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New Textualism in Constitutional Interpretation: *Dobbs v. Jackson* (2022) and Its Creation of a New Rule of Law

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NEW TEXTUALISM IN CONSTITUTIONAL INTERPRETATION: DOBBS V. JACKSON (2022) AND ITS CREATION OF A NEW RULE OF LAW

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Abstract: On June 24, 2022, the U.S. Supreme Court decided *Dobbs v. Jackson* (2022). *Dobbs* overturned *Roe v. Wade* (1973) and *Planned Parenthood v. Casey* (1992), precedents legalizing the constitutional right to an abortion. Its overturning of these precedents marks a seismic shift in the U.S. Supreme Court's abortion jurisprudence from a pro-precedent stare decisis doctrine to a precedent-skeptical new textualist doctrine. By undercutting the stare decisis principle that past abortion cases had used to fulfill the rule-of-law criteria of legal rule stability, predictable rule application, and neutral and objective adjudication, *Dobbs* subverts precedent notions of the rule of law but does not dismantle the principle. Instead, it creates a new rule of law that meets its constitutive criteria by de-emphasizing stare decisis and placing greater emphasis on historical stability, adherence to the constitutional text, and consideration of the context surrounding constitutional drafting. *Dobbs* underscores that a new rule of law seeks to turn back in time by achieving the rule of law's constitutive criteria in a manner that revises the past. It premises future abortion jurisprudence on a 248-year-old text written at a time when the law failed to recognize the rights of all people. In doing so, *Dobbs* puts the rights of women and marginalized communities at stake, illuminating the need for lawyers, judges, and advocates to uphold a rule of law that looks to the present and lives up to the ideals of equality and justice for all.

I. Introduction

I was halfway across the world in Singapore the day the United States Supreme Court

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decided *Dobbs v. Jackson* (2022). *Dobbs* ruled that abortion would no longer be a constitutional right and overturned *Planned Parenthood v. Casey* (1992) and *Roe v. Wade* (1973), precedents legalizing the constitutional right to an abortion.[2]

As a Buddhist, I morally oppose abortion and would seldom, if ever, seek one for myself. But as a survivor of abuse who experienced the pain of being stripped of her bodily autonomy, I fervently hold that one has the right to make fundamental personal decisions, such as the decision to terminate a pregnancy. Having also lived under an autocracy that does not premise its governance on the rule of law, I worried that *Dobbs's* negation of long-standing laws that legalized abortion would inadvertently erode the rule of law. Yet simultaneously, it seemed inconceivable that a single judicial decision could thwart a principle on which the American legal system has been grounded for centuries and whose promulgation shapes how we are held accountable to the law.[3]

The rule of law is defined by its constitutive criteria of "(1) stability of legal rules, (2) transparency and predictability of rule application, and (3) neutrality and objectivity for judges predictably applying the stable rules."[4] As this definition is deployed within the context of constitutional interpretation, its use is warranted when discussing the rule of law in cases such as *Dobbs* that concern constitutional matters.[5]

Leading jurisprudential scholars such as William Eskridge, Jr. have also considered this

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[2] Oyez, "Dobbs v. Jackson Women's Health Organization," *Oyez*. Accessed November 25, 2024. https://www.oyez.org/cases/2021/19-1392.
[3] National Archives, "Declaration of Independence," National Archives (The U.S. National Archives and Records Administration), Accessed November 30, 2024, https://www.archives.gov/founding-docs/declaration-transcript.
[4] William N. Eskridge, Jr., Brian G. Slocum, and Kevin Tobia, "Textualism's Defining Moment," *Columbia Law Review* 123, no. 6 (2023): 1624.
[5] Ibid., 1611, 1614-16.

definition to serve as the "normative foundation" for textualism, a doctrine rooted in adherence to the Constitution's plain text.[6] New textualism, a branch of this doctrine, has become increasingly prevalent among Supreme Court justices and state and federal judges and is evident in landmark cases such as *Dobbs* that affect future privacy jurisprudence.[7] An analysis of new textualist interpretations in *Dobbs* will thus guide my exploration of the rule of law. Espoused by the justices who wrote *Dobbs's* majority and concurring opinions, new textualism calls for interpretations to be based on "the text, the whole text, and nothing but the text."[8] Its proponents, while not entirely ignoring precedents, believe in narrowly construing them and are more willing to overturn them when they are inconsistent with constitutional text.[9] They are less likely to derive statutory meaning from precedents when the constitutional text does not answer legal questions. This mode of interpretation marks a seismic shift from how prior abortion cases followed stare decisis, a constitutional principle under which judges heed precedents in answering such questions.[10] *Casey* followed this precedent method by upholding the right to an abortion as per the precedent set by *Roe*, and judges have grounded their decisions in subsequent abortion cases on these two precedents.[11]

Although the existing literature pinpoints the transition from a pro-precedent past to a new textualist present, it has not fully uncovered how specific parts of the *Dobbs* decision have

[6] Brandon J. Murrill, "Modes of Constitutional Interpretation," Congressional Research Service, March 15, 2018, https://crsreports.congress.gov/product/pdf/R/R45129.
[7] Eskridge, et al., "Textualism's Defining Moment," 1611, 1614-16.
[8] Ibid., 1613; Clint Bolick, "The Case for Legal Textualism," Hoover Institution, February 27, 2018, https://www.hoover.org/research/case-legal-textualism.
[9] Eskridge, et al., "Textualism's Defining Moment," 1678-79.
[10] Bolick, "Case for Legal Textualism"; Murrill, 10; Timothy Oyen, "Stare Decisis," Legal Information Institute, June 5, 2017, https://www.law.cornell.edu/wex/stare_decisis.
[11] *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 846 (1992); *Roe v. Wade*, 410 U.S. 113, 129 (1973).

contributed to these changes and to the overall landscape of constitutional interpretation and the rule of law. How *Dobbs* influences the rule of law's constitutive conditions remains to be discovered. The majority of justices in *Dobbs* and pro-life organizations such as Christ for All have contended that *Dobbs's* overruling of *Roe* and *Casey* is compatible with the rule of law.[12] Meanwhile, the dissenting justices and pro-choice organizations such as the Center for Reproductive Rights, condemned the *Dobbs* decision for being an affront to the rule of law.[13] Current scholarship highlights contrasting perspectives on whether *Dobbs* promotes or subverts the rule of law but does not provide a definitive indication of its effects on this principle.

To identify how elements of the *Dobbs* decision shape the landscape for constitutional interpretation and the rule of law in abortion cases, I will analyze the case's majority and concurring opinions, the joint dissent, and the existing literature on new textualism and constitutional interpretation. These sources illuminate how *Dobbs* has redefined what it means to interpret the Constitution and reshaped how constitutional interpretation will occur in future abortion jurisprudence. Synthesizing these sources, I will examine how the *Dobbs* majority's new textualist approach constitutes a substantial shift from the previous deployment of stare decisis and how this shift impacts *Dobbs's* promulgation of the rule of law. Based on this exploration, I posit that *Dobbs* thwarts prior notions of the rule of law; it undermines the stare decisis principle that earlier abortion cases had used to fulfill the rule-of-law criteria of legal rule stability, predictable rule application, and neutral and objective adjudication. I will then argue that, by

[12] John Avery, "Dobbs v. Jackson: A Victory for Life and Liberty - Christ over All," Christ Over All, 2023, https://christoverall.com/article/concise/dobbs-v-jackson-a-victory-for-life-and-liberty/.; Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022).
[13] Center for Reproductive Rights, "Precedent and the Rule of Law: Spotlight on Dobbs v. Jackson Women's Health," Center for Reproductive Rights, November 17, 2021, https://reproductiverights.org/supreme-court-case-mississippi-abortion-ban-rule-of-law/.

undercutting these past conceptions, *Dobbs* creates a new rule of law that meets the above criteria by de-emphasizing stare decisis and placing greater emphasis on historical stability, adherence to the constitutional text, and consideration of the context surrounding constitutional drafting.

II. *Dobbs's* Subversion of the Rule of Law in its Precedent Notions

I will delve into *Casey*'s stare decisis grounds and then examine the majority, concurring, and dissenting opinions in *Dobbs* through a stare decisis lens. *Casey's* grounds model an interpretive approach that promulgates the rule of law as it was once conceived, so an investigation of *Dobbs* through the lens of these grounds would best inform its implications on earlier conceptions of the rule of law.[14] These analyses will reveal that *Dobbs* thwarts previous notions of the rule of law by compromising precedent's ability to bring about legal rule stability, predictable rule application, and fair judicial decision-making.[15]

IIa. Dobbs's *Erosion of Precedential Legal Stability*

Judges who followed the interpretive approach used in earlier abortion cases believe that legal rule stability turns on precedential stability. They therefore hold that an increased willingness to overrule precedents hinders legal rule stability, contrary to the rule of law as it was once understood.

Casey and the joint dissent in *Dobbs* exemplify the above interpretive approach in which

[14] *Dobbs*, 597 U.S., 2321, 2348.
[15] Eskridge, et al., "Textualism's Defining Moment," 1624.

precedents were retained to keep legal rules on abortion stable. The justices primarily rooted *Casey*'s verdict in *Roe*'s central holding that states cannot abridge a woman's constitutional right to an abortion before viability.[16] By maintaining *Roe, Casey* deemed it to be a "settled" law and ensured that future abortion jurisprudence would retain its holdings, keeping the legal rules prescribed by *Roe* stable.[17] Later, in *Dobbs's* joint dissent, the dissenting justices claimed that 20 post-*Roe* abortion cases reaffirmed *Roe* and *Casey*; thus, these precedents were again stabilized as legal rules.[18] On account of how preceding cases have turned *Roe* and *Casey*'s precedents into legal rules on abortion, *Dobbs's* overruling of these precedents not only struck down these two rules but also destabilized the 20 precedents that further established legal rules for abortion. Henceforth, *Dobbs* undermines traditional notions of the rule of law by not heeding precedents to keep legal rules on abortion stable.

Dobbs's reversal of *Roe* and *Casey* has also invalidated precedents that established legal rules in privacy jurisprudence. Because *Roe* and *Casey* themselves relied on the constitutional right to privacy under the Fourteenth Amendment's Due Process Clause, they were crucial to upholding privacy cases that have come before the Supreme Court, in addition to those on abortion.[19] As noted in Acting U.S. Solicitor General Brian Fletcher's amici curiae supporting the respondents, *Dobbs's* invalidation of *Roe* and *Casey* not only rejected the legal rules steadily retained throughout abortion cases but also those serving as the "constitutional foundation for

[16] *Casey*, 505 U.S., 846; *Roe*, 410 U.S., 129; *Dobbs*, 597 U.S., 2238.
[17] *Dobbs*, 597 U.S., 2320.
[18] *Dobbs*, 597 U.S., 2320.
[19] U.S. Constitution, amend. XIV, sec. 1.; William N. Eskridge, Jr., "Reliance Interests in Statutory and Constitutional Interpretation," *Vanderbilt Law Review* 76, no. 3 (April 2023): 688-89.

most of the leading privacy cases in the last half-century."[20] Ultimately, *Dobbs* destabilized subsequent rulings concerning privacy, eroding a traditional notion of the rule of law that uses precedents to promote legal rule stability.

Arizona Supreme Court Justice Clint Bolick and the U.S. Supreme Court's new textualist justices may posit that although precedents can promote legal rule stability, judges should fulfill this criterion by prioritizing obedience to rules in constitutional texts over those prescribed by precedents; doing so ensures that judges "take an oath" to the Constitution, not to stare decisis.[21] Based on this perspective, Justice Bolick and the new textualist justices would postulate that *Roe* and *Casey* hinder legal rule stability because they confer rights nonexistent in the Constitution.[22] *Dobbs's* reversal of such decisions would accordingly uphold former conceptions of the rule of law, in which following the constitutional text, not just precedents, achieves legal rule stability.

Legal rule stability is premised on abiding by provisions in constitutional texts when they directly answer legal questions. In abortion cases, however, the Constitution provides no direct answers to whether abortion is a right by not discussing the issue, a reality to which *Dobbs's* new textualist justices admit.[23] While judges follow the Constitution in such a scenario, they would also turn to stare decisis in unpacking legal questions on abortion. Precedent notions of the rule of law would hence hold that adherence to precedent is a prerequisite for promoting legal rule stability.[24] By invalidating precedents, *Dobbs* deviates from how judges used to maintain legal

[20] Eskridge, Jr., "Reliance Interests in Statutory and Constitutional Interpretation," 688-89; Brief for the United States as Amici Curiae Supporting Respondents at 4, *Dobbs v. Jackson Women's Health Org*., 597 U.S. 215 (2022).
[21] Bolick, "Case for Legal Textualism."
[22] *Dobbs*, 597 U.S., 2234, 2236-37, 2258, 2279.
[23] Ibid., 2240, 2305.
[24] Ibid., 2235, 2236, 2240, 2242; Sam Capparelli, "In Search of Ordinary Meaning: What Can Be Learned from the Textualist Opinions of Bostock v. Clayton County?," *The University of Chicago Law Review* 88, no. 6 (2021): 1456.

rule stability in abortion cases, ultimately thwarting former conceptions of the rule of law that root themselves in precedential stability.[25]

IIb. Dobbs *and Predictable Rule Application*

With *Dobbs* overturning some precedents and maintaining others, lawyers and judges seeking to understand its rationale could face challenges in determining when to employ them. Such barriers render the implementation of abortion precedents less foreseeable and thus undercut a critical standard for promulgating the rule of law as it used to be conceived.

To facilitate the predictable application of rules, judges had previously ensured that every decision could be traced back to precedents that preceded a case. This precedential conformity is conspicuous when they maintained *Roe's* central holding that abortion qualifies as a constitutional right in *Casey* and the 20 subsequent post-*Roe* abortion cases.[26] Because *Roe* and *Casey* were the foundation for most abortion cases that succeeded them, a lawyer or judge could once anticipate that these precedents would be implemented whenever an abortion case came before the Court.

Dobbs does not predictably deploy precedents. Even while striking down abortion precedents such as *Roe* and *Casey*, it heeds precedents rooted in historical legal sources, such as *Washington v. Glucksberg* (1997), to apply the ordered liberty rationale used to determine the constitutionality of rights unmentioned in the Constitution.[27] Abortion cases had not ubiquitously employed *Glucksberg* as the main basis of their decision, yet the majority incorporated it over

[25] Eskridge, et al., "Textualism's Defining Moment," 1611, 1614-16, 1624.
[26] *Casey*, 505 U.S., 846; *Roe*, 410 U.S., 129; *Dobbs*, 597 U.S., 2241, 2333
[27] *Dobbs*, 597 U.S., 2242, 2300; *Washington v. Glucksberg*, 521 U.S. 702 (1997).

reliably embedded abortion precedents.[28] These precedential applications in *Dobbs* denote a substantial pivot from a reliable implementation of abortion precedents to one that draws upon a more fundamentalist constitutional interpretation. Lawyers who had anticipated *Roe* and *Casey*'s application in preceding abortion cases and judges who had routinely deployed them could thus have been unlikely to foretell *Dobbs*. In this regard, *Dobbs* compromised the inferable application of rules surrounding abortion and thus the rule of law in its traditional notion.

IIc. Dobbs *and Impartial Adjudication*

The neutrality and objectivity of abortion decisions previously hinged on judges' use of stare decisis, a doctrine that discerns ordinary meaning based on a term's application in earlier cases.[29] Justice Sandra Day O'Connor, for instance, employed the precedent set by *Roe* in *Casey* despite her personal opposition to abortion.[30] Thus, her precedential conformity removed judicial discretion from her decision-making in accordance with the rule of law as it used to be perceived.

Unlike *Casey, Dobbs* declares that stare decisis "cannot be absolute."[31] It diverges from this previous practice of deploying precedents to execute impersonal adjudication.[32] Judges, such as the dissenting justices who espouse the stare decisis doctrine, would find that the ability to strike down unfavorable precedents "spell[s] the end of any precedent with which a bare majority

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[28] *Casey*, 505 U.S., 846; *Roe*, 410 U.S., 129.
[29] David A. Strauss, "New Textualism in Constitutional Law," *George Washington Law Review* 66 (1997): 1157.; Tara Leigh Grove, "Is Textualism at War with Statutory Precedent?," *Texas Law Review* 102, no. 4 (April 10, 2024): 652, 658.; Capparelli, "In Search of Ordinary Meaning," 1457-58; *Dobbs*, 597 U.S., 2319-20, 2333.
[30] Evan Thomas, "How Supreme Court Justice Sandra Day O'Connor Helped Preserve Abortion Rights," *The New Yorker* (2025 Condé Nast, March 27, 2019), https://www.newyorker.com/news/news-desk/how-the-supreme-court-justice-sandra-day-oconnor-helped-preserve-abortion-rights.; *Casey*, 505 U.S., 865, 870, 912.
[31] *Dobbs*, 597 U.S., 2307.
[32] Grove, "Is Textualism at War with Statutory Precedent?," 652, 658.

of the present Court disagrees."[33] They would consequently hold that future abortion decisions could become less fair in that they are more likely to align with judges' personal opinions over precedents.

This assertion has already been apparent in how the majority's ruling in *Dobbs* is consistent with its members' long-established opposition to abortion.[34] Public statements from Justice Samuel Alito have revealed how he is "particularly proud" of his work to oppose *Roe*.[35] Justice Amy Coney Barrett has long believed that abortion is "always immoral," as per a 1998 law review article.[36] These statements insinuate that the justices in the majority adjudicated *Dobbs* in a manner that aligns with their charged personal viewpoints over precedents that do not. This departure from precedents signifies that *Dobbs* did not achieve impartiality as understood by former conceptions of the rule of law.

III. *Dobbs's* Creation of a New Rule of Law

Although the new textualists' interpretation of *Dobbs* is inconsistent with the rule of law as it was conceived, it does not entirely undermine this principle. Textualism, at its core, was founded on the rule of law, and the six new textualists who produced *Dobbs's* majority opinion inherently support this principle.[37] *Dobbs* therefore continues to uphold the rule of law, notwithstanding that its majority defines this principle differently from how judges did in the

[33] *Dobbs*, 597 U.S., 2279-80, 2307, 2334, 2336.
[34] Ibid., 2335.
[35] Chris Michael, "US Supreme Court Justices on Abortion—What They've Said and How They've Voted," *The Guardian*, May 4, 2022.
[36] Ibid.
[37] Eskridge, et al., "Textualism's Defining Moment," 1624, 1694.

past. This contrast suggests that *Dobbs* creates a new rule of law. The justices who decided *Dobbs* consulted extratextual historical sources to achieve legal rule stability through historical rather than precedential stability. They ensure that one can infer the application of rules by devising a system grounded in constitutional texts and more stringent guidelines for precedential analysis. They ensure fair adjudication in accordance with the rule of law by contextualizing constitutional texts with broader constitutional history to discern the ordinary meaning of terms.

IIIa. Dobbs's *Promotion of Legal Rule Stability through Historical Stability*

The new textualist interpretations in *Dobbs* have established that maintaining historical stability ensures the stability of legal rules on abortion. By continuing to fulfill a condition necessary to uphold the rule of law, yet doing so in a way that revises the past, they demonstrate how *Dobbs* creates a new rule of law.

Dobbs reiterates that rights not mentioned in the Constitution should be guaranteed only if they are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty," a stark juxtaposition with previous uses of precedent to confer constitutional rights in abortion cases.[38] To make such a determination, new textualists turn to extratextual, historical sources directly tied to the Constitution's creation, such as founding documents and the Federalist Papers.[39] From these consultations, they concluded that abortion is neither an "ordered liberty" nor part of "the Nation's history or tradition," given its lack of mention in the

[38] *Dobbs*, 597 U.S., 2235, 2242-44, 2246-48, 2253, 2257, 2259-60, 2282-83, 2300, 2304, 2319.
[39] Ryan Fortson, "Principle Originalism—the Third Way: A Jurisprudential Response to Dobbs v. Jackson Women's Health Organization," *American University Journal of Gender, Social Policy & the Law* 32, no. 1 (2023): 115, 118–19.

aforementioned sources, lack of discussion as a constitutional matter until a few years before *Roe*, and lack of legalization by historical common law sources that informed constitutional drafting.[40] The majority consequently found *Roe* and *Casey* to depart from legal rules on abortion established in the broader historical context of when the Constitution was written. Their reversal of these precedents in *Dobbs* accordingly substantiates presently promulgated legal rules with those that existed when the Constitution was first drafted. Ultimately, *Dobbs* establishes a new rule of law in which historical rather than precedential stability governs legal rules, hinting at a revisionist worldview through which the Constitution is interpreted in abortion jurisprudence.

To skeptics of new textualism, such as the dissenting justices in *Dobbs*, the doctrine's approach of bringing about legal rule stability through historical stability is not without its pitfalls. They assert: "[T]he constitutional 'tradition' of this country is not captured whole at a single moment. Rather, its meaning gains content from the long sweep of our history and from successive judicial precedents."[41] That is, they believe that upholding historical stability requires precedential stability because precedents have been embedded throughout American legal history and have subsequently served as a fixture in constitutional interpretation. Undermining this fixture would accordingly erode the legal rule stability constitutive of the rule of law.

The justices rightfully underscore the importance of precedents in maintaining historical stability. However, their assertion overlooks the new textualist majority's acute awareness of this significance and its unwillingness to wholly object to following precedents. The majority embedded *Glucksberg* in *Dobbs*, provided that its legal rules aligned with those in sources that

[40] Ibid., 118; *Dobbs*, 597 U.S., 2235, 2248-49, 2252-54.
[41] *Dobbs*, 597 U.S., 2326, 2329-32; Fortson, "Principle Originalism—the Third Way," 144.

informed the United States' "history and tradition."[42] Conversely, they invalidated *Roe* and *Casey,* the abortion precedents in question, due to their inconsistency with such history and tradition.[43] The justices' deliberation of these precedents demonstrates how they indeed weigh a precedent's role in defending historical stability but only implement them if they are consistent with legal sources that have played a role in shaping the country's "history and tradition" and "scheme of ordered liberty."[44] In this sense, *Dobbs* still upholds the historical stability essential to legal rule stability and forms a new rule of law instead of chipping away at it.

Similar to *Dobbs's* dissenting justices, constitutional scholar Ryan Fortson would contend that the new textualist approach, which seeks to achieve legal rule stability through historical stability, does not yield a new rule of law but instead compromises the principle as a whole. Fortson substantiates such a claim with how the *Dobbs's* majority "could not agree on which history to rely upon, with [Justice] Alito looking to legal interpretations of abortion during and around the time of the ratification of the Fourteenth Amendment and [Justice Clarence] Thomas harkening back to understandings of the concept of liberty at the time of the Founding four score prior."[45]

Though not without its merits, Fortson's argument ignores that historical stability does not mandate judges to use the same sources in interpreting the Constitution. Rather, it requires them to consistently corroborate their interpretations with laws that have been vital to the United

[42] Randy E. Barnett and Lawrence B. Solum, "Originalism after Dobbs, Bruen, and Kennedy: The Role of History and Tradition," *Northwestern University Law Review* 118, no. 2 (January 27, 2023): 449-50, 460-61.; *Dobbs*, 597 U.S., 2261-62, 2279-80.
[43] *Dobbs*, 597 U.S., 2234, 2237, 2242, 2246.
[44] Ibid., 2235, 2242-43, 2246-48, 2253, 2259-60, 2282-83, 2300, 2304.
[45] Ibid., 2249-54, 2300-01; Fortson, 139.

States' "history and tradition" and "scheme of ordered liberty."[46] The new textualist justices followed this approach in unpacking the Constitution in *Dobbs*. The sources they turned to, though divergent, were produced during the drafting of the Constitution. The justices' reversion to this era indicates that they endeavored to align their constitutional interpretations in abortion cases with broader constitutional history. On account of this compatibility, they enabled *Dobbs* to stabilize legal rules through historical stability. Satisfying a rule-of-law criterion differently from prior cases, *Dobbs* ultimately produces a new rule of law that looks to history rather than the present in deliberating abortion cases.

IIIb. Dobbs's *New System of Precedential Construal*

Despite new textualist judges' increased willingness to overturn precedents, *Dobbs* does not entirely ignore them and still provides an alternative approach to predicting their application in abortion cases. Bearing this premise in mind, this sub-section will unravel how it promotes this rule-of-law criterion through a two-fold process. Part I will delve into how *Dobbs* emphasizes increased obedience to constitutional texts under the principle of constitutional supremacy and sets a standard in which this adherence foretells precedential implementation in abortion cases. Part II will look into how *Dobbs* critically evaluates the strength of a precedent's grounds and its concrete reliance interests to create a predictable, systematic approach to precedential construal. Both parts reveal that *Dobbs* has set a formulaic structure for inferring the implementation of abortion-related precedents and, in doing so, generates a new rule of law.

1. Constitutional Supremacy

[46] *Dobbs*, 597 U.S., 2235, 2242-43, 2246-48, 2253, 2259-60, 2282-83, 2300, 2304.

To the new textualist justices in *Dobbs*, cases should focus on "settling right" and upholding the Constitution over precedents as per the principle of constitutional supremacy because stare decisis is not an "inexorable command."[47] In line with this view, they overruled *Roe* and *Casey* in *Dobbs,* given their violation of the Constitution's lack of a stance on abortion. They justified doing so by citing *Brown v. Board of Education* (1954), which similarly overruled *Plessy v. Ferguson* (1896), a precedent that contravened the Constitution.[48] *Dobbs's* incorporation of legal rules from the Constitution and rejection of precedents set a standard in which predictable rule implementation in abortion cases hinges on constitutional supremacy.[49] Since *Dobbs* meets this criterion differently from earlier abortion cases, it creates a new rule of law that bases itself on fundamental legal texts over precedents.

2. Systematic Precedent Construal Approach

Dobbs's majority opinion criticizes *Roe* and *Casey* for being grounded on precedents that established the rights to interracial marriage, contraception, same-sex marriage, parochial education, and German language education, none of which are abortion-related.[50] Given these precedents' irrelevance to *Roe* and *Casey*, the majority concluded that abortion is not a constitutional right and therefore *Roe* and *Casey* warranted reversal. *Dobbs* consequently implies that future abortion cases will only embed precedents if they are corroborated by pertinent precedents.

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[47] Ibid., 2237, 2239, 2261-62, 2278, 2334.
[48] Ibid., 2237, 2239, 2262, 2278-79, 2307, 2309, 2341.
[49] Ibid., 2252-53; Robin Charlow, "American Constitutional Analysis and a Substantive Understanding of the Rule of Law," in *The Legal Doctrines of the Rule of Law and the Legal State* (Rechtsstaat) (Springer, 2014), 251-66.
[50] *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Obergefell v. Hodges*, 576 U.S. 644 (2015); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Dobbs*, 597 U.S., 2234, 2257, 2267-68

In addition to relevant precedential support, *Dobbs* has established that judges are to demonstrate a precedent's implication of concrete reliance interests before implementing it in an abortion case.[51] The majority found insufficient proof of individuals being worse off due to *Roe* and *Casey's* reversal than with these precedents not existing in the first place because abortion is generally an "unplanned activity" and reproductive planning allows individuals to prevent themselves from being worse off, regardless of whether *Roe* and *Casey* exist.[52] On account of this finding, the majority indicates that *Roe* and *Casey* do not carry concrete reliance interests, and future abortion cases will only employ precedents when they hold such interests.

By instituting the conditions that warrant precedential deployment in future abortion cases, *Dobbs* has provided a formula for foretelling such application. It ultimately creates a new rule of law that drives the predictable employment of precedents on abortion more stringently than in prior cases such as *Casey*.

IIIc. Dobbs's *Implications on Impartial Adjudication*

The new textualist justices in *Dobbs* determined the Fourteenth Amendment's ordinary meaning by referring to the context within which the Constitution was written.[53] They explained doing so by pointing to how judges are more prone to "cherry-pick" precedents when "interpreting other statutes than the one in question."[54] Because their approach denotes a shift from earlier uses of precedent in rendering unbiased adjudication, *Dobbs* yields a new rule of

[51] *Dobbs*, 597 U.S., 2238-39, 2265, 2276-77.
[52] Ibid., 2238-39, 2265, 2276-77; *Casey*, 856; Rachel Bayefsky, "Tangibility and Tainted Reliance in Dobbs," *Harvard Law Review Forum* 136 (May 25, 2023): 387–88.; Nina Varsava, "Precedent, Reliance, and Dobbs," *Harvard Law Review* 136, no. 7 (May 10, 2023): 1847, 1863–64.
[53] *Dobbs*, 597 U.S., 2257-58, 2261; U.S. Constitution, amend. XIV, sec. 1.
[54] Capparelli, "In Search of Ordinary Meaning," 1464.

law.

These justices harnessed the "objective evidence of law[s]" from when the Constitution was drafted to adjudicate the constitutionality of abortion in *Dobbs* without favor, especially given the Constitution's lack of a stance.[55] A consultation of common law sources from 1864, the year of the Fourteenth Amendment's drafting, led them to discover that 28 out of 37 states had then criminalized pre-quickening abortions and that most states had criminalized abortion at all stages of pregnancy.[56] Based on this objective evidence, the justices concluded that the drafters did not intend abortion to be a constitutional right and that the ordinary meaning of "rights" and "liberty" in the Fourteenth Amendment does not encompass abortion.[57] Their means of judicial decision-making suggest that they turned to historical sources on the Constitution's authorial intent over traditionally consulted precedents in pursuit of unprejudiced adjudication. Their doing so enabled *Dobbs* to produce a new rule of law that reverted to history rather than focusing on more recent precedents.

The dissenting justices and other critics of *Dobbs's* majority opinion would postulate that the majority's new textualist doctrine enables judges to use the guise of constitutional text to insert the judicial discretion and "unguided speculation" constrained by a prior interpretive approach rooted in stare decisis.[58] To them, interpretations laden with judicial discretion are biased, compromising the rule of law instead of producing a new one.

This contention accurately characterizes that text's guise and indeed presents an

[55] Eskridge, "Reliance Interests," 737.
[56] Barnett and Solum, "Originalism after Dobbs, Bruen, Kennedy," 460-61; *Dobbs*, 597 U.S., 2252-53.
[57] *Dobbs*, 597 U.S., 2242-43; U.S. Constitution, amend. XIV, sec. 1.
[58] *Dobbs*, 597 U.S., 2326; Capparelli, "In Search of Ordinary Meaning," 1458.

opportunity for judges to bring about judicial discretion. The view that abortion is not a constitutional right is admittedly congruous with Justices Alito and Barrett's standpoints.[59] Yet, Justice Brett Kavanaugh's concurring opinion and the majority opinion's conclusion signal how *Dobbs* is neither pro-choice nor pro-life, akin to the Constitution, and gives voters the ultimate discretion on abortion.[60] This position is incompatible with Justices Alito and Barrett's personal opposition to abortion.[61] Furthermore, the justices looked to objective evidence, such as documents contextualizing the Constitution's drafting, to support their decision, and hence their decision-making was grounded in evidence beyond the text. In this respect, they adjudicated *Dobbs* without favor, in accordance with the rule of law. Their use of the context surrounding the drafters' intent, rather than judges' use of stare decisis in earlier cases, implies that *Dobbs* has led to a new rule of law—one that seeks to revisit the past rather than remain in the present when mulling abortion cases.

IV. Conclusion

Dobbs v. Jackson (2022) has illustrated the constancy of the rule of law's underlying standards: legal rule stability, predictable rule application, and impartial adjudication. However, how it satisfies each standard differs from that of previous abortion cases. *Dobbs* has shown that such a sizable shift stems from fundamental differences in how constitutional interpretation in pre- and post-*Dobbs* abortion cases views stare decisis and constitutional supremacy: both follow the constitutional text and do not oppose heeding precedent, yet the latter champions greater

[59] Michaels, "US Supreme Court Justices on Abortion."
[60] *Dobbs*, 597 U.S., 2279, 2305.
[61] Michaels, "US Supreme Court Justices on Abortion."

obedience to the text and diminished reluctance to overrule precedent.

With these changes apparent in the new textualist doctrine that justices used to decide *Dobbs*, *Dobbs* has chipped away at what the rule of law once meant. It has impeded the notion that abiding by precedents keeps legal rules stable, yields the predictable incorporation of rules, and achieves unprejudiced adjudication. Yet, at the same time, the rule of law serves as the basis of textualism, and the six new-textualist Supreme Court justices do not interpret texts and statutes with the intent to subvert them. A new rule of law ultimately emerges from *Dobbs.* This new rule of law now harnesses historical stability to maintain the stability of legal rules on abortion. It infers a rule's implementation in abortion jurisprudence by using constitutional supremacy alongside a formula that weighs a rule's supporting precedents and concrete reliance interests. It discerns ordinary meaning from the context of constitutional drafting to accomplish unbiased adjudication in abortion cases.

Dobbs has signified that the rule of law persists, given its fixture as a principle defining the American legal system. Yet, it has simultaneously underscored that a new rule of law seeks to turn back in time by premising future abortion decisions on a 248-year-old text—a text drafted at a time when the law failed to fully recognize the rights of all people and whose reliance interests and ordinary meaning diverge from those of today. If a new rule of law swings the pendulum of progress back by 248 years, it will lead abortion decisions to no longer reflect present-day American society, putting the rights of women and marginalized communities at stake. The question now becomes: how can we maintain a new rule of law while ensuring that judicial decisions reflect the present context? How can we reshape this new rule of law to live up to the ideals of equality and justice for all?

The broader landscape finds these questions to be nebulous. Yet, it has revealed that as long as the rule of law grounds the American legal system, it can persist, with the potential to reinvent itself into new rules of law. Just as a new rule of law can set a country back by 248 years, it has the power to propel it forward. Now is the time for lawyers, judges, and advocates to uphold a rule of law that looks to the present and lives up to the ideals of equality and justice for all.