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REFLECTIONS ON STARE DECISIS

JUDGE JOSEPH A. GREENAWAY, JR.*

Reflecting on the principle of stare decisis is both timely and challenging. I experienced an introduction of sorts to one of the milieus where stare decisis is most important—my confirmation hearings. When I had seen or heard the confirmation hearing of other would-be judges or Justices, the experience seemed a little distant and academic. On the other hand, as the person subjected to the questioning, it was indeed quite real. As I had been told, the questions were pointed. Senators had a specific focus—what kind of judge would you be? What was your judicial philosophy? And most important to each of them—what did you think of precedent? What was settled precedent? What precedents were open to or up for discussion?

Most candidates for judicial appointment respond to these types of questions in like fashion—settled precedent is just that, and hypotheticals cannot create a vehicle for discussion since such opining cannot portend how a particular case should be handled or ultimately decided. This manner of jousting is oftentimes frustrating to the questioner, but the Senate chamber is not always conducive to fulsome exchanges on these weighty subjects. The judicial candidate and the questioning senators are often at cross purposes. Outside of the Senate chamber, a more robust exchange is likely possible. In that vein, I present these thoughts about the principle of stare decisis today.

I. TESTS FOR STARE DECISIS

Stare decisis is the backbone of the method by which we learn, teach, and practice law. We address substantive areas where pronouncements by courts establish precedents. Those precedents build on each other. Changes in the path of the law are generally slow to be made and are more often akin to an ocean liner changing course than a hard turn by a speed boat. We all appreciate the principle—easily recognized and more easily defined—stare decisis—according to the Latin: “To stand by decided cases; to uphold precedents; to maintain former adjudications.”¹ The definition had an almost majestic sound and quality to it when I was a law student. Today, it is so

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* Judge, United States Court of Appeals for the Third Circuit (Ret.). I am grateful for the assistance of my law clerks Purti Pareek and Rhea Christmas. Their tireless research and cogent thoughts were extremely useful.

1. *Stare Decisis*, BLACK’S LAW DICTIONARY (2d ed. 1910).

foundational to the work that my colleagues and I engage in that we rarely discuss it, *per se*, as a guiding or foundational principle. It is so engrained in our collective psyches that we just do it.

At the circuit level, our tussle with the principle of *stare decisis* is different in focus and degree than that of the Supreme Court. My academic colleagues refer to *stare decisis* in this context as vertical *stare decisis*. We are bound by Supreme Court precedent, whether the actual holding or *dicta*. We are guided by the teachings of the Court and cannot act inconsistently with its edicts. The study of horizontal *stare decisis*,² in contrast, seems to capture the imagination of court watchers because the only path to divergent views, particularly on issues and holdings of constitutional moment, is through the Court re-examining precedent.

As students of the Court, we are all familiar with its process over the course of history. Precedent is established. It is not set in stone, and generally shall be re-examined as law, views, and the facts evolve. The ingenuity of the bar is often the genesis of different ways in which the judiciary thinks about and considers different substantive areas.

One could argue that oftentimes *stare decisis* occurred organically based on the very development of ideas I just alluded to. However, in the last few years, the Court has attempted to formalize its manner of thinking about and applying *stare decisis*, particularly in the constitutional context. We were introduced formally to the multi-factor test the Supreme Court applied in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*,³ but it is the application of the five factors employed by the *Dobbs v. Jackson Women's Health Organization*⁴ majority, and the competing discussion in the dissent, that has captured the attention of our legal community and beyond.

Before I delve further into this discussion, I feel obligated, having mentioned *Dobbs*, to take a point of personal privilege as to what this Essay is not. I shall not opine on whether *Roe* was rightly or wrongly decided, or whether there is or is not a constitutional right to an abortion. Nor shall I observe whether *Dobbs* is rightly or wrongly decided, or could have been more narrowly or broadly drawn. What I would like to discuss is what the competing discussions of *stare decisis* leave us with going forward.

2. "The doctrine that a court, esp[ecially] an appellate court, must adhere to its own prior decisions, unless it finds compelling reasons to overrule itself." *Horizontal Stare Decisis*, BLACK'S LAW DICTIONARY (10th ed. 2014).

3. 138 S. Ct. 2448 (2018).

4. 142 S. Ct. 2228 (2022).

As Justice Kavanaugh so aptly noted in *Ramos v. Louisiana*,⁵ constitutional matters are inherently more nettlesome than statutory ones. Specifically, he noted, “[i]n statutory cases, *stare decisis* is comparatively strict, as history shows and the Court has often stated. That is because Congress and the President can alter a statutory precedent by enacting new legislation.”⁶ But even in constitutional cases, he observed that, “to overrule a constitutional precedent, the Court requires something ‘over and above the belief that the precedent was wrongly decided.’”⁷ Justice Kavanaugh quoted Justice Scalia: “As Justice Scalia put it, the doctrine of *stare decisis* always requires ‘reasons that go beyond mere demonstration that the overruled opinion was wrong,’ for otherwise the doctrine would be no doctrine at all.”⁸

In its historical context, many have thought of the principle of *stare decisis* as a process that requires time, which allows arguments to take shape and judicial decisions to be developed and written before re-examination occurs. Many cases in the judicial pantheon have come about in just that way. In several substantive areas, *Plessy v. Ferguson*⁹ to *Brown v. Board of Education*¹⁰ and *Bowers v. Hardwick*¹¹ to *Lawrence v. Texas*,¹² change developed over time.

The current tension regarding *stare decisis* arises as shown by a troika of cases that have garnered considerable attention, culminating in the clash in *Dobbs*. Historically, *stare decisis* has never stood for the proposition that only in the rarest of cases should precedent be disturbed.¹³ Nor does it favor persistent and frequent re-examinations of precedent. Some would argue that this has changed, as best illustrated by *Janus*, *Ramos*, and now *Dobbs*. These cases purport to have created and applied multi-factor tests for consideration of whether *stare decisis* counsels against re-examination of precedent or whether reversal is warranted. In my view, the stated tests are set forth with slight variations that do result in challenges in application for faculty, practitioners, and courts. There lies the rub: Which iteration of the test should

5. 140 S. Ct. 1390 (2020).

6. *Id.* at 1413 (Kavanaugh, J., concurring).

7. *Id.* at 1414 (quoting *Allen v. Cooper*, 140 S. Ct. 994, 1003 (2020)).

8. *Id.* (quoting *Hubbard v. United States*, 514 U.S. 695, 716 (1995) (Scalia, J., concurring in part and concurring in judgment)).

9. 163 U.S. 537 (1896).

10. 347 U.S. 483 (1954).

11. 478 U.S. 186 (1986).

12. 539 U.S. 558 (2003).

13. See, e.g., Thomas Healy, *Stare Decisis and the Constitution: Four Questions and Answers*, 83 NOTRE DAME L. REV. 1173 (2008); Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419 (2006); Richard W. Murphy, *Separation of Powers and the Horizontal Force of Precedent*, 78 NOTRE DAME L. REV. 1075 (2003); cf. Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647 (1999).

be applied? What are the variables which determine whether one applies the test from *Dobbs*, *Ramos*, or *Janus*?

Janus opens by teaching its general view of the principle from *Payne v. Tennessee*,¹⁴ that “[s]tare 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.”¹⁵ It then instructs that the application of stare decisis should consider five factors: the quality of the reasoning espoused in the precedent at hand, the workability of the rule established, the precedent’s consistency with other related decisions, developments since the precedent was handed down, and reliance on the decision.¹⁶

In *Ramos*, two years later, Justice Gorsuch applied a slightly different test which included all of the factors noted in *Janus*, except for the workability of the rule established.¹⁷ In all likelihood, that was a consequence of the subject matter at hand—i.e., whether the Sixth Amendment requires unanimity in a jury verdict¹⁸—but that is conjecture and not clearly stated in the opinion.

The application of the modified multi-factor test in *Dobbs* was met by a steadfast dissent with a competing view of stare decisis and its application in the constitutional context.¹⁹ In *Dobbs*, Justice Alito noted that the five factors to apply are the nature of the Court’s error, the quality of the Court’s reasoning, the workability of the ruling (that is, whether the rule can be understood and applied in a consistent and predictable manner), the effect on other areas of the law (has the precedent led to the distortion of many important but unrelated legal doctrines), and reliance interests.²⁰

The practical challenge of the variation in the tests is determining which to apply and in what circumstances. In *Ramos*, the Court noted that in the constitutional sphere we should keep a few thoughts paramount—stare decisis “is ‘at its weakest when we interpret the Constitution’ because a mistaken judicial interpretation of that supreme law is often ‘practically impossible’ to correct through other means.”²¹

14. 501 U.S. 808 (1991).

15. *Janus v. Am. Fed. of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478 (2018) (quoting *Payne*, 501 U.S. at 827).

16. *Id.* at 2478–79.

17. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020).

18. *Id.* at 1394–95.

19. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2319–23 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

20. *Id.* at 2265 (majority opinion).

21. *Ramos*, 140 S. Ct. at 1405 (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)).

Hence, if constitutional precedent is to be afforded less obeisance than that accorded to other precedent, pressing for uniformity in the application of the appropriate test seems more critical. Moreover, if constitutional precedent is subject to lesser scrutiny from a stare decisis viewpoint, do we embrace the notion that we shall never achieve any degree of predictability?

Of course, a side-by-side comparison of the varying tests of *Janus*, *Ramos*, and *Dobbs* would render little insight into the difficulty of application. As such, I thought I would focus this reflection on the nature of the Court's error and the reliance issues. Admittedly, the dissent in *Dobbs* focused much of its attention on whether the facts and law had sufficiently changed such that a re-examination of constitutional precedent was warranted. This more traditional view of stare decisis and its application poses a steadfast counterpoint to the majority view, but, alas, I lack the space here to pontificate on this matter.

II. THE NATURE OF THE ERROR

As a consequence, I begin with the *Dobbs* majority's stare decisis analysis regarding the nature of the Court's error. The Court adopts the descriptor employed in *Ramos*—the Court's ruling in *Roe* was “egregiously wrong.”²² I appreciate, based on the analysis, how that conclusion could be reached, but my question going forward is: How does one provide contour and context to interpret “egregiously wrong?” It is not patently obvious to all that *Roe* was wrongly decided. Does this mean, going forward, that the nature of the Court's error must fall within a certain magnitude of error?

These recently formulated tests for stare decisis could allow the exercise of judicial discretion in ways I am not sure were anticipated, contemplated, or intended. Going forward, how shall courts determine whether something is “egregiously wrong” versus “terribly wrong” versus “altogether wrong”? Surely, the nature and extent of the error cannot be subject to such an inexact test. Is just “plain wrong” or “evidently wrong” sufficient? I dwell on semantics because of the primacy of this factor. My concern is that “egregiously wrong” slides down the slippery slope to “plainly wrong” and then simply “wrong.” In which case stare decisis will have no principled meaning because if the error is by description wrong, then that can and must form the basis of re-examination and the wholesale abandonment of precedent.

Moreover, does “wrong” mean “uncontestably wrong,” as though the result of an arithmetic equation? Concluding that an error arises from failing to acknowledge that a jury must reach a unanimous verdict is certainly different from deciding whether a constitutional right is evidenced in the

22. *Dobbs*, 142 S. Ct. at 2243.

Constitution based on its history and tradition. If an argument can be made on either side of a constitutional divide, does that mean or imply that whichever side is on the proverbial short end is egregiously wrong? The Roberts Court has consistently addressed its constitutional analysis by determining whether history and tradition support the recognition of a particular right as a constitutional right. Does that mean any failure to identify an historical nexus or analogue establishing the history and tradition of a particular right creates a circumstance to say the constitutional precedent examined must be egregiously wrong?

The dissent in *Dobbs* finds itself equally enmeshed in a tête-à-tête about stare decisis. It asks a quintessential question: What has transpired in the judicial discussion space—case law—to mandate or provide the impetus for the re-examination in which the majority is engulfed? The dissent describes stare decisis as a doctrine of judicial modesty and humility. Such a description seems a bit poetic, but poignant nonetheless. The question it asks is: What has changed? Specifically, it notes “[n]o recent developments, in either law or fact, have eroded or cast doubt on those precedents. Nothing, in short, has changed.”²³

The discussion of the nature of the Court’s error and the clash of what has changed regarding the law and facts crystallize the difficulty in application of stare decisis given the Court’s current analysis. Leaving the Court to determine what is egregiously wrong is problematic.

The caveat arising from employing an amorphous factor, such as the nature of the Court’s error, is more evident when one considers Justice Thomas’s concurrence in *Dobbs*. The majority emphasizes, on several occasions, that its ruling should not cast doubt on precedents unrelated to abortion. (Of course, the fact that footnote forty-eight lists myriad examples of constitutional precedents being overturned should not necessarily inspire confidence.²⁴) On the other hand, Justice Thomas notes that “[b]ecause the Due Process Clause does not secure *any* substantive rights, it does not secure a right to abortion.”²⁵ He noted further, “[f]or that reason, in future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Laurence*, and *Obergefell*. Because any substantive due process decision is ‘demonstrably erroneous,’ we have a duty to ‘correct the error’ established in those precedents.”²⁶

23. *Id.* at 2319 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

24. *See id.* at 2263 n.48 (majority opinion).

25. *Id.* at 2301 (Thomas, J., concurring).

26. *Id.* (first quoting *Ramos*, 140 S. Ct. at 1421 (Thomas, J., concurring in judgment); then quoting *Gamble v. United States*, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring)).

Justice Thomas’s insight makes clear that any factor entitled “the nature of the Court’s error” could be interpreted as a proxy for re-examination of all precedent, despite stare decisis. The Justice goes on to say “[m]oreover, apart from being a demonstrably incorrect reading of the Due Process Clause, the ‘legal fiction’ of substantive due process is ‘particularly dangerous.’”²⁷ These statements are not opinings. They are not equivocal. Most important, the words provide a critical insight into a test that allows such broad and wide-ranging opportunities for re-examination of precedent.

My point is not whether the majority is disingenuous when it says that the breadth of *Dobbs* is merely abortion and no further. Rather, I believe these descriptions regarding substantive due process are at the core of the nature of the Court’s error factor. Should we not discern from these words that every instance where the Court has recognized substantive due process is wrong? Albeit not yet determined to be egregiously wrong, the outcome would predictably be the same. How can the principle of stare decisis be sensibly applied going forward if one need only modify the term “wrong” sufficiently to justify re-examination and reversal?

III. RELIANCE

One common thread in both sides of the *Dobbs* divide is the determination that reliance should be part of the multifactor test. Justice Kavanaugh, in his *Ramos* concurrence, spelled out the reliance interest aptly when he posed the question, “would overruling the prior decision unduly upset reliance interests?”²⁸ He then explained, “[t]his consideration focuses on the legitimate expectations of those who have reasonably relied on the precedent. In conducting that inquiry, the Court may examine a variety of reliance interests.”²⁹

One of the most vivid instances of reliance in the constitutional context is Justice Rehnquist’s opinion in *Dickerson v. United States*.³⁰ There, when the Court had squarely before it the question of overruling *Miranda*, the Justice noted substantial reliance interests. Specifically, he commented that “*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.”³¹ Justice Rehnquist acknowledged a societal reliance interest worthy of consideration, which was part of his calculus in invoking stare decisis and not overruling *Miranda*.

27. *Id.* at 2302 (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 811 (2010) (Thomas, J., concurring in part and concurring in judgment)).

28. *Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring).

29. *Id.*

30. 530 U.S. 428 (2000).

31. *Id.* at 443.

I must admit I do not know what to do with reliance. What is the proper weight to give to reliance? Is it the number of people affected? Is it the gravity of the rights that are at stake? Is it a determination of whether the reliance is reasonable? Here we are not judging reliance in terms of reasonableness. We are judging it in terms of breadth of impact.

In *Ramos*, Justice Kavanaugh said that only defendants who have been found guilty by non-unanimous juries in Louisiana and Oregon were at issue.³² And apparently, numerically, that did not add up to many folks. So, the reliance interests did not sway any consideration of stare decisis. The dissent in *Ramos* said rather obliquely that “the reliance here is not only massive; it is concrete.”³³ Sadly, without much elucidation on how or to whom the massive reliance relates, the argument fails to persuade.

In *Dobbs*, similarly, both the majority and dissent have vastly different views of what the reliance interests are. The majority finds the reliance created by *Roe* and *Casey* to be “intangible.”³⁴ Justice Alito writes, “[b]ut this Court is ill-equipped to assess ‘generalized assertions about the national psyche.’ *Casey*’s notion of reliance thus finds little support in our cases, which instead emphasize very concrete reliance interests, like those that develop in ‘cases involving property and contract rights.’”³⁵ The majority’s reference to such concrete reliance indicates that it does not steer completely away from reliance altogether. Rather, “concrete reliance” as a concept takes center stage in Justice Alito’s analysis in *Dobbs*. We have not seen reliance take such a form, and this shift to a new iteration of this concept is analogous to the focus on “egregiously wrong” as a concept that has morphed over time. Returning to *Dobbs* specifically, Justice Alito continues:

When a concrete reliance interest is asserted, courts are equipped to evaluate the claim, but assessing the novel and intangible form of reliance endorsed by the *Casey* plurality is another matter. That form of reliance depends on an empirical question that is hard for anyone—and in particular, for a court—to assess, namely, the effect of the abortion right on society and in particular on the lives of women.³⁶

The majority’s criticism is essentially ephemeral and suggests the issue is better left to the legislature. When you have such diametrically opposed views, you have to ask yourself: Can we arrive at a uniform understanding of

32. *Ramos*, 140 S. Ct. at 1419 (Kavanaugh, J., concurring).

33. *Id.* at 1438 (Alito, J., dissenting).

34. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2272, 2276–77 (2022).

35. *Id.* at 2276 (first quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 957 (1992) (Rehnquist, C.J., concurring in part and dissenting in part); then quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)).

36. *Id.* at 2277.

what reliance interests are? What does “concrete” mean in this context? Lastly, are the reliance interests put forth in *Dobbs* of a different type and nature than those alluded to in *Dickerson*?

The dissent does not buy into the “intangible” nature of the reliance:

The majority claims that the reliance interests women have in *Roe* and *Casey* are too “intangible” for the Court to consider, even if it were inclined to do so. This is to ignore as judges what we know as men and women. The interests women have in *Roe* and *Casey* are perfectly, viscerally concrete. Countless women will now make different decisions about careers, education, relationships, and whether to try to become pregnant than they would have when *Roe* served as a backstop.³⁷

One might ask, how can it be that reliance interests can concretely exist in property but become intangible when related to the interest of a person? If the issue is a numerical judgment, as it seems in *Ramos*, then certainly the dissent has the better of the argument. But even substantively, the dissent speaks in terms that are familiar to us in how we think about reliance—what is the nature of the reliance? Who has relied? Is the reliance so great or grave that it deserves primary consideration?

CONCLUSION

The Supreme Court troika discussed above makes a few matters evident regarding stare decisis. First, the flexible factors set forth in each of the three precedents would seemingly permit the re-examination of precedent with an ever-increasing frequency only passingly inhibited by considerations of stare decisis. Second, reliance interests, even concrete reliance interests, are unlikely to impede overruling precedent if such precedent is deemed wrong, whether egregiously or not. What is also apparent is that the Court is in the process of reshaping itself and its jurisprudence. Stare decisis has the potential to create great divisiveness on the Court because it, at least theoretically, puts into play any precedent that the majority of the Court thinks is wrongly decided. More precedents will be re-examined and our collective conversation regarding stare decisis will increase in both frequency and intensity.

37. *Id.* at 2346 (Breyer, Sotomayor, & Kagan, JJ., dissenting) (citation omitted).