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## Abort the Court? How abortion jurisprudence has highlighted questions surrounding the legitimacy of the Supreme Court

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Abort the Court?  
How abortion jurisprudence has highlighted questions  
surrounding the legitimacy of the Supreme Court

by

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**ABSTRACT** The Supreme Court is often viewed with awe and the justices treated with reverence. It is the highest court in the United States, tasked with interpreting the law. But is the Supreme Court the neutral arbiter of justice it purports to be? Most recently, the 2022 ruling on *Dobbs v. Jackson Women's Health Organization* overturned the fifty-year precedent of *Roe v. Wade*, causing the Court to face increasing scrutiny and questions of its legitimacy. I conduct a philosophical analysis of the arguments made by the justices in the opinions on *Roe v. Wade*, *Planned Parenthood v. Casey*, and *Dobbs v. Jackson Women's Health Organization* to understand the way abortion jurisprudence is argued. In the Court's opinion on *Casey*, the plurality constructs an argument for the legitimacy of the Court. I take this argument and assess its logical validity, and then with the framework the argument presents, I examine if the Court can maintain its neutrality in the context of philosophical arguments. Then, using case law analysis from Melissa Murray about the impact of abortion and precedent, as well as Ronald Dworkin's constitutional evaluation from *Freedom's Law*, I discuss the role that legal principles play in abortion jurisprudence and apply political behavior research into motivated reasoning to better understand the Court's political motivations. I find, on their own criteria, that the Court fails to maintain the neutrality they claim to have, meaning they are in fact a political body. I also find the Court's political nature impacts its ability to decide on controversial topics and provide suggestions for what this means for the Court's role in American government as we face increasing polarization.

## INTRODUCTION

At the time of the Supreme Court's controversial ruling on *Roe v. Wade* (1973)<sup>1</sup>, it quickly became clear the political fight surrounding reproductive rights was far from over. Anti-abortion advocates organized to protest, construct legal battles, and elect politicians they hoped would lead to the overturning of *Roe*. Since 1973, there have been a handful of cases heard by the Supreme Court challenging *Roe*, most notably including *Planned Parenthood v. Casey* and *Dobbs v. Jackson Women's Health Organization*. Until *Dobbs*, which ultimately overturned *Roe*, the Supreme Court continued to uphold the precedent *Roe* set. The topic of abortion is controversial and divisive, so some compare the Court's opinion on *Roe* to other controversial rulings that were later overturned, the most famous example being *Plessy v. Ferguson* (overruled by *Brown v. Board of Education* in 1954). But the drastic overruling of established Court decisions, like *Roe* and *Plessy*, are rare. With *Plessy v. Ferguson*, the Court cited better factual understanding, or new, previously inaccessible, now widely accepted perspectives as the reason for the reversal.<sup>2</sup> Does this explanation make sense when it comes to abortion jurisprudence? Did the justices who decided *Dobbs* have access to a better understanding of facts? I shall argue it is unlikely that this is the case. The Supreme Court holds itself to be a neutral arbiter of the law, maintaining they are deciding cases separate from political beliefs or influence. The Court has traditionally avoided developing or establishing law, which is partly why their claimed neutrality is so significant. Abortion jurisprudence, however, provides an example for how the Supreme Court is not a neutral arbiter of the law, or neutral at all. Rather, it is a political body.

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<sup>1</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>2</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). 957 – Though argument comes from the justices in the cases discussed here, even *Plessy v. Ferguson* was a controversial opinion at the time of decision, and the justices certainly had access to the facts they needed to rule in the way that *Brown* eventually led to. So, this argument may not even be useful here.

I will examine how the three central cases in abortion jurisprudence, *Roe v. Wade* (1973), *Planned Parenthood v. Casey* (1992), and *Dobbs v. Jackson Women's Health Organization* (2022) use different tactics to arrive at certain conclusions that benefit justices' political motivations. First discussing the idea of neutrality, and its background in the rule of law, I will then discuss the role that precedent plays in Supreme Court cases, specifically controversial ones, and then place the arguments and reasoning specifically in *Casey* and *Dobbs* in conversation to see how they reveal information about the way that justices construct their arguments for justifying their decisions. I will then argue that political behavior research into motivated reasoning further supports the conclusion that the Court is a political body and discuss what that means for the future of the Court.

The majority opinion in *Dobbs* argues that *Roe* proved unworkable, and furthermore that the precedent set by *Roe* was wrong to begin with.<sup>3</sup> To the five justices who decided *Dobbs*, being right was more important than upholding precedent.<sup>4</sup> They write in the majority opinion, “*Stare decisis*, the doctrine on which *Casey*'s controlling opinion was based, does not compel unending adherence to *Roe*'s abuse of judicial authority. *Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences.”<sup>5</sup> It must be overturned, these five justices argue. “That is what the Constitution and the rule of law demand.”<sup>6</sup>

This is a significant claim to make, that the Constitution and the rule of law demand the overturning of a precedent in existence for almost fifty years. These five justices answered a

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<sup>3</sup> *Dobbs v. Jackson Women's Health Organization*, 597 U.S. \_\_\_\_ (2022).

<sup>4</sup> *Dobbs* was a 5-4 decision.

<sup>5</sup> *Dobbs v. Jackson Women's Health Organization*, 597 U.S. \_\_\_\_ (2022). 6

<sup>6</sup> *Dobbs v. Jackson Women's Health Organization*, 597 U.S. \_\_\_\_ (2022). 6

question through their decision that has plagued Supreme Court (and other) justices for the entire existence of the Court – what should justices do when confronted with precedents that they do not agree with, or that they believe have been reasoned poorly? And moreover, can justices decide about issues like rightness and wrongness without their own beliefs or desires impacting their rulings?

## **INTERPRETATION**

It is inevitable, in the American legal system, that justices will have to interpret the law. In large part this is a result of *Marbury v. Madison*, a case that established the idea of judicial review in American law. Judicial review gives justices the power to determine (through their interpretation) a law’s constitutionality.<sup>7</sup> Arguments in favor of judicial review are often supportive of the interpretative framework that has power or has played a role in decisions viewed as important. For example, advocates for *Roe* and pro-choice activists generally declined to discuss judicial review as they were afraid criticism could call into question the legitimacy of *Roe* and threaten the rights it established. Judicial review plays a complicated role in the United States’ unique judicial structure. Ultimately, the creation of the power of judicial review established the power of the Supreme Court to decide on issues of constitutionality, decisions purely based on judicial interpretations of the law. For judicial interpretation to work in the neutral way as expected, justices must have some framework or theory they base their interpretations of the law on beyond their beliefs, opinions, or even morality. “Because judges (like the rest of us) are concerned about the legitimacy of a process that permits them to decide these issues, they cling to their authorizing texts and debate their interpretation rather than

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<sup>7</sup> “The Contemporary Debate over Supreme Court Reform: Origins and Perspectives.”, Waldron- “The Core of the Case Against Judicial Review”

venturing out to discuss moral reasons directly.”<sup>8</sup> Justices – specifically Supreme Court justices – apply interpretive theories and, additionally, legal principles to avoid debating the issues that underlie the cases they face. Justice Antonin Scalia is famous for the originalist theory, which evaluates the Constitution from the original meaning, while Justice Holmes provides a contrasting example of pragmatism, which gives merit to the way the law develops over time. By avoiding the root of the questions being asked in such cases, Supreme Court justices attempt, and seem, to maintain a level of impartiality. They use these frameworks to guide their decisions, and supposedly maintain integrity in their interpretive techniques. By maintaining an apparent level of impartiality, or even objectivity, the Supreme Court retains its legitimacy, in contrast to the traditionally political branches, where legitimacy is rooted in electoral politics.

One of the reasons that neutrality is such a central judicial ideal – and even seems possible to begin with – is the reverence for the rule of law. Rule of law is often cited as one of the central guiding principles of the legal system. Predating the United States as a legal ideal, rule of law seeks to prevent individual authority from controlling the law, holding that no one supersedes the law itself.<sup>9</sup> None are above the law under rule of law, certainly not and especially not those creating, implementing, and evaluating the law.<sup>10</sup> However, there is not a consensus on exactly what this means in practice. Some argue for viewing the rule of law as just one principle or ideal within a larger system of competing values in a legal system, holding it in tension or complementary to values like human rights or equality. Under this view of rule of law, it is possible to have a legal system that perfectly upholds the rule of law, but fails to be just, as the law existing above all else doesn’t inherently lead to the realization of other ideals, like justice or

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<sup>8</sup> Waldron, “The Core of the Case Against Judicial Review.” 1381

<sup>9</sup> The rule of law has a long history, stemming back to Aristotle. Additionally, the themes of tension between humans and law are found dating back to Plato’s *Crito*.

<sup>10</sup> Waldron, “The Rule of Law.”

equality.<sup>11</sup> Some go even further and argue that strict adherence to the rule of law can hinder the ability to uphold other values, especially ones that many would argue are central to a just legal system. Conversely, there are those who argue that the rule of law is substantive or exists outside the legal system. However, even agreement on substantive rule of law does not clarify what is included in the substantive realm and what upholding rule of law looks like in practice. It is possible to privilege different values in a substantive view of rule of law, from property rights to social justice, maintaining the objective nature of these values, but creating disagreement around what rule of law substantively entails.<sup>12</sup>

Rule of law as a principle attempts to address concerns surrounding “rule by man”, or the will of one or a small group of individuals. But laws are frequently unclear, and there are disputes about the meanings of laws. The legal system and judges attempt to address this confusion, in addition to their responsibility to judge guilt and provide reparations for harms as defined by the law. However, the introduction of uncertainty creates tension between the ideal of upholding the rule of the objective law and the justices attempting to determine what the law actually is, whether there is a substantive rule of law above and beyond what has been legislated or if the law is limited to the system as structured. The tension arises from the complexity of ascertaining the distinction between the will of humans and the will of the law. This tension is especially prevalent with the Supreme Court, which is the ultimate decision-maker when it comes to American law, often faced with the complex societal questions about the law that have gone unresolved. Abortion is one example of such a question. Despite being absent from the Constitution, judicial review gives the Supreme Court even more power, because the Court is no longer merely deciding whether something follows the law – now they can interpret what the law

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<sup>11</sup> Raz, *The Authority of Law*. Chapter 11: The Rule of Law and its Virtue. 210-229

<sup>12</sup> Waldron, “The Rule of Law.”



actually says. Did *Roe* create a new law that allowed for abortion through a majority ruling, or was it just clarifying a preexisting law that was unclear in the Constitution? Jeremy Waldron highlights the crux of the issue surrounding rule of law and the complexities brought up by judicial review as a legal practice. “We swing uneasily between the position that the rule of law positively requires that the Supreme Court have the final say in any constitutional crisis, and the position that judicial supremacy is as offensive to the rule of law as any other form of unreviewable hegemony in a constitutional regime.”<sup>13</sup>

The existence of a debate about what rule of law even means calls into question how it can be such a foundational principle. How can the basis for a successful legal system be a principle that lacks an agreed upon meaning? With so many perspectives on what rule of law is, is it reason enough to have neutral decisions? As early as the founding of the United States, The Federalist (Alexander Hamilton, James Madison, and John Jay) was concerned about judicial will. Hamilton argues in Federalist no. 78, “To avoid arbitrary discretion in the courts, it is indispensable that [justices] should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.”<sup>14</sup> He recognizes judicial power presents a serious threat and suggests these “rules and precedents” to keep justices in check, especially when it comes to controversial matters that force justices to make decisions the public is in disagreement on.

## **THE INFLUENCE OF ROE**

The Supreme Court has faced controversial topics at many points, but when *Roe v. Wade* ruled that the Constitution protects individuals’ right to have an abortion, they became involved

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<sup>13</sup> Waldron, “The Rule of Law and the Role of Courts.” 99

<sup>14</sup> Hamilton, “Federalist 78.”

in a topic so controversial it would continue to define the political nature of the United States to this day.<sup>15</sup> The Court found the right to abortion was a liberty protected under substantive due process in the fourteenth amendment, rooted in the right to privacy. The ruling was 7-2 and laid out an explicit trimester framework to deal with the legality of abortions.<sup>16</sup> Immediately, this decision was highly controversial, with pro-choice advocates pleased that the Court affirmed reproductive rights, and anti-abortion advocates horrified at what this meant for abortion bans across the country. Specifically, anti-abortion advocates began organizing around the possibility of having *Roe* overturned. They sought out legal cases to try to force the Court to overrule *Roe*, they organized and supported politicians who vowed to appoint justices that would support the overruling of *Roe* and continued to ingrain anti-abortion beliefs deep into American culture.

In 1992, the Supreme Court heard a case that provided the perfect opportunity to overturn *Roe*. The Court was generally viewed as a conservative Court, with five justices nominated by either Reagan or Bush, both of whom ran on platforms that specifically targeted the overturning of *Roe*. *Planned Parenthood v. Casey*, however, was a shock to everyone when, in a 5-4 ruling, the Court upheld *Roe*. This ruling, with the majority written by the swing bloc of Justices O'Connor, Kennedy, and Souter, appealed to *stare decisis* as important justification for the necessity of upholding *Roe*.

*Stare decisis* is a Latin term meaning “to stand by things decided”. This doctrine is about precedent, and the application of this doctrine means that courts stand by prior decisions,

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<sup>15</sup> The post-*Roe* United States saw a turn towards increasing conservative coalition building, specifically around the issue of abortion. This was the first time that Catholics and fundamentalist and evangelical Christians worked together on the specific issue, with the “Moral Majority” and others mobilizing on the specific issue, encouraged by the Republican party. This led up to the election of Ronald Reagan as president, and the creation of the New Right. The history of this time is pivotal to the path that abortion jurisprudence and politics has taken. McKeegan, “The Politics of Abortion.”

<sup>16</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

specifically with cases that share similar facts.<sup>17</sup> The application of *stare decisis* varies. There is horizontal *stare decisis*, when a court adheres to principles or standards that it lays out itself. Alternatively, there is vertical *stare decisis*, when lower courts are obligated to follow the precedents created by higher courts. In addition to vertical and horizontal *stare decisis*, there are differing levels of intensity, ranging from weak to strong, which can even depend on the type of cases being decided. For example, the Supreme Court does not necessarily uphold *stare decisis* above all else, but the statutory cases it hears tend to have strong *stare decisis* while constitutional cases often have the weakest application of *stare decisis*.<sup>18</sup> *Stare decisis* is not an inexorable command, but a guide to lessen the interpretive work of justices.

Ultimately, in 2022, the Supreme Court overruled *Roe* in a 6-3 judgment on *Dobbs v. Jackson Women's Health Organization*. This decision faced scrutiny because the opinion was leaked prior to its delivery, which caused an already controversial topic to become subject to a whole set of new critiques. The political strategy behind this leak was immediately questioned. Did the leak force conservative justices to maintain their conservative positions? Was the leak someone on the liberal side of the Court who wanted to warn states to put into place legal protections in advance of the potential turmoil? Regardless of who it was, the leak itself was a political move that played a role in abortion jurisprudence and how the public received *Dobbs*.<sup>19</sup> *Dobbs* determined that both *Roe* and *Casey* were wrong in their application of the Fourteenth Amendment and substantive due process. As a result, the legality of abortion became ultimately up to the states, many of whom had trigger laws in place that allowed for abortion to instantly become illegal with the announcement of the decision.

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<sup>17</sup> Murrill, "The Supreme Court's Overruling of Constitutional Precedent." 4

<sup>18</sup> Barrett, "Precedent and Jurisprudential Disagreement." 1712

<sup>19</sup> Gerstein and Ward, "Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows."

*Roe* may have been the case that created legal protections for abortion for the first time nationally, but *Roe* was not determined without anything backing it. In the majority opinion, the justices reference historical precedent, arguing that abortion only became widely illegal in the nineteenth century, with laws predating that shift not being nearly as strict or as harsh. Despite a lack of precedents similar enough to *Roe* to apply *stare decisis*, the justices still appealed to historical precedent to give their ruling some justification.<sup>20</sup> Not only did the seven justices who delivered the ruling on *Roe* appeal to historical precedent, but they referred to established precedent in similar areas. Justice Stewart joined the majority in *Roe v. Wade* because he believed that if one accepted the *Griswold* ruling, then one had to accept *Roe* as well – despite him dissenting in *Griswold*.<sup>21</sup> He argued this because he accepted the precedent set by *Griswold*.

Precedent holds a high level of respect in the judicial system because of the stability it creates. Stability is often cited as a crucial aspect of a legitimate system because of the continuity and reliability created. Upholding precedent allows for courts, and more specifically the Supreme Court, to maintain stability in law. In a common law system, precedent is essential to the law, because there are no statutes or written laws in the sense that justices can refer to a text. Rather, they base their judgments off the established precedent, building and compounding law over time. In a civil law system, judgments do not require the same dedication to precedent, but the law is often extremely clear and there is little to no judicial review present. In the United States' legal system, precedent occupies a confusing space because the legal system is confusing, hovering somewhere between civil law and common law, with both strong written law as well as

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<sup>20</sup> Dworkin, *Freedom's Law*. 51

<sup>21</sup> *Griswold v. Connecticut* - The Court ruled that the Constitution of the United States protects the liberty of married couples to buy and use contraceptives without government restriction. Contrary to *Roe*, *Griswold* did not base this ruling on the fourteenth amendment, but rather relied on the First, Third, Fourth, and Fifth Amendments. This predates *Lochner v. New York* falling out of favor and impacting the ways justices rule (see footnote 30).

law that has evolved based on judicial decisions over time. As a result, the role of precedent, and *stare decisis*, are often up to interpretation, though still crucial to the stability of the system.

However, the majority in *Dobbs* later argued this historical precedent does not exist, and that *Roe* based its appeal to history on false information and referenced untrue historical facts. *Dobbs* implies that the majority in *Roe* was referring to historical precedent that does not exist to justify their decision, reading something into the Constitution that isn't there.<sup>22</sup> In response to the appeal of the precedent laid out by *Griswold*, the majority in *Dobbs* argues that because *Griswold* does not deal with the moral question of abortion, it cannot provide precedent for *Roe*.<sup>23</sup> Though the majority in *Dobbs* does not make a specific claim about why they view the justices as ruling wrongly on *Roe*, it is clear through their argument that they do not view the judgment as being based in anything substantial, and it is implied that they view the justices implementing their own will, rather than ruling correctly. As they argue, "...sometimes the Court errs, and occasionally the Court issues an important decision that is egregiously wrong."<sup>24</sup>

Yet, despite the arguments *Dobbs* makes against *Roe*, the majority in *Casey* was able to read the same case and come to a very different conclusion. They argue "the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable."<sup>25</sup> Appealing to the rule of law, which they state as critical for the legitimacy of the Court, adherence to precedent is crucial. Repeatedly throughout the ruling, the majority references the importance of *stare decisis* for both the Court and for American law in general.

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<sup>22</sup> *Dobbs v. Jackson Women's Health Organization*, 597 U.S. \_\_\_\_ (2022). 23

<sup>23</sup> *Dobbs v. Jackson Women's Health Organization*, 597 U.S. \_\_\_\_ (2022). 32

<sup>24</sup> *Dobbs v. Jackson Women's Health Organization*, 597 U.S. \_\_\_\_ (2022). 70

<sup>25</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). 854

When it comes to judicial rulings, *stare decisis* presents a unique challenge, but it also provides support to justices. Supposedly, justices should rely on precedent to guide their decisions. However, it also shapes how justices view the cases that are in front of them. Despite this structure that adherence to precedent provides, precedent cannot decide cases itself. Justices face cases where they view the precedent as bad precedent, or wrongly ruled.<sup>26</sup> *Dobbs* provides a perfect example of this potential issue, where the five justices who voted to overrule *Roe* argue that they did so because *Roe* was a wrongly decided precedent that should not continue to impact decisions on future cases. These justices viewed *Roe* as wrong, and so the majority of the Supreme Court ruled in this case that correcting a wrong ruling was more important than the continuation of established precedent.<sup>27</sup>

*Casey* argues that *Roe* is not unworkable, and that the Court does not get to decide to overrule it simply because they might have concerns or ‘reservations’ about the central holding of *Roe*, as this is outweighed “by the explication of individual liberty we have given combined with the force of *stare decisis*.”<sup>28</sup> The majority cites *stare decisis* as their reason for ruling, almost gesturing to some outside force that has tied their hands, not allowing them to make any other decision. They feel obligated to uphold *Roe*, because they do not have a good reason to overturn it. To elucidate their application of *stare decisis*, these justices break down why *Casey* is not the case to overturn established precedent. They examine two cases in which the Court overturned past decisions. The most famous is *Plessy v. Ferguson*, overruled by *Brown v. Board*

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<sup>26</sup> Barrett, “Precedent and Jurisprudential Disagreement.” 1714

<sup>27</sup> *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. \_\_\_\_ (2022).

<sup>28</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

of *Education*.<sup>29</sup> The other is *Lochner v. New York*, overruled by *West Coast Hotel v. Parrish*.<sup>30</sup>

The Court, in *Casey*, argued that with both cases, there was new information, new ‘facts’ that were available to the Court when it overruled both established precedents. They did not believe that this same situation applied to them. “Because neither the factual underpinnings of *Roe*’s central holding nor our understanding of it has changed (and because no other indication of weakened precedent has been shown), the Court could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from the Court of 1973.”<sup>31</sup> Because there is not some special reason (beyond perhaps simply arguing the prior case was decided wrongly), they did not feel they could overrule. Under the Court’s argument in *Casey*, *stare decisis* requires more than just thinking, or believing, that prior justices decided wrongly. When, in 2022, the Court decided in *Dobbs* that *Roe* was unworkable and should be overturned, they did not have access to some special reason above and beyond “a present doctrinal disposition”, under this view.

## CASEY & LEGITIMACY

While the main argument of *Casey* seems straightforward, there are two important things to note about this case that make it seem less simple. First, and significantly, despite their clear argument to uphold *Roe*, the majority in *Casey* began the process of dismantling it with their ruling. It is important to note that *Casey* was a 5-4 ruling, and of the majority, there were three

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<sup>29</sup> *Plessy*’s ruling created the idea of “separate but equal”, where segregation was allowed because it did not inherently signal that one race was inferior to the other. *Brown* overruled this by recognizing that discrimination is inherent in segregation.

<sup>30</sup> *Lochner* upheld *laissez-faire* principles under contract rights to not have to pay women minimum wage, and *West Coast Hotel* overruled these principles. In *Casey*, this case is cited as being overruled because of the rude awakening the Great Depression brought and the “the capacity of a relatively unregulated market to satisfy minimal levels of human welfare”.

<sup>31</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). 864

justices that wrote the opinion. Even though there was not a majority on all parts of their argument, because they were in the plurality, these sections of the Court’s opinion became precedent and were the ruling. The three justices who wrote the opinion of the Court were Justices O’Connor, Kennedy, and Souter. All three were considered swing votes and appointed by conservative presidents.

In their opinion, they deconstructed *Roe*. They overruled the trimester framework as an overreach of the state, and created the undue burden standard to replace ‘strict scrutiny’.<sup>32</sup> Strict scrutiny required states to largely avoid any regulations on abortion, while undue burden relaxed the constraint on states and enabled them to create some restrictions as long as they did not place an undue burden on people seeking abortions.<sup>33</sup> As legal scholar Melissa Murray argues, *Casey* only selectively upholds *Roe*, and as a result, “*Casey* dramatically altered the abortion landscape, allowing states broader authority to slowly strangle access to abortion via a steady stream of restrictions and regulations.”<sup>34</sup> Substantively, *Casey* set up future decisions to overrule *Roe*, despite arguing the very opposite. This was so evident that both dissenters in *Casey* as well as the majority in *Dobbs* recognized what the plurality had done. Chief Justice Rehnquist noted in his dissent for *Casey* that the plurality revises the precedent while in the same breath purporting to adhere to it. “*Roe* continues to exist, but only in the way a storefront on a western movie set exists: a mere facade to give the illusion of reality.”<sup>35</sup> Later, the majority in *Dobbs* recognized this too. “Paradoxically, the judgment in *Casey* did a fair amount of overruling. Several important abortion decisions were overruled *in toto*, and *Roe* itself was overruled in part.”<sup>36</sup>

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<sup>32</sup> Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992). 872.

<sup>33</sup> Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992). 877.

<sup>34</sup> Murray, “The Symbiosis of Abortion and Precedent.” 315

<sup>35</sup> Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992). 954

<sup>36</sup> Dobbs v. Jackson Women’s Health Organization, 597 U.S. \_\_\_\_ (2022). 3-4



Additionally, while the majority in *Casey* argued for the maintaining of *Roe* based on *stare decisis*, the dissent also argued based on *stare decisis*. Chief Justice Rehnquist in his dissent, with Justices White, Scalia, and Thomas joining in parts, referenced *stare decisis*, and argued that *stare decisis* is consistent with overruling *Roe*.<sup>37</sup> Rehnquist argued the Court has a responsibility to correct past wrongs and disagreed with the *Casey* interpretation of needing new facts to be able to overturn past decisions. He was skeptical of pure reliance, which was his categorization of the *Casey* ruling's relation to precedent.<sup>38</sup> His argument demonstrates that *stare decisis* can be used to reach opposite conclusions based on how the individual justice decides to interpret the doctrine.

Murray argues *Casey*'s interpretation of precedent created a path to overturning *Roe* through the simultaneous recognition and limitation of precedent. The *Casey* opinion subtly discredited precedent, allowing for later cases to build on the deconstruction, eventually leading to the overruling altogether.<sup>39</sup> The relationship between abortion jurisprudence and *stare decisis* outlined in *Casey* established the Court's entire *stare decisis* jurisprudence going forward.<sup>40</sup> *Casey*'s strategy for subtly undermining while simultaneously publicly upholding precedent is rooted in the concerns about the way the public views the Court as an institution. As the *Casey* opinion reveals, the majority is deeply concerned about the perception of the Court's legitimacy. This is one of the major reasons why they argue it is so important to uphold *stare decisis*. They cite both their argument about *stare decisis* as well as the ability of the Court to function in a

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<sup>37</sup> Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992). 954

<sup>38</sup> Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992). 956

<sup>39</sup> Murray, "The Symbiosis of Abortion and Precedent." This paper predates the 2022 *Dobbs* overruling of *Roe*, but the argument is successful because it accurately predicted the trajectory of *Roe*'s overturning because of the prior cases.

<sup>40</sup> Murray. 330

“Nation dedicated to the rule of law” as reasons for not being able to overturn *Roe*.<sup>41</sup> *Casey*’s argument relies on an understanding of the Court’s power sourced from the legitimacy that the people give to the it, which is based on an understanding of the Court as a neutral arbiter of the law. The majority in *Casey* was concerned for the potential of instability that could have arisen with the overturning of *Roe*, which could lead to a loss of legitimacy.<sup>42</sup> In contrast, those who disagree with the *Casey* decision argue that ruling correctly is more important than ruling in a way that will satiate the public or avoid questions about the Court’s legitimacy.<sup>43</sup>

The justices in the plurality in *Casey* were concerned with the potential for instability as a consequence of overruling established precedent, but their concerns were already a reality. As multiple conservative presidents had promised in their campaigns, the Supreme Court had many justices appointed specifically with the goal of overturning *Roe*, causing the Court to look like “politics being carried on in a different forum.”<sup>44</sup> In fact, despite stability playing a role in the *Casey* decision, it could be argued *Casey* created more instability because of the impact it had on the next thirty years of politics surrounding both abortion and the makeup of the Court.<sup>45</sup>

The justices that wrote the majority in *Casey* argued that the Supreme Court’s governmental power was uniquely supported because of its legitimacy – it does not have the

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<sup>41</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). 865

<sup>42</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). 866-867

<sup>43</sup> *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. \_\_\_\_ (2022). 67. “The *Casey* plurality was certainly right that it is important for the public to perceive that our decisions are based on principle, and we should make every effort to achieve that objective by issuing opinions that carefully show how a proper understanding of the law leads to the results we reach. But we 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.”

<sup>44</sup> Gerhardt, “The Pressure of Precedent: A Critique of the Conservative Approaches to *Stare Decisis* in Abortion Cases.” 82

<sup>45</sup> Dworkin, *Freedom’s Law*. 129 “The *Casey* decision did not, as some commentators have suggested it might have, take abortion and the Supreme Court out of the election debate. On the contrary, the decision showed the breathtaking importance of the very next nomination to that Court, and of which President will make it.”

power of the purse like Congress nor the enforcement power of the executive branch. The Supreme Court's authority comes from its legitimacy, which, *Casey* argued, comes from the people's acceptance. This acceptance is based on both 'substance' and 'perception'. The substance of this authority comes from both the Constitutional warrant for the power of the Court, as well as the legal principles on which the Court draws, like *stare decisis*. Substance is demonstrated through the Court's opinions. Significantly, the *Casey* Court said judicial opinions must be based on "principled justification", trying to get away from justices relying on their own wills or desires, and using some objective framework to analyze cases, but opinions must also be "beyond dispute". Justices should not be basing judicial opinions on political or societal pressures, but rather basing opinions in something more objective.<sup>46</sup> We might call this view the neutral arbiter view, the idea that justices use objective arguments to decide on cases in a neutral manner.

The *Casey* Court concluded that "the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation."<sup>47</sup> They applied this definition of legitimacy and the practical implications on decision making to *Casey*, which would have led to the overruling of a watershed case (*Roe*). Referring again to the significance of precedent, the majority argued that to overturn a watershed case, or any major decision, there needs to be evidence beyond a shadow of a doubt that the overruling is not succumbing to political pressures, individual will, or any other unjustified rejection of Court precedent. Without the ability to convincingly demonstrate

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<sup>46</sup> Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992). 865-866

<sup>47</sup> Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992). 866

that the overruling of a case would not be based on an unjustified rejection, any such overruling would decimate the Court's legitimacy.<sup>48</sup>

If this analysis of the Supreme Court's legitimacy is correct, then it follows why the majority in *Casey* did not want to overtly overrule *Roe*. A complete overruling of *Roe* would have brought the Court's legitimacy into question and without any power of enforcement or other means of control, the Court could have faced serious issues with its role in American democracy.

If the majority in *Casey* is right about the structure of legitimacy for the Court, then *Dobbs* did exactly what *Casey* was afraid of. *Dobbs* agreed in some ways with *Casey*'s opinion on legitimacy, but was firmer about the public's influence on the ruling, arguing that justices should attempt to write opinions that demonstrate their principled reasoning, but ultimately cannot exceed the authority given to them by the Constitution.<sup>49</sup> They follow Justice Rehnquist's dissent on *Casey*, defining legitimacy as coming from "deciding by its best lights whether legislative enactments of the popular branches of Government comport with the Constitution."<sup>50</sup> Ultimately, *Dobbs* disagreed with *Casey*'s definition of legitimacy because it did what *Casey* was trying so hard to avoid – overturned a case without evidence beyond a shadow of a doubt that the decision was based on principled justification beyond dispute.

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<sup>48</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). 867: "But whatever the premises of opposition may be, only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure, and an unjustified repudiation of the principle on which the Court staked its authority in the first instance. So, to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question."

<sup>49</sup> *Dobbs v. Jackson Women's Health Organization*, 597 U.S. \_\_\_\_ (2022). 67

<sup>50</sup> *Dobbs v. Jackson Women's Health Organization*, 597 U.S. \_\_\_\_ (2022). 67, citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). 963

However, even if we accept *Casey*'s standard of legitimacy, it raises questions. Firstly, and perhaps most importantly, is it possible for a ruling to be principled without dispute? As mentioned, the Court assumes a neutral arbiter view, where the Court is an impartial decider of cases. This view appeals to the argument structure where there is a law, certain facts, and a conclusion that seems to follow from the facts. Yet this view, specifically in the judicial system, merely imitates a formal argument structure. The Court can select facts to suit the argument they want to make, advantaging one opinion over another, as seen in the arguments in *Casey* and *Dobbs*.

The *Casey* majority was concerned with the stability of the neutral arbiter view, and the effects that vacillation, or inconsistency in the Court might have.<sup>51</sup> Their concern is justified, as overruled cases are almost always the result of transitions on the Court. Out of 163 overruled cases between the Court's founding and 2008, only four were overruled without any change in Court personnel – and in the fifteen years since 2008, there have been six new justices.<sup>52</sup> If it is unlikely for a case to be overturned without turnover in the Court, then it seems that changes in the Court often lead to cases being reassessed, creating instability. Overruling and revisiting settled case law impacts lower courts as well, since vertical *stare decisis* is much stricter than horizontal *stare decisis*. This is *especially* true when revisiting follows the ideological preferences of current justices which contrast to the ideological preferences of the justices on the Court of the original ruling.<sup>53</sup>

Another question that *Casey*'s standard of legitimacy raises is the ability of future Courts to overrule their precedent. As previously discussed, *Casey* undermined much of the specifics of

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<sup>51</sup> Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992). 866

<sup>52</sup> Gerhardt, *The Power of Precedent*. 11

<sup>53</sup> McMillion and Vance, "Criticism from Below." 82

*Roe* while still maintaining the central holding but providing room for future cases both about abortion and about precedent to lead to the overturning of *Roe*. Leaving the space for new majorities to overrule prior decisions gives the opportunity to change what the Court says the Constitution means with each new justice.<sup>54</sup> Even justices themselves recognize the effect this may have on the Court's legitimacy. Prior to becoming a justice, Amy Coney Barrett wrote, "If the Court's opinions change with its membership, public confidence in the Court as an institution might decline."<sup>55</sup> Yet even as the *Casey* majority was concerned with the legitimacy of the Court, and their standard of legitimacy being tied up with the neutral arbiter view, the plurality was undermining *Roe*, implementing their own will.<sup>56</sup>

## **JUSTICES & MOTIVATED REASONING**

Research into motivated reasoning, a psychological theory that has been applied heavily to the realm of political and public policy, examines how individuals are affected by their own positions on issues when making decisions about political issues.<sup>57</sup> Specifically, directional goals are when individuals are motivated to arrive at a specific conclusion because of pre-existing opinions or desires about outcomes, in contrast to accuracy reasoning where individuals are motivated to arrive at an accurate conclusion. People tend to analyze evidence in favor of their pre-existing beliefs.<sup>58</sup> Of course, the Supreme Court is not composed of regular individuals, but composed of highly educated lawyers and judges who are experts in their field. Motivated reasoning research has found that politicians have even stronger directional reasoning, likely

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<sup>54</sup> Barrett, "Precedent and Jurisprudential Disagreement." 1725

<sup>55</sup> Barrett. 1725-26

<sup>56</sup> Murray, "The Symbiosis of Abortion and Precedent."

<sup>57</sup> Bolsen, Druckman, and Cook, "The Influence of Partisan Motivated Reasoning on Public Opinion."

<sup>58</sup> Bolsen, Druckman, and Cook. 236.

because of the nature of holding a political position.<sup>59</sup> However, research has also found that judges and lawyers do the opposite. One study found that they were more likely to rule on test cases in consistent ways regardless of prior beliefs or motivations.<sup>60</sup>

Despite these findings about judges and lawyers being less impacted by motivated reasoning, there are certain things about motivated reasoning that are important to point out that may impact the Supreme Court uniquely compared to other judges. First, the nature of Supreme Court seats. Supreme Court justices are appointed by presidents and must be confirmed by the Senate. As a result, they are not always the most qualified candidate, or even the first candidate that a president might pick but are politically advantageous candidates. Presidents Reagan, Bush, and Obama all nominated candidates to the Supreme Court who were not confirmed, for various reasons, demonstrating the complicated political processes and barriers that Supreme Court nominees face. Additionally, presidents nominate candidates who they believe will achieve certain goals, like President Trump's vow before he was elected president to nominate justices who would overturn *Roe*, and the tendency of conservative presidents since *Roe* was ruled to run on nominating justices to overturn it.<sup>61</sup> Furthermore, this study on motivated reasoning juxtaposed judges and lawyers with the general public (and law students) and concluded that something about how lawyers and judges are trained influences their lack of motivated reasoning when it comes to ruling on cases.<sup>62</sup> The critiques of judges claiming they are 'ideologically motivated' that come from the public are not supported by their findings, the researchers say.<sup>63</sup>

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<sup>59</sup> Christensen and Moynihan, "Motivated Reasoning and Policy Information."

<sup>60</sup> Kahan et al., "'Ideology' or 'Situation Sense'? An Experimental Investigation of Motivated Reasoning And Professional Judgment."

<sup>61</sup> Mangan, "Trump: I'll appoint Supreme Court justices to overturn *Roe v. Wade* abortion case"

<sup>62</sup> Kahan et al., "'Ideology' or 'Situation Sense'? An Experimental Investigation of Motivated Reasoning And Professional Judgment." 414

<sup>63</sup> Kahan et al. 422

Yet, despite these findings and conclusions, there are people who claim the Supreme Court, specifically, is ideologically motivated who possess this unique perspective – lawyers. While it is certainly not a unanimous criticism, many lawyers argue that the Supreme Court is political.<sup>64</sup>

Based on this research finding, it seems that lawyers and justices have access to a type of understanding or knowledge that impact the way they understand or interpret legal rulings, meaning that for lawyers to make this criticism of the Supreme Court holds epistemic weight.<sup>65</sup>

Additionally, the Supreme Court has come more significantly under fire for the *Dobbs* ruling and labeled as political. As one motivated reasoning study found, polarized political topics led to increased directional reasoning.<sup>66</sup> Abortion is a clear example of a polarizing political topic, and it would follow that increased directional reasoning is at play, hence the heightened awareness of both the reasoning behind judges’ rulings as well as the intensified politics surrounding the Supreme Court. While Supreme Court justices may want to uphold their supposed role as neutral arbiters, they are heavily influenced by extremely polarized political positions. Furthermore, they are motivated to implement their own will, even if not intentionally, as the evidence around directional reasoning shows.

## CONCLUSION

If we are to take the Court at their own word, their politicization renders them at best hypocritical, at worst, illegitimate as an institution. It is unclear if the public will continue to accept the Court as a neutral institution under evident polarization. The Court has been able to

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<sup>64</sup> Reed, “Politics, the Court, and ‘the Dangerous Place We Find Ourselves in Right Now.’”

<sup>65</sup> Kahan et al., “‘Ideology’ or ‘Situation Sense’? An Experimental Investigation of Motivated Reasoning And Professional Judgment.” “The legal profession is doing well, our study suggests, in equipping judges to be neutral decisionmakers. But the very ubiquity and persistence of conflict over whether judges are in fact deciding cases on neutral grounds is a testament to how little the profession knows, and how poorly equipped its members are, to communicate the neutrality of the law.” 422

<sup>66</sup> Bolsen, Druckman, and Cook, “The Influence of Partisan Motivated Reasoning on Public Opinion.”



persist through decades of criticism, even specifically within the context of abortion jurisprudence, and the current Court, with overruling *Dobbs*, is testing *Casey*'s own argument for legitimacy. Will the Court continue to persist in its current form, or will the public no longer accept a false narrative about the Court's neutrality in executing the law?

The implications of the political nature of the Court can be answered by two questions; the normative question (what should be done) and the practical question (what could be done). Both are important to address, and both are complex. Furthermore, any conversation about the future of the Supreme Court is overshadowed by the looming constitutionality of all discussions surrounding governmental decisions. Any proposed changes, whether increasing or decreasing the size, power, or reach of the Court, will be hotly debated. Both the constitutionality and even the precedent of such decisions. For example, arguments for packing the Court, which became popular again in the wake of *Dobbs*, are often critiqued for disobeying the nature of the Court's role, though technically a constitutional move. Gerhardt, who has argued about the politicism of the Court, suggests that educating the public will provide more accountability for the Court, if the public understands what is happening with the way the Court is influenced. "Accountability depends on the public's understanding of what is really happening when national political leaders are attempting to shape the Court's composition, size, and direction."<sup>67</sup> Bowie, testifying for a Presidential Commission on the Supreme Court, urges that the antidemocratic nature of the Court be considered.<sup>68</sup> Epps and Sitaraman suggest proposals for revising the Court, creating a lottery system for federal justices to share the responsibility of the Court, or balancing the political power that comes with the confirmation process.<sup>69</sup>

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<sup>67</sup> "Written Testimony of Michael J. Gerhardt."

<sup>68</sup> "The Contemporary Debate over Supreme Court Reform: Origins and Perspectives."

<sup>69</sup> Epps and Sitaraman, "How to Save the Supreme Court."

The Supreme Court is clearly a political institution, one that can implement the will of individuals if there is consensus among enough justices to create a majority of five. Furthermore, the Supreme Court has no code of ethics, unlike most judges in the United States.<sup>70</sup> Yet, when it comes to controversial issues like abortion, they have power to decide constitutionality, a power that comes from their supposed legitimacy. Yet if, as the Court claims, legitimacy is given by the people, legitimacy can also be taken away by the people, and if the Court rules on cases in such political matters because they are engaging in politics, their own standard for legitimacy that *Casey* lays out finds them illegitimate. Public opinion of the Court was at an all-time low before the *Dobbs* decision came out, at 25% confidence in the Court.<sup>71</sup> The Court is failing its own test of legitimacy.

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<sup>70</sup> Totenberg, “Outside Groups Take a First Stab at a Supreme Court Ethics Code.”

<sup>71</sup> “Confidence in U.S. Supreme Court Sinks to Historic Low.”

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## APPENDIX: HONORS SYMPOSIUM PRESENTATION

### “Hungry for Power”

Panel Description: Traditionally, power in the United States has been a self-perpetuating structure. Dominant groups within the country define the parameters and restrict opportunities. Access to power – or lack thereof – often becomes embedded in society, ranging from policy application to institutional perception. If left unchallenged, therefore, the constructs of power in the United States will only escalate the already problematic social division that currently exists. This panel seeks to interrogate these invisible hierarchies of power through the disciplinary lenses of sociology, philosophy, and public health. Each panelist’s research provides differently useful approaches toward dismantling them, from their construction to their impact.

Presentation: Power has a way of creating systems that become so ingrained in society we rarely question it. Why would we? That’s just how things are. Not to mention, when faced with the magnitude of institutional power that feels so deeply integrated with how the world around us works, the idea of questioning power can be terrifying. How could we even revise the patterns of society? “I’d rather deal with the devil I know than the devil I don’t”. But there comes a point at which power is grasped too tightly, or construed too broadly, and when this point is reached, people become willing to challenge the established ways of being in society.

Protestors flocked to Supreme Court Justice’s homes in the wake of the 2022 Dobbs decision, both when the draft was leaked and when the final ruling was announced. Chants included things like “abort the court”, continuing a long tradition of protests in support of the right to abortion, in addition to those protesting against. As such protests might suggest, the topic of abortion is controversial and divisive. The Supreme Court holds itself to be a neutral arbiter of

the law, maintaining they decide even controversial cases separate from political beliefs or influence. The Court has traditionally avoided developing or establishing law, which is partly why their claimed neutrality is so significant. Abortion jurisprudence, however, provides an example of how the Supreme Court is not a neutral arbiter of the law, or neutral at all. Rather, it is a political body.

In the United States, the Supreme Court possesses a unique position when it comes to governmental power. The president and Congress get their power from the electorate and the executive and legislative branches are expected to be political, to implement power in overtly politically motivated ways. The Court has traditionally been expected to place a check on these other institutions, creating a way to limit the political powers of the representatives of the majority.

My research examines how the three central cases in abortion jurisprudence, *Roe v. Wade* (1973), *Planned Parenthood v. Casey* (1992), and *Dobbs v. Jackson Women's Health Organization* (2022) use different tactics to arrive at certain conclusions that benefit justices' political motivations. First discussing the idea of neutrality, and its background in the rule of law, I discuss the role that precedent plays in Supreme Court cases, specifically controversial ones, and then place the arguments and reasoning specifically in *Casey* and *Dobbs* in conversation to see how they reveal information about the way that justices construct their arguments for justifying their decisions. I additionally argue that political behavior research into motivated reasoning further supports the conclusion that the Court is a political body and discuss what that means for the future of the Court. While I cannot cover the extent of my research here, I provide a brief overview of some of my argument, in the context of our larger discussion about power.

The majority opinion in *Dobbs* argues that *Roe* proved unworkable, and furthermore that the precedent set by *Roe* was wrong to begin with. For the five justices who decided *Dobbs*, being right was more important than upholding precedent. They argue that *Roe* was always wrong, and caused serious consequences. It must be overturned, these five justices argue. “That is what the Constitution and the rule of law demand.”

Judicial review gives justices the power to determine (through their interpretation) a law’s constitutionality. Arguments in favor of judicial review are often supportive of the interpretative framework that has power or has played a role in decisions viewed as important. For example, advocates for *Roe* and pro-choice activists generally declined to discuss judicial review as they were afraid criticism could call into question the legitimacy of *Roe* and threaten the rights it established. Ultimately, the creation of the power of judicial review established the power of the Supreme Court to decide on issues of constitutionality, decisions purely based on judicial interpretations of the law. For judicial interpretation to work in the neutral way as expected, justices must have some framework or theory they base their interpretations of the law on beyond their beliefs, opinions, or even morality.

This deeply entrenched value for neutrality grows out of a tradition based on rule of law, a principle that seeks to prevent individual authority from controlling the law, holding that no one supersedes the law itself. But rule of law is a complicated ideal and one that is challenging to apply when dealing with the fundamental constitutional questions that are handed to the Supreme Court to rule on.

Abortion is one of these topics. With its 7-2 ruling on *Roe v. Wade*, the Court found the right to abortion was a liberty protected under substantive due process in the fourteenth amendment, rooted in the right to privacy. An incredibly controversial ruling, many anti-abortion

advocates were dedicated to the possibility of overruling the case. In 1992, the Supreme Court heard a case that provided this possibility. At this time, the Court was generally viewed as a conservative Court, with five justices nominated by either Reagan or Bush, both of whom ran on platforms that specifically targeted the overturning of *Roe*. However, it was a shock to everyone when, in a 5-4 ruling, the Court upheld *Roe*. This ruling, with the majority written by the swing bloc of Justices O'Connor, Kennedy, and Souter, appealed to *stare decisis* as important justification for the necessity of upholding *Roe*.

*Stare decisis* is a Latin term meaning “to stand by things decided”. This doctrine is about precedent, and the application of this doctrine means that courts stand by prior decisions, specifically with cases that share similar facts. *Stare decisis* is not an inexorable command, but a guide to lessen the interpretive work of justices.

Ultimately, in 2022, the Supreme Court overruled *Roe* in a 6-3 judgment on *Dobbs v. Jackson Women’s Health Organization*. This decision faced scrutiny in part because the opinion was leaked prior to its delivery, which caused an already controversial topic to become subject to new critiques. The political strategy behind this leak was immediately questioned. This leak was a political move that played a role in abortion jurisprudence and how the public received *Dobbs*. *Dobbs* determined that both *Roe* and *Casey* were wrong in their application of the Fourteenth Amendment and substantive due process. As a result, the legality of abortion became ultimately up to the states, many of whom had trigger laws in place that allowed for abortion to instantly become illegal with the announcement of the decision.

*Roe* itself relied on historical precedent and established precedent in similar issue areas, like *Griswold v. Connecticut*, a case that dealt with access to contraception. Precedent holds a high level of respect in the judicial system because of the stability it creates. Stability is often



cited as a crucial aspect of a legitimate system because of the continuity and reliability created. The majority did not view *Roe* as being based in anything substantial, and it is implied that they view the justices implementing their own will, rather than ruling correctly. Yet, despite the arguments *Dobbs* makes against *Roe*, the majority in *Casey* was able to read the same case and come to a very different conclusion. Appealing to the rule of law, which they state as critical for the legitimacy of the Court, they argue adherence to precedent is crucial. Repeatedly throughout the ruling, the majority references the importance of *stare decisis* for both the Court and for American law in general. They feel obligated to uphold *Roe*, because they do not have a good reason to overturn it, and are concerned if they overturn *Roe*, the public will think it is only because that is what they want to do.

Despite their clear argument to uphold *Roe*, the majority in *Casey* began the process of dismantling it with their ruling. *Casey* was a 5-4 ruling, and of the majority, there were three swing justices that wrote the opinion. Even though there was not a majority on all parts of their argument, because they were in the plurality, these sections of the Court's opinion became precedent and were the ruling.

These three conservative-appointed justices deconstructed *Roe* in their opinion. They overruled the trimester framework as an overreach of the state, and created the undue burden standard to replace 'strict scrutiny'. As legal scholar Melissa Murray argues, *Casey* only selectively upholds *Roe*, and as a result, allowed states more opportunity to "slowly strangle access to abortion via a steady stream of restrictions and regulations." Substantively, *Casey* set up future decisions to overrule *Roe*, despite arguing the very opposite. This was so evident that both dissenters in *Casey* as well as the majority in *Dobbs* recognized what the plurality had done. Chief Justice Rehnquist noted in his dissent for *Casey* that the plurality revises the precedent

while in the same breath purporting to adhere to it. Later, the majority in *Dobbs* recognized this too.

Murray argues *Casey*'s interpretation of precedent created a path to overturning *Roe* through the simultaneous recognition and limitation of precedent. The *Casey* opinion subtly discredited precedent, allowing for later cases to build on the deconstruction, eventually leading to the overruling altogether. This strategy is rooted in the concerns about the way the public views the Court as an institution. The justices in the plurality in *Casey* were concerned with the potential for instability as a consequence of overruling established precedent, but their concerns were already a reality. As multiple conservative presidents had promised in their campaigns, the Supreme Court had many justices appointed specifically with the goal of overturning *Roe*.

The Supreme Court's authority comes from its legitimacy, which, *Casey* argued, comes from the people's acceptance. This acceptance is based on both 'substance' and 'perception'. The substance of this authority comes from both the Constitutional warrant for the power of the Court, as well as the legal principles on which the Court draws, like *stare decisis*. Substance is demonstrated through the Court's opinions. Significantly, the *Casey* Court said judicial opinions must be based on "principled justification", and opinions must also be "beyond dispute". Justices should not be basing judicial opinions on political or societal pressures, but rather basing opinions in something more objective. We might call this view the neutral arbiter view, the idea that justices use objective arguments to decide on cases in a neutral manner.

This view relies heavily on the perception of the Court by the public. The *Casey* Court's definition of legitimacy comes from their desire to appear a certain way to be able to gain the consent of the people. Perception plays a crucial role in legitimizing power, especially institutional power, because it allows for institutional structures to stand unchallenged. If people

perceive the Court as legitimate, there is no reason to question that role and the resulting influence it has on law and the impacts in society.

The interpretational power given by the precedent of judicial review is an opportunity for justices to determine how society will be structured. With *Roe*, justices determined that access to abortion would be the law of the land. With *Casey*, a Court made of many different people decided that the rules were not as strict as formerly understood. With *Dobbs*, the entire court but for Clarence Thomas was different, and this almost entirely new Court determined that this would no longer be the case, basing their decision entirely on what they argued is the wrong application of law. They had the institutional power, as given by the perceived neutrality of the Court to decide a topic in a very un-neutral way, overruling precedent, ignoring *stare decisis*, and engaging in politics, even if they would have us believe otherwise.

If the majority in *Casey* is right about the structure of legitimacy for the Court, then *Dobbs* did exactly what *Casey* was afraid of. *Dobbs* disagreed with *Casey*'s definition of legitimacy because it did what *Casey* was trying so hard to avoid – overturned a case without evidence beyond a shadow of a doubt that the decision was based on principled justification beyond dispute.

Is it possible for a ruling to be principled without dispute? As mentioned, the Court assumes a neutral arbiter view, where the Court is an impartial decider of cases. This view appeals to the argument structure where there is a law, certain facts, and a conclusion that seems to follow from the facts. Yet this view, specifically in the judicial system, merely imitates a formal argument structure. The Court can select facts to suit the argument they want to make, advantaging one opinion over another, as seen in the arguments in *Casey* and *Dobbs*. Again, this is largely an issue of perception. The Court appears to maintain its neutrality because it is

structuring the argument in a certain way. Because knowledge of the Court and their arguments requires such detailed understanding, it is easy for them to get away with this manipulation – even if the justices themselves aren't aware they are doing this.

Another question that *Casey*'s standard of legitimacy raises is the ability of future Courts to overrule their precedent. As previously discussed, *Casey* undermined much of the specifics of *Roe* while still maintaining the central holding but providing room for future cases both about abortion and about precedent to lead to the overturning of *Roe*. Leaving the space for new majorities to overrule prior decisions gives the opportunity to change what the Court says the Constitution means with each new justice. Yet even as the *Casey* majority was concerned with the legitimacy of the Court, and their standard of legitimacy being tied up with the neutral arbiter view, the plurality was undermining *Roe*, implementing their own will.

I specifically chose the topic of abortion to examine the Court through because of its controversy. In my paper, I briefly talk about another example of a controversial topic that was decided one way by the Court, and then later overruled: *Plessy v. Ferguson*, which was overruled by *Brown v. Board of Education*, dealing with the unjust discrimination of people based on race. *Plessy* is famous for its “separate but equal” decision, which was controversial even at the time it was decided, and remained controversial until it was overturned by *Brown v. Board*. This simply provides another example of how the Supreme Court has the ability to decide issues that should not be left up to a panel of nine justices who are not necessarily even the most qualified, or the most neutral, but rather are nominated by partisan presidents to serve their own agendas, and confirmed by the Senate, an additional political hurdle that any potential justice must be approved by.

These political systems that both influence and shape the Court impact the way the Supreme Court's power manifests in American society. Additionally, the Supreme Court is nothing without these systems: it does not have enforcement power nor power of the purse like the president and Congress do. It merely has the ability to make decisions, but those decisions are accepted because of the constructed understandings of what the Supreme Court is.

If we are to take the Court at their own word, their politicization renders them at best hypocritical, at worst, illegitimate as an institution. It is unclear if the public will continue to accept the Court as a neutral institution under evident polarization. The current Court, with overruling *Dobbs*, is testing *Casey*'s own argument for legitimacy. Will the Court continue to persist in its current form, or will the public no longer accept a false narrative about the Court's neutrality in executing the law?

The implications of the political nature of the Court can be answered by two questions; the normative question (what should be done) and the practical question (what could be done). Both are important to address, and both are complex. Furthermore, any conversation about the future of the Supreme Court is overshadowed by the looming concerns about constitutionality inherent in all discussions surrounding governmental decisions. Any proposed changes, whether increasing or decreasing the size, power, or reach of the Court, will be hotly debated, both regarding the constitutionality and the precedent for such decisions. For example, arguments for packing the Court, which became popular again in the wake of *Dobbs*, are often critiqued for disobeying the nature of the Court's role, though technically a constitutional move. One suggestion is that educating the public will provide more accountability for the Court, if the public understands what the Court is truly doing, rather than continuing to perceive it in a way contrary to the true nature of what the Court is. Others have critiqued the antidemocratic nature

of the Court, with no representation and lack of accountability for justices. There are many interesting proposals for revising the Court, like creating a lottery system that would allow federal justices to share the responsibility of the Court and rotate the makeup, or balancing the political power that comes with the confirmation process by creating party allocations for justices, creating an equal distribution of explicitly partisan justices who then decide on additional nonpartisan or bipartisan justices. Additionally, while imposing term limits on the justices is a frequently-cited proposal by those who want to see the structure of the Court change, and one that would likely have some positive outcomes, it is unlikely that term limits alone would solve the perceptual issues and political nature of the Court, as the same problems would inevitably arise surrounding the appointment process and the pool of justices that are being drawn from.

The Supreme Court is clearly a political institution, one that can implement the will of individuals if there is consensus among enough justices to create a majority of five. Furthermore, the Supreme Court has no code of ethics, unlike most judges in the United States. Yet, when it comes to controversial issues like abortion, they have power to decide constitutionality, a power that comes from their supposed or perceived legitimacy.

If, as the Court claims, legitimacy is given by the people, legitimacy can also be taken away by the people, and if the Court rules on cases in such political matters because they are engaging in politics, their own standard for legitimacy that *Casey* lays out finds them illegitimate.