance on *Roe* cannot be exactly measured." [87]

In essence, societal reliance is a tool that will likely be inconsistently applied, and it is a powerful tool for the Court to uphold precedents when other legal reasonings may fail, while simultaneously being ambiguous enough to not be invoked – or declared that not enough of it exists – if the the Court prefers that the precedent be overturned. To be sure, it is impossible to verify whether this is true, as no Justice would likely admit that their legal reasoning consists of subjective biases justified by convenient legal doctrine. But the danger in such an application weakens the position that reliance is harmless, albeit redundant. It is a "selective insulation of precedent that is unpredictable and inconsistent in application."[88]

III. CONCLUSION

All in all, I have laid out the context that frames the discussion of precedential authority and reliance, and I ultimately argued that reliance does not contribute to the process of stare decisis deliberations, because it does not provide the Court another factor of consideration. It does not add another lens to view the cases from. It is merely another reiteration of what the stare decisis doctrine aims to do in the first place, rather than another metric that might help the Court make a more robust decision, making it redundant.

Furthermore, I have argued that the redundancy of reliance interest considerations are not worth the potential harms that it may bring. I have pointed to the way it makes the

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[86] "Dobbs v. Jackson Women's Health Organization Oral Argument - December 01, 2021," audio, Oyez, December 1, 2021, https://www.oyez.org/cases/2021/19-1392.
[87] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 835 (June 29, 1992).
[88] Alexander Lazaro Mills, "Reliance By Whom?," 2121.

position of stakeholders vulnerable, because arguing reliance actually weakens their claim to the Court's protection of their interests. I have also pointed to the way its application may undermine the goals of stare decisis, such as promoting predictability, stability, and fairness.

This is not to say that the Court should not care about how changes to precedents may affect those who have come to rely on it. What I argue is that the Court already does do so, without a separate legal test of reliance interest. My point is that the way this legal test is manifested in the Court's practice is redundant and harmful, and that it may not be the solution to the conundrums of the doctrine of stare decisis.

The question that needs to be explored further is what should be the alternative, given that workability, change in facts, and reliance all have difficulties as a proxy for stare decisis considerations. There is also the greater question of whether the doctrine of stare decisis by itself is constitutionally sound, beyond the mechanisms that guide the Court through the application of it.

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