

THERE'S NOTHING "SUPER" ABOUT *ROE V. WADE*

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*The U.S. Senate Judiciary Committee opened its hearing on the nomination of Neil Gorsuch to be an Associate Justice of the U.S. Supreme Court on March 20, 2017. This Article examines a particular argument made during the hearing about the Supreme Court's 1973 decision in *Roe v. Wade*¹ and its status as a precedent of the Court. During her opening statement, Ranking Member Dianne Feinstein (D-CA) offered a list of "39 decisions where [Roe] has been reaffirmed by the court."² These decisions, she said, make *Roe* a "super precedent."³ This claim is the basis for the argument that *Roe v. Wade* should be virtually immune from being overruled. After setting the stage by outlining relevant principles of stare decisis, this Article will evaluate the validity of the "super precedent" argument.*

INTRODUCTION

The "super precedent" argument is that *Roe v. Wade* is virtually immune from being overruled in the future because it has been reaffirmed so many times in the past.⁴ Senator Arlen Specter (R-PA)

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¹ *Roe v. Wade*, 410 U.S. 113 (1973). The Supreme Court held that the Constitution protects a "right of personal privacy," that is "founded in the Fourteenth Amendment's concept of personal liberty." *Id.* at 152-53. This "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153.

² *Nomination of the Hon. Neil M. Gorsuch, to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (2017) (statement of Sen. Dianne Feinstein, Ranking Member, S. Comm. on the Judiciary), <https://www.judiciary.senate.gov/imo/media/doc/FeinsteinStatement03-20-2017%20.pdf>.

³ *Id.*

⁴ The first reference to "super precedent" occurred in a 1976 article analyzing citations to precedents in judicial opinions. William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J. L. & ECON.

presented this argument to three Supreme Court nominees before Senator Feinstein raised it in the Gorsuch hearing. On September 13, 2005, when he chaired the Judiciary Committee, Specter began his questions for Supreme Court nominee John Roberts by addressing “the issue of the woman’s right to choose and *Roe v. Wade*.”⁵ His goal was to determine whether Roberts would, if confirmed, vote to overrule *Roe*.⁶

For as long as Supreme Court nominees have appeared before the Judiciary Committee, however, they have declined to discuss their views about issues that could come before them on the Court. The Judiciary Committee held its first public Supreme Court confirmation hearing in 1916.⁷ Since then, 36 Supreme Court nominees have at-

249, 251 (1976). The authors defined a “super precedent” as a “precedent that is so effective in defining the requirements of the law that it prevents legal disputes from arising in the first place or, if they do arise, induces them to be settled without litigation.” *Id.* The Supreme Court has also identified a “superpowered form of *stare decisis*” that requires “a superspecial justification to warrant reversing” a precedent. *Kimble v. Marvel Entertainment*, 135 S. Ct. 2401, 2410 (2015). This category, however, is for cases involving statutory construction as well as property or contract rights. *Id.* The Court has said that “we do not give super-duper protection to decisions that do not actually interpret a statute.” *Id.* at 2418. The “super precedent” argument under review here does not fit into either of these categories. Rather than focus generally on *Roe v. Wade*’s precedential effect on future cases, it focuses specifically on the effect of later cases on whether *Roe v. Wade* remains a precedent at all. Under this argument, whether *Roe* is a “super precedent” and, therefore, immune from being overruled in the future depends entirely on whether, and how often, it has been reaffirmed in the past.

⁵ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 141 (2005) (statement of Sen. Arlen Specter, Chairman, S. Comm. on the Judiciary), <https://www.judiciary.senate.gov/imo/media/doc/GPO-CHRG-ROBERTS.pdf> [hereinafter *Roberts Hearing*].

⁶ In her opening statement during the hearing on Sonia Sotomayor’s Supreme Court nomination in 2009, Senator Feinstein acknowledged that her goal was to determine “how a nominee will actually act as a Supreme Court Justice.” *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong., 15 (2009) (statement of Sen. Dianne Feinstein, Member, S. Comm. on the Judiciary), <https://www.gpo.gov/fdsys/pkg/CHRG-111shrg56940/pdf/CHRG-111shrg56940.pdf> [hereinafter *Sotomayor Hearing*].

⁷ *The Nomination of Louis D. Brandeis to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 64th Cong. 1 (1916). The committee did not hold a hearing on the following nominees: John Clarke, nominated in 1916 by President Woodrow Wilson; William Howard

tended their hearings,⁸ and 34 of them answered questions from committee members.⁹ Of the 30 who were asked about their views on issues that could come before the Supreme Court,¹⁰ 29 explicitly declined to discuss them.¹¹

Taft (1921), George Sutherland (1922), Pierce Butler (1923), and Edward Sanford (1923), each nominated by President Warren G. Harding; Charles Evans Hughes and Owen Roberts, nominated in 1930 by President Herbert Hoover; Hugo Black (1937), Frank Murphy (1940), James Byrnes (1941), and Wiley Rutledge (1943), nominated by President Franklin D. Roosevelt; Harold Burton, nominated in 1945 by President Harry Truman; Harriet Miers and John Roberts, nominated in 2005 by President George W. Bush to be Associate Justices; and Merrick Garland, nominated in 2016 by President Barack Obama.

⁸ In addition to Brandeis, the following Supreme Court nominees did not appear at their confirmation hearing: John Parker (1930) and Benjamin Cardozo (1932), nominated by President Herbert Hoover; Harlan Fiske Stone, nominated in 1941 by President Franklin D. Roosevelt to be Chief Justice; Fred Vinson (1946), Tom Clark (1949), and Sherman Minton (1949), nominated by President Harry Truman; and Earl Warren (1953), nominated by President Eisenhower.

⁹ Stanley Reed (1938) and William O. Douglas (1939), both nominated by President Franklin Roosevelt, attended their Judiciary Committee hearings but did not interact with the committee. *See Nomination of Stanley F. Reed: Hearing Before the S. Comm. on the Judiciary, 75th Cong. 1, 26 (1938); Nomination of William O. Douglas, to be an Associate Justice of the Supreme Court of the United States: Hearing before the S. Comm. on the Judiciary, 75th Cong. 1 (1939).* While Reed's hearing lasted 55 minutes, Douglas' "hearing" was over in just five.

¹⁰ President Calvin Coolidge nominated then-Attorney General Harlan Fiske Stone to the Supreme Court on January 5, 1925, and the Judiciary Committee approved the nomination without a hearing on January 9. Five days later, however, the nomination was returned to the committee at the insistence of Sen. Thomas Walsh (D-MT). Walsh had served as legal counsel to Senator Burton Wheeler (D-MT), who was indicted in April 1924 for intent to commit fraud. Senator Walsh, a Judiciary Committee member, cited Stone's December 1924 decision to broaden the Wheeler investigation as the basis for further committee consideration. A hearing on January 28, 1925, focused solely on the Wheeler case and Stone "answered almost five hours of questioning in a polite and straightforward manner." James A. Thorpe, *The Appearance of Supreme Court Nominees Before the Senate Judiciary Committee*, 18 J. PUB. L. 371, 373 (1969). The U.S. Senate website's description of this controversy concludes that Stone's "masterful performance . . . cleared the way for his quick confirmation." https://www.senate.gov/artandhistory/history/minute/Committee_Grills_Nominee.htm. President Franklin Roosevelt nominated then-Attorney General Robert Jackson to the Supreme Court on June 12, 1941. Senators asked Jackson only about his decision not to prosecute for libel two individuals accused Senator Millard Tydings (D-MD), a Judiciary Committee member, of using government workers to build a road for his estate. *See id.* at 378. President Eisenhower nominated Charles Whittaker to the Supreme Court on March 2, 1957. Most of the hearing consisted of testimony by, and questions to, a Tennessee attorney whose client had lost a case

Perhaps anticipating that Roberts would take the same approach, Specter began “collaterally”¹² by discussing the “principles of *stare decisis*”¹³ that the Supreme Court considers when deciding whether to overrule a precedent. Roberts discussed those principles generally¹⁴ but declined to apply them to *Roe v. Wade*.¹⁵ Failing to elicit Roberts’ views about the validity of *Roe v. Wade*, Specter shifted to sharing with Roberts his own views on the subject by discussing “the concept of super-*stare decisis*.”¹⁶

before then-U.S. District Judge Whittaker. The nominee’s interaction with the Judiciary Committee occupies just three of the 34 page hearing record. *Nomination of Charles E. Whittaker, of Missouri, to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 85th Cong. 32-34 (1957)*. President John F. Kennedy nominated Byron White to the Supreme Court on April 3, 1962. He was asked questions about when a Justice should recuse himself and “the role of the Supreme Court in our constitutional form of government.” *Nomination of Byron R. White, of Colorado, to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 87th Cong. 23 (1962)*. The *New York Times* described the hearing as “an admiration session for Mr. White.” Anthony Lewis, *Senate Approves White for Bench*, N.Y. TIMES (Apr. 12, 1962), <http://www.nytimes.com/books/98/08/23/specials/white-approves.html>. The Senate confirmed the White nomination by voice vote just hours after his hearing.

¹¹ The Appendix documents this long and consistent tradition. President Dwight Eisenhower nominated John Marshall Harlan to the Supreme Court on November 9, 1954. Harlan did not attend the hearing 10 days later. On behalf of himself and “a number of Democratic Senators,” Senator James Eastland (D-MS) objected “to the consideration of this nomination at this time” and asked that it be delayed until January. *Consideration of Nominations, Committee on the Judiciary, United States Senate*, November 19, 1954, at 2. After some discussion, the chairman said that “[t]he matter will go over.” *Id.* at 7. President Eisenhower re-nominated Harlan on January 10, 1955, after Democrats regained control of the Senate. The Judiciary Committee opened its hearing on February 23, 1955, but postponed actual proceedings until the next day. *Report of Proceedings: Hearing Held Before the Committee on the Judiciary, Nomination of John Marshall Harlan, 84th Cong. 8 (1955)*. Harlan began his testimony on the afternoon of February 24, 1955. *Nomination of John Marshall Harlan, of New York, to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 84th Cong. 128 (1955)*.

¹² *Roberts Hearing*, at 141.

¹³ *Id.*

¹⁴ See *infra* notes 71-75 and accompanying text.

¹⁵ *Roberts Hearing*, at 142 (“I feel the need to stay away from a discussion of particular cases” or “particular issues that are likely to come before the Court again.”).

¹⁶ *Id.* at 144.

Specter used a chart titled “Supreme Court Decisions Upholding *Roe v. Wade*”¹⁷ that, he said, listed “38 occasions where *Roe* has been taken up . . . with an opportunity for *Roe* to be overruled.”¹⁸ Specter asserted that by passing up these “38 chances to reverse it,”¹⁹ the Supreme Court had actually reaffirmed *Roe v. Wade* that many times, giving it the status of “super-duper precedent.”²⁰ Later in the hearing, Specter went even further: “With the reaffirmation, [*Roe v. Wade*] may become a super-duper, or maybe even more, super-duper-duper [precedent].”²¹

Specter made the same argument a few months later to Supreme Court nominee Samuel Alito. On January 10, 2006, Specter again presented a chart listing “all 38 cases which have been decided since *Roe*, where the Supreme Court of the United States had the opportunity” to overrule it but did not do so.²² *Roe v. Wade*, he said, is a particularly strong precedent because it has been “reaffirmed 38 times.”²³ Alito declined to “get into categorizing precedents as super precedents or super duper precedents.”²⁴

On July 15, 2009, Specter presented the same argument to Supreme Court nominee Sonia Sotomayor. He stated “that the Supreme Court of the United States has had 38 cases after *Roe v. Wade* where it could have reversed *Roe v. Wade*”²⁵ and asked whether the Court failing to do so would “add weight to the impact of *Roe v. Wade*.”²⁶ Sotomayor declined to address this issue specifically, saying only that “how the Court has dealt with [a precedent] in subse-

¹⁷ Chairman Specter did not request that this list be made part of the hearing record. A graphic of the chart, which was used as a visual aid, was found in the records of the Senate Judiciary Committee. A photograph may be found at <http://media.gettyimages.com/photos/senate-judiciary-committee-chairman-arlen-specter-uses-a-chart-to-picture-id94891106>.

¹⁸ *Roberts Hearing*, at 145.

¹⁹ *Id.* at 525.

²⁰ *Id.* at 145.

²¹ *Id.* at 505. Karen Pearl, interim president of the Planned Parenthood Federation of America, testified against the Roberts nomination and also claimed that *Roe v. Wade* has been “reaffirmed 38 times.” *Id.* at 539.

²² *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before S. Comm. on the Judiciary*, 109th Cong. 321, <https://www.gpo.gov/fdsys/pkg/CHRG-109shrg25429/pdf/CHRG-109shrg25429.pdf> [hereinafter *Alito Hearing*].

²³ *Id.*

²⁴ *Id.*

²⁵ *Sotomayor Hearing*, at 376.

²⁶ *Id.*

quent cases” would be one factor the Court would consider.²⁷ Asked whether the Court’s decision in *Planned Parenthood v. Casey*,²⁸ which reaffirmed the “central holding”²⁹ of *Roe v. Wade*, was an example of “super-*stare decisis*,” Sotomayor responded: “I don’t use the word ‘super.’ I don’t know how to take that word. All precedent of the Court is entitled to the respect of the doctrine of *stare decisis*.”³⁰

Senator Feinstein’s statement in the Gorsuch hearing was the latest, but likely not the last, assertion of the “super precedent” argument, which has two premises. First, the argument says that each of these 38 or 39 cases properly placed “the *Roe* issue,”³¹ or the validity of *Roe v. Wade* as a precedent, before the Court as an issue for decision. Second, the Court’s failure to overrule *Roe* in a given case constitutes an actual reaffirmance of the decision, strengthening *Roe* as a precedent of the Court and protecting it further from future reversal. This Article will apply the relevant principles of *stare decisis* to evaluate these two premises and the overall validity of the “super precedent” argument.

I. PRINCIPLES OF *STARE DECISIS*

The phrase *stare decisis* means “to stand by things decided.”³² It identifies “the principle that a decision made in one case will be followed in the next.”³³ This doctrine has consumed countless volumes of scholarship, commentary, and case law and has many differ-

²⁷ *Id.*

²⁸ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

²⁹ *Id.* at 853.

³⁰ *Sotomayor Hearing*, at 376.

³¹ *Roberts Hearing*, at 505.

³² Timothy Oyen, *Stare Decisis*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/stare_decisis (last visited Aug. 9, 2017).

³³ Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in 18 THE TANNER LECTURES ON HUMAN VALUES 79, 83 (Grethe B. Peterson ed., 1997); see also GEORGE COSTELLO, CONG. RESEARCH SERV., RL33172, THE SUPREME COURT’S OVERRULING OF CONSTITUTIONAL PRECEDENT: AN OVERVIEW 1 (2005) (“[W]hen the [Supreme] Court has laid down a principle in deciding a case, ordinarily it will apply that same principle in future cases with substantially similar facts.”).

ent elements and dimensions. A recent tome on judicial precedent, for example, spans more than 800 pages.³⁴

When the Supreme Court decides whether to overrule a precedent, it applies what it calls “principles of *stare decisis*.”³⁵ Four of those principles are relevant here. First, *stare decisis* is an important part of the judicial process designed by America’s founders. As Alexander Hamilton wrote: “To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents.”³⁶

Justice Samuel Alito made this point during his confirmation hearing before the Senate Judiciary Committee. *Stare decisis*, he said, is a “very important doctrine” and a “fundamental part of our legal system . . . because it limits the power of the judiciary.”³⁷ Citing Hamilton, Alito explained that limiting the exercise of judicial power is “one of the important reasons for the doctrine of *stare decisis*.”³⁸ Being “bound up by precedent . . . would keep them from injecting their own views into the decision-making process.”³⁹

³⁴ Bryan A. Garner et al., *THE LAW OF JUDICIAL PRECEDENT* (2016) [hereinafter *LAW OF JUDICIAL PRECEDENT*].

³⁵ See, e.g., *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 457 (2008) (“Principles of *stare decisis*, after all, demand respect for precedent whether judicial methods of interpretation change or stay the same.”); *United States v. Booker*, 543 U.S. 220, 237 (2005); *Quill Corp. v. North Dakota*, 504 U.S. 298, 317 (1992); *Boys Markets, Inc. v. Retails Clerk’s Union*, 398 U.S. 235, 240 (1970).

³⁶ *THE FEDERALIST NO. 78* (Alexander Hamilton); see also Michael Sinclair, *Precedent, Super-Precedent*, 14 *GEO. MASON L. REV.* 363, 369 (2007) (the “most significant” virtue of *stare decisis* “is the stability, continuity, and predictability it lends to the law . . . Stability and certainty reduce judicial discretion.”).

³⁷ *Alito Hearing*, at 318. See also *id.* at 342 (“*Stare decisis* . . . is an important limitation on what the Supreme Court does. And although the Supreme Court has the power to overrule a prior precedent, it uses that power sparingly, and rightfully so. It should be limited in what it does.”).

³⁸ *Id.* at 526.

³⁹ *Id.* Justice Gorsuch also cited Hamilton in this context: “Alexander Hamilton said that’s one important feature . . . of judges, if we’re going to give them life tenure . . . they should be bound down by strict rules and precedents.” See also *LAW OF JUDICIAL PRECEDENT*, *supra* note 34, at 10 (“[B]y seeking to ensure some consistency in outcomes among decision-makers, the doctrine of precedent may simultaneously promote respect for the judiciary as a neutral source.”); *id.* at 21 (“In a democracy, citizens and litigants must have confidence in the judiciary and in the rule of law, which requires that a judge’s decisions not be—and must not seem to be—arbitrary, based on personal preference, or unbounded.”).

Avoiding arbitrary discretion also helps protect the judiciary's legitimacy. "The respect given the court by the public and by the other branches of government," wrote Justice Lewis Powell, "rests in large part on the knowledge that the Court is not composed of unelected judges free to write their policy views into law."⁴⁰ It is "the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion."⁴¹

The second relevant principle of *stare decisis* is that, while it is an "important doctrine"⁴² and "a basic self-governing principle within the Judicial Branch,"⁴³ it is "not a universal, inexorable command."⁴⁴ The Supreme Court has expressed this principle in different ways. *Stare decisis* is "a principle of policy and not a mechanical

⁴⁰ Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 286-87 (1990). *See also* Payne v. Tennessee, 501 U.S. 808, 827 (1991) ("*Stare decisis* is the preferred course of action because it . . . contributes to the actual and perceived integrity of the judicial process."); Welch v. Texas Dept. of Highways and Pub. Transp., 483 U.S. 468, 494 (1987) (*stare decisis* is "of fundamental importance to the rule of law"); *Alito Hearing*, at 319 ("the legitimacy of the Court would be undermined in any case if the Court made a decision based on its perception of public opinion. It should make its decisions based on the Constitution and the law."); *Roberts Hearing*, at 141-42 (*stare decisis* promotes "stability in the law" as well as "evenhandedness, predictability...[and] the appearance of integrity in the legal system."); Alaska Pub. Interest Research Grp. v. Alaska, 167 P.3d 27, 44 (2007) ("Finally, and perhaps most importantly, precedent 'maintain[s] public faith in the judiciary as a source of impersonal and reasoned judgment.'"); Progressive Northern Ins. Co. v. Romanshek, 697 N.W.2d 417, 429 (Wis. 2005) ("Failing to abide by *stare decisis* raises serious concerns as to whether the court is implementing 'principles . . . founded in the law rather than in the proclivities of individuals.'") (internal citations omitted).

⁴¹ Vasquez v. Hillery, 474 U.S. 254, 265 (1986). *See also* Johnson v. United States, 135 S. Ct. 2551, 2563 (2015) ("Although it is a vital rule of judicial self-government, *stare decisis* does not matter for its own sake.").

⁴² Vasquez, 474 U.S. at 265.

⁴³ Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989). *See also* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 377 (2010) (Roberts, C.J., concurring) (*stare decisis* is "vital to the proper exercise of the judicial function"); Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 494 (1987) (*stare decisis* is of "fundamental importance to the rule of law"); Ring v. Arizona, 536 U.S. 584, 608 (2002); Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2036 (2014) (*stare decisis* is "a foundation stone of the rule of law."); Sinclair, *supra* note 36, at 374 (*stare decisis* is "intrinsic to the role of judging").

⁴⁴ Washington v. W.C. Dawson & Co., 264 U.S. 219, 238 (1924). *See also* State Oil v. Kahn, 522 U.S. 3, 20 (1997).

formula of adherence to the latest decision.”⁴⁵ It is “a rule of stability, but not inflexibility.”⁴⁶ While *stare decisis* may be described as “ordinarily a wise rule of action”⁴⁷ and the “preferred course,”⁴⁸ it is “an aid”⁴⁹ and “a useful rule”⁵⁰ rather than an end in itself. Put simply, “[w]ith horizontal precedents—past decisions of the same court—nothing about *stare decisis* is absolute.”⁵¹ The doctrine “doesn’t demand obedience to precedent without exception. It leaves room for courts to distinguish and overrule.”⁵²

The third relevant principle of *stare decisis* is that “not all precedent is created equal.”⁵³ The “precedential power”⁵⁴ of *stare decisis* depends on the category of case in which it is applied.⁵⁵ Professor Michael Sinclair describes the weight or authority given to precedents as determined by “damage control,”⁵⁶ inversely related to the ease of correcting that decision. As a result, *stare decisis* “carries enhanced force when a decision . . . interprets a statute. Then, unlike in

⁴⁵ *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). *See also* *Payne v. Tennessee*, 501 U.S. 808, 828 (1991); *Hohn v. United States*, 524 U.S. 236, 251 (1998); *United States v. IBM*, 517 U.S. 843, 856 (1996); LAW OF JUDICIAL PRECEDENT, *supra* note 34, at 40 (“The Supreme Court has established that because following horizontal precedent is a ‘principle of policy’ and ‘the preferred course,’ it is inherently flexible.”).

⁴⁶ Powell, *supra* note 40, at 17.

⁴⁷ *Id.*

⁴⁸ *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

⁴⁹ *Dorchy v. Kansas*, 264 U.S. 286, 290 (1924). *See also* *Williams v. Standard Oil Co.*, 278 U.S. 235, 241 (1928) (quoting *Dorchy*); *Utah Power & Light Co. v. Pfof*, 286 U.S. 165, 184 (1932) (*stare decisis* is “but an aid to interpretation and not an inexorable command”).

⁵⁰ *See, e.g., Erie R.R. v. Tompkins*, 304 U.S. 64, 92 (1938) (Reed, J., concurring) (“In this Court, *stare decisis*, in statutory construction, is a useful rule, not an inexorable command.”).

⁵¹ LAW OF JUDICIAL PRECEDENT, *supra* note 34, at 35.

⁵² *Id.* at 8.

⁵³ *Id.* at 23.

⁵⁴ Sinclair, *supra* note 36, at 368.

⁵⁵ *See* Brian C. Kalt, *Three Levels of Stare Decisis: Distinguishing Common-Law, Constitutional, and Statutory Cases*, 8 TEX. REV. OF L. & POL. 277, 277-78 (2003-2004) (“[C]ourts should and do treat *stare decisis* differently based on what sort of case the court is faced with—whether it is a common-law case, a constitutional case, or a statutory case.”).

⁵⁶ Sinclair, *supra* note 36, at 368.

a constitutional case, critics of our ruling can take their objections across the street, and Congress can correct any mistake it sees.”⁵⁷

Accordingly, the Supreme Court “is less reluctant to overrule a decision that involves constitutional interpretation rather than interpretation of a statute.”⁵⁸ Justice Louis Brandeis noted in 1932 that “in cases involving the Federal Constitution, where correction through legislation is practically impossible, this Court has often overruled its earlier decisions.”⁵⁹

The Court has described the principle this way: “In constitutional questions, where correction depends upon amendment and not

⁵⁷ *Kimble v. Marvel Entertainment*, 135 S. Ct. 2401, 2409 (2015). *See also* Powell, *supra* note 40, at 18 (“[S]tare decisis should operate with special vigor in statutory cases because Congress has the power to pass new legislation correcting any statutory decision by the Court that Congress deems erroneous.”); *Webster v. Reproductive Health Services*, 492 U.S. 490, 518 (1989) (opinion of Rehnquist, C.J., and White and Kennedy, JJ.) (*Stare decisis* . . . has less power in constitutional cases, where, save for constitutional amendments, this court is the only body able to make needed changes.”). State courts follow the same principle. *See, e.g.*, *Phelps v. Texas*, 2017 Tex. App. LEXIS 3104 at n.6; *People v. Gardner*, 482 Mich. 41, 84 (2008) (Kelly, J., dissenting) (“Under this hierarchy, *stare decisis* applies differently to different areas of law. The hierarchy approach gives the greatest weight to statutory precedents.”); Randy J. Kozel, *Precedent and Reliance*, 62 EMORY L.J. 1459, 1463 (2013) (The Court “portrays its statutory decisions as entitled to the strongest form of deference.”); LAW OF JUDICIAL PRECEDENT, *supra* note 34, at 333-34.

⁵⁸ COSTELLO, *supra* note 33, at 2. *See also Kimble*, 135 S. Ct. at 2404 (“[S]tare decisis carries enhanced force when a decision . . . interprets a statute. Then, unlike a constitutional case, critics of our ruling can take their objections across the street, and Congress can correct any mistake it sees.”). *See also* Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 703-04 (1999) (“[O]ne point has achieved an unusual degree of consensus: that *stare decisis* has ‘great weight . . . in the area of statutory construction’ but ‘is at its weakest’ in constitutional cases.”) (internal citations omitted).

⁵⁹ *Burnet*, 285 U.S. at 406-07 (1932) (Brandeis, J., dissenting). *See also United States v. Scott*, 437 U.S. 82, 101 (1978) (quoting Brandeis). Correcting the Court’s constitutional interpretations by constitutional amendment requires proposal by two-thirds of Congress or a convention and ratification by three-fourths of the states. U.S. Const., art. V. While more than 11,750 constitutional amendments have been introduced in Congress, only 33 have been sent to the states, where 27 have been ratified. According to the U.S. Senate website, a total of 11,699 amendments were introduced in either the Senate or House of Representatives as of January 3, 2017. According to the Legislative Information System, 63 additional amendments were introduced as of January 15, 2018.

upon legislative action, this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions.”⁶⁰ *Stare decisis*, then, “has only limited application in the field of constitutional law.”⁶¹ To date, the Supreme Court has overruled its constitutional precedents more than 200 times.⁶²

The final principle of *stare decisis* relevant here is that, as the Supreme Court said in 2015, “[t]here must be good reasons for overruling a precedent.”⁶³ These reasons begin with “its correctness,” but

⁶⁰ *Smith v. Allwright*, 321 U.S. 649, 665 (1944). *See also Burnet*, 285 U.S. at 407 (Brandeis, J., dissenting) (“[I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions.”); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 63 (1996) (“Our willingness to reconsider our earlier decisions has been particularly true in constitutional cases, because in such cases correction through legislative action is practically impossible.”).

⁶¹ *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 94 (1936) (Stone, J., concurring in the result). *See also Planned Parenthood v. Casey*, 505 U.S. 833, 854 (plurality opinion) (quoting *Burnet*) (“[I]t is common wisdom that the rule of *stare decisis* is not an ‘inexorable command,’ and is certainly not in every constitutional case.”); *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (“‘[S]tare decisis is not an inexorable command’ . . . particularly when we are interpreting the Constitution.” (citations omitted)); *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 419-20 (1983) (“[T]he doctrine of *stare decisis*, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law.”); *Webster v. Reproductive Health Services*, 492 U.S. 490, (opinion of Rehnquist, C.J., and White and Kennedy, JJ.) (“*Stare decisis* is a cornerstone of our legal system, but it has less power in constitutional cases, where, save for constitutional amendments, this Court is the only body able to make needed changes.”); William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949) (“The place of *stare decisis* in constitutional law is even more tenuous. A judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it.”).

⁶² *See* MICHAEL GERHARDT, *THE POWER OF PRECEDENT*, app. 1, at 206 (189 constitutional precedents overruled); SAUL BRENNER & HAROLD J. SPAETH, *STARE INDECISIS*, apps. I-II, at 112-22 (1995) (twelve additional constitutional precedents overruled); COSTELLO, *supra* note 33 (seven additional constitutional precedents overruled).

⁶³ *Johnson v. United States*, 135 S. Ct. 2551, 2575 (2015). *See also Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (while “precedents are not sacrosanct . . . ‘any departure from the doctrine of *stare decisis* demands special justification.” (citation omitted)); *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) (“Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of *stare decisis* demands special justification.”);

“the mere erroneousness of a prior line of precedent is generally not sufficient to overturn it.”⁶⁴ Beyond that, the Court has “identified a cluster of factors . . . [that are] relevant to the decision whether or not to overrule a prior decision.”⁶⁵

In *Planned Parenthood v. Casey*, the Court discussed “prudential and pragmatic considerations” when the Court “reexamines a prior holding.”⁶⁶ These include whether a precedent has defied “practical workability”⁶⁷ or led to reliance that would make overruling it “a special hardship.”⁶⁸ The Court will also consider whether facts or principles of law have changed so that the precedent is rendered “no more than a remnant of abandoned doctrine”⁶⁹ or “robbed . . . of significant application or justification.”⁷⁰

Supreme Court nominees have discussed these factors during their confirmation hearings. In 2005, for example, Chief Justice Roberts used the phrase “principles of *stare decisis*” nearly forty times in his oral testimony and answers to post-hearing written questions.⁷¹

Alito Hearing, at 319 (“There needs to be a special justification for overruling a prior precedent.”).

⁶⁴ LAW OF JUDICIAL PRECEDENT, *supra* note 34, at 391, 397. *See also Casey*, 505 U.S. at 864 (“[A] decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.”); *Dickerson*, 530 U.S. at 443 (“Whether or not we would agree with *Miranda*’s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now.”); *People v. Gardner*, 482 Mich. 41, 85 (2008) (Kelly, J., dissenting) (“The most significant aspect of this ‘special justification’ approach is that it requires more than a conviction that the challenged precedent was wrongly decided.”).

⁶⁵ Michael Stokes Paulsen, *Does the Supreme Court’s Current Doctrine of Stare Decisis Require Adherence to the Supreme Court’s Current Doctrine of Stare Decisis?*, 86 N.C. L. REV. 1165, 1172 (2008).

⁶⁶ *Casey*, 505 U.S. at 854.

⁶⁷ *Id.* *See also* *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 924 (Breyer, J., dissenting).

⁶⁸ *Casey*, 505 U.S. at 854. *See also* LAW OF JUDICIAL PRECEDENT, *supra* note 34, at 401.

⁶⁹ *Casey*, 505 U.S. at 855.

⁷⁰ *Id.* *See also* *Leegin Creative Leather Prods.*, 551 U.S. at 924-26 (Breyer, J., dissenting) (factors include whether a precedent creates an unworkable legal regime, unsettles the law, or establishes a rule of law that becomes embedded in our national culture).

⁷¹ *Roberts Hearing*, at 142-48, 156, 158, 160, 164, 180, 223-24, 249, 259, 271, 293, 351, 357, 392, 398. *See also* *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing before the S. Comm. on*

During the hearing, he cited as relevant considerations “reliance by the people on the precedent”⁷² or “settled expectations,”⁷³ whether particular precedents “have proven to be unworkable,”⁷⁴ and “whether the doctrinal bases of a decision have been eroded by subsequent developments.”⁷⁵

Justice Alito similarly noted:

“Factors that weigh in favor of *stare decisis* are things like what the initial vote was on the case, the length of time that the case has been on the book, whether it has been reaffirmed, whether it has been reaffirmed on *stare decisis* grounds, whether there has been reliance, the nature and extent of the reliance, whether the precedent has proven to be workable.”⁷⁶

Justice Gorsuch offered a similar review of these factors:

“The age of the precedent, [a] very important factor. The reliance interests that have built up around the precedent. Has it been reaffirmed over the years? What about the doctrine around it? Has it built up, shored up, or has it become an island, as you point out? Those are all relevant considerations. It’s workability is a consideration too [C]an people figure out how to abide [by] it? Or is it just too confusing for the lower courts and their administration? Those are

the Judiciary, 111th Cong. 92 [hereinafter *Kagan Hearing*] (*Citizens United v. Federal Election Commission* is “entitled to all the weight that precedent usually gets.”); *Id.* at 124 (*District of Columbia v. Heller* is “entitled to all the weight that any precedent has going forward.”); *id.* at 165 (*McDonald v. City of Chicago* is “entitled to all the weight that precedent usually gets.”); *id.* at 443 (*Gonzalez v. Carhart* is “entitled to all the precedent of settled law going forward.”).

⁷² *Roberts Hearing*, at 142.

⁷³ *Id.* at 142, 144, 160, 181, 223, 350-51.

⁷⁴ *Id.* at 142, 180.

⁷⁵ *Id.* at 142. *See also id.* at 350 (“[T]he settled expectations, the workability, whether the doctrinal basis of a decision has been eroded.”).

⁷⁶ *Alito Hearing*, at 398-99. He agreed that “when a precedent is reaffirmed, that strengthens the precedent I think that when a precedent is reaffirmed, each time it’s reaffirmed that is a factor that should be taken into account in making the judgment about *stare decisis*.” *Id.* at 321. *See also id.* at 455 (“[W]hen a decision is challenged and it is reaffirmed that strengthens its value as *stare decisis*.”); *id.* at 531 (“[W]hen a decision is reaffirmed, that strengthens its value as *stare decisis*.”).

all factors that a good judge will take into consideration when examining any precedent.”⁷⁷

These principles of *stare decisis* counsel “a strict but rational adherence to the doctrines of adjudged cases.”⁷⁸ Put another way, there is a rebuttable presumption that the Supreme Court will follow its precedents.⁷⁹ Rebutting that presumption is easier when a precedent interpreted the Constitution and requires application of recognized factors or criteria, including whether a precedent has been reaffirmed.

II. HAS *ROE V. WADE* BEEN REAFFIRMED DOZENS OF TIMES?

A. *The Test*

The test to be applied to the cases on the Specter/Feinstein lists is comprised of two questions, each derived from one of the “super precedent” argument’s premises. First, did the case place the validity of *Roe v. Wade* before the Supreme Court as an issue for decision? Second, if so, did the Court decide that issue by reaffirming *Roe*?

One important clarification is necessary before applying this test to the cases. The “super precedent” argument is concrete and rests on a specific factual claim. The Supreme Court cannot be said to have done something as significant as reaffirming a constitutional precedent by inference, silence, or suggestion. Many principles and practices confirm this conclusion.

The judiciary itself exercises power that is limited to actual “cases” and “controversies.”⁸⁰ These must be justiciable disputes, or disputes “that may be resolved by the courts.”⁸¹ So-called “justicia-

⁷⁷ *Supreme Court Nominee Hearings*, CNN (Mar. 21, 2017), <http://transcripts.cnn.com/TRANSCRIPTS/1703/21/cnr.02.html>.

⁷⁸ H. Campbell Black, *The Principle of Stare Decisis*, 34 AM. LAW REG. 745, 747 (1886).

⁷⁹ See *Alito Hearing*, at 319 (“It’s not an inexorable command, but it is a general presumption that courts are going to follow prior precedents.”).

⁸⁰ U.S. CONST., art. III, § 2.

⁸¹ *Nixon v. United States*, 506 U.S. 224, 226 (1993).

bility doctrines”⁸² include requirements about the parties, such as standing,⁸³ and about the issues, such as mootness.⁸⁴

In addition, federal courts refuse to consider issues that were not raised in a timely manner or that were waived or forfeited by the parties.⁸⁵ “It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.”⁸⁶ Courts will refuse to consider issues raised for the first time at oral arguments⁸⁷ or in reply briefs.⁸⁸ These and other considerations narrow, rather than broaden, the issues deemed to be properly before a court and, therefore, open for decision.

Next, federal courts will address constitutional issues, including the validity of a precedent, only when necessary.⁸⁹ Even when doing so is unavoidable, the Supreme Court will address the issue directly through briefing, argument, and decision. In *Citizens United v. FEC*,⁹⁰ for example, the Supreme Court considered whether the Bipartisan Campaign Reform Act barred a film that a non-profit organization wished to air during the 2008 presidential election cycle.⁹¹ The Court first considered whether the case could be decided on statutory grounds.⁹² Concluding that it could not, the Court decided to overrule two of its constitutional precedents only after the parties separately briefed and argued that issue.⁹³

⁸² Note, *Advisory Opinions and the Influence of the Supreme Court Over American Policymaking*, 124 HARV. L. REV. 2064, 2064 (2011).

⁸³ See *Baker v. Carr*, 369 U.S. 186, 204 (1962) (Parties must have “such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.”).

⁸⁴ See BRIAN T. YEH, CONG. RESEARCH SERV., RS22599, MOOTNESS: AN EXPLANATION OF THE JUSTICIABILITY DOCTRINE (2007).

⁸⁵ See, e.g., ERIC J. MAGNUSON & DAVID F. HERR, FEDERAL APPEALS JURISDICTION AND PRACTICE § 5:1 (2018 ed.).

⁸⁶ *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). See also *Hormel v. Helvering*, 312 U.S. 552, 557 (1941).

⁸⁷ 5 AM. JUR. 2d *Appellate Review* § 542 (2018).

⁸⁸ MAGNUSON & HERR, *supra* note 85, at § 12:17.

⁸⁹ See, e.g., *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916).

⁹⁰ 558 U.S. 310 (2010).

⁹¹ *Id.* at 321.

⁹² *Id.* at 322-23.

⁹³ *Id.* at 322.

Another related doctrine concerns so-called “advisory opinions,” which the Supreme Court has long held are impermissible and exceed the “judicial power” granted by Article III.⁹⁴ An advisory opinion is often described as a nonbinding interpretation of law on a “legal question submitted by a legislature, government official, or another court.”⁹⁵ Federal courts refuse to provide advisory opinions because those issues have not been “presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.”⁹⁶

As the Court noted in *Flast v. Cohen*:

“[T]he rule against advisory opinions also recognizes that such suits often ‘are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests.’”⁹⁷

Rather, the judicial power is the power to “render dispositive judgments.”⁹⁸

Similarly, a decision’s holding, or “the rule or principle necessary to justify or explain the outcome,”⁹⁹ but not its dictum, consti-

⁹⁴ See *Flast v. Cohen*, 392 U.S. 83, 97, n.14 (1968) (“The rule against advisory opinions was established as early as 1793 . . . and the rule has been adhered to without deviation.”); *Herb v. Pitcarin*, 324 U.S. 117, 126 (1945) (“We are not permitted to render an advisory opinion . . .”).

⁹⁵ *Advisory Opinion*, CORNELL LAW SCHOOL: LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/advisory_opinion (last visited Feb. 22, 2018).

⁹⁶ *Flast*, 392 U.S. at 95.

⁹⁷ *Id.* at 96-97 (quoting *United States v. Fruehauf*, 365 U.S. 146, 157 (1961)).

⁹⁸ *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995) (quoting Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1990)).

⁹⁹ LAW OF JUDICIAL PRECEDENT, *supra* note 34, at 2; Philip M. Kannan, *Advisory Opinions by Federal Courts*, 32 U. RICHMOND L. REV. 769, 784 (1998) (“The binding or precedential force of federal courts’ opinions is limited to those conclusions that are necessary to support the decisions The statements that are not necessary to support the decision amount to an advisory opinion contained within the resolution of a case or controversy.”).

tutes precedent.¹⁰⁰ Holdings are “the parts of a decision that focus on the legal questions actually presented to and decided by the court.”¹⁰¹ Dicta, in contrast, are “statements untethered to the facts of the case and not presented for adjudication.”¹⁰² This distinction reflects the fact that “our system of *stare decisis* relies on determinate holdings.”¹⁰³

These principles and practices form a long-standing pattern. An 1886 treatment of *stare decisis* concluded that, for a point of law to be considered a precedent, it must have been “settled by a decision of a competent court.”¹⁰⁴ A treatise published 130 years later made the same point: “Most important, the court must have decided the issue for which the precedent is claimed; it cannot merely have discussed it in dictum, ignored it, or assumed the point without ruling upon it.”¹⁰⁵

During his confirmation hearing, Chief Justice Roberts distinguished between having “the opportunity to address” a question and “when the Court actually considers the question.”¹⁰⁶ He explained further in his written response to Senator Feinstein’s post-hearing questions:

“The Supreme Court recently reiterated that questions in a case that are ‘neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.’ . . . As such, decisions that do not specifically address *Roe* do not have the same precedential effect as the express re-examination of *Roe*’s holding in *Cassey*.”¹⁰⁷

¹⁰⁰ See *Camreta v. Greene*, 563 U.S. 692, 716 (2011) (Kennedy, J., dissenting). LAW OF JUDICIAL PRECEDENT, *supra* note 34, at 2.

¹⁰¹ LAW OF JUDICIAL PRECEDENT, *supra* note 34, at 44.

¹⁰² *Id.* at 47.

¹⁰³ Judith M. Stinson, *Teaching the Holding/Dictum Distinction*, 19 PERSPECTIVES: TEACHING LEGAL RES. & WRITING 192 (2011).

¹⁰⁴ Black, *supra* note 78, at 745. See also *id.* at 750 (There must be a “decision of the court upon it.”); *id.* (The issue must be “deliberately passed upon by the court.”).

¹⁰⁵ LAW OF JUDICIAL PRECEDENT, *supra* note 34, at 6.

¹⁰⁶ *Id.* at 145.

¹⁰⁷ *Roberts Hearing*, at 567 (quoting *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 125 S. Ct. 577, 586 (2004) (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925))).

B. *The Cases*

The test to be applied to the cases on the Specter/Feinstein lists, then, is whether the validity of *Roe v. Wade* was “brought to the attention”¹⁰⁸ and “ruled upon”¹⁰⁹ by the Court through a “dispositive judgment”¹¹⁰ or a “determinate holding.”¹¹¹ It must be a “question which needs to be decided”¹¹² and must be “actually presented to and decided by the court.”¹¹³ Was the “*Roe* issue” actually placed before the Court as an issue for decision and did the Court explicitly decide that issue by reaffirming *Roe*? Passing this test strengthens *Roe v. Wade* as a precedent; failing this test does not.

A total of 41 Supreme Court cases appear on the Specter/Feinstein lists: 36 cases appear on both, two cases appear only on the Specter list, and three cases appear only on the Feinstein list. These cases fall into five categories.

In the first category, eight of the 41 cases involved, at least generally, the issue of abortion but did not challenge the constitutionality of abortion regulations.¹¹⁴ *Bigelow v. Virginia*,¹¹⁵ for example, challenged a state law prohibiting encouraging or promoting the procurement of abortion. The Supreme Court explicitly agreed with the Commonwealth of Virginia that “this is ‘a First Amendment case’ and ‘not an abortion case.’”¹¹⁶ *Beal v. Doe* addressed whether the Social Security Act required states participating in the Medicaid program to fund the cost of non-therapeutic abortions.¹¹⁷ While citing *Roe* in passing, the Court stated that “the only question before us is

¹⁰⁸ *Cooper Indus. v. Aviall Servs.*, 543 U.S. 157,170 (2004) (internal citation omitted).

¹⁰⁹ *Id.*

¹¹⁰ *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211,219 (1995) (internal citation omitted).

¹¹¹ Stinson, *supra* note 103.

¹¹² Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1250 (2006).

¹¹³ LAW OF JUDICIAL PRECEDENT, *supra* note 34, at 44.

¹¹⁴ These eight are: *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Singleton v. Wulff*, 428 U.S. 106 (1976); *Beal v. Doe*, 432 U.S. 438 (1977); *Rust v. Sullivan*, 500 U.S. 171 (1991) (First Amendment challenge to Title X regulations); *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263 (1993); *Madsen v. Women’s Health Center*, 512 U.S. 753 (1994); *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997) (First Amendment challenge to restrictions on pro-life activists near abortion clinics); *Hill v. Colorado*, 530 U.S. 703 (2000) (same).

¹¹⁵ 421 U.S. 809 (1975).

¹¹⁶ *Id.* at 815 n.5.

¹¹⁷ 432 U.S. 438 (1977).

one of statutory construction.”¹¹⁸ None of these cases relied on *Roe v. Wade* as a relevant precedent, let alone raised the issue of its validity. They fail the first part of the test because they did not place the validity of *Roe v. Wade* before the Court as an issue for decision.

The second category includes nine cases involving challenges to abortion restrictions in which the Supreme Court did not cite or discuss *Roe v. Wade*.¹¹⁹ These include brief rulings on motions. *Rodgers v. Danforth*, for example, was a two-sentence order denying a motion to dismiss the appeal while vacating and remanding the lower court decision “for further consideration in light of *Roe v. Wade* . . . and *Doe v. Bolton*.”¹²⁰

This category also includes summary affirmances that did not cite *Roe v. Wade* at all. The opinion in *Louisiana State Board of Medical Examiners v. Rosen*,¹²¹ for example, reads in its entirety: “Affirmed on appeal from D.C.E.D. La.”¹²² The opinion in *Danforth v. Rodgers* reads: “Appeal from the United States District Court for the Western District of Missouri. Judgment affirmed.”¹²³ Similarly, the opinion in *Ashcroft v. Freiman*¹²⁴ reads: “Judgment affirmed. Mr. Justice White and Mr. Justice Rehnquist would note probable jurisdiction and set case for oral argument.”¹²⁵ And the entire opinion in

¹¹⁸ *Id.* at 443.

¹¹⁹ These nine are: *Danforth v. Rodgers*, 414 U.S. 1035 (1973); *Louisiana State Board of Medical Examiners v. Rosen*, 419 U.S. 1098 (1975); *Gerstein v. Coe*, 428 U.S. 901 (1976); *Sendak v. Arnold*, 429 U.S. 1056 (1977); *Guste v. Weeks*, 429 U.S. 968 (1976); *Bowen v. Gary-Northwestern Indiana Women’s Services*, 429 U.S. 1067 (1977); *Ashcroft v. Freiman*, 440 U.S. 941 (1979); *Babbitt v. Planned Parenthood of Central and Northern Arizona*, 479 U.S. 925 (1986); *Hartigan v. Zbaraz*, 484 U.S. 171 (1987).

¹²⁰ 410 U.S. 949 (1973). The Specter and Feinstein lists include the correct citation but list the case as *Danforth v. Rodgers*.

¹²¹ 419 U.S. 1098 (1975).

¹²² Similar examples include *Sendak v. Arnold*, 429 U.S. 968 (1976) (“affirmed on appeal from D.C.S.D. Ind.”) and *Bowen v. Gary-NW Indiana Women’s Services*, 429 U.S. 1067 (1977) (“affirmed on appeal from D.C.N.D. Ind.”).

¹²³ 414 U.S. 1035 (1973).

¹²⁴ 440 U.S. 941 (1979).

¹²⁵ In this case, a physician challenged the constitutionality of a state law regarding care of “a live born infant result[ing] from an attempted abortion.” *Freiman v. Ashcroft*, 584 F.2d 247, 248 (8th Cir. 1978). The only issue before the Supreme Court, however, was the physician’s standing. In addition to summarily affirming the appeals court’s denial of standing, the Supreme Court’s order denied a motion to file an amicus brief and a motion for appointment of counsel for third parties. *Ashcroft v. Freiman*, 440 U.S. at 941.

*Hartigan v. Zbaraz*¹²⁶ reads: “The judgment below is affirmed by an equally divided Court.” These opinions do not decide any issue in these cases, let alone whether *Roe v. Wade* remains a valid precedent of the Court.

The third category includes 19 cases challenging abortion restrictions in which *Roe v. Wade* was applied as a precedent but its validity was not questioned. These challenged abortion statutes prohibiting certain abortion methods¹²⁷ or taxpayer funding;¹²⁸ requiring parental consent¹²⁹ or notification;¹³⁰ limiting the performance of abortions to physicians;¹³¹ or imposing requirements on the performance of abortions.¹³² The Supreme Court treated *Roe v. Wade* as an applicable precedent, but no one suggested that *Roe* itself should be re-examined.

In the fourth category, two cases challenged *Roe*’s continued validity as a precedent, but the Court expressly declined to address that issue. *Webster v. Reproductive Health Services* challenged the constitutionality of a Missouri statute regulating abortion.¹³³ Writing for himself and Justices White and Kennedy, Chief Justice Rehnquist concluded that “[t]his case therefore affords us no occasion to revisit the holding of *Roe* . . . and we leave it undisturbed.”¹³⁴ Justice O’Connor agreed that “there is no necessity to . . . reexamine the constitutional validity of *Roe v. Wade*.”¹³⁵ In her view, addressing that

¹²⁶ 484 U.S. 171 (1987).

¹²⁷ *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *Gonzales v. Carhart*, 550 U.S. 124 (2007).

¹²⁸ *Maher v. Roe*, 432 U.S. 464 (1977); *Harris v. McRae*, 448 U.S. 297 (1980).

¹²⁹ *Bellotti v. Baird*, 443 U.S. 622 (1979).

¹³⁰ *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990); *Mazurek v. Armstrong*, 520 U.S. 968 (1997); *H.L. v. Matheson*, 450 U.S. 398 (1981).

¹³¹ *Connecticut v. Menillo*, 423 U.S. 9 (1975); *Lambert v. Wicklund*, 520 U.S. 292 (1997).

¹³² *Doe v. Bolton*, 410 U.S. 179 (1973); *Colautti v. Franklin*, 439 U.S. 379 (1979); *Simopoulos v. Virginia*, 462 U.S. 506 (1983); *Whole Women’s Health v. Hellerstedt*, 136 S.Ct. 2292 (2016). Other cases in this category include: *Poelker v. Doe*, 432 U.S. 519 (1977); *Bellotti v. Baird*, 428 U.S. 132 (1976); *Planned Parenthood Assoc. of Kansas City, Missouri v. Ashcroft*, 462 U.S. 476 (1983); *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320 (2006).

¹³³ 492 U.S. 490 (1989).

¹³⁴ *Id.* at 521.

¹³⁵ *Id.* at 525 (O’Connor, J., concurring in part and concurring in the judgment). *See also id.* at 532 (Scalia, J., concurring in part and concurring in the judgment) (the

issue would not be appropriate until “the constitutional invalidity of a State’s abortion statute actually turns on the constitutional validity of *Roe v. Wade*.”¹³⁶

In *Stenberg v. Carhart*, the Supreme Court declared Nebraska’s law prohibiting the method known as partial-birth abortion unconstitutional.¹³⁷ Justice Breyer wrote for the majority that “this Court, in the course of a generation, has determined and then redetermined that the Constitution offers basic protection to the woman’s right to choose.”¹³⁸ He concluded: “We shall not revisit those legal principles.”¹³⁹

The final category includes the three remaining cases on the Specter/Feinstein lists. In *City of Akron v. Akron Center for Reproductive Health*, Justice Lewis Powell began his opinion for the Court by acknowledging that:

“[A]rguments continue to be made, in these cases as well, that we erred in interpreting the Constitution. Nonetheless, the doctrine of *stare decisis*, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law. We respect it today, and reaffirm *Roe v. Wade*.”¹⁴⁰

Three years later, in *Thornburgh v. American College of Obstetricians and Gynecologists*, Justice Harry Blackmun wrote for the Court: “In *Akron*, the Court specifically reaffirmed *Roe v. Wade* Again today, we reaffirm the general principles laid down in *Roe* and in *Akron*.”¹⁴¹ In *Planned Parenthood v. Casey*, the Supreme Court addressed the constitutionality of five provisions of the Pennsylvania Abortion Control Act of 1982.¹⁴² Noting that *Roe v. Wade* had “engendered opposition,”¹⁴³ the Court applied “a series of prudential and

Court “contrive[d] to avoid” overruling *Roe v. Wade*) and *id.* at 536 (the Court chose to “avoid the question” of *Roe*’s validity).

¹³⁶ *Webster*, 492 U.S. at 526.

¹³⁷ 530 U.S. 914 (2000).

¹³⁸ *Id.* at 921 (citing *Roe* and *Casey*).

¹³⁹ *Id.*

¹⁴⁰ 462 U.S. 416, 419-20 (1983).

¹⁴¹ 476 U.S. 747, 759 (1986).

¹⁴² 505 U.S. 833 (1992).

¹⁴³ *Id.* at 855.

pragmatic considerations”¹⁴⁴ and concluded that it is “imperative to adhere to the essence of *Roe*’s original decision, and we do so today.”¹⁴⁵

To summarize, 36 of the 41 cases on the Specter/Feinstein lists did not create an opportunity for the Supreme Court to reconsider the validity of *Roe v. Wade* as a precedent. Two cases created such an opportunity by placing “the *Roe* issue” before the Court, but the Court declined to address that issue. In only the final three cases did the Court take the opportunity to address “the *Roe* issue” directly and reaffirmed that precedent. The Court itself confirmed this conclusion in *Casey*, noting that “[w]e have twice reaffirmed [*Roe*],” citing *Thornburgh* and *Akron*.¹⁴⁶

One additional fact must be noted. The vote in *Roe v. Wade* was 7-2. The vote in *Akron* to “reaffirm *Roe v. Wade*” was 6-3.¹⁴⁷ The vote in *Thornburgh* to “reaffirm the general principles laid down in *Roe*” was 5-4.¹⁴⁸ And the vote in *Casey* to reaffirm the “essence” of *Roe* was also 5-4.¹⁴⁹ Thus, far from the Supreme Court reaffirming *Roe* dozens of times, it has, by declining majorities, reaffirmed at least some aspect of *Roe* only three times.¹⁵⁰

In addition to being factually invalid, the “super precedent” argument has some highly unusual implications. It presumes, for example, that placing the validity of *Roe v. Wade* before the Supreme Court as an issue for decision requires nothing more than a case that may touch, even indirectly, upon the subject matter of abortion. It presumes that the issue is before the Court in any case where *Roe v. Wade* is even arguably a relevant precedent.

The “super precedent” argument treats single-sentence opinions on motions that do not cite *Roe v. Wade*¹⁵¹ as comparable to fully developed, briefed, and argued cases with opinions that consider

¹⁴⁴ *Id.* at 854.

¹⁴⁵ *Id.* at 870.

¹⁴⁶ *Id.*

¹⁴⁷ 462 U.S. at 420.

¹⁴⁸ 476 U.S. at 759.

¹⁴⁹ 505 U.S. at 869.

¹⁵⁰ In the Alito hearing, Senator Mike DeWine (R-OH) distinguished between applying *Roe* as a relevant precedent and “directly tak[ing] up the issue of whether to overrule *Roe*.” *Alito Hearing*, at 391. He noted that while [the court] reaffirmed *Roe* in *Akron*, *Thornburgh*, and *Casey*, it “did so in a way that hardly left *Roe* on firm footing.” *Id.*

¹⁵¹ *E.g.*, *Louisiana State Board; Hartigan*.

Roe v. Wade's continued validity directly.¹⁵² It equates the Court saying "we shall not revisit" *Roe*¹⁵³ with saying "we . . . reaffirm" *Roe*.¹⁵⁴ It requires treating a decision refusing to reexamine the validity of *Roe v. Wade* as if it were a decision to do so. And it attributes to the Supreme Court a decision on a question that the Court either did not agree, or even explicitly refused, to address.

Finally, the "super precedent" argument, if taken seriously, would undermine the very concept of *stare decisis* itself. The Supreme Court's precedents are part of the body of authority that the Court uses to decide its cases. The presumption in favor of following precedents suggests that "in most matters it is more important that the applicable rule of law be settled than that it be settled right."¹⁵⁵ But "settled" hardly describes a situation in which a precedent's continued existence is open to reversal simply by being treated as an applicable precedent.

CONCLUSION

The validity of *Roe v. Wade*, as an interpretation of the Constitution and a Supreme Court precedent, has been hotly debated since it was decided in 1973. Supporters and opponents of its result alike have struggled to defend it as a legitimate substantive decision.¹⁵⁶ Those who, for jurisprudential or political reasons, want to see *Roe* remain a Supreme Court precedent, therefore, are anxious to

¹⁵² E.g., *Danforth*; *Ashcroft*; *Webster*.

¹⁵³ *Stenberg*, 530 U.S. at 921.

¹⁵⁴ *Thornburgh*, 476 U.S. at 759.

¹⁵⁵ *Burnet*, 285 U.S. at 406.

¹⁵⁶ Professor Mark Tushnet writes that: "Most academic commentators probably believe that, as a matter of sound public policy, access to abortions should be relatively unrestricted. But none has been able to provide conclusive arguments that the Supreme Court correctly found that policy in the Constitution." Mark Tushnet, *The Supreme Court on Abortion: A Survey*, in *ABORTION, MEDICINE, AND THE LAW* 165 (J. Butler & D. Walbert eds.) (3d ed. 1986). See also Philip B. Heymann & Douglas E. Barzelay, *The Forest and the Trees: Roe v. Wade and its Critics*, 53 B.U. L. REV. 765, 784 (1973) (*Roe* "leaves the impression that the abortion decisions rest in part on unexplained precedents, in part on an extremely tenuous relation to provisions of the Bill of Rights, and in part on a raw exercise of judicial fiat."). Little more than a dozen years after *Roe* was decided, one article organized the critical academic literature into no less than twelve different lines of attack. See Dennis J. Horan, Clarke D. Forsythe & Edward R. Grant, *Two Ships Passing in the Night: An Interpretivist Review of the White-Stevens Colloquy on Roe v. Wade*, 6 ST. LOUIS U. PUB. L. REV. 229, 230 n.8 (1987).

prevent its overruling and, as a result, *Roe*'s survival has become an issue in the appointment of Supreme Court Justices.

Supreme Court nominees, however, will likely not provide "hints . . . forecasts . . . [or] previews"¹⁵⁷ about their views on the present or future validity of *Roe v. Wade*. Abortion rights advocates have, therefore, taken the opportunity to tell nominees what their views should be. The "super precedent" argument is that *Roe v. Wade* is virtually immune from being overruled because it has been reaffirmed dozens of times. This single factor, the argument goes, overwhelms all other considerations.

This Article's evaluation of the "super precedent" argument delineated four relevant principles of *stare decisis*: 1) it is an important part of the judicial process; 2) "nothing about *stare decisis* is absolute";¹⁵⁸ 3) the Supreme Court is most willing to reconsider precedents that interpret the Constitution; and 4) the Court applies recognized criteria when deciding whether to overrule a precedent. One of these criteria is whether the precedent has been reaffirmed. The "super precedent" argument, therefore, depends entirely on the claim that *Roe* has been reaffirmed many times.

Judiciary Committee members Arlen Specter and Dianne Feinstein have offered a total of 41 cases in which, they claim, the Supreme Court reaffirmed *Roe v. Wade*. For that claim to be true, each of those cases must have properly placed the validity of *Roe* before the Court as an issue for decision, and the Court must have decided that issue by explicitly reaffirming *Roe*. Applying that test to those cases, however, shows that the Supreme Court has, by decreasing majorities, reaffirmed some aspect of *Roe* only three times.

Should the Supreme Court revisit the validity of *Roe v. Wade* in the future, it will apply recognized criteria in deciding whether to overrule that precedent. With regard to the criterion of reaffirmance, however, there is nothing "super" about *Roe v. Wade*.

¹⁵⁷ *Ginsburg Hearing*, at 323.

¹⁵⁸ LAW OF JUDICIAL PRECEDENT, *supra* note 34, at 35.

APPENDIX

SUPREME COURT NOMINEES DECLINE TO
GIVE VIEWS**Felix Frankfurter (Roosevelt, 1939)**

“I should think it improper for a nominee no less than for a member of the Court to express his personal views on controversial political issues affecting the Court. My attitude and outlook on relevant matters have been fully expressed over a period of years and are easily accessible. I should think it not only bad taste but inconsistent with the duties of the office for which, I have been nominated for me to attempt to supplement my past record by present declarations.”¹⁵⁹

John Marshall Harlan (Eisenhower, 1955)

“[T]he position that I am in as a nominee to the Supreme Court of the United States, for I take it not only would the committee agree with me that it would be inappropriate for me to comment upon cases that may come before me, and to express my views on issues that may come before me, but that if I undertook to do so that would seem to me to constitute the gravest kind of question as to whether I was qualified to sit on that great Court.”¹⁶⁰

William Brennan (Eisenhower, 1957)

“I do have an obligation not to discuss any issues that are touched upon in cases before the Court.”¹⁶¹

Potter Stewart (Eisenhower, 1959)

“I don’t think I could generalize on that I certainly don’t want to indicate to you how I am going to decide a case.”¹⁶²

¹⁵⁹ *Nomination of Felix Frankfurter: Hearing Before the S. Comm. on the Judiciary*, 76th Cong. 107-08 (1939).

¹⁶⁰ *Nomination of John Marshall Harlan: Hearing Before the S. Comm. on the Judiciary*, 84th Cong. 138 (1955).

¹⁶¹ *Nomination of William Joseph Brennan, Jr. : Hearing Before the S. Comm. on the Judiciary*, 85th Cong. 20 (1957).

¹⁶² *Nomination of Potter Stewart: Hearing Before S. Comm. on the Judiciary*, 86th Cong. 30-31 (1959).

Arthur Goldberg (Kennedy, 1962)

“I would like to say this. There are several cases I have seen on the docket of the Supreme Court involving this question. If I am confirmed by the Senate, I would hope to participate in these cases. I would not like any remark of mine to lead any litigant to believe that I am prejudiced for or against any particular form of view.”¹⁶³

Abe Fortas (Johnson, 1965)

“I can say without impropriety I know that nominees for the Supreme Court here in the past have expressed great diffidence in speaking about matters that may possibly come before the Court, and I appreciate that, and I do not want to breach that rule.”¹⁶⁴

Thurgood Marshall (Johnson, 1967)

“My position is, which in every hearing I have gone over is the same, that a person who is up for confirmation for Justice of the Supreme Court deems it inappropriate to comment on matters which will come before him as a Justice.”¹⁶⁵

Abe Fortas (Johnson, 1968)

“Senator, with the greatest deference, and the greatest respect, I assure you, my answer must stand. I cannot address myself to the question that you have phrased because I could not possibly address myself to it without discussing theory and principle. And the theory and principle that I would discuss would most certainly be involved in situations that we have to face.”¹⁶⁶

Homer Thornberry (Johnson, 1968)

“Senator, I guess I am at that stage where I have to say that that opinion speaks for itself I believe that under the separation of powers, under the provisions of the Constitution, under my judicial oath,

¹⁶³ *Nomination of Arthur J. Goldberg: Hearing Before the S. Comm. on the Judiciary*, 87th Cong. 9 (1962).

¹⁶⁴ *Nomination of Abe Fortas: Hearing Before the S. Comm. on the Judiciary*, 89th Cong. 42 (1965).

¹⁶⁵ *Nomination of Thurgood Marshall: Hearing Before the S. Comm. on the Judiciary*, 90th Cong. 55 (1967).

¹⁶⁶ *Nomination of Abe Fortas: Hearing Before the S. Comm. on the Judiciary*, 89th Cong. 181-82 (1968).

after once having expressed my views for a court, I ought not to try to amend it, take back, add to, or anything else.”¹⁶⁷

Warren Burger (Nixon, 1969)

“[T]his is a matter which I would assume is going to come before the court, the courts generally, and perhaps the Supreme Court, and therefore it would be inappropriate for me to try to analyze the rationale of the denial of certiorari in that case. I just assume that this is one of the subjects which is going to be before the Court over a period of years.”¹⁶⁸

Clement Haynsworth (Nixon, 1969)

“As far as what you wish me to say what I would do after I am on the Supreme Court, if the Senate should confirm me, I don't think I should get into that. And this is the position, of course, you have had throughout. If I speculate now on what I am going to do in a particular field or in a particular case, as a Justice, if I become one, then I put myself in a position, too, that I couldn't sit on a case in that field when it came up.”¹⁶⁹

G. Harrold Carswell (Nixon, 1970)

“If you're asking me to pass judgment on a set of facts prematurely. I respectfully submit that I can't answer them. It would be highly improper to answer such a question. There may be cases just in the category that you describe, probably are on their way to the Supreme Court of the United States. In all likelihood, there may be some before the court on which I now sit. In this area, without attempting to be evasive about it at all, I just simply have to take the position of other nominees, the traditional stance, and, I think, the proper one, that you cannot get into this. I would box myself in in such a manner that I would probably then be disqualified to sit on that case that arose under that situation.”¹⁷⁰

¹⁶⁷ *Nomination of Homer Thornberry: Hearing Before the S. Comm. on the Judiciary, 90th Cong. 256 (1968).*

¹⁶⁸ *Nomination of Warren Burger: Hearing Before the S. Comm. on the Judiciary, 91st Cong. 19 (1969).*

¹⁶⁹ *Nomination of Clement Haynsworth: Hearing Before the S. Comm. on the Judiciary, 91st Cong. 76 (1969).*

¹⁷⁰ *Nomination of George Harrold Carswell: Hearing Before the S. Comm. on the Judiciary, 91st Cong. 36 (1970).*

Harry Blackmun (Nixon, 1970)

“I suppose there are some others there that you have listed where perhaps a measure of restraint on my part would be indicated because I think some of those things are certain to come before the Court before too long.”¹⁷¹

Lewis Powell (Nixon, 1971)

“I may be getting into areas that could possibly embarrass me if I should be confirmed to the Court.”¹⁷²

William Rehnquist (Nixon, 1971)

“Well, naturally it would be improper for me to comment in any sense in a situation like that that might come before the Court for review, whether or not I might feel bound to disqualify myself.”¹⁷³

John Paul Stevens (Ford, 1975)

“I honestly do not think it is appropriate for me to give you a philosophical discussion off what I might do if I were a legislator. I do not intend to be a legislator, and my policy thoughts are really not what would be controlling when I face the adjudication of these matters later on. I think in good conscience I should do my best to avoid saying anything that might have an impact on the impartial treatment of this issue when it comes before the Court. I am afraid that if you lead me on this way I may be led to say something that might make it more difficult to have whatever I do later be accepted as a completely impartial analysis of the question. That’s how I see it.”¹⁷⁴

Sandra Day O’Connor (Reagan, 1981)

“There is, however, a limitation on my responses which I am compelled to recognize. I do not believe that as a nominee I can tell you how I might vote on a particular issue which may come before the

¹⁷¹ *Nomination of Harry Blackmun: Hearing Before the S. Comm. on the Judiciary*, 91st Cong. 37 (1970).

¹⁷² *Nominations of William H. Rehnquist and Lewis F. Powell, Jr. : Hearing Before the S. Comm. on the Judiciary*, 92nd Cong. 210 (1971).

¹⁷³ *Nominations of William H. Rehnquist and Lewis F. Powell, Jr. : Hearing Before the S. Comm. on the Judiciary*, 92nd Cong. 85 (1971). *See also id.* at 132 (“But I could not, of course, express any view on a question that might come before the Court.”).

¹⁷⁴ *Nomination of John Paul Stevens to be a Justice of the Supreme Court: Hearing Before the S. Comm. on the Judiciary*, 94th Cong. 27 (1975).

Court, or endorse or criticize specific Supreme Court decisions presenting issues which may well come before the Court again. To do so would mean that I have prejudged the matter or have morally committed myself to a certain position. Such a statement by me . . . would result in my inability to do my sworn duty; namely, to decide cases that come before the Court.”¹⁷⁵

Antonin Scalia (Reagan, 1986)

“I do not think I should, Senator, because that may well be an issue argued before the Court, and I do not want to be in a position of having, in connection, as a condition of my confirmation . . . giving . . . an indication of how I would come out on it.”¹⁷⁶

William Rehnquist (1986)

“Senator, as you can imagine, I would like to oblige, but the fact that the issue is fundamental, and important, does not make it any less one that could well come before the Court. And I think that the approach I have to take is, in a case like that, I ought not to attempt to predict how I would vote in a situation like that.”¹⁷⁷

Anthony Kennedy (Reagan, 1988)

“I think the reason for our not answering detailed questions with respect to our views on specific cases, or specific constitutional issues, is . . . that the public expects that the judge will keep an open mind, and that he is confirmed by the Senate because of his temperament and his character, and not because he has taken particular positions on the issues.”¹⁷⁸

David Souter (Bush, 1990)

“And I think for reasons that we all appreciate, I would not think that it was appropriate to express a specific opinion on the exact result in

¹⁷⁵ *Nomination of Sandra Day O'Connor: Hearing Before the S. Comm. on the Judiciary*, 97th Cong. 57-58 (1981).

¹⁷⁶ *Nomination of Judge Antonin Scalia: Hearing Before the S. Comm. on the Judiciary*, 99th Cong. 58 (1986).

¹⁷⁷ *Nomination of Justice William Hubbs Rehnquist: Hearing Before the S. Comm. on the Judiciary*, 99th Cong. 188 (1986).

¹⁷⁸ *Nomination of Anthony M. Kennedy: Hearing Before the S. Comm. on the Judiciary*, 101st Cong. 217 (1988). *See also id.* at 182 (“The issue has not come before me in a judicial capacity as a circuit judge, and might well as a Supreme Court Justice, so I would not commit myself on the Issue.”).

Griswold, for the simple reason that as clearly as I will try to describe my views on the right of privacy, we know that the reasoning of the Court in *Griswold*, including opinions beyond those of Justice Harlan, are taken as obviously a predicate toward the one case which has been on everyone's mind and on everyone's lips since the moment of my nomination—*Roe v. Wade*, upon which the wisdom or the appropriate future of which it would be inappropriate for me to comment.”¹⁷⁹

Clarence Thomas (Bush, 1991)

“I think it is inappropriate for any judge who is worth his or her salt to prejudge any issue or to sit on a case in which he or she has such strong views that he or she cannot be impartial. And to think that as a judge that you are infallible I think totally undermines the process. You have to sit. You have to listen. You have to hear the arguments. You have to allow the adversarial process to think. You have to be open. And you have to be willing to work through the problem. I don't sit on any issues, on any cases that I have prejudged. I think that it would totally undermine and compromise my capacity as a judge.”¹⁸⁰

Ruth Bader Ginsburg (Clinton, 1993)

“There is, of course, this critical difference. You are well aware that I came to this proceeding to be judged as a judge, not as an advocate. Because I am and hope to continue to be a judge, it would be wrong for me to say or preview in this legislative chamber how I would cast my vote on questions the Supreme Court may be called upon to decide. Were I to rehearse here what I would say and how I would reason on such questions, I would act injudiciously. Judges in our system are bound to decide concrete cases, not abstract issues; each case is based on particular facts and its decision should turn on those facts and the governing law, stated and explained in light of the particular

¹⁷⁹ *Nomination of David H. Souter: Hearing Before the S. Comm. on the Judiciary*, 101st Cong. 54 (1990).

¹⁸⁰ *Nomination of Judge Clarence Thomas: Hearing Before the S. Comm. on the Judiciary*, 102nd Cong. 173 (1991). *See also id.* at 127 (“I do not think that at this time that I could maintain my impartiality as a member of the judiciary and comment on that specific case.”); *id.* at 183 (“I do not believe that a sitting judge, on very difficult and very important issues that could be coming before the Court, can comment on the outcomes, whether he or she agrees with those outcomes as a sitting judge.”).

arguments the parties or their representatives choose to present, A judge sworn to decide impartially can offer no forecasts, no hints, for that would show not only disregard for the specifics of the particular case, it would display disdain for the entire judicial process. Similarly, because you are considering my capacity for independent judging, my personal views on how I would vote on a publicly debated issue were I in your shoes-were I a legislator-are not what you will be closely examining. As Justice Oliver Wendell Holmes counseled: “[O]ne of the most sacred duties of a judge is not to read [her] convictions into [the C]onstitution[.]” I have tried, and I will continue to try, to follow the model Justice Holmes set in holding that duty sacred.”¹⁸¹

Stephen Breyer (Clinton, 1994)

“Yes; the case of *Roe v. Wade* has been the law for 21 years or more, and it was recently affirmed by the Supreme Court of the United States in the case of *Casey*. That is the law. The questions that you are putting to me are matters of how that basic right applies, where it applies, under what circumstances. And I do not think I should go into those for the reason that those are likely to be the subject of litigation in front of the Court.”¹⁸²

John Roberts (Bush, 2005)

“Senator, my answer is that the independence and integrity of the Supreme Court requires that nominees before this Committee for a position on that Court not forecast, give predictions, give hints about how they might rule in cases that might come before the Court.”¹⁸³

Samuel Alito (Bush, 2006)

“I don't think I can express an opinion on how I would have decided a hypothetical case.”¹⁸⁴

¹⁸¹ *Nomination of Ruth Bader Ginsburg: Hearing Before the S. Comm. on the Judiciary*, 103rd Cong. 55 (1993). See also *id.* at 323 (“I cannot address that question without violating what I said had to be my rule about no hints, no forecasts, no previews.”).

¹⁸² *Nomination of Stephen Breyer: Hearing Before the S. Comm. on the Judiciary*, 103rd Cong. 138 (1994).

¹⁸³ *Nomination of John G. Roberts, Jr.: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 189 (2005).

¹⁸⁴ *Nomination of Samuel A. Alito, Jr.: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 396 (2006).

Sonia Sotomayor (Obama, 2009)

“As I’ve indicated to you, opining on a hypothetical is very, very difficult for a judge to do . . . [a]nd as a potential-as a potential Justice on the Supreme Court, but more importantly as a Second Circuit Judge still sitting, I can’t engage in a question that involves hypotheses.”¹⁸⁵

Elena Kagan (Obama, 2010)

“I do not believe it would be appropriate for me to comment on the merits of *Roe v. Wade* other than to say that it is settled law entitled to precedential weight. The application of *Roe* to future cases, and even its continued validity, are issues likely to come before the Court in the future.”¹⁸⁶

Neil Gorsuch (Trump, 2017)

“Accordingly, I can promise no more than that I will endeavor to follow the law as faithfully as I am able. To offer more would risk violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.”¹⁸⁷

¹⁸⁵ *Nomination of Hon. Sonia Sotomayor: Hearing Before S. Comm. on the Judiciary*, 111th Cong. 376 (2009).

¹⁸⁶ *Nomination of Elena Kagan: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 460 (210).

¹⁸⁷ S. COMM ON THE JUDICIARY, 115TH CONG. NOMINATION OF JUDGE NEIL M. GORSUCH, QUESTIONS FOR THE RECORD 4 (Mar. 24, 2017).