Essay

John Roberts' Supreme Court: The Triumph of Partisanship and Ideology over Precedent

David Schultz† and Jacob Bourgault††

INTRODUCTION

Stare decisis, meaning "to stand by things decided," has roots in English common law and goes back centuries.[1] Since the founding of the United States, and largely because of English influence, precedent has been a central legal principle in American law.[2] Many legal scholars have consistently reinforced the importance of respecting precedent.[3] The U.S. Supreme Court has emphasized the benefits derived from respecting precedent: "*Stare decisis* . . . promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived

† Distinguished University Professor, Winston Folkers Endowed Distinguished Faculty Chair, Departments of Political Science, Legal Studies, and Environmental Studies; Professor, Lithuanian Military Academy; Adjunct Professor of Law, University of Minnesota, University of St. Thomas.

†† J.D. Candidate 2025, University of Minnesota Law School; Managing Editor, *Minnesota Law Review*, Volume 109.

1. *See generally* George T. Evans, *The Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied*, 23 DICTA 32 (1946) (delineating the history of stare decisis).

2. *See, e.g.*, STEPHEN BREYER, READING THE CONSTITUTION: WHY I CHOSE PRAGMATISM, NOT TEXTUALISM 181–82 (2024); 1 WILLIAM BLACKSTONE, COMMENTARIES *69 ("[I]ndeed these judicial decisions are the principal and most authoritative evidence, that can be given, of the existence of such a custom as shall form a part of the common law."); D. NIEL MACCORMICK & ROBERT S. SUMMERS, INTERPRETING PRECEDENTS: A COMPARATIVE STUDY 1, 2 (1997); BRYAN A. GARNER, THE LAW OF JUDICIAL PRECEDENT 22 (2016) (describing the meaning and history of precedent and the logic of arguing by precedent).

3. *See, e.g.*, Stephen R. Perry, *Judicial Obligation, Precedent and the Common Law,* 7 OXFORD J.L. STUD. 215, 219–26 (1987) (discussing views that reinforce the importance of precedent and stare decisis in legal scholarship).

integrity of the judicial process."[4] In short, the importance of respecting judicial precedent has long appeared to be ubiquitously accepted in the American legal community among legal scholars, practitioners, and judges.

However, when one looks at the Republican-appointed "conservative" Justices on the Supreme Court under Chief Justice John Roberts (2005-current), they have voted to reject constitutional precedent far more often than Democratic-appointed "liberal" Justices. In doing so, these Republican-conservative Justices have forgotten the principle of stare decisis, demonstrating a lack of understanding and respect for the role of precedent in American law. These votes similarly neglect to recognize the importance of stare decisis in confining judicial discretion, even theirs. This Article is an empirical analysis of the Roberts Court's approach to overruling constitutional precedent. The argument is that while precedent should be an important principle in U.S. common law—and while in theory Republican-appointed and conservative Justices have expressed fidelity to it—these Republican-appointed Justices have been far more willing to reject *stare decisis* than Justices who were appointed by Democrat Party presidents or whose voting record on the bench classifies them as liberal.

This Article proceeds as follows. Part I discusses the importance of precedent in U.S. law. Part II discusses the rejection of precedent and highlights situations in which it may be justified. Part III applies these principles directly to the U.S. Supreme Court. Part IV empirically analyzes U.S. Supreme Court decisions to overturn their own precedent from 2005 to 2022, differentiating between the votes of Justices classified as "liberal" and Justices classified as "conservative." The Article concludes with a brief discussion of what this means for the Supreme Court, what could come next, and what the repercussion could be for American jurisprudence. In short, partisanship and ideology matter.

4. Payne v. Tennessee, 501 U.S. 808, 827 (1991); *see also* Kimble v. Marvel Ent., LLC, 576 U.S. 446, 455 (2015) (quoting *Payne*, 501 U.S. at 827–28).

I. THE IMPORTANCE OF PRECEDENT IN THE UNITED STATES LEGAL SYSTEM

For common law systems such as the United States, respect for judicial precedent is central to judicial decision-making.[5] Unlike civil law systems, where rendering a decision is merely about ascertaining a statute's intent, in common law systems judicial decisions become part of the law.[6] Of course, the task of a judge is still to begin with the text of the constitutional provision or statute at issue to try and ascertain its meaning.[7] But precedent also becomes an important way of understanding what the law or what the Constitution means while providing a sense of uniformity in judicial decision making.[8]

The concept of precedent or stare decisis is rooted in the concept of equity or fairness.[9] In Western philosophical terms, stare decisis reflects the idea that equal things should be treated equally.[10] In terms of the law, it represents the principle that if a court of appropriate jurisdiction decided a case a certain way, and another case of similar facts appeared, it should be decided in a similar fashion.[11] Precedent reflects the concept of judicial

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5. *See, e.g.*, BREYER, *supra* note 2, at 181–82 (explaining why precedent is important); JAMES T. MCHUGH, COMPARATIVE CONSTITUTIONAL TRADITIONS 16–17 (2002) (indicating the importance of precedent to common law systems); DAVID SCHULTZ, CONSTITUTIONAL PRECEDENT IN US SUPREME COURT REASONING 3 (2022) (noting that "[p]recedent is central to legal reasoning and argumentation" in common law systems).

6. *See* Leonor Moral Soriano, Note, *The Use of Precedents as Arguments of Authority, Arguments* Ab Exemplo*, and Arguments of Reason in Civil Law Systems*, 11 RATIO JURIS 90, 91 (1998) ("If by sources of law a legal system means those legal elements used for deciding a case, then in civil law systems statutes alone are considered sources of law, while in common law systems statutes along with precedents are sources of law or what qualifies such elements as sources of law."). *See generally* JAMES G. APPLE & ROBERT P. DEYLING, FED. JUD. CTR., A PRIMER ON THE CIVIL-LAW SYSTEM (1995).

7. *See* MCHUGH, *supra* note 5, at 16–17 (discussing the elements of common law reasoning); BREYER, *supra* note 2, at 117–23 (contrasting precedent with plain textualism).

8. *See* David A. Strauss, *Common Law Constitutional Interpretation,* 63 U. CHI. L. REV. 877, 888 (1996) ("Properly understood, then, the common law provides the best model for both understanding and justifying how we interpret the
Constitution.").

9. *See* GARNER, *supra* note 2, at 21–22 (indicating that precedent is rooted in notions of fair, reliability, and predictability).

10. *See id.*

11. *See id.* at 35–44.

economy.[12] Instead of rethinking facts and legal principles in every case, judges should look to past decisions as a guide.[13] Precedent also respects the principles of fairness, uniformity, equality, consistency, predictability, stability, reliance, and finality in the law.[14] Promoting stability and reliability within the law is critical to ensuring equitable outcomes and reinforcing trust in the judicial system.[15]

The idea of precedent is to ensure that the courts do not engage in wide open or arbitrary discretion.[16] To contain discretion or arbitrariness, courts are forced to decide cases about similar fact patterns, in similar circumstances, in a similar manner.[17] Precedent establishes a rule or a principle of law that should be

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12. *Cf.* NEIL DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT 1 (2008) ("A precedent is a past event—in law the event is nearly always a decision—which serves as a guide for present action.").

13. MACCORMICK & SUMMERS, *supra* note 2, at 1 (describing precedent as a useful tool for problem solving).

14. 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, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."). *See also* Aleksander Peczenik, *The Binding Force of Precedent, in* MACCORMICK & SUMMERS, *supra* note 2 (examining the factors that render precedent as binding or which give it its weight).

15. *See* Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 4223 (1988) ("Precedent not only economizes on information but also cuts down on idiosyncratic conclusions by subjecting each judge's work to the test of congruence with the conclusions of those confronting the same problem. This increases both the chance of the court's being right and the likelihood that similar cases arising contemporaneously will be treated the same by different judges.").

16. *See* Cass R. Sunstein, Commentary, *On Analogical Reasoning,* 106 HARV. L. REV. 741, 782–83 (1993) (delineating some of the ways in which precedent could constrain judicial discretion and aid judges); DUXBURY, *supra* note 12, at 27 ("[A] purpose of [stare decisis] is to curb the arbitrary exercise of judicial discretion . . . .").

17. *See* Easterbrook, *supra* note 15, at 422–23; *cf.* THE FEDERALIST NO. 78 (Alexander Hamilton) ("To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them.").

followed by subsequent courts.[18] In effect, precedent has a binding or constraining effect on arbitrariness.[19] Precedent also assists in the interpretation of the Constitution.[20] According to Stephen Breyer, respect for precedent as a guide for constitutional interpretation provides more consistency and stability in the law, especially compared to originalism and textualism.[21] The latter two, for Breyer, seem to have a problem with stare decisis—failing, among other things—to offer a principled model or guide for when to department from precedent.[22] In fact, textualists and originalists may not feel constrained or bound by precedent.[23] Breyer goes so far to argue that these two forms of interpretation, because they do not respect stare decisis, cannot be part of a stable and workable legal system.[24]

Precedent can be thought of in several ways. One is in terms of verticalness, the other in terms of horizontalness (e.g., self-binding or deference).[25] From a vertical perspective, lower courts in a jurisdiction are generally expected to follow the precedent set by superior courtswithin their jurisdictions.[26] Additionally, the Supremacy Clause of the Constitution[27] renders the Constitution the supreme law of the land. Because of this, through text

18. *See* Mortimer N.S. Sellers, *The Doctrine of Precedent in the United States of America*, 54 AM. J. COMPAR. L. 67, 68 (2006) ("[T]he concept of precedent in the United States is simply the recognition that judicial decisions have the force of law and must be respected, not only by the litigants in particular cases, but also by the government, the public, lawyers and (in most cases) by the courts themselves.").

19. *See* PIERRE SCHLAG & AMY J. GRIFFIN, HOW TO DO THINGS WITH LEGAL DOCTRINE 23 (2020) ("[D]octrine is generally believed to guide, constrain, or, at the extreme, determine judicial decisions. In this sense, doctrine is *authoritative*."); 3 LEONARD W. LEVY ET AL., ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1436–37 (1986) (explaining the role of precedent in constraining judicial discretion).

20. *See* Strauss, *supra* note 8, at 877 ("[W]hen people interpret the Constitution, they rely not just on the text but also on the elaborate body of law that has developed, mostly through judicial decisions, over the years.").

21. *See* BREYER, supra note 2, at 181–87 (arguing that adherence to precedent promotes stability, reliability, and predictability in the law).

22. *See id.*

23. *See id.*

24. *See id.* at 194.

25. GARNER, *supra* note 2, at 27–35 (contrasting vertical from horizontal precedent).

26. *See id.*

27. U.S. CONST. art. VI, cl. 2.

and precedent,[28] decisions of the U.S. Supreme Court are generally binding upon lower courts.[29]

Similarly, the concept of precedent means that the Supreme Court itself should also be bound by its own precedent.[30] This has been referred to as the "horizontal" concept of stare decisis.[31] In the words of Chief Justice Roberts: "The legal doctrine of *stare decisis* requires us, absent special circumstances, to treat like cases alike."[32] Ironically, this language came from Chief Justice Roberts' concurrence in *June Medical Services*, which reinforced abortion protections only two years before the decision in *Dobbs*.[33] It is worth nothing that the Supreme Court has placed limitations on adherence to horizontal stare decisis, finding that it is not an "inexorable command," and does not need to be followed "[w]hen governing decisions are unworkable or are badly reasoned."[34] The purpose again of stare decisis is to contain judicial discretion and promote economy, fairness, uniformity, consistency, reliance interests, and all those other virtues that were previously noted.[35]

Precedent is a central part of American law. Ronald Dworkin, the famous legal philosopher, once argued that we should think of the law as a chain novel.[36] It is a chain novel in the sense that our constitutional framers wrote the first draft of

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28. *See generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Cooper v. Aaron, 358 U.S. 1 (1958).

29. *See* Sellers, *supra* note 18, at 68 ("The courts usually respect their own internal lines of authority, so that the United States Supreme Court has the ultimate word in federal and constitutional cases . . . .").

30. *See* BREYER, supra note 2, at 181–82 (explaining that stability and predictability are important in the law).

31. *See* Sneha Solanki, *What is Stare Decisis in Simple Terms?*, THOMSON REUTERS (Nov. 5, 2024), https://legal.thomsonreuters.com/blog/the-doctrine-of-stare-decisis [https://perma.cc/GAK2-N29N] ("Absent extraordinary circumstances, a court that upholds the principle of 'horizontal stare decisis' will follow its own earlier decisions . . . .").

32. June Med. Servs. L.L.C. v. Russo, 591 U.S. 299, 345 (2020) (Roberts, C.J., concurring), *abrogated by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

33. *See generally id.*

34. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 63 (1996) (first quoting Payne v. Tennessee, 501 U.S. 808, 828 (1991); and then quoting *Payne*, 501 U.S. at 827).

35. *See* SCHLAG & GRIFFIN, *supra* note 19, at 23 (discussing some purposes of judicially formulated doctrines).

36. RONALD DWORKIN, LAW'S EMPIRE 228–32 (1986) (formulating the "chain novel" theory).

the novel of American constitutional law when they wrote the Constitution and the Bill of Rights. Subsequently, the Supreme Court under various Chief Justices has continued to author this constitutional novel, building upon previous decisions and the Constitution and Bill of Rights. In a common law system such as the United States, deciphering the Constitution's meaning and defining constitutional law more broadly requires examining the text of the Constitution in tandem with Supreme Court decisions and precedents.[37] The concept of precedent in the law is a tool to constrain judicial discretion, especially when judges acknowledge it,[38] again promoting consistency, uniformity, and reliability among the other virtues noted above.[39]

II. DANGERS OF REJECTING PRECEDENT

Because precedent is so important, rejecting or overturning well-established precedent should be a rare phenomenon justified only by the clearly erroneous reasoning in the governing decision. Former Justice Benjamin Cardozo in *The Nature of the Judicial Process* argued that adherence to precedent should be the rule, not the exception.[40] However, he also noted the reasons when precedent should be rejected, contending that when a precedent no longer proved workable or the conditions under which it was decided no longer existed, or when the precedent was at odds with a sense of justice, it could be overturned.[41] Cardozo's

37. *See* Sellers, *supra* note 18, at 68 ("Common-law customs, state and federal constitutions, and the enactments of legislatures all establish broad principles and general rules that are worked out in detail by courts in deciding actual cases and controversies brought by litigants whose real interests are at stake."). *See generally* Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68 (1991) (discussing the functions of precedent in constitutional interpretation); Steven G. Calabresi, *Text vs. Precedent in Constitutional Law*, 31 HARV. J.L. & PUB. POL'Y 947 (2008) (emphasizing the role of constitutional text in constitutional interpretation).

38. *See* Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. REV. 1156, 1205 (2005) ("[J]udges exercise relatively more ideological decisionmaking freedom in cases of first impression[, which] demonstrates that they can exercise less ideological freedom in other cases that are already governed by relevant precedents.").

39. *See supra* notes 14–19 and accompanying text.

40. BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149–51 (1921) ("I think adherence to precedent should be the rule and not the exception.").

41. *Id.* at 150 ("I think that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with

point was that once decided, precedent should not be lightly disregarded and its rejection should be rare. The Court should not, as Amy Coney Barrett argued as a law professor, disregard precedent simply because it disagrees with it.[42]

Moreover, the Supreme Court has generally argued that there is a difference between statutory and constitutional precedent.[43] While in general the Court should avoid deciding cases on constitutional grounds if an alternative is possible, statutory precedent should receive more deference by the Supreme Court than constitutional precedent.[44] If the Court were to make a mistake on statutory grounds, the remedy would be for Congress to change the law.[45] But were the Court to incorrectly decide a case on constitutional grounds, the remedy would be to amend the Constitution which is far more difficult.[46]

Of course, there are times when overturning governing precedent is necessary, and even desirable. The ratification of the Fourteenth Amendment rendered *Dred Scott v. Sanford* clearly

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the social welfare, there should be less hesitation in frank avowal and full abandonment.").

42. *See* Amy Coney Barrett, *Precedent and Jurisprudential Disagreement,* 91 TEX. L. REV. 1711, 1722 (2013) ("Absent a presumption in favor of keeping precedent, and absent the system of written opinions on which stare decisis depends, new

majorities could brush away a prior decision without explanation."); *see also* Robert S. Summers & Svein Eng, *Departures from Precedent*, *in* MACCORMICK & SUMMERS, *supra* note 2, at 519, 526.

43. *See* EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 7 (Chicago Univ. Press ed. 1963) ("[W]hen a written constitution of a nation is involved, the court has greater freedom than it has with the application of a statute or case law."); Payne v. Tennessee, 501 U.S. 808, 828 (1991); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–07 (1932) (Brandeis, J., dissenting) ("Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions." (footnote omitted) (citation omitted)).

44. *See* LEVI, *supra* note 44, at 58–59 ("[A] written constitution, which is frequently thought to give rigidity to a system, must provide flexibility if judicial supremacy is to be permitted."); Barrett, *supra* note 43, at 1713 (discussing different levels of horizontal *stare decisis*).

45. GARNER, *supra* note 2, at 352 (contending that precedent should be less rigidly applied in constitutional as opposed to statutory cases).

46. *Id.*

unconstitutional.[47] *Plessy v. Ferguson*[48] was marred with flawed logic that sought to circumvent the Fourteenth Amendment, and *Korematsu v. United States*[49] denied Japanese Americans constitutional guarantees of Equal Protection—finally being overturned in 2018,[50] almost seventy-five years after the decision was handed down. Yet, the throughline for cases such as these is that they restored rights that were stripped away because of prejudice, paranoia, and fear rather than legitimate constitutional reasoning. The cases overturning the precedent established by *Dred Scott*, *Plessy*, and *Korematsu* were appropriate because the underlying reasoning was gravely flawed and had little to no legitimate constitutional support. However, many of the votes to overturn well-established precedent in the Roberts Court have not been based on reasoning analogous to those three cases, as evidenced partially by the continual partisan split in the votes.

III. PRECEDENT AND CONTROLLING SUPREME COURT DISCRETION

The Supreme Court should generally follow its own precedent. One of the critiques that conservatives and Republicans have had of the judiciary, especially the liberal-leaning Warren Court, is its alleged failure to respect precedent and follow past decisions, instead engaging in legislation and policymaking.[51] Conservatives such as Robert Bork have argued that the Court

47. 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

48. 163 U.S. 537 (1896), *overruled by* Brown v. Board of Education, 347 U.S. 483 (1954).

49. 323 U.S. 214 (1944), *abrogated by* Trump v. Hawaii, 585 U.S. 667 (2018).

50. *Trump*, 585 U.S. at 710 ("*Korematsu* was gravely wrong the day it was decided, [and] has been overruled in the court of history . . . .").

51. *See generally* JEREMY RABKIN, JUDICIAL COMPULSIONS: HOW PUBLIC LAW DISTORTS PUBLIC POLICY (1989) (arguing for limited judicial role in federal policymaking and criticizing judicial over involvement); DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977) (discussing the judiciary's role in policymaking and its inability to correctly confront those challenges)*;* Barry Feld*, Race, Politics, and Juvenile Justice: The Warren Court and the Conservative "Backlash"*, 87 MINN. L. REV. 1447 (2003) (discussing conservative backlash against the liberal-leaning Warren Court); FREDERICK P. LEWIS, THE CONTEXT OF JUDICIAL ACTIVISM: THE ENDURANCE OF THE WARREN COURT LEGACY IN A CONSERVATIVE AGE (Rowman & Littlefield ed. 1998) (discussing the Warren Court's enduring legacy through Republican administrations).

should be hesitant to overturn its previous decisions and should not even decide a case unless it can do so on principled grounds.[52]

But as we saw, in 2022, the U.S. Supreme Court under Chief Justice Roberts was willing to reject precedent in *Dobbs v. Jackson's Women's Health Organization*.[53] *Dobbs* overturned *Roe v. Wade*[54] and thereby held that the Constitution does not protect the right to an abortion. By the time the *Dobbs* decision was handed down, *Roe* had been the law of the land for almost fifty years. *Roe* and its progeny had withstood repeated Supreme Court scrutiny throughout the years, with at least thirteen Supreme Court decisions discussing abortion rights between *Roe* and *Dobbs*.[55] The partisan split, accompanied by the fact that *Dobbs* reduced, instead of increased, personal liberties and constitutional protections for the over 165 million women and otherwise impacted people in the United States, drew considerable scrutiny on the Roberts Court.

The *Dobbs* decision put the Supreme Court's respect for its own precedent in the news, especially on a Court where six of the Justices were appointed by Republican presidents.[56] It is particularly notable that, during the confirmation hearings of several of these Justices, many of the Court appointees commented on precedent.[57] It is also telling that, historically, public trust in the judiciary has been the highest of the three branches, but this

52. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 35 (1971) ("The Supreme Court's constitutional role appears to be justified only if the Court applies principles that are neutrally derived, defined and applied.").

53. 597 U.S. 215 (2022).

54. 410 U.S. 113 (1973), *overruled by Dobbs*, 597 U.S. 215.

55. *See* Roe v. Wade *and Supreme Court Abortion Cases*, BRENNAN CTR. FOR JUST. (Sept. 28, 2022), https://www.brennancenter.org/our-work/research-reports/roe-v-wade-and-supreme-court-abortion-cases [https://perma.cc/28BE-UEX5] (listing abortion cases between *Roe* and *Dobbs*).

56. In *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024) six Republican-appointed Justices overruled *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). While the case furthers the point regarding the Republican-Democratic or Conservative-Liberal split, this case is not included in this analysis, both because it is outside the time frame for the study and because the decision was not rendered on constitutional grounds.

57. *See, e.g.*, Melissa Quinn, *What the Republican-Appointed Supreme Court Justices Have Said About* Roe v. Wade, CBS NEWS (May 3, 2022), https://www.cbsnews.com/news/roe-v-wade-supreme-court-republican-gop-appointed-justices [https://perma.cc/6YY8-B7NV] (discussing Supreme Court nominee comments on precedent and Roe during their Senate confirmation hearings).

trust has largely fallen flat during the Roberts Court.[58] In light of *Dobbs*, what can we say about the Roberts Court when it comes to judicial precedent?

IV. EMPIRICAL ANALYSIS OF ADHERING TO PRECEDENT IN THE ROBERTS COURT

Chief Justice John Roberts took over the Supreme Court in 2005. From 2005 through the end of the 2022 term, there have been sixteen Supreme Court cases in which the Court overturned a constitutional precedent.[59] Table One lists those cases as well as how the Justices on the Court at the time of the decision voted in terms of upholding or overturning precedent. This table is simply descriptive, listing all the identified decisions in which the Roberts Court rejected or overturned a previous constitutional precedent and the accompanying votes from each Justice.

Table One: Roberts Court Votes on Constitutional Precedent

Case	Overturned Precedent	Affirmed Precedent
Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022)	Alito, Thomas, Gorsuch, Kavanaugh, Barrett	Roberts, Breyer, Sotomayor, Kagan
Ramos v. Louisiana, 590 U.S. 83 (2020)	Gorsuch, Ginsburg, Breyer, Sotomayor, Kavanaugh	Alito, Roberts, Kagan

58. *See* JOSH NUMAINVILLE, Q&A: IS THE SUPREME COURT OVERTURNING MORE PRECEDENT THAN BEFORE? (2024), Westlaw 2024 APPELLBRF 1962 ("Historically, the Supreme Court has been the most trusted of the three major branches of the federal government. For example, in the late 1980s, public opinion polls found that 66% of the American public had a favorable view of the Supreme Court. . . . But over time, that gap has faded, especially during the Roberts Court. Today, only 43% of the public has a favorable view of the Supreme Court.").

59. *See id.* ("[T]he Supreme Court has overturned a constitutional precedent less than 150 times in its 235-year history, with 16 of those decisions coming from the Roberts Court over a 17-year span.").

Gamble v. United States, 587 U.S. 678 (2019)	Alito, Roberts, Thomas, Breyer, Sotomayor, Kagan, Kavanaugh	Ginsburg, Gorsuch
Franchise Tax Board of California v. Hyatt, 587 U.S. 230 (2019)	Thomas, Roberts, Alito, Gorsuch, Kavanaugh	Breyer, Ginsburg, Sotomayor, Kagan
Herrera v. Wyoming, 587 U.S. 329 (2019)	Sotomayor, Ginsburg, Breyer, Kagan, Gorsuch	Alito, Roberts, Thomas, Kavanaugh
Knick v. Township of Scott, 588 U.S. 180 (2019)	Roberts, Thomas, Alito, Gorsuch, Kavanaugh	Kagan, Ginsburg, Breyer, Sotomayor
Rucho v. Common Cause, 588 U.S. 684 (2019)	Roberts, Thomas, Alito, Gorsuch, Kavanaugh	Kagan, Ginsburg, Breyer, Sotomayor
Janus v. Am. Fed'n of State, Cty., and Mun. Emps., Council 31, 585 U.S. 878 (2018)	Alito, Roberts, Kennedy, Thomas, Gorsuch	Kagan, Ginsburg, Breyer, Sotomayor
South Dakota v. Wayfair, 585 U.S. 162 (2018)	Kennedy, Thomas, Ginsburg, Alito, Gorsuch	Roberts, Breyer, Sotomayor, Kagan
Trump v. Hawaii, 585 U.S. 667 (2018)	Roberts, Kennedy, Thomas, Alito, Gorsuch	Breyer, Kagan, Sotomayor, Ginsburg

Hurst v. Florida, 577 U.S. 92 (2016)	Sotomayor, Roberts, Scalia, Kennedy, Thomas, Ginsburg, Kagan, Breyer	Alito
Obergefell v. Hodges, 576 U.S. 644 (2015)	Kennedy, Ginsburg, Breyer, Sotomayor, Kagan	Roberts, Scalia, Thomas, Alito
Alleyne v. United States, 570 U.S. 99 (2013)	Thomas, Ginsburg, Breyer, Sotomayor, Kagan	Roberts, Scalia, Kennedy, Alito
Citizens United v. Federal Election Commission, 558 U.S. 310 (2010)	Kennedy, Roberts, Scalia, Alito, Thomas	Stevens, Ginsburg, Breyer, Sotomayor.
Montejo v. Louisiana, 556 U.S. 778 (2009)	Scalia, Roberts, Kennedy, Thomas, Alito	Stevens, Souter, Ginsburg, Breyer
Johnson v United States, 576 U.S. 591 (2015)	Scalia, Roberts, Ginsburg, Breyer, Sotomayor, Kagan, Kennedy, Thomas	Alito

Table Two provides two sets of information. It first indicates the partisanship of the appointing president for each Justice. Second, it looks at the percentage or rate which a Justice voted to overturn constitutional precedent in situations where the Court ultimately decided to reject a constitutional precedent. What emerges is an interesting pattern. First, because of changing Court personnel, some Justices have voted on more cases to overturn constitutional precedent than others. For example, Chief Justice Roberts and Justice Thomas have cast votes in all sixteen cases, Justice Barrett in only one. Second, Justices display various levels of support for their own constitutional precedent. Table Two also lists those patterns for the different

Justices. Barrett voted 100% to reject precedent for the one case she decided. Chief Justice Roberts voted 62.5% of the time to reject constitutional precedent, whereas Justice Kagan voted to do so only 33% of the time.

Table Two: Percentage Overruling Among Roberts Court Justices

Party of Appointing President	Justice	Votes to Overrule	Total Votes	Percentage Overruling
Republican	Barrett	1	1	100%
Republican	Gorsuch	9	10	90%
Republican	Kennedy	8	9	88.90%
Republican	Thomas	14	16	87.50%
Republican	Kavanaugh	6	7	85.70%
Republican	Scalia	4	6	67%
Republican	Roberts	10	16	62.50%
Republican	Alito	10	16	62.50%
Democrat	Ginsburg	6	12	50%
Democrat	Sotomayor	7	15	46.70%
Democrat	Breyer	7	15	46.70%
Democrat	Kagan	4	12	33%
Republican	Stevens	0	2	0%

If one were to look at a rejection of precedent, in terms of partisanship an interesting pattern also emerges. Table Three displays that. Among all votes cast by all Justices in all sixteen

cases to overturn constitutional precedent, 86 out of 137 (62.8%) of the votes were to reject precedent. Among the Justice who were appointed by a Republican president, they voted 74.7% of the time to overturn precedent. In contrast, Justices appointed by a Democratic president voted 44.4% of the time to reject constitutional precedent. Republican-appointed Justices were significantly more likely to reject constitutional precedent.

Table Three: Partisanship Voting on Constitution Precedent

Votes	Republican	Democrat	Total
Votes to Overrule	62	24	86
Votes to Affirm	83	54	137
Percentage Overrule	74.70%	44.40%	62.80%

Is there any relationship between ideology and decisions to reject constitutional precedent? Political scientists and judicial scholars have constructed what is known as the Martin-Quinn measure for judicial ideology.[60] The metric ranks how conservative or liberal a Justice is based upon their voting behavior in relationship to the rest of the Court.[61] Under the Martin-Quinn standard, a score of zero would indicate political neutrality or centrism.[62] The more negative the number, the more liberal the Justice, while the greater the positive number, the more conservative.[63]

Table Four provides a ranking for all the Justices on the Court during the Roberts era. Justices change their ideological orientation, or it evolves over time. This study provides a composite average of the Martin-Quinn scores for each of the

60. *See generally* Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134 (2002) (formulating the Martin-Quinn complex).

61. *See generally id.*

62. *See id.* at 145 (noting that the baseline, constant point is zero).

63. *See id.* at 145–46 (noting that "liberal" Justices had negative scores and "conservative" Justices had positive scores in their model).

Justices.[64] Thus, for example, Justice O'Connor has a score of 0.073, and Kennedy has a score of 0.263, indicating them to be relative centrists. Justice Sotomayor's score is -3.127, making her the most liberal member of the Court, and Justice Stevens comes in at -2.809. Conversely, during his tenure on the Roberts Court, Thomas has a Martin-Quinn score of 3.114 and Scalia has a score of 2.069, indicating conservative ideology.

Table Four: Average Martin-Quinn Score for Justices on the Roberts Court

Justice	Martin-Quinn Score
Sotomayor	-3.127
Stevens	-2.809
Ginsburg	-2.132
Kagan	-1.713
Brown Jackson	-1.712
Breyer	-1.578
Souter	-1.508
O'Connor	0.073
Kennedy	0.263
Kavanaugh	0.558
Roberts	0.859
Barrett	0.949
Gorsuch	1.027
Alito	1.95
Scalia	2.069

64. *See Martin-Quinn Scores: Measures*, WASH. UNIV. ST. LOUIS, http://mqscores.wustl.edu/measures.php [https://perma.cc/2C8H-427W] (last visited Mar. 23, 2025) (recommending the use of "posterior mean location[s]" for Martin-Quinn scores).

Thomas 3.114

What this study did was something quite simple. It looked at the percentage of time that a Justice voted to overturn constitutional precedent and correlated it with the Justice's average Martin-Quinn score. Correlations are measured on a scale of negative one to positive one. A score of zero would indicate no relationship between ideology and voting to overturn constitutional precedent. For this study, a negative score would mean that the more liberal a Justice is, the more likely they would be to overturn precedent. A positive score would indicate that the more conservative a Justice is, the more likely they would be to overturn precedent. Rarely would one find a value of positive one or negative one, but instead some value in between.

Here the Correlation Coefficient is 0.735. The Probability Value (P-Value) is .004206. The result is significant at $p < .01$. By any standard measure, this is a significant positive correlation.[65] Phrased another way, there is an incredibly strong or high correlation or relationship between being politically conservative and willingness to overturn constitutional precedent. Republican-appointed Justices, and those more likely to be ranked as conservative, were significantly more likely to overturn constitutional precedent than were Democrat-appointed Justices and those more likely to be ranked as liberal.

However, defenders of the Roberts Court's adherence to judicial precedence have noted that the current Court has overturned less precedent than its predecessors. This includes the Warren Court (1953-1969), the Burger Court (1969-1986), and the Rehnquist Court (1986-2005).[66] Justice Amy Coney Barrett mentioned this point at a talk at the University of Minnesota, noting that the Roberts Court is at "a low when you look at historically how many precedents are overruled a term."[67] However,

65. *See, e.g.*, Patrick Schober et al., *Correlation Coefficients: Appropriate Use and Interpretation*, 126 ANESTHESIA & ANALGESIA 1763, 1765 (2018) (providing a table showing conventional approaches to interpreting correlation coefficients).

66. *See* Adam Liptak, *The Supreme Court's Mixed Record on Adhering to Precedent*, N.Y. TIMES (Jan. 29, 2024), https://www.nytimes.com/2024/01/29/us/supreme-court-precedent-chevron.html [https://perma.cc/6RNQ-UGQL] (comparing the number of precedents overruled between the Roberts Court, Warren Court, Burger Court, and Rehnquist Court).

67. Duncan Hosie, *Stealth Reversals: Precedent Evasion in the Roberts Court and Constitutional Reclamation*, 58 U.C. DAVIS L. REV. 1323, 1325–26 (2025) (quoting *Justice Amy Coney Barrett Speaks at University of Minnesota*,

as seen in the above analysis, that is not for a lack of trying when constitutional cases are granted certiorari, particularly among the most conservative Justices. It also must be seen in the context of the Supreme Court hearing far less cases each year than their predecessors.[68] Most importantly, decisions like *Dobbs* fundamentally alter the legal landscape and eviscerate protections long afforded to American citizens. This places it in a unique category, as legal scholars have indicated that there have only "been 13 key cases addressing constitutional rights where the Supreme Court has thrown out major precedents that had stood for at least 10 years" as of 2019.[69]

When looking at the precedents overturned by the Roberts Court, it is imperative to look beyond the number of precedents, and to the context of the decisions, the number of decisions accepted, and the constitutional ramifications of those decisions. Although beyond the scope of this Article, there is also evidence that the Roberts Court has continually engaged in "stealth" reversals, which rely on not explicitly overturning judicial precedents but nonetheless creating outcomes favorable to conservative-leaning ideas.[70] It is likely that this trend will continue, as the Roberts Court has seen a considerable uptick in overturning precedents since the appointment of the three Justices during the first Trump administration.[71] But most importantly, regardless of the relative political makeup of the Court, the authors hope that the U.S. Supreme Court will stop straying from the path and begin to recognize the importance of judicial precedent in maintaining fairness, uniformity, equality, consistency,

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C-SPAN, at 31:57 (Oct. 16, 2023), https://www.c-span.org/video/?531030-1/justice-amy-coney-barrett-speaksuniversity-minnesota [https://perma.cc/5T4J-3HJZ]).

68. *See, e.g.*, Adam Feldman, *Final Stat Pack for October Term 2019*, SCOTUSBLOG (July 10, 2020), https://www.scotusblog.com/2020/07/final-stat-pack-for-october-term-2019 (providing a chart of Supreme Court decisions by term).

69. Dan Keating et al., *How Often Does the Supreme Court Overturn Precedents Like Roe v. Wade?*, WASH. POST (May 21, 2019), https://www.washingtonpost.com/politics/2019/05/21/how-often-does-supreme-court-overturn-precedents-like-roe-v-wade [https://perma.cc/JHF7-2LWZ].

70. *See* Hosie, *supra* note 68, at 1423 (noting that, under the Roberts Court, "stealth reversals [have] span[ned] a wide variety of legal issues and take[n] a variety of forms, but they have moved the law to the right as part of an effort to shield the Court from scrutiny and backlash.").

71. *See* Liptak, *supra* note 67 (noting that the rate of overruled precedents under the Roberts Court increased from 1.6 precedents per term prior to 2017 to 2.2 precedents per term as of 2024).

predictability, stability, reliance, and finality in the law, particularly for constitutional cases.

CONCLUSION

What does all this mean? It first suggests that there is hypocrisy among Republicans and ideological conservatives when it comes to the Court. They criticized the Supreme Court for rejecting constitutional precedents—perhaps when it was a decision they did not like—and then criticized the Court for making policy. It seems that, now that conservative Justices make up the majority of the Court, constitutional precedent is not so sacred.

Second, if precedent is meant to limit discretion or arbitrariness, the failure of Republican-appointed or conservative Justices on the Court to adhere to these principles indicates a lack of self-constraint. At one time there were arguments for judicial restraint or for the Court to follow "passive virtues"[72] and avoid constitutional decisions, but that approach seems to have been abandoned.

Third, rejection of precedent raises fundamental questions regarding how some Justices seem to understand American constitutional law and their use of interpretive methods. Among Justices on the Court, such as Thomas and Alito, for example, their approach to the Constitution is based upon originalism or textualism. This approach fundamentally ignores the key role that precedent is supposed to play in the law. Their interpretive strategy runs roughshod over constitutional precedent, leading them back to their own interpretation of what the text says or what the originalist interpretation of the constitutional document means. Precedent is part of the law, and it is supposed to constrain discretion, guide the Court, and to ensure predictability. It appears that the conservatives and Republican-appointed Justices on the Roberts Court have abandoned precedent, leaving potentially no limits on what they may continue to do going forward.

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72. *See generally* Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961) (arguing for judicial restraint in controversial constitutional questions).