RELIANCE BY WHOM? THE FALSE PROMISE OF SOCIETAL RELIANCE IN STARE DECISIS ANALYSIS

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Under the doctrine of stare decisis, an important factor in determining whether to uphold or overrule a constitutional precedent is whether there are reliance interests in the rule it established. The Supreme Court's analysis of reliance in this context has been brief and conclusory, leaving indeterminate the precise nature of the reliance interests at stake and causing uncertainty as to which forms of reliance the Court will deem cognizable in the future. Beginning with Planned Parenthood of Southeastern Pennsylvania v. Casey, *the Court has signaled a willingness to give weight to societal reliance—reliance interests of society as a whole. Drawing on previous scholarship, I argue that societal reliance should be given no weight. To measure reliance for stare decisis, the Court should first identify the entities that have taken steps in reliance upon the challenged precedent and then weigh the costs of repudiation to those entities. When purported reliance interests cannot be attributed to particular entities but instead belong to society as a whole, no true reliance is at stake, and it should therefore count for nothing. Adopting this approach will provide clarity, consistency, and predictability to the Court's determinations whether to uphold or overrule constitutional precedents.*

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Introduction

Under the doctrine of stare decisis, it is often appropriate for a court to uphold its precedents regardless of how it would have decided those cases as a matter of first impression. For constitutional precedents, a key factor in making this determination is whether anyone has reasonably relied upon the rule set out in a previous decision.[1] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[2] the Supreme Court invoked a broad conception of reliance to uphold *Roe v. Wade*.[3] In subsequent cases, there has been uncertainty as to the proper application of this sweeping conception of reliance, and members of the Court have disagreed sharply over fundamental questions: most notably, whose reliance counts in this analysis?[4]

Although it is an important factor for stare decisis, reliance is often referenced summarily.[5] The Court has made only cursory distinctions between different types of reliance, which may be entitled to differing weights, and has been far too casual in its treatment—especially when applying the concept to society as a whole.[6] Members of

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[1] *See, e.g.*, Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 855 (1992) ("[I]n this case we may enquire whether . . . the rule's limitation on state power could be removed without serious inequity to those who have relied upon it . . . .").

[2] 505 U.S. 833 (1992).

[3] 410 U.S. 113 (1973).

[4] *See generally* Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 Wash & Lee L. Rev. 411, 413 (2010) ("[D]espite its billing, stare decisis has a remarkable tendency to incite disagreements that contradict the very principles it is supposed to foster."). *Compare* Arizona v. Gant, 556 U.S. 332, 349–50 (2009) (stressing reliance on a precedent by society as a whole and discounting reliance by police departments), *with id.* at 359–60 (Alito, J., dissenting) (finding that police department reliance interests were "substantial" and expressing disagreement with the majority for failing to give police department reliance interests any weight).

[5] *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 443–44 (2000) (devoting two pages to stare decisis analysis, only a fraction of which discusses reliance interests, yet concluding that there was reliance on a precedent because it had "become part of our national culture").

[6] *See* Kozel, *supra* note 4, at 451–52 (noting that in invoking "broad notions of reliance" the Court has not explained "[w]hat exactly those interests consisted of, how widely they were shared, [or] how severe the disruption would be if the applicable precedent were overruled" and has instead "briefly nodded toward the importance of reliance and then forged ahead.").

the Court have raised strong disagreements over the proper conception of reliance in several pointed dissents,[7] and commentators have questioned whether there can be any legitimate explanation for the Court's decision to uphold certain precedents under the doctrine while overruling others.[8] This disagreement and uncertainty is at least in part the result of a lack of rigor in the Court's analysis of reliance interests in constitutional cases.

I argue that societal reliance—that is, reliance interests attributed to society as a whole—should be given no weight in stare decisis analysis. The increased role for societal reliance in modern jurisprudence is a negative development because it is an imprecise concept that cannot be measured or concretely weighed. Its use, therefore, creates uncertainty as to whether a precedent will be upheld or overturned.[9] The most obvious way it might be measured—thereby rendering its application more transparent and predictable—is to look to public opinion as a proxy for societal reliance. This solution, however, is untenable because the idea that public opinion might factor into the Court's decisions directly undermines the Court's conception of its own legitimacy.[10] Further, factors in stare decisis analysis other than societal reliance do much of the same analytical work as it does, with one key difference: While the other factors allow the Court to overrule precedents because of new facts and understandings, societal reliance operates to keep existing precedents in place. Ultimately, societal reliance provides the Court with vast and unpredictable discretion when deciding whether to overturn a contested precedent.[11] For these reasons, societal reliance should be eliminated from the Court's jurisprudence. This will increase the clarity, consistency, and predictability of the Court's reliance analysis while preserving adequate flexibility to overrule precedents.

In Part I, I explain the doctrine of stare decisis and lay out four different types of reliance interests that have played a role in the

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[7] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 591 (2003) (Scalia, J., dissenting) (accusing the *Casey* majority of applying a "different 'sort' of reliance"); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 957 (1992) (Rehnquist, C.J., dissenting) (finding that the majority had failed to set forth "any evidence to prove any true reliance").

[8] *See e.g.*, William S. Consovoy, *The Rehnquist Court and the End of Constitutional Stare Decisis:* Casey*,* Dickerson*, and the Consequences of Pragmatic Adjudication*, 2002 UTAH L. REV. 53, 55 (2002) ("A review of Rehnquist Court stare decisis decisions does not reveal a coherent ideology or approach to overruling precedent."); *id.* at 105 ("[S]tare decisis is merely a tool used to reach a preordained outcome based on a blending of the merits of a case and public pressure.").

[9] *See infra* Part II.B.1. (arguing that societal reliance is not susceptible to concrete measurement or weighing, making it difficult for prospective litigants to predict outcomes).

[10] *See infra* Part II.B.2.

[11] *See infra* Part II.B.3.

Court's analysis. In Part II, I apply this framework to cases in which reliance has featured. I point out significant disagreement among members of the Court and commentators over the proper role of societal reliance and argue that the increasing role of societal reliance is a negative development. In Part III, I suggest that societal reliance should not be given weight and should be eliminated from the Court's analysis of reliance interests. I point out that what may at first appear to rest on notions of societal reliance may, in fact, embody more traditional notions of reliance. In other words, what at first may appear to be societal reliance—which, under my proposal, should not figure into the Court's reliance analysis—may be reframed as a more concrete type of reliance interest, and therefore should be afforded weight. I apply this framework to three cases: *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[12] *Dickerson v. United States*,[13] and *Lawrence v. Texas*.[14] I then explore the benefits of this new approach, which include increased clarity, consistency, and predictability of judicial decisions.

I
Reliance in Stare Decisis Analysis

Under stare decisis, "a court is expected to decide issues in the same way that *it* has decided them in the past, even if the membership of the court has changed, or even if the same members have changed their minds."[15] It is an "imposed hierarchy from earlier to later . . . . [T]he earlier decision becomes superior just because it is earlier."[16] Stare decisis is somewhat counterintuitive: If a case was wrongly decided in the past, why should a court affirm that error today?[17] The answer is that stare decisis promotes stability, predictability, efficiency, and legitimacy.

A. The Values Underlying Stare Decisis

First, stare decisis promotes stability and predictability in the law.[18] Because a judicial system that adheres to stare decisis will tend to have fewer overrulings than one without it, the doctrine will tend to

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[12] 505 U.S. 833 (1992). *See infra* Part III.A.

[13] 530 U.S. 428 (2000). *See infra* Part III.B.

[14] 539 U.S. 558 (2003). *See infra* Part III.C.

[15] Frederick Schauer, Thinking Like a Lawyer 37 (2009) (emphasis omitted).

[16] *Id.* (emphasis omitted).

[17] *See id.* at 41 (describing stare decisis as a "[s]trange [i]dea" because it often requires judges to "reach what they think is the wrong decision").

[18] *See* Payne v. Tennessee, 501 U.S. 808, 827 (1991) ("Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles . . . .").

increase the consistency of legal decisionmaking.[19] Once a decision has been rendered and the dispositive issues have been settled, members of the public may order their behavior in accordance with the decision without the lurking fear that a subsequent court will reach the opposite conclusion.[20] Thus, stare decisis promotes reliance on judicial decisions.

Stare decisis also promotes efficiency by conserving judicial and private resources. First, it promotes decisional economy: If judges were to consider every issue anew, it would put a severe strain on the resources of our judicial system.[21] Treating certain issues as settled law frees up resources to focus on unsettled ones.[22] Second, stare decisis reduces costs by deterring parties from endlessly relitigating in the hopes of obtaining a different result. When parties unhappy with a precedent know they are unlikely to succeed in challenging it, they will bring fewer suits, reducing the costs relitigation imposes on the judicial system.[23] Similarly, knowing that some issues have been conclusively decided increases the prospects of private settlement, which likewise conserves judicial resources.[24] Finally, stare decisis reduces the costs to parties in society who must change their behavior to comply with changing legal norms every time a relevant precedent is

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[19] *See* Kozel, *supra* note 4, at 464 ("[S]tare decisis promotes predictability . . . by making the legal backdrop relatively stable—at very least, more stable than it would be if the doctrine did not exist.").

[20] *See* SCHAUER, *supra* note 15, at 43 ("[I]t is often valuable to have things settled so that others can rely on those decisions and guide their behavior accordingly."); *see also Payne*, 501 U.S. at 827 (noting that stare decisis "fosters reliance on judicial decisions"). Similarly, stare decisis protects legitimate expectations arising from precedent. *See* Hubbard v. United States, 514 U.S. 695, 716 (1995) (Scalia, J., concurring) ("[S]tare decisis protects the legitimate expectations of those who live under the law . . . .").

[21] *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921) ("[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case . . . .").

[22] *See* SCHAUER, *supra* note 15, at 43 ("None of us has the ability to keep every issue open for consideration simultaneously, and we could scarcely function if all of our decisions were constantly up for grabs. . . . [D]oing some things well requires that we treat other things as best left for another time."); *see also* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 854 (1992) (citing Cardozo for the proposition that "no judicial system could do society's work if it eyed each issue afresh in every case that raised it").

[23] *See* Consovoy, *supra* note 8, at 54 ("[S]tare decisis promotes judicial economy by allowing courts to reduce caseloads and creates disincentives to relitigation of precedent cases."); *see also* Taylor v. Sturgell, 553 U.S. 880, 903 (2008) ("[S]tare decisis will allow courts swiftly to dispose of repetitive suits . . . .").

[24] *See* Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 653 (1999) ("[A] doctrine of reliance on precedent furthers the goal of stability by enabling parties to settle their disputes without resorting to the courts.").

overturned.[25] Upholding even imperfect precedents will be less costly for these parties than continuously overruling them, which would undermine the public's ability to order their lives around past decisions.[26]

Stare decisis lends legitimacy to judicial institutions by contributing to the "actual and perceived integrity of the judicial process."[27] By applying the same legal rule to a plaintiff who sues in the precedent case and to a plaintiff who brings a subsequent suit, a court "treat[s] similarly situated individuals in the same way."[28] Doing so increases the perception that the court applies the law evenly and consistently to all, thereby promoting the rule of law.[29] Similarly, the doctrine facilitates consistent and stable results over time, even as the membership of a court changes, which allows the public to perceive that the court's analysis is not swayed by the "vagaries of the political process,"[30] increasing a court's perceived legitimacy. In these ways, stare decisis promotes the overlapping values of stability, predictability, efficiency, the conclusive settlement of legal issues, legitimacy (actual and perceived), the rule of law, and respect for the past.

B. Planned Parenthood v. Casey*: Stare Decisis in Constitutional Cases*

Stare decisis is not an "inexorable command," but a "principle of policy."[31] Although the Court retains flexibility in applying the doctrine in individual cases, it has recognized that it must not uphold or

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[25] *See* Richard A. Epstein, *Beware of Legal Transitions: A Presumptive Vote for the Reliance Interest*, 13 J. CONTEMP. LEGAL ISSUES 69, 71–72 (2003) (arguing that legal transitions may upset reliance interests because individuals and firms incur the costs of transitions from one legal rule to another); *accord* Randy J. Kozel, *Precedent and Reliance*, 62 EMORY L.J. 1459, 1464–65 (2013) (noting that stare decisis reduces "interpretive vacillation" and therefore "gives citizens a firmer basis for planning their affairs").

[26] *See* SCHAUER, *supra* note 15, at 43 ("From the perspective of those who are subject to law's constraints, the gains from marginal improvements in the law are rarely sufficient to outweigh the losses that would come from being unable to rely even on imperfect legal rules and imperfect precedent."); *see also* Emery G. Lee III, *Overruling Rhetoric: The Court's New Approach to Stare Decisis in Constitutional Cases*, 33 U. TOL. L. REV. 581, 583 (2002) ("If actors plan and make decisions relying on prior judicial decisions, then the law must not change too frequently.").

[27] Payne v. Tennessee, 501 U.S. 808, 827 (1991).

[28] Consovoy, *supra* note 8, at 61.

[29] *See id.* at 59 ("The 'rule of law' refers to the concept that judicial decisions are predicated on an established duty to apply the law both evenly and consistently to all that come before the bench."); *see also* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 854 (1992) ("[T]he 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.") (citations omitted).

[30] *See* Lee, *supra* note 24, at 653.

[31] *Payne*, 501 U.S. at 828 (quoting Helvering v. Hallock*,* 309 U.S. 106, 119 (1940)).

overturn precedents arbitrarily.[32] The Court's legitimacy has been said to rest on the public's perception that it objectively implements principles, rather than acting on inconsistent and changing personal inclinations,[33] and so the Court must at least appear to act consistently in determining whether to uphold or overturn its precedents.

Stare decisis carries less weight in constitutional cases than in statutory ones.[34] Because it is difficult to amend the Constitution, an incorrect constitutional ruling combined with strong stare decisis could render the faulty judgment virtually unchangeable.[35] In contrast, when the Court interprets a statute, Congress is free to overrule it by passing a new one.[36] The Court therefore applies stare decisis with less rigidity in the constitutional context.[37]

Despite its weaker status in constitutional cases, stare decisis nevertheless "carries such persuasive force that [the Court has] always required a departure from precedent to be supported by some 'special

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[32] *See* Lawrence v. Texas, 539 U.S. 558, 587 (2003) (Scalia, J., dissenting) ("I do believe that we should be consistent rather than manipulative in invoking [stare decisis]."); Antonin Scalia, *Response*, *in* A MATTER OF INTERPRETATION 139–40 (Amy Gutmann ed., 1997) ("I cannot deny that *stare decisis* affords some opportunity for arbitrariness—though I attempt to constrain my own use of the doctrine by consistent rules . . . .").

[33] *See Payne*, 501 U.S. at 852–53 (Marshall, J., dissenting) ("[T]his Court can legitimately lay claim to compliance with its directives only if the public understands the Court to be implementing 'principles . . . founded in the law rather than in the proclivities of individuals.'") (citations omitted).

[34] In his dissent in *Burnet v. Coronado Oil & Gas Co.*, Justice Brandeis famously stated, "[I]n most matters it is more important that the applicable rule of law be settled than that it be settled right. . . . But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions." 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

[35] *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 954–55 (1992) (Rehnquist, C.J., dissenting) ("Erroneous decisions in such constitutional cases are uniquely durable, because correction through legislative action, save for constitutional amendment, is impossible.").

[36] *See* Lee, *supra* note 26, at 593 ("If the Court errs in interpreting a statute, Congress is always free to correct the Court's error. If the Court errs in interpreting the Constitution, however, 'correction through legislative action is practically impossible.'") (quoting *Coronado Oil*, 285 U.S. at 409 (Brandeis, J., dissenting)).

[37] *Compare* Pearson v. Callahan, 555 U.S. 223, 233 (2009) ("We recognize that 'considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation.'" (quoting Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977))), *and* Neal v. United States, 516 U.S. 284, 295 (1996) ("[W]e give great weight to stare decisis in the area of statutory construction . . . ."), *with* Agostini v. Felton, 521 U.S. 203, 235 (1997) ("[Stare decisis] is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions."). For another explanation of the decreased influence of stare decisis in constitutional cases, see Thomas R. Lee, *supra* note 24, at 704 (noting that the judicial oath is to uphold the Constitution, and not the "gloss" which one's "predecessors have put on it" (quoting South Carolina v. Gathers, 490 U.S. 805, 824–25 (1989) (Scalia, J., dissenting) (citations omitted))).

justification.'"[38] Mere disagreement with the previous decision is not enough; stare decisis requires reasons beyond a mere "present doctrinal disposition to come out differently,"[39] that are "*in addition to* the principled disagreement of members of the Court with the challenged precedent."[40]

Traditionally, considerations of *stare decisis* have weighed most heavily in cases where reliance interests are involved (e.g. property and contract disputes) but have weighed less heavily in cases involving procedural and evidentiary rules.[41] This is because, the "concern for stability in the law is typically understood as particularly relevant in commercial and business settings."[42] Because "contracts or title to property may be premised on a rule established by case law . . . overruling such precedent would undermine vested contract and property rights."[43] Given the extensive planning involved in the business and contracting contexts, a change in the law might be particularly disruptive[44] and could lead to suboptimal levels of investment.[45]

In *Planned Parenthood v. Casey*, the Supreme Court laid out a framework for stare decisis in constitutional cases. In determining whether to uphold a previous rule of decision, the Court set forth four factors: (i) whether a previous decision has "proven intolerable simply in defying practical workability," (ii) "whether the rule is subject to a

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38 Dickerson v. United States, 530 U.S. 428, 443 (2000) (quoting United States v. IBM Corp., 517 U.S. 843, 856 (1996)).

39 *Casey*, 505 U.S. at 864 (1992) (plurality opinion).

40 Lee, *supra* note 26, at 612. This is sometimes referred to as the "'special justification' theory" of stare decisis. *Id.* at 588; *accord* Hubbard v. United States, 514 U.S. 695, 716 (1995) (Scalia, J., concurring) ("Who ignores [stare decisis] must give reasons, and reasons that go beyond mere demonstration that the overruled opinion was wrong (otherwise the doctrine would be no doctrine at all).").

41 Payne v. Tennessee, 501 U.S. 808, 828 (1991) (internal citations omitted).

42 Lee, *supra* note 26, at 617; *see* Lee, *supra* note 24, at 652–53 (noting that *stare decisis* promotes "stability in commercial relationships").

43 Lee, *supra* note 24, at 652–53.

44 *See Casey*, 505 U.S. at 856 (noting that in the commercial context, "advance planning of great precision is most obviously a necessity"). Strongly disagreeing with the primacy of stare decisis in the commercial context, Justice Marshall argued in dissent in *Payne* that, "[*S*]*tare decisis* is in many respects even *more* critical in adjudication involving constitutional liberties than in adjudication involving commercial entitlements . . . because enforcement of the Bill of Rights and the Fourteenth Amendment frequently requires this Court to rein in the forces of democratic politics . . . ." 501 U.S. at 852–53 (Marshall, J., dissenting). He argued that the Court maintains legitimacy "only if the public understands the Court to be implementing principles . . . founded in the law." *Id.* at 853 (internal quotation marks omitted).

45 Stephen Breyer, Making our Democracy Work: A Judge's View 152 (2010) ("Individuals and firms may have invested time, effort, and money based on [a judicial] decision. The more the Court undermines this kind of reliance, the riskier investment becomes. The more the Court engages in a practice that appears to ignore that reliance, the more the practice threatens economic prosperity.").

kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation," (iii) "whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine," and (iv) "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] Applying this framework, the Court upheld the "essential holding of *Roe v. Wade*."[47]

Significantly, the Court analyzed reliance interests.[48] Although the analysis was brief,[49] it embodied an expansive and far-reaching conception of reliance that went far beyond that traditionally employed in the business context,[50] where one party trusts that another will fulfill a promise.[51] Anticipating that this would be controversial, the Court wrote, "it is no cause for surprise that some would find no reliance worthy of consideration in support of *Roe*."[52] In dissent, Chief Justice Rehnquist criticized the Court for basing its reliance analysis "solely on generalized assertions about the national psyche,"[53] and was not convinced that there were any reliance interests at stake. Given this strong disagreement, it is necessary to lay some groundwork to understand whether and how *Casey* represented an expansion of the scope of reliance interests for stare decisis.

C. Types of Reliance

Noting that the Court's reliance analysis "tends to fall back on abstract pronouncements about the importance of settled expectations,"[54] Randy Kozel sets forth a helpful framework that divides reli-

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[46] *Casey*, 505 U.S. at 854–55.

[47] *Id.* at 846. In *Roe v. Wade*, the Court held that a woman's decision to terminate her pregnancy is protected against state interference as a substantive component of the Due Process Clause of the Fourteenth Amendment. 410 U.S. 113, 164 (1973). It is discussed in Part II.A.

[48] Justices O'Connor, Kennedy, and Souter authored the joint opinion. *Casey*, 505 U.S. at 833. The stare decisis analysis, which is contained in Part III of the opinion, received votes from a majority of the Court. *See id.*

[49] The joint opinion devoted Section III.A.2, just under two pages, to analysis of reliance interests. *See id.* at 855–56.

[50] *See id.* at 855 ("[T]he classic case for weighing reliance heavily in favor of following the earlier rule occurs in the commercial context.").

[51] *See* BLACK'S LAW DICTIONARY 1481 (10th ed. 2014) (defining reliance as "[d]ependence or trust by a person, esp. when combined with action based on that dependence or trust").

[52] *Casey*, 505 U.S. at 855–56.

[53] *Id.* at 957 (Rehnquist, C.J., dissenting).

[54] Kozel, *supra* note 4, at 415.

ance interests into four categories: specific, governmental, doctrinal, and societal.[55]

Specific reliance is "[r]eliance upon a precedent by a discrete group of private citizens or entities . . . ."[56] It exists when individuals take actions or order their affairs in dependence on the rule set out in a precedent. A classic example is *Quill Corp. v. North Dakota*, where the Court upheld a tax rule—exempting out-of-state mail-order vendors from state taxation—upon which these vendors had relied in structuring their business operations.[57] Notably, as Kozel points out, the affected mail-order sellers had taken "identifiable steps in reaction to the issuance of a precedent" and took "direct action, such as spending money or structuring business operations," making a finding of reliance particularly appropriate.[58]

Governmental reliance is reliance by Congress, the executive branch, or another governmental unit.[59] When passing legislation, for instance, Congress may rely on a Supreme Court precedent as setting the background rules against which it legislates. For example, in *Randall v. Sorrell*, the Court refused to overrule *Buckley v. Valeo*,[60] in part because *Buckley* had "promoted considerable reliance" among legislators, who depended upon it while drafting campaign finance statutes.[61] When a governmental unit acts in reliance upon a precedent, there is governmental reliance on that precedent.[62]

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[55] *Id.* at 452 ("The universe of reliance interests can be usefully (if roughly) divided into four categories: reliance by specific individuals, groups, and organizations; reliance by governments; reliance by courts; and reliance by society at large."). Kozel is critical of the Court's brief references to reliance without specifying what type of reliance is at stake. *Id.* ("The extent of reliance on a Supreme Court precedent is too important, and too complex, to be resolved in such an abbreviated fashion.").

[56] *Id.* at 453.

[57] 504 U.S. 298 (1992). Under the standing precedent, so long as vendors limited their contacts with a state to the shipment of goods to in-state customers, they were not subject to tax-collection obligations. Nat'l Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 753 (1967). In *Quill*, the Court upheld this rule in part because it had "engendered substantial reliance and [had] become part of the basic framework of a sizeable industry." *Quill*, 504 U.S. at 317.

[58] *See* Kozel, *supra* note 25, at 1489. *See id.* at 1488–89 (discussing the reliance interests in *Bellas Hess*).

[59] *See* Kozel, *supra* note 4, at 454.

[60] 424 U.S. 1 (1976) (per curiam).

[61] Randall v. Sorrell, 548 U.S. 230, 244 (2006). In *Buckley*, the Court upheld contribution limitations, but struck down expenditure limitations imposed by the Federal Election Campaign Act of 1971 (FECA), Pub. L. No. 92-225, 86 Stat. 3 (codified as amended at 52 U.S.C. § 30101 (2012)). *Buckley*, 424 U.S. at 23–24. In *Sorrell*, the Court stated, "Congress and state legislatures have used *Buckley* when drafting campaign finance laws" and that overturning it would "undermine this reliance on our settled precedent." *Sorrell*, 548 U.S. at 244.

[62] In a more recent campaign finance case, *Citizens United v. FEC*, 558 U.S. 310 (2010), the Court struck down a different First Amendment precedent, *Austin v. Michigan State*

Doctrinal reliance is reliance by the judiciary itself that arises when many cases depend upon a foundational precedent.[63] For instance, if the Court were to decide that the Bill of Rights should no longer be incorporated via the Fourteenth Amendment, numerous Supreme Court precedents would potentially crumble.[64] The judiciary makes decisions in reliance on the accepted jurisprudential framework, and has a reliance interest in not having that framework, and their decisions based on it, upended.

Societal reliance is the most difficult form of reliance to pin down. Kozel characterizes it as "unrelated to specific behaviors" and claims that it arises from "the effect of the precedent on shaping societal perceptions about our country, our government, and our rights."[65] It has also been characterized as "how much the public or culture-at-large has come to rely on a particular precedent."[66] Noting that societal reliance "can be a complex and daunting concept," Kozel argues that "it is a necessary component of any *stare decisis* jurisprudence that aims to be complete."[67] With this framework in mind, we may better analyze the reliance interests at stake in *Casey*.

II
The Expansion of Societal Reliance

In this Part, I apply Kozel's categories of reliance to Supreme Court cases. I explain that *Casey* ushered in an era in which broad notions of societal reliance play a meaningful role in the Court's stare decisis analysis, and that this trend continued in *Dickerson v. United States*. I then analyze sharp disagreement within the Court and among commentators about whether this is a positive or negative development. I argue that the expanded role for societal reliance is undesirable because it leads to increased uncertainty and unpredictability, and that these problems cannot be eliminated without undermining the Court's legitimacy.

Chamber of Commerce, 494 U.S. 652, 668 (1990). It stated, "[l]egislatures may have enacted bans on corporate expenditures believing that those bans were constitutional. This is not a compelling interest for *stare decisis*." *Citizens United*, 558 U.S. at 365. While it is possible to read this as discounting all governmental reliance interests, Kozel points out that the more plausible reading is that Congress's reliance, in this particular case, was insufficient to save *Austin*. *See* Kozel, *supra* note 4, at 457–58.

63 *See* Kozel, *supra* note 4, at 459.

64 *Id.*

65 *Id.* at 460.

66 Tom Hardy, Note, *Has Mighty* Casey *Struck Out?: Societal Reliance and the Supreme Court's Modern Stare Decisis Analysis*, 34 Hastings Const. L.Q. 591, 592 (2006–2007).

67 Kozel, *supra* note 4, at 460.

A. Casey*,* Dickerson*, and an Expanded Conception of Reliance*

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court considered whether a Pennsylvania statute which imposed restrictions on access to abortion ran afoul of the "central holding" in *Roe v. Wade*—under which a woman's decision to terminate her pregnancy was protected against state interference as a substantive component of the Due Process Clause of the Fourteenth Amendment.[68] While the dissent advocated a reexamination and overturning of *Roe*, the controlling joint opinion cautioned that any substantive disagreements with *Roe* were outweighed by stare decisis.[69] The joint opinion laid out the four-part framework discussed above and concluded that none of the non-reliance factors supported overturning *Roe*.[70]

In its analysis of reliance interests, the Court first noted that, at least according to most indications, traditional conceptions of reliance were lacking or minimal because "[a]bortion is customarily chosen as an unplanned response to the consequence of unplanned activity."[71] Even assuming some reliance interest, the joint opinion noted that many would deem it de minimis because "reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions."[72] In other words, as soon as *Roe* was overturned, people would be on notice and could change their sexual

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[68] *See* 505 U.S. 833, 860–61 (1992). The joint opinion articulates three components that make up "*Roe*'s essential holding": First, "a recognition of the right of a woman to choose to have an abortion before viability," second, "a confirmation of the State's power to restrict abortions after fetal viability," and third, "the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus." *Id.* at 846. *See also id.* at 860 (articulating *Roe*'s "central holding, that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions").

[69] *See Casey*, 505 U.S. at 853 ("[R]eservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*.").

[70] Although there had been considerable public opposition to *Roe* and the framework it set forth necessitated difficult judicial determinations regarding the constitutionality of state laws, it had not proven unworkable. *See id.* at 855. Similarly, principles of law had not developed since *Roe* that would render it abandoned doctrine. *See id.* at 860. Finally, there had been some factual change since *Roe*. Notably, the point during a pregnancy at which a fetus becomes viable was now earlier due to advances in medical technology. *See id.* This, however, did not change the "central holding, that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions." *Id.*

[71] *Id.* at 856.

[72] *Id.*

activity accordingly. Once aware of the overruling, they could hardly claim reliance on *Roe* for subsequent unwanted pregnancies.[73]

The joint opinion, however, rejected this simple framework: "To eliminate the issue of reliance that easily . . . one would need to limit cognizable reliance to specific instances of sexual activity."[74] The Court viewed this conception as far too narrow and offered a sweeping review of the changing role of women in American society:

> [F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed.[75]

Commentators have interpreted the language in *Casey* as contemplating reliance interests that exist independent of any actions taken in reliance upon a precedent.[76] They point out that the Court's reasoning rests on broad notions of society's conception of itself and its values.[77] Under *Casey*, when a significant number of people "order their thinking and living"[78] in a certain way, they have a reliance interest in not having a judicial decision that validates that thinking overturned. Mark Tushnet explains the reliance interests in *Casey* as arising from the idea that "*Roe* had become so embedded in the nation's culture that overruling it would disrupt understandings not about abortion alone, but about the role of women in society."[79] He deems this a "cultural theory of stare decisis" because it is a view of

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[73] In his later dissent in *Lawrence v. Texas*, Scalia took this view. 539 U.S. 558, 592 (2002) (Scalia, J., dissenting) (noting that had *Roe* been overturned in *Casey*, the most significant reliance interests would have expired within six months).

[74] *Casey*, 505 U.S. at 856.

[75] *Id.* (citations omitted).

[76] *See, e.g.*, Lee, *supra* note 26, at 606 n.169 (describing *Casey*'s reliance analysis as "a rather wide-ranging framework for inquiry into reliance interests that emphasizes 'personal dignity and autonomy'" (quoting *Casey*, 505 U.S. at 851)).

[77] *See* Consovoy, *supra* note 8, at 77 ("[T]he [*Casey*] joint opinion . . . expanded the reliance inquiry into a consideration of not only specific reliance, but a generalized societal reliance as well. It is this expansion that was at the heart of the dispute in *Casey*."). *See also* Lawrence v. Texas, 539 U.S. at 591 (Scalia, J., dissenting) ("*Casey*, however, chose to base its *stare decisis* determination on a different 'sort' of reliance . . . .").

[78] *Casey*, 505 U.S. at 856.

[79] MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER 91–92 (2003).

the doctrine under which cultural views that "prevail[ ] outside the courts" may preclude the overturning of precedents.[80]

Dissenting, Chief Justice Rehnquist characterized the Court's approach as a "newly minted variation on *stare decisis*," and contended that applying the four factors in the joint opinion, *Roe* should be overturned.[81] Quite simply, Rehnquist denied that the Court had articulated any reliance interest: The joint opinion's view that overturning *Roe* would undercut two decades of economic and social developments was "undeveloped and totally conclusory"[82] and "any traditional notion of reliance" was not applicable.[83] The Chief Justice concluded:

> [H]aving failed to put forth any evidence to prove any true reliance, the joint opinion's argument is based solely on generalized assertions about the national psyche, on a belief that the people of this country have grown accustomed to the *Roe* decision over the last 19 years and have "ordered their thinking and living around" it.[84]

Chief Justice Rehnquist believed that "reliance is truly at issue" only when "judicial decisions . . . have formed the basis for private decisions," and was unconvinced that there could be reliance on a precedent when no private decisions have been made based upon it (or similarly, where the parties who have made such decisions can adjust their behavior immediately and without cost).[85]

The disagreement over reliance in *Casey* can be understood in terms of Kozel's framework. The joint opinion employed societal reliance to uphold *Roe*. Even absent specific actions taken by members of the public, *Roe* impacted societal perceptions about our country, our government, and our rights. The greater role of women in professional and public life had been incorporated into American thinking, and on this basis, there was societal reliance on *Roe*.[86] In contrast, the Chief Justice rejected societal reliance as a concept, and concluded that there was no specific reliance on *Roe* because there did not appear to be any action taken in reliance upon it. If *Roe* were overturned, people could immediately adapt their sexual behavior to account for the change. Those who disagreed with the overruling on the merits would be disappointed, but this would not constitute a reliance

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[80] *Id.* at 92.

[81] *Casey*, 505 U.S. at 944 (Rehnquist, C.J., dissenting).

[82] *Id.* at 956.

[83] *Id.*

[84] *Id.* at 957.

[85] *See id.* at 956.

[86] An astute reader may notice that the joint opinion mentions that people have "made choices" based on *Roe*. *Id.* at 856. For an argument that this is best understood as specific reliance, see Part III.A.

interest. Because the joint opinion and the Rehnquist dissent contemplated different notions of reliance, they came to opposite conclusions.

The Court continued to apply an expansive notion of societal reliance in *Dickerson v. United States*.[87] In *Dickerson*, the Court considered whether to overrule *Miranda v. Arizona*,[88] which held that certain warnings, commonly known as *Miranda* warnings, must be given before a criminal suspect's custodial interrogation can be admitted as evidence.[89] Two years after *Miranda*, Congress enacted 18 U.S.C. § 3501, which, contrary to *Miranda*, set forth a rule under which such statements would be admissible so long as they were voluntary.[90] The Court concluded that because *Miranda* was a constitutional holding, it could not be overruled by an act of Congress and then declined to overrule *Miranda* of its own volition.[91]

Chief Justice Rehnquist, this time writing for a majority, stated that whether the Justices agreed or disagreed with *Miranda* as a matter of first impression, "principles of *stare decisis* weigh heavily against overruling it now."[92] The Court's analysis implicated three of the *Casey* factors,[93] reliance featuring prominently among them. Strikingly, Chief Justice Rehnquist adopted the broad societal view of reliance he so strongly opposed in *Casey*. He wrote, "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our *national culture*."[94] This analysis appears to accept that societal and cultural notions play a significant

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87 530 U.S. 428 (2000).

88 384 U.S. 436 (1966).

89 530 U.S. at 431–32. These *Miranda* Rights are that, "a suspect 'has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.'" *Id.* at 435 (quoting *Miranda*, 384 U.S. at 479).

90 *See id.* at 435 ("In any criminal prosecution brought by the United States or by the District of Columbia, a confession . . . shall be admissible in evidence if it is voluntarily given.").

91 *Id.* at 432, 444.

92 *Id.* at 443.

93 *See* Lee, *supra* note 26, at 614 ("*Dickerson* briefly discusses three of the four considerations addressed in the *Casey* opinion.").

94 *Dickerson*, 530 U.S. at 443 (emphasis added). The "clear suggestion . . . is that reliance weighs against overruling a precedent to the extent that it has become 'part of our national culture.'" Emery G. Lee, *supra* note 26, at 614. It may appear to some readers that Chief Justice Rehnquist could be referring to governmental reliance by police departments, and not to societal reliance. To the contrary, the Court subsequently clarified that the *Dickerson* Court referred not to reliance interests of police departments, but to societal reliance on *Miranda*. *See* Arizona v. Gant, 556 U.S. 332, 349–50 (2009); *infra* Part III.B. (explaining why other types of reliance are not sufficient to support the outcome of *Dickerson*).

role in forming reliance interests for stare decisis.[95] Rehnquist then considered two other *Casey* factors and concluded that they counted in favor of upholding *Miranda*.[96] Given his criticism of the *Casey* joint opinion for resting on the "vagaries of public opinion,"[97] it is surprising that public perceptions and cultural notions featured prominently in his analysis.

Applying Kozel's framework, the Court in *Dickerson* appealed to societal reliance. As a longstanding police practice, *Miranda* warnings had entered public consciousness and become part of how people viewed society in general. Overruling *Miranda*, then, would conflict with people's conceptions of themselves and of society.[98] Specific reliance seems to be lacking, because if *Miranda* were overruled, individuals would be able to immediately adjust at no cost; moving forward, they would know that anything they stated voluntarily to the police could be used against them regardless of whether officers read them their rights.[99] Governmental reliance by police departments is also lacking because overruling *Miranda* would not preclude police departments from continuing to read the warnings if they chose, thus making additional training unnecessary.[100]

Taken together, *Casey* and *Dickerson* represent the Court's willingness to invoke a broad conception of reliance interests. Given the sweeping language in both opinions, the Court's analysis fits nicely within the category of societal reliance. In *Casey*, the fact that many had ordered their thinking around the availability of abortion protected by *Roe*, and in *Dickerson*, the fact that *Miranda* warnings had

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[95] Lee, *supra* note 26, at 614 ("[R]egarding the existence of reliance interests, the *Dickerson* opinion appears to use a form of *Casey*'s broad-ranging inquiry into reliance on civil-liberties decisions . . . .").

[96] *See Dickerson*, 530 U.S. at 443–44 (finding the doctrinal underpinnings of *Miranda* had not eroded and that the *Miranda* rule had not become unworkable). *See also* Lee, *supra* note 26, at 614.

[97] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 963 (1992) (Rehnquist, C.J., dissenting).

[98] *See* Lee, *supra* note 26, at 615 ("The 'national culture' may be enough . . . to explain the majority's failure to find a 'special justification' for overruling *Miranda*.").

[99] William Consovoy points out another reason why there can be no specific reliance in *Miranda*. He notes that once people are aware of the *Miranda* rights disclaimer, they become aware of the Fifth Amendment rights it protects. It is therefore difficult to imagine a person who both relies on the existence of a *Miranda* warning while remaining ignorant of the rights contained within that warning. Either the person was unaware of these rights, and therefore could not have acted in reliance upon them, or she was aware of her rights, in which case she could not claim to have relied on the warnings to explain her rights. *See* Consovoy, *supra* note 8, at 94–95.

[100] Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1, 26 (2010). *See id.* ("When it comes to overruling *Miranda*, reliance is of no moment.").

been ingrained as part of our national culture represented societal reliance interests that counted in favor of upholding *Roe* and *Miranda*.

B. Is the Expanded Role for Societal Reliance Desirable?

Some commentators have criticized the increased role for societal reliance and have questioned the role of reliance more broadly.[101] William Consovoy finds the use of "generalized societal reliance" in *Casey* problematic because of its indeterminacy, and accuses the Court of results-oriented decisionmaking, whereby it overturns decisions so long as it disagrees with the precedent and believes that overturning will not provoke severe public backlash.[102] Mark Tushnet criticizes societal reliance because he believes that cultural understandings come to embrace precedent whether correctly decided or not, and that the political branches are unlikely to contravene these understandings.[103] He argues that the Court should take a leading role in overturning precedents and opposes a strong notion of societal reliance because it may prevent the achievement of a new and better constitutional order.[104]

Others believe that there should be a role for societal reliance in stare decisis doctrine. Emery Lee argues that the Court's contemporary overruling rhetoric—under which it defers to a past interpretation of the Constitution rather than overruling it—is a reasonable response to a political environment in which there is a risk that overrulings will be perceived as politically motivated.[105] More broadly, others have embraced the idea that public opinion influences the Supreme Court, shaping the meaning of the Constitution.[106]

In this section, I argue that the broad conception of societal reliance announced in *Casey* and *Dickerson* is a negative development. First, it is different in kind from the other forms of reliance in that it cannot be measured or concretely weighed by the judiciary. Because

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[101] *See, e.g.*, Consovoy, *supra* note 8, at 63 ("Reliance . . . is easily manipulated and amorphous at best.").

[102] *Id.* at 102. He therefore calls for the wholesale abandonment of stare decisis in constitutional cases. *Id.* at 104. Professor Gary Lawson comes to the same conclusion on different grounds; he argues that the Court must overturn previous unconstitutional rulings as part of its duty, under *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), to "say what the law is." Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 27–28 (1994). For a review of related arguments, see Emery G. Lee, *supra* note 26, at 584–88.

[103] Hardy, *supra* note 66, at 601.

[104] TUSHNET, *supra* note 79, at 93.

[105] Lee, *supra* note 26, at 619.

[106] *See infra* note 128 (considering the views of commentators who accept and support the idea that public opinion influences outcomes in constitutional cases).

societal notions of our country, our government, and our rights are open for debate, and change over time, allowing a role for societal reliance undermines the values of predictability, stability, and clarity that underlie stare decisis. If societal reliance amounts to nothing more than the Justices' evaluations of whether a precedent has become part of our national culture, outcomes will be driven by the proclivities of individual Justices, and not by articulable judicial standards.

Second, we cannot escape this problem by measuring societal reliance through public opinion polls. Defenders of societal reliance might look to public opinion as an objective measurement indicative of the public's reliance upon a precedent. It seems plausible, after all, that societal perceptions about our country, our government, and our rights could at least be indirectly measured via public opinion. On this account, polls would provide an objective basis for a finding of societal reliance, thereby restoring predictability and reducing the role of the Justices' proclivities. But this would achieve precisely what the Court claims it must not do: It allows public opinion to determine whether a precedent should be upheld or overruled, thereby undermining the account of the Court's legitimacy set out in *Casey*.[107]

Third, the other three *Casey* factors already function in much the same way as societal reliance, with one key difference: While the other factors count towards overruling a precedent, reliance interests count towards keeping the precedent in place. An expansive notion of societal reliance therefore allows the Court to uphold precedents in a way that appears legitimate, but which, in fact, affords it unbounded discretion.

1. Societal Reliance Cannot Be Measured or Concretely Weighed by the Judiciary

Societal reliance does not lend itself to measurement or concrete judicial weighing, which reduces the predictability and certainty of outcomes. This is a direct consequence of the fact that societal reliance is not only different in scope from the other forms of reliance, but is different in kind. Whereas reliance interests can be weighed against one another in the context of specific, governmental, and doctrinal reliance, this weighing cannot take place for societal reliance. Put otherwise, societal reliance is not merely the aggregation of the specific reliance of each individual in society. It is something more.

The problem is illuminated when one considers how a Justice might go about balancing societal reliance interests with predictability,

[107] 505 U.S. 833, 865 (2002).

rigor, and consistency.[108] Ours is a pluralistic society with many overlapping yet distinct conceptions of the proper way to conceive of ourselves.[109] Given this reality, it is difficult to see how the Court can even begin to weigh these interests against one another, let alone specify what these reliance interests are. The Court's refusal to "delve[ ] into the reliance interests at stake,"[110] at least in the context of societal reliance, is unsurprising because such a delving is not possible without spelling out assumptions concerning society and its values. This is, in part, why the Court has relied on abstract pronouncements, while admitting, for instance, that "the effect of [societal] reliance on *Roe* cannot be exactly measured."[111] Kozel admits that "evaluating diffuse societal reliance interests can be a difficult and uncertain enterprise," but believes that they should not be ignored.[112] While additional rigor in the analysis of reliance interests is needed, it is not possible for the Court to increase its rigor with respect to societal reliance.

In contrast, the other types of reliance lend themselves to comparative analysis. Reliance, in these contexts, is based on at least two findings. First, the Court identifies specific entities—individuals, groups, the courts, or the government—who have taken identifiable steps in reliance on a precedent. Second, the Court weighs the costs of repudiating the precedent to those entities. These two steps are integral to the first three types of reliance.

Finding specific reliance requires the Court to consider which individuals, corporations, or other entities have taken steps in reliance on a precedent.[113] Once it has identified the relevant entities, it considers the magnitude of the inequity that would result in the event of an overruling by considering the costs that would befall these entities. It is essential that the Court considers the impact of the overturning of

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[108] *See* Kozel, *supra* note 4, at 452 ("[W]e need a new framework for conducting rigorous, systematic, and consistent analysis of reliance implications.")

[109] *See* UNESCO, Universal Declaration on Cultural Diversity Res. 25, Doc. 31C (Nov. 2, 2001), http://unesdoc.unesco.org/images/0012/001271/127160m.pdf (noting the emergence of "increasingly diverse societies" with "plural, varied and dynamic cultural identities").

[110] Kozel, *supra* note 4, at 451–52.

[111] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 856 (1992).

[112] Kozel, *supra* note 4, at 462. *See Casey*, 505 U.S. at 856 (finding that despite the Court's inability to measure reliance interests, the "cost of overruling *Roe* for people who have ordered their thinking and living around that case" must be taken into account).

[113] *See* Kozel, *supra* note 4, at 453 ("The most evident way that a Supreme Court precedent engenders [specific] reliance is by encouraging individuals or groups to *behave* in a certain manner on the understanding that the precedent is, and will remain, the law of the land.") (emphasis added).

a precedent *on those who have taken steps* in reliance upon it.[114] Thus, the costs of repudiation are not free-floating, but are directly tied to those identified as having taken steps in reliance upon the precedent.[115] While there may be disagreement about how best to calculate these costs,[116] at a bare minimum, the costs of tangible and immediate harms to those who reasonably relied must be taken into account.

In evaluating governmental reliance, the Court identifies governmental bodies that took actions, or decided not to take actions, in reliance on a precedent. These may include Congress, the executive branch, government agencies, and other governmental units. In identifying steps taken in reliance, courts may look to official acts such as statutes passed and executive orders issued, or to less formal manifestations of governmental policy or guidance. To measure the value of these reliance interests, a court may estimate the energy and resources necessary to find "new ways to achieve legislative goals that previously were thought to be accomplished" prior to the overruling.[117]

In weighing doctrinal reliance, the Court considers the decisions the judiciary has handed down in reliance upon the doctrinal order established by a precedent, which would be jeopardized if a key precedent that underlies them is overturned. After identifying the decisions that would be impacted, the Court determines "how much judicial work would need to be redone and what consequences would occur in the interim while lower courts were reacting to the overturning of an important precedent."[118]

As the foregoing makes clear, in conducting this inquiry for specific, governmental, and doctrinal reliance, the Court first identifies the entities—individuals, private organizations, Congress, the executive, other governmental units, and the judiciary—that have taken identifiable steps in reliance upon a precedent and, second, estimates the costs of the changes that would be necessary for those entities to transition from operating under the old precedent to a new legal regime.

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114 *See* Thomas R. Lee, *Stare Decisis in Economic Perspective: An Economic Analysis of the Supreme Court's Doctrine of Precedent*, 78 N.C. L. REV. 643, 664 (2000) ("If no decisions are made in reliance on a rule, then there are no adjustment costs that flow from its replacement.").

115 Recall, for example, that the mail-order sellers in *Quill* took steps in structuring their business around a tax precedent, and therefore, specifically relied upon that precedent. Quill Corp. v. North Dakota, 504 U.S. 298 (1992). *See supra* Part I.C. (discussing the facts of *Quill*).

116 *See generally* Kozel, *Precedent and Reliance*, *supra* note 25 (arguing that reliance interests, typically conceived as backward-looking expectations, should be reconceptualized as the forward-looking disruptive costs of adjudicative change).

117 Kozel, *supra* note 4, at 455.

118 *Id.* at 460.

This weighing of reliance interests is not possible with respect to societal reliance. The relevant entity in the context of societal reliance is society as a whole. Society as an entity does not take identifiable steps in reliance upon precedents. It is an aggregation of individuals and institutions that each take their own actions, some of which may be taken in reliance upon precedent, while others are not, or are even taken in the hopes that a precedent will be overturned. Other than putting its own gloss on perceived societal trends, the Court cannot conduct the first step of its inquiry. It cannot identify steps taken at the societal level.

Because society does not take identifiable steps in reliance on precedents, it is exceedingly difficult to measure its reliance interests. The costs to society of adopting an understanding are often unidentifiable or speculative. What counts as an understanding of society? Was that understanding based on the precedent, or did it exist for other reasons, such as preexisting religious, moral, or ethical beliefs? There are no standards for determining the answers to these questions; we are left solely with the Justices' conclusions. Unlike the concrete explication and measurement of the other types of reliance, the analysis is not grounded in costs to certain entities, but is instead a subjective estimate of the costs to society which arise from changing societal thinking. It is no wonder the Justices disagree when making this determination.

Because the Court does not invoke the two-step inquiry in weighing societal reliance, it provides nothing that would allow one to predict what might engender societal reliance in a future case. Although the majorities in *Casey* and *Dickerson* found that *Roe* and *Miranda* had attained cultural status, those who wish to predict subsequent cases are free to guess whether they will make similar findings in the future. It is simply uncertain whether in the eyes of the Justices any particular precedent has become part of the nation's culture. The result is unclear and arbitrary outcomes that cannot be easily explained or foreseen.

The problem is illustrated by *Lawrence v. Texas*, in which the Court overruled *Bowers v. Hardwick*.[119] In *Bowers*, the Court held that consensual homosexual sex was not protected as a liberty right under the Due Process clause, finding that prohibitions on sodomy had ancient roots.[120] In *Lawrence*, the Court ran through some of the *Casey* factors, finding that they counted in favor of overruling

[119] Lawrence v. Texas, 539 U.S. 558, 573–74 (2003).

[120] Bowers v. Hardwick, 478 U.S. 191–92 (1985).

Bowers.[121] Crucially, the Court stated, "[T]here has been no . . . societal reliance on *Bowers* of the sort that could counsel against overturning its holding once there are compelling reasons to do so."[122] In dissent, Justice Scalia challenged this assertion, and argued that "[C]ountless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority's belief that certain sexual behavior is 'immoral and unacceptable' constitutes a rational basis for regulation."[123]

Translated into Kozel's framework, Justice Scalia identified several forms of reliance. First, he noted that judges had doctrinal reliance in *Bowers*, which validated laws based on moral beliefs; once overturned, Scalia warned, these morals laws would be called into question.[124] To the extent that judges would need to create new doctrines to replace the displaced ones, this could be characterized as a doctrinal reliance cost. Similarly, legislators who passed these laws on the assumption that *Bowers* properly held that morals legislation was constitutional can be said to have acted in governmental reliance on *Bowers*. To the extent that there is an alternative constitutional basis for these laws, the costs to legislatures of passing replacement statutes and to judges who might develop replacement jurisprudence would count towards the reliance interests on the precedent.

Crucially, Justice Scalia invoked societal reliance when he claimed that there would be a "massive disruption of the current social order" upon overturning *Bowers*.[125] Scalia seemed to believe that as a result, the fabric of society would change. While many would disagree that his vision represents what our society should aspire to be, it is plausible that for many, morals legislation such as that at stake

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[121] *See* Hardy, *supra* note 66, at 599 (noting that the Court's analysis in *Lawrence* did not specifically set out the *Casey* factors, but implicitly relied upon them in its analysis). The *Lawrence* Court found that principles of law had developed since *Bowers*; *Casey* had recognized a right to personal autonomy and privacy in intimate matters, *Lawrence*, 539 U.S. at 573–74, and *Romer v. Evans*, 517 U.S. 620, 624, 635–36 (1996), had struck down an amendment to the Colorado Constitution, which denied gays, lesbians, and bisexuals protected status under antidiscrimination statutes, as a violation of the Equal Protection Clause. *Lawrence*, 539 U.S. at 573–74. The Court found that these decisions had eroded the foundations of *Bowers*. *Id.* at 576. In addition, facts had changed since *Bowers*, because over time, fewer and fewer states prohibited and enforced laws against homosexual acts. *Id.* at 573 ("The 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct.").

[122] *Id.* at 577.

[123] *Lawrence*, 539 U.S. at 589 (Scalia, J., dissenting).

[124] *See id.* at 590 ("State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*'[s] validation of laws based on moral choices.").

[125] *Id.* at 591.

in *Bowers* and *Lawrence* had shaped their conceptions of the country, the government, and rights. The fact that some may agree and others may disagree is precisely the point. Given that notions of society are subjective and mutable, it is exceedingly difficult to explain objectively why societal reliance should count towards upholding *Roe* and *Miranda* but not towards upholding *Bowers*.[126]

Because there is no objective or predictable way to determine which norms the public—in reality, the Court—believe are important enough to be crucial to our societal identity, and because societal reliance is not susceptible to measurement or weighing, societal reliance adds to the uncertainty and unpredictability of stare decisis analysis. The lack of articulable judicial standards allows the Justices to uphold precedents based on their subjective impressions of what our society ought to be in some cases, while freely overturning others.

2. Societal Reliance as Public Opinion

One way for the Court to fill out the concept of societal reliance is to use public opinion as a proxy; on this view, public opinion polls could serve as a measure of the degree to which society has come to rely on a rule articulated in a precedent.[127] It makes sense, after all, to measure whether members of society have come to alter their thinking and perceptions around a precedent by measuring trends in societal thinking. Because public opinion can be measured numerically, this inquiry is objective; it might thereby eliminate the uncertainty of outcomes and reduce the influence of proclivities of the Justices. But doing so would directly undermine the *Casey* joint opinion's account of the Court's legitimacy.

Affording weight to societal reliance, measured as public opinion, establishes a system in which the Court derives legitimacy not from interpreting the Constitution based on its own lights and its precedent, but instead by adopting the interpretation the public supports. This is directly contrary to the joint opinion's and commentators' proclama-

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[126] *See* Drew C. Ensign, *The Impact of Liberty on Stare Decisis: The Rehnquist Court from* Casey *to* Lawrence, 81 N.Y.U. L. REV. 1137, 1138 (2006) (pointing out that the Court's stare decisis jurisprudence is difficult to explain under its articulated standard).

[127] There are many difficulties in determining how to conduct a public opinion poll that would measure societal reliance. One is that public opinion polls measure popularity, which is not necessarily indicative of reliance; a decision may have popular support, but may not, in any sense, have shaped "societal perceptions about our country, our government, and our rights." *See supra* note 65 and accompanying text. A more appropriate public opinion poll would ask more targeted questions such as (1) whether a precedent has become part of our national culture or (2) whether a hypothetical overruling of a given precedent would be a legitimate judicial act. It is not clear that any set of questions in a public opinion poll could ever directly capture societal reliance, but for the purposes of this analysis, I will assume that it can be done.

tions that the Court derives legitimacy in precisely the opposite fashion: that first it makes decisions on the basis of objective legal criteria, and second, the public comes to accept its reasoning. So long as the Court wishes to maintain that political tides do not dictate its decisions, it should abandon societal reliance.[128]

The *Casey* joint opinion engages in an extensive discussion of the sources of the Court's legitimacy, stresses that it objectively interprets the law, and notes that it is essential that the public perceives it as objective, suggesting that its legitimacy lies in public perception as much as substance.[129] The Court makes clear that its decisions must be understood not as political compromises, but as "grounded truly in principle."[130] It is therefore essential that the public perceives that the Court engages in objective, principled legal analysis that is not impacted by political whims.[131] If the public perceives changes as a

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[128] Despite the distinction drawn in *Casey* between legal principle and political considerations, some have argued strongly that public opinion influences the Supreme Court and have defended this as desirable. Barry Friedman argues that the public and their representatives exert pressure on the Court, making it accountable to the popular will and that therefore, constitutional meaning emerges from a dialogue between the courts and the American people. *See* BARRY FRIEDMAN, THE WILL OF THE PEOPLE 369–72, 381–85 (2009); *accord* Cass R. Sunstein, *The Supreme Court Follows Public Opinion*, *in* LEGAL CHANGE: LESSONS FROM AMERICA'S SOCIAL MOVEMENTS (Jennifer Weiss-Wolf & Jeanine Plant-Chirlin eds., 2015) (arguing that the Court's understanding of the Constitution is influenced by emerging moral consensus, especially when considering fundamental rights). An examination of the desirability of the influence public opinion has upon the Supreme Court is beyond the scope of this Note. It is enough to state that the Court's legitimacy, as articulated in *Casey*, is severely undermined if the Court's decisions are caused by changes in political winds. *See infra* notes 129–34 and accompanying text.

[129] *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 865 (1992) (explaining that in order to understand why overruling *Roe* would "seriously weaken the Court's capacity to exercise the judicial power . . . . [I]t is necessary to understand the source of this Court's authority, the conditions necessary for its preservation, and its relationship to the country's understanding of itself as a constitutional Republic."). The Court goes on to explain that its legitimacy is a "product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands." *Id.*

[130] *See id.* at 865–66. ("The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, . . . not as compromises with social and political pressures having . . . no bearing on the principled choices that the Court is obliged to make.").

[131] "[T]he 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*." *Id.* at 866 (emphasis added). "The Court must take care to speak and act in ways that *allow people to accept its decisions* . . . as grounded truly in principle, not as compromises with social and political pressures . . . ." *Id.* at 865 (emphasis added); *see also* Emery G. Lee, *supra* note 26, at 608 (noting that the Court must not merely give principled explanations for its rulings, but must "provide *sufficiently plausible* principled justifications so that the Nation can accept them as principled"). This account comports with classic notions of the Court's legitimacy as resting in the application of principle rather than other, illegitimate factors. As Emery Lee has argued, "In a democratic political system with a

result of a change in membership of the Court,[132] or in order to bow to the popular will,[133] the Court loses legitimacy. Thus, there is a crucial distinction between political pressures, which have "no bearing on the principled choices that the Court is obliged to make" and the "legally principled" decisions the Court makes which depend on the unchanging application of objective legal principles.[134]

The joint opinion's arguments about legitimacy are at least to some extent self-defeating: By admitting that public perceptions of the Court's legitimacy impact its decision to uphold or overturn precedents, the Court reveals that it does not conduct detached legal analysis separate from political considerations, but is, in fact, influenced by public perceptions. This is made apparent when the Court details two circumstances which demand a heightened standard of stare decisis.[135] The first takes place when "frequent overruling would overtax *the country's belief* in the Court's good faith."[136] The Court postulates that every time a decision is overturned, the public perceives, correctly, that the prior decision was wrong.[137] Once there is a sufficient number of overrulings such that the error can no longer "plausibly be imputed to prior Courts," the public will become aware that the Court is acting out of short-term political motive.[138] The second circumstance arises when the Court decides an "intensely divisive controversy"[139] by calling on the opposing factions to accept "a common mandate rooted in the Constitution."[140] In the face of strong public pressure to overrule a precedent, there must be a "most compelling

written constitution, the legitimacy of an institution like judicial review is tolerable only if the Court's decisions are understood as principled applications of the written constitution." *Id.* at 603.

132 *Lee*, *supra* note 26, at 603. ("If . . . membership changes on the Court are followed by the overruling of precedent, this calls into doubt the principled nature of judicial review and thus undermines the Court's legitimacy.").

133 Recall Justice Marshall's conception of stare decisis as protecting against the "forces of democratic politics." Payne v. Tennessee, 501 U.S. 808, 852–53 (1991) (Marshall, J., dissenting). *See supra* notes 33, 44, and accompanying text (discussing further Justice Marshall's view of stare decisis).

134 *See Casey*, 505 U.S. at 865–66.

135 *Id.*

136 *Id.* (emphasis added).

137 *Id.* ("Despite the variety of reasons that may inform and justify a decision to overrule, we cannot forget that such a decision is usually perceived (and perceived correctly) as, at the least, a statement that a prior decision was wrong.").

138 *Id.*

139 *Id.* at 866–67.

140 *Id.* at 867; *see* Lee, *supra* note 26, at 606 ("[T]he [*Casey*] joint opinion states that additional stare decisis analysis is necessary because of the controversial nature of *Roe*.").

reason" for reexamination; otherwise, the country would lose "confidence in the Judiciary."[141]

Strangely, then, despite the joint opinion's insistence that the Court does not take public opinion into account, the Court's perception of how the public will respond to a potential overruling plays a role in determining whether a precedent will be upheld. The public's perceptions—perhaps, more accurately, the Court's anticipation of the public's likely reaction— impact legal outcomes.[142]

This, however, is not as problematic as it might at first appear. The Court does not look to public opinion generally, but considers it only in two specific circumstances. In the frequent overruling context, it does not consider the public's preference directly, but rather, adopts a rule of thumb that frequent overruling will undermine public confidence in the Court. With respect to overruling under fire, the Court allows political support for an idea to play a role in its analysis only in rare instances in which public opinion is strongly divided in a "national controversy" in which "contending sides" oppose one another.[143] In both instances, public opinion merely heightens the standard for overruling. None of this brings about a concern that the Court may bow to the substantive content of public opinion.[144]

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141 *Casey*, 505 U.S. at 867.

142 *See* Lee, *supra* note 26, at 617 (noting that under the Court's new overruling rhetoric expressed in *Casey* and *Dickerson*, the "Justices have to take the expectations of the American people and the Court's own legitimacy into account" in determining whether to uphold a precedent). Emery Lee notes that this is a new conceptualization of the role of Supreme Court justices. *Id.*

143 *See Casey*, 505 U.S. at 867.

144 In fact, Justice Scalia was outraged that the joint opinion's approach compelled it to count public opposition as a factor "*against* overruling." *Id.* at 998 (Scalia, J., dissenting). Presumably, he believed that to the extent the joint opinion was willing to take public opinion into account (something it should not do), it should influence the Court in the opposite direction. Another unproblematic use of public opinion is the use of "state counts." *See e.g.*, *Lawrence*, 539 U.S. at 573. That is, the Court sometimes looks to the number of states that have particular laws that would be dislocated by a particular decision. While this may appear to be a measurement of public opinion and will often correlate with public sentiment, the Court may legitimately look to state counts for purposes other than measuring public opinion as a proxy for societal reliance. First, because these counts measure the number of laws that may be impacted by an overruling, they are a measure of governmental reliance by legislatures. The Court may therefore consider state counts not for the purpose of determining popular practices which enjoy high rates of public approval, but to determine the disruptive impact an overruling would have given that legislatures have relied on a precedent in fashioning these laws. Second, state counts may demonstrate a lack of reliance based on changes in facts since the precedent was decided. In *Lawrence*, for instance, Justice Kennedy pointed to the decreasing number of states which enforced laws against homosexual conduct as a change in fact since *Bowers*. *See supra* note 121 and accompanying text. This type of change is indicative of a decrease in the magnitude of any reliance interests there may have been on that decision. When fewer states enact or enforce laws of a certain kind, the costs of

In contrast, when societal reliance—measured as public opinion—is given weight in stare decisis analysis, the impact of public opinion on the Court's determination to uphold or overturn a precedent is far more significant. Allowing a public opinion poll, even if objective, to influence a decision undermines the conception of the Court's legitimacy under which it applies legal principle without regard to its popularity. The intractable problem is that if societal reliance can be measured by looking at public opinion—or is in any way empirically measured by surveying societal attitudes—it is difficult to see how it is any different from the political pressures the joint opinion perceives as illegitimate. If the Court wishes to give public opinion this role in its jurisprudence, it must abandon the notion that it makes objective legal determinations divorced from political considerations, and must admit that it is influenced by the changing political winds.[145]

So long as societal reliance plays a role in whether the Court upholds a precedent, we must reject the notion that the Court weighs objective legal factors in reaching a principled decision, and that the Court's legitimacy is derived from public acceptance of the Court's objectivity. Instead, the direction of causation flips; precedents are upheld precisely because they enjoy public support; the public may then (incorrectly) perceive the Court's upholding of precedent as legitimate merely because it aligns with prevailing popular opinion. To the extent it is desirable that the Court "derives its legitimacy, not from following public opinion, but from deciding by its best lights whether legislative enactments of the popular branches of Government comport with the Constitution,"[146] societal reliance, measured by public opinion, should not be afforded weight.

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overruling a precedent that underlies those laws decreases; where laws are not enacted or enforced, no judicial or legislative response is required.

[145] Kozel does not appear to perceive this problem. He maintains that "acceptance by the citizenry [is] an important value" but that "the perceived legitimacy of the Court's actions should be understood as an *effect*, not an *objective*." Kozel, *supra* note 4, at 463. He contends that the Court obtains and maintains its legitimacy when it makes "reasoned decisions" which the citizenry accepts "even where widespread disagreement exists." *See id.* at 464–65. The foregoing shows, to the contrary, that societal reliance operates in the opposite direction. The Court does not come to a reasoned decision whether to uphold a precedent based on objective legal reasons, at which point a potentially divided public comes to perceive the ruling as correct and legitimate. Instead, the Court looks to (its perceptions of) public opinion to determine whether to uphold a precedent. Its perception of the public response to an overruling is considered up front in determining whether a precedent should be overruled. Public opinion may therefore dictate substantive constitutional law.

[146] *Casey*, 505 U.S. at 963 (Rehnquist, C.J., dissenting).

As the foregoing demonstrates, those advocating for the continued use of societal reliance face a dilemma. On the one hand, reliance may be a mysterious concept, in which case we are at the mercy of unpredictable results when the Court is asked to reconsider its past decisions; the analysis is left to proclivities of the particular Justices. On the other hand, if societal reliance is tied directly to objective measures of public opinion, its use is problematic because it undermines the Court's account of its legitimacy.[147]

3. Selective Insulation: A Jurisprudence of Doubt

The final problem with societal reliance is that it provides the Court with a plausible justification for upholding precedents even when they should be overturned. As the Court does not formally take public opinion into account, it relies on its own evaluations of which precedents have become engrained in public thinking. When upholding a precedent, it may then point to its evaluation of societal reliance as a principled factor to which it must give weight. When overturning, it is free to point to the other three *Casey* factors. The result is that the Court may justify overturning or upholding any given precedent without rigor, consistency, or predictability in a way that (falsely) appears to rest on objective legal principles.

Whereas the other *Casey* factors provide a basis for overturning precedent, "reliance interests are really a justification for *not* overruling precedent."[148] While the Court may choose to insulate precedents using societal reliance, as it did in *Casey* and *Dickerson*, it sometimes chooses not to do so, and instead overturns the precedent, dismissing societal reliance in its entirety, as it did in *Lawrence*. Societal reliance provides the Court with means to uphold precedents with impunity, while at other times pointing to the other *Casey* factors to overturn. Worst of all, given the indeterminate nature of societal reliance, it is impossible to discern ex ante which precedents will be upheld on this basis and which will be overturned. The result is a selective insulation of precedent that is unpredictable and inconsistent in application.[149]

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147 Those who support a role for societal reliance may set forth another account of how the Justices should measure it, but at the time of writing, they have not done so.

148 *See* Lee, *supra* note 26, at 605.

149 Mark Tushnet has argued that a broad reading of reliance that incorporates cultural norms may lock precedents in place. TUSHNET, *supra* note 79, at 93 ("Treating culture as a constraint on overruling places substantial limits on the Court's ability to take a leading role in changing one constitutional order into another . . . . [It] will stop the Court from doing much until the other [branches of government take action]."). *See also* Lee, *supra* note 26, at 617 ("The 'special justification' approach . . . appears to apply the 'better-settled-than-right' rule to constitutional precedents and, in the process, insulates

III
Casey, *Dickerson*, and *Lawrence* Revisited: Reined-In Reliance

In this final Part, I propose that societal reliance should be eliminated from the Court's analysis of reliance interests for stare decisis. Because of the dangers of keeping rulings in place in constitutional cases, reliance should count towards upholding a wrongly decided precedent only when it is clearly defined. And because societal reliance is not circumscribed, but is subject to multitudinous interpretations, it should not be afforded weight. To the extent that the Court wishes to uphold a precedent based on reliance, it must explain the reliance interests in terms of specific, governmental, or doctrinal reliance: It must point to particular entities which took steps in reliance upon a precedent and must weigh the costs of repudiation to those entities.

There are several benefits to this approach. First, it will increase the clarity, consistency, and predictability of decisions. When the Court draws upon societal reliance, it may selectively insulate a constitutional precedent by conclusorily stating that society has come to rely upon it, and that it has therefore become part of our culture. In contrast, in identical situations in which a majority prefers to overrule, it can merely not mention societal reliance, or can state that the other three *Casey* factors outweigh it. Litigants challenging or defending constitutional precedents are left in a place of uncertainty; they cannot predict whether the Court will find societal reliance (*Casey* and *Dickerson*) or will cast purported societal reliance as inconsequential (*Lawrence*). In all cases, the precise nature of the reliance interests the Court finds salient remains unclear. Eliminating societal reliance makes it harder for the Court to selectively insulate constitutional precedents without giving a rationale. To find specific, governmental, or doctrinal reliance, the Court must follow the two-step process. The first step requires the Court to point to specific entities, and the

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precedents that some . . . consider erroneous from overruling"). Voicing a similar worry, in his dissent in *Casey*, Chief Justice Rehnquist pointed out that at various points in the past one might have argued that erroneous decisions such as *Plessy v. Ferguson*, 163 U.S. 537, 551–52 (1896) (upholding segregation laws because accommodations were separate but equal), and *Lochner v. New York*, 198 U.S. 45, 53, 64–65 (1905) (invalidating a New York state statute limiting the number of hours bakers were permitted to work on the grounds that it violated "the right of contract"), had engendered societal reliance. *Casey*, 505 U.S. at 957 (Rehnquist, C.J., dissenting). Emery Lee correctly points out that "[i]t would be a mistake . . . to think that *all* constitutional precedents have been insulated from overruling by the contemporary Court's new approach." Lee, *supra* note 26, at 617. The problem with the jurisprudence is not that it locks all precedents in place, but that it allows the Court to selectively insulate certain precedents in place in a way that is not predictable or consistent, while overturning others at its discretion.

second step requires it to identify specific costs to those entities which are the direct result of overruling. It cannot rely on abstract pronouncements, but must give concrete explication of the reliance interests at stake. These forms of reliance are therefore less susceptible to manipulation and inconsistent application, and are clearer, more consistent, and more predictable.

Second, this approach will increase the Court's legitimacy and intellectual honesty. To the extent that one accepts the account in *Casey* that the Court's decisions ought to be based on legal principle, and not influenced by changing societal mores, eliminating societal reliance enhances legitimacy. Even if one does not accept this account of legitimacy, the elimination of societal reliance restores the Court's intellectual honesty, making it less vulnerable to attacks that its stare decisis jurisprudence has "no real content"[150] and that its opinions "cannot possibly form a coherent, principled theory."[151] Because the two-step inquiry grounds reliance in identifiable entities, it is less susceptible to the strong differences of opinion that plague societal reliance. Even those who disagree with the Court's analysis in any particular case will be better off, as they will be able to point to specific portions of the Court's reliance analysis with which they disagree (i.e. the Court failed to identify a relevant entity, or discounted the inequity of overruling) rather than disagreeing with abstract pronouncements about societal values.

Some might object that eliminating societal reliance reduces the Court's flexibility in weighing reliance and that it counts genuine societal interests for nothing. But my proposal retains a significant role for reliance; to the extent reliance interests at first appear to be societal, they may nevertheless satisfy the definition of any of the other three forms of reliance, and are therefore cognizable. My proposal is therefore best understood not as reducing the role of reliance in stare decisis analysis, but as sharpening it so that it is always anchored to particular entities. It is less extreme than other proposals, which seek to jettison stare decisis from constitutional cases altogether.[152] And to the extent that the elimination of societal reliance constrains the Court, this constraint is desirable; it ensures that reliance is based on specific judicially administrable standards and avoids intractable debates about what constitutes part of our culture. Reining in reliance is, to this extent, a good thing. Public opinion or the Court's

[150] Hardy, *supra* note 66, at 601.

[151] Consovoy, *supra* note 8, at 56; *see id.* ("[The Court's] decisions are joined only in that each achieved the result a majority of the Justices of the Court wanted at that particular moment, for their own particular reasons.").

[152] *See supra* note 102 and accompanying text.

unchecked interpretations of our culture ought not be used as a tool to insulate precedents from reconsideration on the merits.[153]

Others may worry that eliminating societal reliance will make it easier to overturn precedents conferring constitutional rights. This worry is misplaced because of an asymmetry in specific reliance interests that favors the protection of rights. While those who enjoy rights come to rely on the constitutional precedent conferring those rights, those who seek to uphold a precedent denying constitutional rights to others generally do not take steps in reliance on the precedent, and therefore do not satisfy step one of the reliance inquiry. For this reason, specific reliance is often more protective of precedents conferring rights than of those denying them.[154]

I close by considering how this framework might apply in practice using *Casey*, *Dickerson*, and *Lawrence* as examples. This reconceptualization serves as a model for how the Court should think about reliance in the future. The lesson of this exercise is that what may at first appear to be societal reliance may turn out to be specific, governmental, or doctrinal reliance. When it cannot be expressed as one of these forms of reliance, but can only be described as societal, it should

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153 Changes in societal perceptions, may, however, play a role in exposing precedents which were at one time thought to rest on legal analysis, but turn out to rest merely on ideas that were widely accepted at the time, but are no longer accepted. When the Court determines (under the fourth *Casey* factor) "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification," *Casey*, 505 U.S. at 855, it looks not just to whether scientific facts have changed, but to societal understandings of those facts. Thus, in *Brown v. Board of Education*, 347 U.S. 483, 494–95 (1954), the Court noted that the state of knowledge in the field of psychology had changed, which constituted the facts necessary to overturn *Plessy*. The *Casey* court, however, emphasized that cultural attitudes had also shifted: by the time of *Brown*, "[*s*]*ociety's understanding of the facts* upon which a constitutional ruling was sought in 1954 was thus fundamentally different from the basis claimed for the decision in 1896." *Casey*, 505 U.S. at 863 (emphasis added). Similarly, in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), the Court noted not that society had come to recognize new facts about economic theory, but that society had rejected *laissez faire* capitalism, and with it, *Lochner*. *Casey*, 505 U.S. at 861–62 (noting that at the time of *West Coast Hotel*, "*laissez faire* was recognized everywhere *outside the Court* to be dead." (emphasis added) (quoting Jackson, J., THE STRUGGLE FOR JUDICIAL SUPREMACY 85 (1941))). This use of public opinion counts towards overturning precedents that were once thought to rest on objective legal analysis, but turn out to have rested on social and political paradigms that are later rejected. Eliminating societal reliance, then, does not eliminate the capacity for shifting public opinion to reveal the flaws of precedents. It does, however, prevent public opinion from insulating precedents from reconsideration.

154 *Compare infra* Part III.A (arguing that there is specific reliance in *Roe*) *with* Part III.C (arguing that supporters of *Bowers* lacked specific reliance interests in *Bowers* because they did not take steps in reliance on its rule). For a novel argument that the Court has been protective of rights in its constitutional stare decisis jurisprudence, see Ensign, *supra* note 126, at 1138 (arguing that the addition of a factor to stare decisis, "the impact of the previous decision on individual liberty rights," explains the results, with the Court affirming precedents that expanded rights, while overturning those that restricted them).

be afforded no weight. Crucially, the goal here is not to argue the outcome on the merits in these cases, but rather to advocate a mode of analysis, which will add clarity and predictability which has previously been lacking.

For the purposes of this exercise, I conclude that reliance in *Roe* can be explained by uncontroversial notions of specific reliance, but that reliance in *Miranda* is predominantly societal. To the extent that there were reliance interests in *Bowers*, they were outweighed by the other *Casey* factors at play in *Lawrence*. Under my framework, then, reliance interests count towards upholding *Roe*, but are entitled to little or no weight towards upholding *Miranda* and *Bowers*.

A. Casey *Reconsidered*

A closer reading of *Casey* demonstrates that a finding of reliance in *Roe* could have been based solely on specific reliance. The uproar over the broad conceptions of societal reliance in *Casey* was the result of the broad, sweeping (and somewhat unnecessary) language the Court used to convey the reliance interests at stake. By focusing on single instances of sexual intercourse as the only action one might take in specific reliance on *Roe*, the Court adopted an unnecessarily narrow notion of specific reliance before resorting to societal reliance.[155] It could have instead recognized the broader range of actions taken in specific reliance on *Roe*.

The key to finding specific reliance is that the availability of abortion based on *Roe* may have factored into family planning decisions, which could not be changed immediately and without cost in the event *Roe* was overturned. For example, a heterosexual couple who decided that the woman would be the primary breadwinner while the man was a secondary earner could plausibly have concretely relied on *Roe*. In deciding on the desired division of labor, this couple could have factored in the availability of abortion in the event of an unplanned pregnancy, taking solace in the fact that an unplanned pregnancy would not derail the woman's career.

This type of planning involves specific, not societal, reliance. First, decisions about how to structure one's family unit and the division of labor between spouses involve direct actions, or identifiable steps, taken in part in reliance on the holding of *Roe*.[156] Second, these decisions cannot be adjusted immediately if *Roe* is overturned. Once a

[155] *See supra* notes 73–74 and accompanying text.

[156] This answers Chief Justice Rehnquist's objection that there are no reliance interests, because here, *Roe* has formed the basis for private decisions, and is not merely the result of musings on the nature of society.

couple has decided that one spouse will be the primary breadwinner, they will rationally invest time and resources in developing that spouse's skills and professional prospects. The other spouse may forego opportunities to advance professionally, trusting that the other spouse will earn adequate income. Overturning *Roe* frustrates this planning by increasing the impact of an unexpected pregnancy:

	Roe upheld	*Roe* overturned
Expected Value of Option 1: Female as Primary Earner	$100,000	$60,000
Expected Value of Option 2: Male as Primary Earner	$100,000	$90,000

In the event of an unexpected pregnancy, a couple that elected to have a female primary earner is materially worse off when *Roe* is overturned.[157] Had the male spouse been the primary earner, an unexpected pregnancy could reduce the wages of their secondary earner, but would leave the wages of the male primary earner intact. The impact on a family where the primary earner unexpectedly becomes pregnant is of much greater magnitude. This is true even when rates of sexual activity remain constant regardless of who is the primary earner.[158]

A closer look at the *Casey* joint opinion reveals hints of specific reliance. Although interspersed with societal reliance, the joint opinion notes that "people have *organized* intimate relationships and *made choices* . . . in reliance on the availability of abortion in the event that contraception should fail."[159] Ironically, in contrasting the traditional notion of reliance with the facts of *Casey*, the joint opinion pointed to conditions that were at play in *Casey*. It stated "the classic case for weighing reliance heavily in favor of following the earlier rule

[157] In this example, the family is $30,000 worse off in the event of an unexpected pregnancy.

[158] Thus, the counterargument noted in the joint opinion that "[unless] no intercourse would have occurred but for *Roe*'s holding, such behavior may appear to justify no reliance claim," *Casey*, 505 U.S. at 856, is incorrect as a matter of specific reliance. Some might object that once *Roe* is overturned, the couples in question are free to adapt to the new legal order by refraining from sexual activity to reduce or eliminate the risk of an unwanted pregnancy completely. But just as advanced planning is critical in the commercial context, it is so here. In the commercial context, the reliance interests are not rooted in the fact that firms cannot possibly adapt their behavior to the new legal order; the problem is that they must incur the costs of adaptation. *See* Epstein, *supra* note 25, at 72. The same is true here. If adapting to the new legal order involves changing of behaviors that were explicitly planned based on the existing legal order, the costs to individuals of changing their behaviors to comply cannot be ignored.

[159] *Casey*, 505 U.S. at 856 (emphasis added).

occurs in the commercial context, where *advance planning of great precision* is most obviously a necessity."[160] This is true in the context of reproductive planning and is explicable through the lens of specific reliance.

Societal reliance should not factor into this analysis because it does not lead to a clear outcome and does not allow future litigants to predict the weight of reliance interests in future cases. While the increasing role of women in the workforce has impacted society greatly, it does not provide a concrete basis upon which to decide a matter of constitutional law, as is made clear by the strong disagreements raised in Chief Justice Rehnquist's *Casey* dissent.[161] Once societal reliance is eliminated from the inquiry, it becomes clear that specific reliance interests count towards upholding *Roe*. These specific reliance interests can be articulated with more specificity, and therefore are not subject to the types of normative disagreements that arise when Justices are at odds over societal values. In contrast to approaches involving societal reliance, which rely on unpredictable and changing notions of what society ought to aspire towards, my proposal rests on specifically articulable measures of the injury that would befall specific entities who have acted in reliance on *Roe* in planning their personal and economic affairs. This allows future litigants to more accurately predict whether reliance interests will impact a future decision.

B. Dickerson *Reconsidered*

Reliance interests do not provide a basis for upholding *Miranda*.[162] In identifying reliance interests of police officers, the legal profession, and courts, the Court provided potential bases for finding governmental, specific, and doctrinal reliance. These are at best weak reliance interests, and are outweighed by the erosion of *Miranda* through subsequent cases.

At first glance, it appears that police department reliance on *Miranda* could constitute governmental reliance. *Miranda* warnings had become "embedded in routine police practice,"[163] and provided "*concrete constitutional guidelines for law enforcement agencies and courts to follow*."[164] However, these reliance interests are of low magnitude, as police remain free to continue giving *Miranda* warnings

[160] *Id.* at 855–56 (1992) (emphasis added) (citations omitted).

[161] *See supra* notes 81–85 and accompanying text.

[162] Of course, this is not to say that *Miranda* should be overruled. *Miranda* may nevertheless be upheld for other reasons.

[163] Dickerson v. United States, 530 U.S. 428, 443 (2000).

[164] *Id.* at 439 (quoting Miranda v. Arizona, 384 U.S. 436, 441–42 (1966)).

even if they are no longer constitutionally required.[165] An overruling would therefore not compel departments to change their training methods, and therefore would not necessitate any cost. Casting further doubt upon this basis for reliance, in a later case, *Arizona v. Gant*, the Court clarified that the reliance interests to which it referred in *Dickerson* were not the governmental reliance interests of police departments, but rather societal reliance on *Miranda*.[166]

A second potential basis for reliance is specific reliance of the legal profession. Chief Justice Rehnquist noted that when a rule has found "wide acceptance in the legal culture" this counts as a reason not to overrule it.[167] But it does not appear that members of the legal profession took identifiable steps in reliance on *Miranda*. While defense attorneys and prosecutors had become accustomed to the rule requiring the reading of *Miranda* rights, the *Dickerson* opinion does not discuss steps taken in reliance on that rule, but rather depends on generalized thoughts, feelings, and culture of the legal profession. Without identifiable steps, there is no specific reliance.

Finally, there is no cognizable doctrinal reliance interest. Although an overruling would overturn the *Miranda* rule, there is no indication that numerous other opinions would be upended so as to require additional judicial work in order to achieve the same aims. In fact, Chief Justice Rehnquist notes that if anything, the significance of the *Miranda* rule had already been reduced in subsequent cases.[168]

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165 *See supra* note 100 and accompanying text.

166 Arizona v. Gant, 556 U.S. 332, 350 (2009) ("The [*Dickerson*] Court was referring not to police reliance on a rule requiring them to provide warnings but to the broader societal reliance on that individual right."). The Court also noted that, "[t]he fact that the law enforcement community may view [a precedent] as an entitlement does not establish the sort of reliance interest that could outweigh the countervailing interest that all individuals share in having their constitutional rights fully protected." *Id.* at 349. In dissent, Justice Alito focused on reliance by police officers, which he believed the Court had wrongly discounted. *Id.* at 358–59 (Alito, J., dissenting). He argued that "[the precedent at issue] has been taught to police officers for more than a quarter century," and lamented that, "for the Court, this seemingly counts for nothing." *Id.* at 359. One reading of *Gant* is that police departments never have reliance interests in their training programs. If this is the correct reading, then there is no remaining basis for finding of reliance on *Miranda*. A second reading is that police departments do have reliance interests, but they are not entitled to such weight that they could outweigh the proper interpretation and protection of constitutionally-mandated *Miranda* rights. Because the Court did not explicitly state that police department interests are entitled to no weight, it is prudent to assume that they remain cognizable and adopt the second reading.

167 *Dickerson*, 530 U.S. at 439 (quoting Mitchell v. United States, 526 U.S. 314, 331–32 (1999) (Scalia, J., dissenting)).

168 *See id.* at 443 ("If anything, our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement . . . ."). Apart from reliance, the third *Casey* factor provides a basis for overturning. Because *Miranda* has been undermined in subsequent decisions, it may be considered a remnant of abandoned doctrine, and could be

Societal reliance should not factor into this analysis because deciding whether *Miranda* warnings have become part of our culture involves making subjective determinations about society as a whole, and is not amenable to articulable judicial standards; it rests on the proclivities of the Justices and their subjective estimations of the importance of *Miranda* warnings to society. Once societal reliance is removed from the inquiry, the analysis becomes clearer. There is no specific reliance, and the reliance interests of the police departments, legal profession, and courts are entitled to little weight. My proposal is preferable because the analysis involves consideration of each entity's purported reliance interests, and therefore is measurable, predictable, and more rigorous than a societal reliance analysis which depends on conclusory opinions regarding societal values, about which the Justices often disagree.

C. Lawrence *Reconsidered*

There are no significant reliance interests in *Bowers*. Although there may appear to be governmental or doctrinal reliance, these interests are best categorized as societal. In addition, specific reliance is lacking and the other *Casey* factors count towards overruling. Under my proposal, reliance interests would not count significantly against overturning *Bowers*.

In his *Lawrence* dissent, Justice Scalia described the reliance interests in *Bowers* chiefly as societal; society had come to believe that "a governing majority's belief that certain sexual behavior is immoral and unacceptable constitutes a rational basis for regulation."[169] These reliance interests cannot be characterized as specific reliance. It is difficult to imagine how one might order one's decisions around a precedent that allows others to be punished for engaging in certain types of consensual sex. While the opposite rule—one protecting certain sexual conduct—could foster specific reliance, the converse does not hold true. One does not take steps in reliance on a rule which punishes sexual acts in which others engage.

The interests to which Justice Scalia referred cannot be conceptualized as governmental. He noted that legislators passed morals legislation believing that ethical views of a majority constituted a rational basis for regulation and that in the wake of the overruling, these laws would be called into question.[170] Legislators might therefore expend

overruled on this basis. *See* Friedman, *supra* note 100, at 26 ("[S]ubsequent legal developments suggest overturning *Miranda* would be altogether appropriate.").

[169] Lawrence v. Texas, 539 U.S. 558, 589 (2003) (Scalia, J., dissenting) (internal quotation marks omitted).

[170] *Id.* at 589–90.

resources finding new ways to achieve the legislative goals they had previously achieved. To the extent that these laws merely achieved unconstitutional goals, these costs would be near-zero, as legislatures should expend no resources or effort finding new ways to replace them. The difficulty one faces in articulating and quantifying the magnitude of any governmental reliance by legislators indicates that to the extent there might be governmental reliance, it should be given little or no weight.[171]

Similarly, there are not significant doctrinal reliance interests in *Bowers*. Justice Scalia pointed to judicial decisions that relied on *Bowers* to uphold the morals statutes passed by legislatures,[172] and argued that all of these decisions would be called into question once *Bowers* was overruled.[173] Assuming such an overruling would create a void which must be filled by the crafting of new doctrines, the necessary judicial resources and effort could be weighed as doctrinal reliance. But to the extent that *Lawrence* invalidated the decisions resting on *Bowers* as violations of substantive due process, and not merely the particular approach taken in those decisions, there would be no need for judicial work to fill the void.

Ultimately, the reliance interests in *Bowers* are overwhelmingly societal; they arise from the notion that the expectations of a majority would be upset by its overruling. In this way, *Bowers* is analogous to *West Coast Hotel* and *Lochner*.[174] Rather than resting on a principled interpretation of the content of the Constitution, as determined by objective legal analysis, they directly depend on a zeitgeist or once-adopted paradigm for their content.[175] And facts had changed, as fewer states had come to enforce these laws, thereby reducing the magnitude of any governmental or doctrinal reliance.[176] Reliance

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171 There may be governmental reliance interests which arise out of the costs of repealing the law, retraining those who enforced it, or adopting a narrow interpretation of it that is not unconstitutional, but these appear to be small in this case.

172 *See Lawrence*, 539 U.S. at 589–90 (Scalia, J., dissenting) (listing cases that relied on *Bowers* to uphold laws prohibiting the sale of sex toys and preventing those who engaged in homosexual sex acts from serving in the military, as well as denying a constitutional right to commit adultery).

173 *Id.* at 590 ("Every single one of these laws is called into question by today's decision.").

174 *See supra* note 153 and accompanying text. *See also supra* note 149 (describing *Lochner*).

175 Any possible governmental and doctrinal reliance interests in *Bowers* are outweighed by the other *Casey* factors. Principles of law had developed since *Bowers*, eroding its basis. *Casey* and *Romer* had recognized a right to personal autonomy and privacy in intimate matters and extended protections under the Equal Protection Clause. *See supra* note 121 and accompanying text.

176 *See supra* notes 144, 153 and accompanying text.

interests in *Bowers* do not provide a plausible basis for refusing to overrule it.

Societal reliance should not factor into this analysis because deciding whether morals legislation is an integral part of our society is a subjective moral judgment not susceptible to articulable judicial standards; it rests instead on whether the Justices believe morals legislation is beneficial based on their own inclinations and personal experiences. Once societal reliance is removed from the inquiry, it becomes clear that are no strong specific, governmental, or doctrinal reliance interests at stake. My proposed methodology is preferable because the analysis involves a rigorous look at each entity's purported reliance interests, and reveals when what may at first appear to be reliance is truly nothing more than subjective preference regarding societal values. If the Justices follow this method, they will be less likely to come to differing conclusions based on their idiosyncratic value preferences.

Conclusion

The proposal I have set forth offers the Court an opportunity to bring clarity, predictability, and consistency to its evaluation of reliance interests for stare decisis. Eliminating societal reliance reduces the Court's ability to selectively insulate precedent from reconsideration by appealing to unchecked notions of societal norms. Reliance exists only when identifiable entities take steps in reliance on a precedent, and would face costs of repudiation if the precedent were overturned. This will add clarity to the Court's opinions, enhance the predictability of outcomes, and eliminate much of the uncertainty that pervades the current doctrine, while retaining a robust and equitable role for genuine reliance interests in stare decisis analysis.