Buffalo Law Review

Volume 42 | Number 1 Article 8

1-1-1994

Stare Decisis and the Rehnquist Court: The Collision of Activism, Passivism and Politics in *Casey*

John Wallace
University at Buffalo School of Law (Student)

Stare Decisis and the Rehnquist Court: The Collision of Activism, Passivism and Politics in *Casey*

JOHN WALLACE*

* J.D. Candidate, University at Buffalo Law School, May 1994.

Wisdom too often never comes, and so one ought not to reject it merely because it comes late.[1]

INTRODUCTION

On June 29, 1992, the United States Supreme Court, in a joint opinion handed down by Justices Sandra Day O'Connor, William Kennedy, and David Souter, announced its decision in the Pennsylvania abortion case—*Planned Parenthood v. Casey*.[2] As evidenced by its auspicious beginning,[3] the decision was rendered in the hopes of securing a woman's "liberty" interest in the right to terminate her pregnancy and to resolve the doubt, confusion, and controversy created after the Court's original foray into abortion jurisprudence.[4] The *Casey* decision purported to accomplish this by announcing its resolute and unwavering support for the "central holding" of *Roe v. Wade*. According to the joint opinion, the "central holding" of *Roe v. Wade* was that: (1) a woman has the right to choose to have an abortion before fetal viability and to obtain it without undue interference from the State; (2) the State has the power to restrict abortions after viability; and (3) the State has legitimate interests from the outset of the pregnancy in protecting the life of the woman and the life of the fetus.

The justifications for the affirmation of *Roe*'s "central holding" were threefold. First, the *Casey* Court stated it was bound to reaffirm *Roe* because of the "fundamental constitutional question" involved. Second, "institutional integrity" necessitated it. Lastly, and most importantly, the doctrine of *stare decisis*[5] required it.[6]

As evidenced by the Court's justifications, the doctrine of *stare decisis* and its concomitant notion of institutional integrity was a

---

1. Henslee v. Union Planters Nat'l Bank & Trust Co., 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting).

2. 112 S. Ct. 2791 (1992).

3. The joint opinion began: "Liberty finds no refuge in a jurisprudence of doubt." *Id.* at 2803.

4. The Court's major opinion, the one which set off a storm of controversy, was the landmark case of Roe v. Wade, 410 U.S. 113 (1973).

5. Black's Law Dictionary defines *stare decisis* as follows:

> To abide by, or adhere to, decided cases. Policy of courts to stand by precedent and not to disturb settled point. Doctrine that, when a court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same; regardless of whether the parties and property are the same .... Doctrine is one of policy, grounded on theory that security and certainty require that [an] accepted and established legal principle ... be recognized and followed ....

BLACK'S LAW DICTIONARY 1407 (6th ed. 1990).

6. 112 S. Ct. at 2804.

significant, if not the major, reason behind the decision to affirm *Roe*. As such, an analysis of *stare decisis* is particularly relevant. However, as this Note will show, *stare decisis* did not command *Roe*'s affirmance.

This article examines the Supreme Court's use of *stare decisis* in the *Casey* decision. The article is divided into four parts. Part One explores the historical underpinnings of the doctrine of *stare decisis*, its usage and development in American law, and current applications of the doctrine by the Rehnquist Court. Part Two is an in-depth analysis of the *Casey* decision and, out of necessity, an analysis of *Roe v. Wade*. This section analyzes the Court's reasoning, use, and justifications in employing the doctrine of *stare decisis* in the *Casey* decision. Part Three explains how the Court's decision in *Casey* is not only inconsistent in its own use of *stare decisis,* but is also inconsistent with traditional notions of *stare decisis,* and with *Roe*. This section compares the *Casey* Court's use of the doctrine with that of its predecessors and examines the doctrine's new found force as a decision-making tool. Finally, Part Four gauges the ramifications that the Court's new twist on *stare decisis* will have for the future of the doctrine, *Casey,* and for settled and unsettled areas of American law.

I. THE DOCTRINE OF *STARE DECISIS*—AN HISTORICAL PERSPECTIVE

A. *English and American Origins*

The doctrine of *stare decisis* is by no means of recent origin. Its origins date back to medieval England, and the doctrine, itself, has become the cornerstone of English common law. In actuality, the term *stare decisis* is an abbreviated form of the Latin phrase *stare decisis et non quieta moevre* which translates: "to stand by matters that have been decided and not to disturb what is tranquil."[7] As the late Judge Robert Sprecher recounted, the modern doctrine of *stare decisis* began to develop at the end of the fifteenth century.[8]

---

7. DICTIONARY OF FOREIGN PHRASES AND ABBREVIATIONS 187 (Kevin Guinach trans., 3d ed. 1983). For further discussion of the modern definition of *stare decisis*, see Robert A. Sprecher, *The Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied*, 31 A.B.A. J. 501, 501 (1945) (defining *stare decisis*: "to stand by the decisions and not to disturb settled points"); Albert Kocourek & Harold Koven, *Renovation of the Common Law Through Stare Decisis*, 29 ILL. L. REV. 971, 973 (1935) (defining *stare decisis*: "to abide by the precedents and not to disturb settled points").

8. Sprecher, *supra* note 7, at 502. Sprecher notes that historians agree that Bracton's *Note Book*, which contains one of the first collections of English decisions, dating back to approximately 1217-1240, gave early impetus to the doctrine of *stare decisis. Id.* at 501 & n.9; *see also* SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 146-47 (1938); A. K. R. KIRALFY, POTTER'S HISTORICAL INTRODUCTION TO ENGLISH LAW AND ITS INSTITUTIONS 276-78 (4th ed. 1958).

The doctrine was seized upon by Lord Coke and William Blackstone. In his *Commentaries*, written in 1765, Blackstone stated that "it is an established rule to abide by former precedents, where the same points come again in litigation."[9] By the end of the eighteenth century, the English doctrine of *stare decisis* was substantially in place.[10]

The doctrine of *stare decisis* developed in England to the extent that a judicial precedent became an authoritative or fixed and binding rule. The doctrine mandated that precedent be followed in three specific instances: (1) by all lower courts after promulgation by a superior one; (2) by the House of Lords in its own prior decisions; and (3) by the Court of Appeal in its own decisions and by those of older courts of coordinate authority.[11] The precedent, though perceived as absolute, remained subject to three important reservations. The first was that the rule laid down in a case need not be followed if it was "plainly unreasonable and inconvenient" (i.e., contrary to well established principles or statutes).[12] Second, the judge had discretion in employing the doctrine where courts of equal authority had created conflicting decisions.[13] Third, the binding force was attached not to the words used, nor reasons given by a judge for a particular decision, but to the actual principle or principles necessary for the decision of the case.[14]

The development of *stare decisis* in American law has resulted in a major breach with its English antecedents. "The modern and present trend is characterized by the overruling and distinguishing of precedents to an extent that would strike an English judge and lawyer as revolutionary."[15] That statement was made in 1937, and while talk of "Court-packing" and "switches in time"[16] consumed the day, this author believes that the Supreme Court's current use of the doctrine would strike an English jurist as anathema.

---

9. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 69 (Thomas M. Cooley ed., 3d ed. rev. 1884)).

10. Sprecher, *supra* note 7, at 502.

11. *Id.*; SIR JOHN SALMOND, JURISPRUDENCE 192-93 (8th ed. 1930); *see also* RUPERT CROSS, PRECEDENT IN ENGLISH LAW 104-11 (1961).

12. Sprecher, *supra* note 7, at 503. Indeed as Blackstone commented, *stare decisis* need not be followed "when the former determination is most evidently contrary to reason .... For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law* ...." BLACKSTONE, *supra* note 9, at 69-70; *see also* HOLDSWORTH, *supra* note 8, at 152-53; SALMOND, *supra* note 11, at 193-94.

13. Sprecher, *supra* note 7, at 503; HOLDSWORTH, *supra* note 8, at 153; CROSS, *supra* note 11, at 128-30, 134-38.

14. Sprecher, *supra* note 7, at 502-03; *see also* ROSCOE POUND, THE FUTURE OF THE COMMON LAW 125 (1937).

15. Kocourek & Koven, *supra* note 7, at 976.

16. For a brief discussion of this historical event, see *infra* part III.A.2.

The American doctrine of *stare decisis* has always embraced the three English reservations to *stare decisis.* However, the traditional American application of the doctrine also included two additional reservations which strengthened the hand of judicial discretion and departed from the English notion of precedent as a voluntary but rigidly followed rule. First, the Supreme Court has come to accept the notion that whether *stare decisis* "shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question."[17] Second, the American version of the doctrine is adaptable to the "spirit of the times."[18] Frequently, and perhaps no better exemplified than in *Casey*, judicial use of the doctrine is tempered by judicial perceptions of the political, economic, and social realities of the day.

These two reservations were indicative of the early twentieth century American approach to the use of *stare decisis.* Since that time, however, a number of other reservations, explanations, or justifications have received the approval of the Supreme Court. While the additional reservations comprise a part of the traditional American approach to *stare decisis,* they do not constitute a complete and exclusive list. Development of the doctrine has, by and large, been evolutional.[19] As several commentators suggest, the doctrine of *stare decisis* is in reality not one but two doctrines, comprising both a strict and liberal rule of precedent.

> According to the strict rule of precedent, a court is bound by its own previous decisions and by the previous decisions of all higher courts. There is

---

17. Sprecher, *supra* note 7, at 503 (quoting Hertz v. Woodman, 218 U.S. 205, 212 (1910)).

18. *Id.* at 504.

19. Admittedly, this is the author's own impression of the voluminous research that has been done on *stare decisis.* Consistent with this author's approach to the subject, this article will defer to "traditional" definitions of the doctrine and then examine the approaches taken by the Supreme Court's most prolific jurists as evidence of this evolution. Since this article will show how the *Casey* Court has taken the doctrine into unexplored territory, a precise definition of "traditional" *stare decisis* is not required. To the extent that one is required, D. H. Chamberlain, in the seminal American article on *stare decisis,* encapsulated the traditional American approach as follows:

> A deliberate or solemn decision of a court or judge, made after full argument on a question of law fairly arising in a case and necessary to its determination, is an authority or binding precedent in the same court, or in other courts of equal or lower rank within the same jurisdiction, in subsequent cases where the very point is again presented; but the degree of authority belonging to such precedent depends, of necessity, on its agreement with the spirit of the times or the judgement of subsequent tribunals upon its correctness as a statement of the existing or actual law, and the compulsion or exigency of the doctrine is, in the last analysis, moral and intellectual, rather than arbitrary and inflexible.

D. H. Chamberlain, *The Doctrine of Stare Decisis as Applied to Decisions of Constitutional Questions*, 3 HARV. L. REV. 125, 125 (1889).

> no provision made in this theory for the departure from or alteration of a rule that has been previously asserted and followed. The only valid justification for refusing to apply the rule is that the fact situation of the present case is not controlled by the rule, i.e., is not subsumable under the class delineated by the antecedent of the rule.
>
> . . . The liberal rule . . . is one which therefore allows for flexibility and growth; under its dictates precedents need not always be followed. The doctrine . . . allows for both definite expectation and innovations . . . . And if the judge should conclude that the prior cases were wrongly decided—that the precedents are incorrect—then the cases should be openly overruled. For if the rule of stare decisis demanded that precedents be followed regardless of the amount of good or harm produced in society by so doing, then this rule might be open to the objection that certainty is being procured at too great a price.[20]

B. Stare Decisis *and the Supreme Court*

The development of the doctrine of *stare decisis* is best exemplified through its treatment in the Supreme Court. Throughout the history of the Court, many Justices have felt the need to explicate the doctrine, both on and off the bench. In so doing, the doctrine of *stare decisis* has come to embrace additional considerations and justifications. These include: diminished force, reliance, court legitimacy and public confidence, administrative efficiency, and judicial restraint.

1. *Diminished Force.* The doctrine of *stare decisis* has never meant that subsequent courts are absolutely barred from overruling precedent. This was true both for English and American courts.[21] Indeed, the Supreme Court has had a long history of overruling its own precedents.[22] This is especially true in cases where the Court is confronted with a constitutional, as opposed to statutory precedent.

---

20. RICHARD A. WASSERSTROM, THE JUDICIAL DECISION 50-51 (1969); *see also* JOHN R. SCHMIDHAUSER, CONSTITUTIONAL LAW IN THE POLITICAL PROCESS 505-07 (1963); KARL LLEWELLYN, THE BRAMBLE BUSH 68 (1960); David L. Shapiro, *Essays Commemorating The One Hundredth Anniversary Of The Harvard Law Review: In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 734 (1987).

21. *See supra* notes 12-14, 17-20 and accompanying text.

22. There have been numerous attempts by commentators, judges, and Congress to count the total number of cases which have been overruled by the Court. As the 1991-1992 term indicates, this number is in continual flux. As of the date of the *Casey* decision, the count stood at 216. *See* Brief Amicus Curiae of Hon. Henry J. Hyde et al. in support of Respondents, Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) (Nos. 91-744 and 91-902) (listing 214 implicit and explicit overrulings by the Court to date) [hereinafter, Casey, Brief]. The *Casey* Court overruled two previous decisions. Also, the brief shows that in nearly three-fourths of these cases, the Court overruled the earlier decision because the previous Court wrongly interpreted the Constitution.

In the former case, *stare decisis* applies with diminished force.

No discussion of the diminished applicability of *stare decisis* to constitutional questions would be complete without a reference to Justice Brandeis—one of the first American jurists to state such a proposition. Justice Brandeis, in his stinging dissent in *Burnett v. Coronado Oil & Gas Co.*,[23] called for the overruling of an established precedent, arguing that:

> *Stare decisis* is not . . . a universal and inexorable command. "The rule of stare decisis . . . is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided." *Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right. This is commonly true even where error is a matter of serious concern, *provided correction can be had by legislation.* But in cases involving the Federal Constitution where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate in the judicial function.[24]

Justice Brandeis' concerns were predicated upon his belief in the difficulty of amending the Constitution.[25] The appropriate weight precedent should receive thus depends upon whether a constitutional or statutory issue is involved. When the Court refuses to overrule constitutional precedent, it becomes extremely difficult to correct an erroneous or unjust decision. Since legislative correction is constitutionally impermissible, the only way to correct an erroneous decision would be through the amendment process.[26] In essence, "the practice of judicial review requires that constitutional questions remain open to interpretation because only the Court can correct its

---

23. 285 U.S. 393 (1932).

24. *Id.* at 405-08 (footnotes and citations omitted) (emphasis added).

25. Passage of a constitutional amendment requires approval of two-thirds of both houses of Congress and ratification by three-fourths of all fifty states. U.S. CONST. art. V. The enactment of the 27th Amendment perhaps best underscores the difficulties inherent in the amendment process. This amendment, originally included in the Bill of Rights, was not enacted until May 1992, more than 200 years after it was first introduced. *See, e.g.*, J. Jennings Moss, *House, Senate OK Amendment*, WASH. TIMES, May 21, 1992, at A3.

26. *See* LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT: HOW THE CHOICES OF SUPREME COURT JUSTICES SHAPES OUR HISTORY 102 (1985); ROBERT H. BORK, THE TEMPTING OF AMERICA 155-57 (1990); PAUL A. FREUND, ON UNDERSTANDING THE SUPREME COURT 72-73 (1949); James C. Rehnquist, Note, *The Power That Shall Be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B.U. L. REV. 345, 350-53 (1986); Albert P. Blaustein & Andrew H. Field, *"Overruling" Opinions in the Supreme Court*, 57 MICH. L. REV. 151, 183 (1958). *But see* Earl M. Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467, 471 (arguing that Brandeis' argument is overstated).

own mistakes given the laborious nature of the amendment process."[27] Conversely, Court error with respect to a statutory precedent may be remedied simply by Congressional legislation.[28]

As Professor Maltz explains, the prevailing dogma, at least since the days of Chief Justice Roger Taney, was that the Supreme Court should feel "more free to overrule constitutional decisions than non-constitutional precedents."[29] In constitutional cases, once the Court has ruled upon the constitutionality of a law or precedent, Congress cannot amend it. To do so would violate the Constitution and the power of judicial review.[30] Thus, the only practical way to overturn a decision of the Court on a constitutional issue is if the Court does so itself.[31] If the Court is to be absolutely constrained by *stare decisis*, then judicial correction of erroneous decisions is foreclosed. The only other alternative, constitutional amendment, is so laborious and infrequent that it is impractical and dangerous to rely on it as the sole means of correcting judicial error.[32]

Justice Brandeis' concerns in *Burnett* were seized upon by Justices Stone and Cardozo in *St. Joseph Stockyard Co. v. United States*.[33] In a concurring opinion, both Justices agreed that "[t]he doctrine of *stare decisis,* however appropriate and even necessary at

27. Parisis G. Filippatos, *The Doctrine of Stare Decisis and the Protection of Civil Rights and Liberties in the Rehnquist Court*, 11 B.C. THIRD WORLD L.J. 335, 351 (1991); *see also* Philip P. Frickey, *Stare Decisis in Constitutional Cases: Reconsidering* National League of Cities, 2 CONST. COMMENTARY 123, 127 (1985); Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 77 (1991).

28. *See generally* Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response To Supreme Court Statutory Decisions*, 65 TEMP. L. REV. 425, 425-29 (1992).

29. Maltz, *supra* note 26, at 467. *But see* Lewis F. Powell Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 286 (1990) (arguing that wrongly decided cases should be overruled equally in both the statutory or constitutional cases); ARTHUR J. GOLDBERG, EQUAL JUSTICE: THE WARREN ERA OF THE SUPREME COURT 74-75 (1971) (suggesting that when a court rules to expand personal liberties adherence to *stare decisis* is diminished; however, adherence to *stare decisis* is absolute, when a court seeks to contract them).

30. U.S. CONST. art. VI, cl. 2; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803).

31. U.S. CONST. art. V.

32. Only four Supreme Court decisions have been overruled by amendment. Chisolm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) (11th amendment); Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857) (13th and 14th amendments); Pollack v. Farmer's Loan & Trust, 157 U.S. 429 (1895) (power to lay direct taxes), *overruled by* South Carolina v. Baker, 485 U.S. 523 (1988); Oregon v. Mitchell, 400 U.S. 112 (1970) (26th amendment); *see also* Casey, Brief, *supra* note 22; TRIBE, *supra* note 26, at 102-03.

33. 298 U.S. 38, 93 (1936) (Stone, J., with whom Cardozo, J., joins concurring); *see also* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 150 (1921) (agreeing that adherence to precedent should be relaxed when it is necessary to bring a ruling in line with society's current sense of justice).

times, has only a limited application in the field of constitutional law."[34] Justice William O. Douglas agreed, stating that:

> 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 . . . . He cannot do otherwise unless he lets men long dead and unaware of the problem of the age in which he lives do his thinking for him.[35]

Justice Robert H. Jackson went even further:

> [F]or over a century it has been the settled doctrine of the Supreme Court that the principle of *stare decisis* has only limited application in constitutional cases. It might be thought that if any law is to be stabilized by a court decision it logically should be the most fundamental of all law—that of the Constitution. But the years brought about a doctrine that such decisions must be tentative and subject to judicial cancellation if experience fails to verify them. The result is that constitutional precedents are accepted only at their current valuation and have a mortality rate almost as high as their authors.[36]

Expanding upon the laborious nature of the amendment process, Justice Jackson noted:

> Of course, such judicial misconstruction theoretically can be cured by constitutional amendment. But the period of gestation of a constitutional amendment, or of any law reform, is reckoned in decades usually; in years, at least. And, after all, as the Court itself asserted in overruling the minimum-wage cases, it may not be the Constitution that was at fault.[37]

In addition to the problems inherent in the amendment process, there is another reason to be wary of rigid adherence to *stare decisis* in constitutional cases. This danger is that the resolution of a constitutional issue is left to the first Court that is presented with the issue. Aside from the fact that times can change, there also exists the possibility that the first Court is poorly prepared, the case is poorly argued, or the judgment is poorly considered. This danger becomes even more acute when a court has moved too far in an activist

---

34. 298 U.S. at 93.

35. William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949); *see also* GLENDON A. SCHUBERT, CONSTITUTIONAL POLITICS: THE POLITICAL BEHAVIOR OF THE SUPREME COURT JUSTICES AND THE CONSTITUTIONAL POLICIES THAT THEY MAKE 217-40 (1964) (discussing factors that influence judges' attitudes toward *stare decisis*).

36. Robert H. Jackson, *The Task of Maintaining Our Liberties: The Role of the Judiciary*, 39 A.B.A. J. 961, 962 (1953) [hereinafter Jackson, *Maintaining Our Liberties*]; *see also* ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY IN CRISIS IN AMERICAN POWER POLITICS 297 (1941) [hereinafter JACKSON, THE STRUGGLE].

37. JACKSON, THE STRUGGLE, *supra* note 36, at 297.

direction.[38]

2. *Reliance.* One of, if not, the most frequently invoked reasons for adherence to precedent is the notion of reliance. The essential argument is this: if society has relied upon a certain legal rule, it should not be overturned. As Professor Wasserstrom notes, "the failure to give effect to those activities and commitments which were undertaken *in justified reliance* upon the pronouncements of that system could serve, arguably, only to make the legal system ill-conceived, irresponsible, and vicious."[39] Thus, when it can be shown that great numbers of people have committed and relied upon judicial rules, the argument is that the Court should adhere to the prior decision even if it was erroneous.[40]

The importance of reliance, as certain commentators have suggested, has even led the Supreme Court to render what it considered to be wrong decisions rather than overrule incorrect ones.[41] For example, it is generally accepted that precedents upholding the New Deal and Great Society programs[42] and the *Legal Tender Cases*[43] were wrongly decided, yet they have become immune to reversal because public and private expectations, as well as governmental and societal institutions, have been created based upon a belief in the lasting validity of these precedents. Overturning these precedents, it

38. Maltz, *supra* note 26, at 493. When the Court moves in an activist direction, it is susceptible to the charge that the Court is violating the doctrines of separation of powers and judicial review by attempting to "make law" and not interpret it. If the Court does so, *stare decisis* will ensconce this arguably unconstitutional decision into the law.

39. WASSERSTROM, *supra* note 20, at 67.

40. *See* Rehnquist, *supra* note 26, at 374.

41. Blaustein & Field, *supra* note 26, at 179 (citing *Helvering v. Griffiths* as one such example). Writing for the majority, Justice Jackson stated, "[t]o rip out of the past seven years of tax administration a principle of law on which both Government and taxpayers have acted would produce readjustments and litigation so extensive [that] we would contemplate them with anxiety .... [Therefore], a long period of accommodations to an older decision sometimes requires us to adhere to an unsatisfactory rule to avoid unfortunate practical results from a change." Helvering v. Griffiths, 318 U.S. 371, 403 (1943).

42. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (upholding Congressional power under the Commerce Clause to enact the Civil Rights Act of 1964); Katzenbach v. McClung, 379 U.S. 294 (1964) (upholding the power of Congress to apply the Civil Rights Act of 1964 to local restaurants pursuant to the Commerce Clause); Wickard v. Filburn, 317 U.S. 111 (1942) (upholding Congressional regulation of the production of wheat by an individual farmer on a family farm pursuant to Congress' authority under the Commerce Clause); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding the power of Congress to enact the National Labor Relations Act); Nebbia v. New York, 291 U.S. 502 (1934) (upholding New York's regulation of milk prices).

43. Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1869), *overruled by* Knox v. Lee, 79 U.S. (12 Wall.) 457 (1870) (holding that the legalization of paper money constitutionally permissible); *see infra* part III.A.5.

is believed, would send governmental and societal institutions into chaos.[44] Before a precedent acquires this reliance interest, however, it is usually required that the decision be subject to political and social acceptance, as well as time.

As Professor Wasserstrom notes, "under no circumstances would the fact of reliance alone permit the inference that a good reason has been furnished for having a legal system which ought always to follow precedent."[45] The permanency of such decisions will usually depend upon the amount of controversy surrounding the issue and the extent to which political pressure has mobilized against it. If hostile political forces are able to organize against a controversial precedent, the reliance interest is weaker as a substantial portion of the populace considers the precedent to have been incorrectly decided. If such opposition and criticism persists, the ability of the remainder of the populace to rely upon that decision is diminished. This is so because continued and vehement opposition to a Court ruling may compel the Court to reexamine, if not overrule, the prior decision.[46] However, the less controversial the decision, the more ingrained it becomes. Over time, the lack of opposition coupled with political acceptance creates a reliance interest. It is this type of reliance interest that makes even erroneous precedents immutable.[47]

Traditionally, the Court has been most sympathetic to economic or industrial reliance interests. Thus, cases governing the financial affairs of government, states, or taxpayers are more readily adhered to than departed from. Creating an atmosphere of stability and continuity, where reasonable expectations can be met, has historically been an important consideration for the Court, as well as fundamental to our market economy.[48] However, the Court has historically

---

44. *See generally* Gerhardt, *supra* note 27, at 88-89; BORK, *supra* note 26, at 158.

45. WASSERSTROM, *supra* note 20, at 69.

46. The classic example of this is the repudiation of Plessy v. Ferguson, 163 U.S. 537 (1896) by Brown v. Board of Education, 347 U.S. 483 (1954).

47. Gerhardt, *supra* note 27, at 87-90.

48. CHARLES S. HYNEMAN, THE SUPREME COURT ON TRIAL 230 (1963); Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 749-52 (1988); Powell, *supra* note 29, at 286; *see also* Helvering v. Griffiths, 318 U.S. 371, 403 (1943) (interpreting the tax code in a manner consistent with the taxpayer's and Treasury's reasonable expectations); ALPHEUS T. MASON, THE SUPREME COURT FROM TAFT TO WARREN 194-95 (1958).

The Rehnquist Court has been particularly vocal in its support for this proposition. *See* Allied-Signal, Inc. v. Director, Div. of Taxation, 112 S. Ct. 2251, 2261 (1992) (Kennedy, J., majority opinion) (upheld continued use of the unitary business principle as an appropriate method for determining whether a state has acted unconstitutionally by taxing nondomicilliary corporations); Hilton v. South Carolina Pub. Rys. Comm'n, 112 S. Ct. 560, 564 (1992) (Kennedy, J., majority opinion) (precedent showed that Federal Employer's Liability Act (FELA) applies to state owned railroads); American Trucking Ass'n v. Smith, 496 U.S. 167, 182 (1990) (O'Connor, J., plurality opinion) (holding that the

been less willing to embrace social or private reliance interests. Such a reliance argument was best articulated by Justice Arthur Goldberg, who stated that the dictates of *stare decisis* become absolute when the "Court seeks to overrule in order to cut back the individual's fundamental, constitutional protections against governmental interference."[49]

Thus, while the Court has upheld the validity of some questionable cases, because these were relied upon by large numbers of people (what I will refer to as "societal reliance"), these decisions are basically limited to the economic arena (i.e., Congressional power under the commerce, taxing, and spending clauses). Indeed, as the authors of the joint opinion noted in *Casey*, the classic case for

---

Court's prior decision in *Scheiner*, which held unapportioned flat highway use taxes violated the commerce clause, applied prospectively only); California v. FERC, 495 U.S. 490, 498 (1990) (O'Connor, J., majority opinion) (provisions of the Federal Power Act which protected state laws relating to specific water uses from supersedure, did not apply to state's minimum stream flow requirements); City of Oklahoma City v. Tuttle, 471 U.S. 808, 818 n.5 (1985) (Rehnquist, J., majority opinion) (recognizing the reliance interest of municipalities in ordering their financial affairs); Planned Parenthood v. Casey, 112 S. Ct. 2791, 2861-62 (1992) (Rehnquist, J., concurring and dissenting in part) (discounting social reliance as a traditional notion of reliance, and the amount of social reliance actually at stake in *Roe*); Payne v. Tennessee, 111 S. Ct. 2597, 2610 (1991) (Rehnquist, CJ., majority opinion) (discounting reliance interests in cases involving procedural and evidentiary rules); Pennsylvania v. Union Gas Co., 109 S. Ct. 2273, 2298-99 (1989) (Scalia, J., concurring and dissenting in part) (discounting reliance interests with respect to state sovereignty from individual court action); Bendix AutoLite Corp. v. Midwesco Inc., 486 U.S. 888, 897-98 (1988) (Scalia, J., concurring) (an Ohio statute tolling a statute of limitations for time during which a person or corporation is not present in the state violates the Commerce Clause); Quill Corp. v. North Dakota, 112 S. Ct. 1904, 1915 (1992) (Stevens, J., majority opinion) (Congress' ability to pass Commerce Clause legislation relative to state's power to tax commerce supports adherence to *stare decisis*); United States v. Maine, 420 U.S. 515, 527 (1975) (White, J., majority opinion) (upholding the rule that the paramount rights to the offshore seabed inhere in the United States as an incident of national sovereignty as confirmed by the Submerged Lands Act of 1953 and the Outer Continental Shelf Lands Act of 1953); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S 747, 786-87 (1986) (White, J. dissenting) (*stare decisis* should not be the *only* constraint on judicial decision-making, "expressed will of the people call other considerations into play"), *overruled by* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2816 (1992).

But see SCHUBERT, *supra* note 35, at 219. Schubert states that the "search for a static stability-in the law or elsewhere-is misguided." *Id.* He argues: "The fact is that security can only be achieved through constant change, through the wise discarding of old ideas that have outlived their usefulness .... Even for the experts law is only a prediction of what judges will do under a given set of facts-a prediction that makes rules of law and decisions not logical deductions but functions of human behavior .... The decisions of yesterday or of the last century are only the starting points." *Id.*

49. GOLDBERG, *supra* note 29, at 74; *see also* Webster v. Reproductive Health Servs., 492 U.S. 494, 558 (1989) (Blackmun, J., dissenting) (arguing that "to overturn a constitutional decision that secured a fundamental personal liberty to millions of persons would be unprecedented in our 200 years of constitutional history").

weighing reliance interests is virtually limited to the commercial context.[50]

3. *Court Legitimacy and Public Confidence.* This justification for the doctrine of *stare decisis* was most aptly stated by Robert Bork in a 1971 article in the *Indiana Law Journal*.[51] Bork's argument justifying the doctrine of *stare decisis* is as follows: the Court's continued ability to function effectively as the ultimate arbiter of constitutional law depends upon the willingness of the public to accept the Court in this role. This acceptance, in turn, depends upon the public perception that in each case the majority of the Court is speaking for the Constitution itself rather than simply for five or more lawyers in black robes.[52] Similarly, the respect given by the other branches of government to the decisions of the judiciary rests in large part on the belief that the Court is not composed of judges who do little but effectuate their own moral and political views through the judicial process. Rather, their respect is predicated upon a view that the Court is a body vested with the duty to exercise judicial power only within the confines of the Constitution. An important aspect of this belief is the respect that the Court shows for its own previous opinions.

The public is most likely to retain confidence in the impartiality and consistency of the Court's decision-making if the reasons for the Court's choices are persuasive and in conformity with the rule of law.[53] As with the invocation of reliance arguments, however, the

---

50. 112 S. Ct. at 2810.

51. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 3-4 (1971).

52. *Id.*

53. *See* Powell, *supra* note 29, at 286-87; Gerhardt, *supra* note 27, at 78; MASON, *supra* note 48, at 200. At the heart of the concern for court legitimacy and public confidence lies what is best known as the "counter-majoritarian difficulty." That is, "when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people [exercising] control, not on behalf of the prevailing majority, but against it." ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16-17 (1986).

The Supreme Court exists almost at odds with democracy. The Justices' role as life-tenured, unelected final arbiters of constitutional disputes is characteristically undemocratic. The public's acceptance of the Court in this role is conditioned upon the public's perception that the Court pronounce its decisions in accordance with law and not will. Such a concern is traced back to Alexander Hamilton who explained that the Court is truly the "least dangerous to the political rights of the Constitution" because the judiciary "has no influence over either the sword or the purse . . . and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment . . . ." THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Implementation of court judgments depend mainly upon the public's willingness to accept the court in this role, and "ultimately upon the aid of the executive

Court must determine whether the advantages of overruling a precedent outweigh the disadvantages of keeping it before it can invoke a system-legitimacy justification to explain its use of *stare decisis*. This justification supports the use of *stare decisis* "only to prevent disruption of practices and expectations so settled, or to avoid revitalization of a public debate so divisive, that departure from precedent would contribute . . . to a failure of confidence in the lawfulness of fundamental features of the political order."[54]

Court legitimacy and the building of public confidence are, without a doubt, essential to the rule of law. However, concern for these can be taken to extremes. While the Court must be sensitive to notions of legitimacy and confidence, these sensitivities must not distract the Court from its responsibility to faithfully interpret the Constitution and the laws of the land. Quite often, this duty is at odds with public opinion. Nevertheless, as Justice Jackson remarked:

> The judge who would resolve uncertainties of interpretation by conscious deference to public opinion will find new pitfalls in his path . . . . To the extent that public opinion of the hour is admitted to the process of constitutional interpretation, the basis for judicial review of legislative actions disappears.[55]

4. *Administrative Efficiency.* The "administrative efficiency" argument for adhering to *stare decisis* has best been explained by Justice Cardozo: "[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own secure bricks on the secure foundation of the courses laid by others who had gone before him."[56] Few cases that reach the Supreme Court are easy; most involve hours of study and reflection, voluminous briefs and testimony, and decisions can usually go either way. It would be impossible to require the Court to reexamine every relevant precedent each time it comes up. Thus, *stare decisis* allows judges to dispose of cases by resort to precedent, enabling them to turn their attention towards new and unresolved questions of law.[57]

In this regard, *stare decisis* has become an indispensable tool

---

arm . . . ." *Id.*

54. Monaghan, *supra* note 48, at 750.

55. Jackson, *Maintaining Our Liberties, supra* note 36, at 964. The late Justice Thurgood Marshall would disagree with Justice Jackson's statement. Several of Justice Marshall's opinions have endorsed a flexible or sliding scale approach to constitutional adjudication. *See* Furman v. Georgia, 408 U.S. 238, 330 (1972) (recognizing that as public opinion changes, the validity of court precedent would have to be reexamined).

56. CARDOZO, *supra* note 33, at 149.

57. *See* Powell, *supra* note 29, at 286; Sprecher, *supra* note 7, at 506.

for limiting the Court's agenda. In a very real sense, *stare decisis* works "behind the scenes" to guide the Court's *certiorari* process. At the outset of each case, the Court must decide whether or not the case presents a new or unresolved judicial question. If resort to precedent will dispose of the case, then *certiorari* will be denied. While the denial of *certiorari* is not necessarily a final judgment, it is a judicial recognition that the matter can be reconciled under existing precedent.[58] By virtue of the principles underlying *stare decisis,* many constitutional issues "are so far settled that they are simply off the agenda."[59]

5. *Judicial Restraint.* Pursuant to constitutional separation of powers theory, the federal government is divided into three co-equal branches of government. The legislative branch is vested with the power to make law;[60] the judicial branch has the power to interpret law;[61] and the executive branch is given the power to enforce the law.[62]

It is both the province and duty of the judge to interpret the law and not make it.[63] Thus, *stare decisis* restrains an individualistic, idiosyncratic, or activist judge from injecting his or her own personal mores and beliefs into the law. The doctrine requires the judge to follow precedent rather than fashion his or her own rule. The advantages of *stare decisis* are thus two-fold: (1) it acts as an effective restraint upon the commission of error in that it compels a judge to utilize and employ the reasoning and decisions of predecessors, and (2) prevents the infusion of bias and personal preferences. While this argument is valid only if the original judge was free from bias and error, in the abstract at least, it provides for correct decisions. *Stare decisis* in this regard, serves as a straitjacket, preventing future justices from abuse and derogation of law.[64]

C. Stare Decisis *in the Rehnquist Court*

While it may be true that *stare decisis* is neither an inexorable command nor a mechanical formula,[65] use of the doctrine by the Re-

58. *See* Gerhardt, *supra* note 27, at 78.

59. Monaghan, *supra* note 48, at 744.

60. U.S. CONST. art. I.

61. U.S. CONST. art. III; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803).

62. U.S. CONST. art. II; *see also* Wayman v. Southard, 23 U.S. (10 Wheat) 1, 46 (1825) (holding that "[t]he difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law").

63. *See* Minor v. Happersett, 88 U.S. (21 Wall.) 162, 178 (1874); Luther v. Borden, 48 U.S. (7 How.) 1, 41 (1849); BORK, *supra* note 26, at 5.

64. *See* WASSERSTROM, *supra* note 20, at 75-79.

65. *See supra* notes 12-14, 17-20, 24 and accompanying text.

hnquist Court has become quite mechanical. When confronted with divergent precedent, for example, the Justice who seeks to overrule the prior decision will routinely look to certain authorities to support his or her decision. This process usually involves categorizing the current case as ripe for reversal (i.e., as precedent erroneously decided, unsound in principle, or unworkable in theory) and then citing one or two leading cases which have dispensed with precedent for exactly the same reason. Thus, while most Justices will disavow using any particular formula in analyzing precedent, in reality most will routinely apply a "they-did-it-so-I-can-do-it" approach to *stare decisis.*

All nine current Justices, at one time or another, have recognized that *stare decisis* applies with diminished force in constitutional as opposed to statutory cases.[66] Similarly, all nine Justices

66. For opinions in which Justice Blackmun joined or rendered, see the following cases. Eastman Kodak Co. v. Image Technical Servs., 112 S. Ct. 2072, 2089 n.29 (1992) (Blackmun, J., majority opinion) (declaring that *stare decisis* is authoritative in antitrust case); *see also* Patterson v. McLean Credit Union (Patterson I), 485 U.S. 617, 620 (1988) (Blackmun, J., dissenting) (*stare decisis* supported application of civil rights law to private acts of racial discrimination); Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 164 & n.47 (1984) (Stevens, J., with whom Blackmun, J., joins, dissenting) (critical of majority's departure from *stare decisis* relative to federal court jurisdiction over state agencies); Webster v. Reproductive Health Servs., 492 U.S. 490, 558 (1989) (Blackmun, J., concurring in part and dissenting in part) (*stare decisis* should not be abandoned given people's belief "that they possess an unabridgeable right to undertake certain conduct," in this case, abortion).

For opinions in which Justice Kennedy joined or rendered, see the following cases. Hilton v. South Carolina Pub. Rys. Comm'n, 112 S. Ct. 560, 564 (1991) (Kennedy, J., majority opinion) (applies to state-owned railroads); Patterson v. Mclean Credit Union (Patterson II), 491 U.S. 164, 172-73 (1989) (Kennedy, J., majority opinion) (no special basis existed for departing from *stare decisis* in civil rights case); *see also* Webster v. Reproductive Health Servs., 492 U.S. at 518 (Rehnquist, J., with whom Kennedy, J., joins in plurality opinion) (*stare decisis* not authoritative in abortion case law since precedent had proven "unsound in principle and unworkable in practice") (citation omitted).

For opinions in which Justice O'Connor joined or rendered, see the following cases. California v. FERC, 495 U.S. 490, 498-99 (1990) (O'Connor, J., majority opinion) (*stare decisis* should control interpretation of administrative regulation controlling hydroelectric power project); *see also* City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 458-59 (1983) (O'Connor, J., dissenting) (*stare decisis* should not have compelled majority to strike down anti-abortion city ordinance since the *stare decisis* "framework is clearly an unworkable means of balancing" personal and societal interests), *overruled by* Planned Parenthood, 112 S. Ct. 2791 (1992); Miller v. Fenton, 474 U.S. 104, 115 (1985) (O'Connor, J., majority opinion) (*stare decisis* should not have compelled majority to strike down anti-abortion city ordinance since the *stare decisis* "framework is clearly an unworkable means of balancing" personal and societal interests); Arizona v. Rumsey, 467 U.S. 203, 212 (1984) (O'Connor, J., majority opinion) (*stare decisis* afforded criminal defendant protection from double jeopardy).

For opinions in which Justice Rehnquist joined or rendered, see the following cases. Edelman v. Jordan, 415 U.S. 651, 670 & n.14 (1974) (Rehnquist, J., majority opinion); Fry v. United States, 421 U.S. 542, 559 (1975) (Rehnquist, J., dissenting); Weber v. Aetna, 406

have recognized or endorsed departure from precedent when the prior decision has proved erroneous, unsound, or without constitutional foundation.[67]

U.S. 164, 177 (1972) (Rehnquist, J., dissenting); General Atomic v. Felter, 434 U.S. 12, 19 (1977) (Rehnquist, J., dissenting); *see also* City of Oklahoma City v. Tuttle, 471 U.S. 808, 818 n.5 (1985) (Rehnquist, J., plurality opinion); City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. at 458 (O'Connor, J., with whom Rehnquist, J., joins dissenting); Webster v. Reproductive Health Servs., 492 U.S. at 518 (Rehnquist, CJ., majority opinion) (citation omitted); Payne v. Tennessee, 111 S. Ct. 2597, 2609-11 (1991) (Rehnquist, CJ., majority opinion).

For opinions in which Justice Scalia joined or rendered, see the following cases. Quill Corp. v. North Dakota, 112 S. Ct. 1904, 1922-24 (1992) (Scalia, J., concurring in part) (Congress' ability to pass Commerce Clause legislation relative to state's power to tax commerce supports adherence to *stare decisis*); Harmelin v. Michigan, 111 S. Ct. 2680, 2686 (1991) (Scalia, J., plurality opinion) (*stare decisis* relative to Eighth Amendment jurisprudence is not controlling when that precedent is recent and seems to be inconsistent with other decisions); Johnson v. Transportation Agency, 480 U.S. 616, 672-73 (1987) (Scalia, J., dissenting).

For opinions in which Justice Souter joined or rendered, see the following cases. Payne v. Tennessee, 111 S. Ct. at 2617-18 (Souter, J., concurring) ("Our considered practice [has] not [been] to apply *stare decisis* as rigidly in constitutional cases."); Bray v. Alexandria Women's Health Clinic, 1993 U.S. LEXIS 833, 116-17 (1993) (Souter, J., concurring) (recognizing *stare decisis*'s increased force in statutory cases); St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2765-66 (1993) (Souter, J., with whom, Blackmun, J. and Stevens, J. joins, dissenting).

For opinions in which Justice Stevens joined or rendered, see the following cases. *Patterson I*, 485 U.S. at 621 (Stevens, J., dissenting); Square D Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 409, 424 & n.34 (1986) (Stevens, J., majority opinion); Thomas v. Washington, 448 U.S. 261, 272 & n.18 (1980) (Stevens, J., majority opinion); Monell v. Department of Social Servs., 436 U.S. 658, 713 (1978); Runyon v. McCrary, 427 U.S. 160, 189 (1976) (Stevens, J., concurring); *see also* Commissioner v. Fink, 483 U.S. 89, 104 & n.6 (1987) (Stevens, J., dissenting); Bray v. Alexandria's Women's Health Clinic, 1993 U.S. LEXIS at 116 (Stevens, J., dissenting).

For opinions in which Justice Thomas joined or rendered, see the following cases. Two Pesos, Inc. v. Taco Cabana, Inc., 112 S. Ct. 2753, 2766 (1992) (Thomas, J., concurring); Planned Parenthood v. Casey, 112 S. Ct. 2791, 2860-61 (1992) (Rehnquist, CJ., with whom Thomas, J., joins, concurring and dissenting in part); *see also* Lechmere, Inc. v. NLRB, 112 S. Ct. 841, 847 (1992) (Thomas, J., majority opinion).

For opinions in which Justice White joined or rendered, see the following cases. Irwin v. Veteran's Admin., 111 S. Ct. 453, 459 & n.3 (1991) (White, J., concurring in part); Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977) (White, J., majority opinion) (holding that *stare decisis* weighs heavily in statutory construction); City of Oklahoma City v. Tuttle, 471 U.S. at 818 & n.5 (majority opinion); United States v. Maine, 420 U.S. 515, 527 & n.9 (1975) (White, J., majority opinion); City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. at 458-59 (O'Connor, J., with whom White, J., joins dissenting); Ankenbrandt v. Richards, 112 S. Ct. 2206, 2213 (1992) (White, J., majority opinion) (holding *stare decisis* has particular strength when Congress can alter the result); Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 786-87 (1986) (White, J., dissenting), *overruled by* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

67. For opinions in which Justice Blackmun joined or rendered, see the following cases. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 557 (1985) (Blackmun, J., majority opinion) (stating that the Court has never felt constrained by *stare decisis*

"when it has become apparent that a prior decision has departed from a proper understanding of congressional power under the Commerce Clause"); Papasan v. Allain, 478 U.S. 265, 293 (1986) (Blackmun, J., concurring in part and dissenting in part) (showing a willingness to abandon "[t]he Court's Eleventh Amendment jurisprudence because it is not supported by history or sound legal reasoning"); Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 519-21 (1987) (Brennan, J., with whom Blackmun, J., joins dissenting) (showing a willingness to abandon *stare decisis* when a precedent has proven unstable, has no historical foundation, or lacks a textual anchor).

For Justice Kennedy's position see the following: Payne v. Tennessee, 111 S. Ct. 2597 (1991) (Kennedy, J. joined and concurring in part) (holding that *stare decisis* did not require the Court to follow prior precedent thus allowing the court to overrule Booth v Maryland, 482 U.S. 496 (1987) and South Carolina v. Gathers, 490 U.S. 805 (1989)).

For opinions in which Justice O'Connor joined or rendered, see the following cases. City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. at 458 (O'Connor, J., dissenting) (arguing that "'when convinced of former error, this Court has never felt constrained to follow precedent'") (quoting Smith v. Alwright, 321 U.S. 649, 665 (1944)); California v. FERC, 495 U.S. at 499 (O'Connor, J., majority opinion); Miller v. Fenton, 474 U.S. 104, 115, (1985) (O'Connor, J., majority opinion) (arguing in light of *stare decisis* and congressional intent that "voluntariness" is a legal question meriting independent consideration in a federal *habeus corpus* proceeding); *see* Hilton v. South Carolina Pub. Rys. Comm'n, 112 S. Ct. at 568 (O'Connor, J., dissenting).

For opinions in which Justice Rehnquist joined or rendered, see the following cases. United States v. Scott, 437 U.S. 82, 86-87 (1978), *overruling* United States v. Jenkins, 420 U.S. 358 (1975) (Rehnquist, J., majority opinion) (finding that *stare decisis* did not preclude overruling *Jenkins* since a constitutional question was presented); Carlson v. Green, 446 U.S. 14, 32 & n.1 (1980) (Rehnquist, J., dissenting) (quoting Ashwander v. TVA, 297 U.S. 288, 352-53 (1936)); Webster v. Reproductive Health Servs., 492 U.S. at 518 (Rehnquist, CJ., majority opinion); Vasquez, Warden v. Hillery, 474 U.S. 254, 269 (1986) (Powell, J., with whom Rehnquist , J., joins dissenting) (noting that "badly reasoned" decisions may be departed from).

For Justice Scalia's position, see the following sources. Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis,* 40 CASE W. RES. L. REV. 581, 597 (1990); Gerhardt, *supra* note 27, at 124-27; *see also* South Carolina v. Gathers, 490 U.S. 805, 823-25 (1989) (Scalia, J., dissenting) (implying that there is a violation of the judicial oath when the judge adheres to precedent which the judge believes to be wrongly decided).

For an opinion in which Justice Souter joined, see Payne v. Tennessee, 111 S. Ct. 2597, 2617-19 (1991) (Souter, J., concurring) (showing a willingness to depart from precedent which he believed to be "wrongly decided").

For opinions in which Justice Stevens joined or rendered, see the following cases. Welch v. Texas Highways & Pub. Transp. Dep't, 483 U.S. at 519 (Brennan, J., with whom Stevens, J., joins dissenting); Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. at 779 (Stevens, J., concurring) (agreeing that Justice White "is of course correct in pointing out that the Court 'has not hesitated to overrule decisions, or even whole lines of cases, where experience, scholarship, and reflection demonstrated that their fundamental premises were not to be found in the Constitution'"); *see* Runyon v. McCrary, 427 U.S. at 189 (Stevens, J., concurring) (showing a willingness to depart from a long line of cases that he firmly believes "to have been incorrectly decided").

In *Casey,* Justice Thomas joined both Chief Justice Rehnquist's and Justice Scalia's concurring and dissenting opinions which called for the overruling of *Roe* because the case had been erroneously decided. Planned Parenthood v. Casey, 112 S. Ct. at 2855-73 (Rehnquist, CJ., with whom Thomas, J., joins concurring and dissenting); *id.* at 2874-85 (Scalia, J., with whom White & Thomas, JJ., joins concurring and dissenting).

For opinions in which Justice White joined or rendered, see the following cases.

In terms of approach, Justices Blackmun, O'Connor, Stevens, Kennedy, and Souter each appear to accord substantial weight to precedent. Each of these Justices treats the precedent as creating a rebuttable presumption that should be adhered to, unless the presumption can be overcome by special justifications. Thus, despite recognizing that *stare decisis* applies with diminished force in constitutional cases, each of these Justices will still require some articulable reason or special justification[68] before overruling. Of course, the criteria for what constitutes "special justification," necessarily varies from Justice to Justice.[69] The effect, however, of emphasizing

---

Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. at 787 (White, J., dissenting); Quill Corp. v. North Dakota, 112 S. Ct. at 1922 (White, J., concurring and dissenting in part) (noting that the Court has not been "adverse to overruling our precedents under the Commerce Clause when they have become anachronistic in light of later decisions"); *see also* David A. Richards, *Constitutional Legitimacy and Constitutional Privacy*, 61 N.Y.U. L. REV. 800, 802-03 (1986) (detailing Justice White's "interpretive mistake" theory by using *stare decisis* to overrule erroneous precedent).

68. Pennhurst State School & Hospital v. Halderman, 465 U.S. at 164-65 (Stevens, J., with whom Blackmun, Marshall & Brennan, JJ., join, dissenting); *Patterson I*, 485 U.S. at 619 (Blackmun, J., dissenting); Vasquez, Warden v. Hillery, 474 U.S. at 266 (Marshall, J., with whom Blackmun, J., joins, majority opinion); Webster v. Reproductive Health Servs., 492 U.S. at 558 (Blackmun, J., concurring in part and dissenting in part); Hilton v. South Carolina Pub. Rys. Comm'n, 112 S. Ct. at 563-64 (Kennedy, J., majority opinion); *Patterson II*, 491 U.S. at 172 (Kennedy, J., majority opinion); Arizona v. Rumsey, 467 U.S. at 212 (O'Connor, J., majority opinion); Payne v. Tennessee, 111 S. Ct. at 2617-18 (Souter, J., concurring); *see* Solorio v. United States, 483 U.S. 435, 451-52 (1987) (Stevens, J., concurring).

69. Justice Blackmun, for example, will in some cases require more than "articulable reasons" before departing from precedent. When confronted with precedent that has established or expanded personal liberties, he adopts a Goldberg-type analysis, characterizing the decision to overrule as a "rare and grave undertaking" which he is unwilling to make. *See* Webster v. Reproductive Health Servs., 492 U.S. at 558 (Blackmun, J., dissenting); Thornburgh v. American College of Obstetricians & Gyneclogists, 476 U.S. at 771; *see also* GOLDBERG, *supra* note 29.

Justice Kennedy's overrulings will generally permit departure from precedent only when consonant with Court practice (i.e., when precedent has become "unsound in principle" or "unworkable in practice"). Allied Signal, Inc. v. Director, Div. of Taxation, 112 S. Ct. at 2261 (Kennedy, J., majority opinion); Webster v. Reproductive Health Servs., 492 U.S. at 518 (Rehnquist, J., with whom Kennedy, J., joins in a plurality opinion); *see* Hilton v. South Carolina Pub. Rys. Comm'n, 112 S. Ct. at 563-64 (Kennedy, J., majority opinion); *Patterson II*, 491 U.S. at 172-74 (Kennedy, J., majority opinion).

Justice O'Connor's threshold for what constitutes a "special justification" is not as strict as Justice Kennedy's. She has recognized that persuasive arguments can be made for overruling precedent where there has been a sufficient intervening change in the law, where adherence to precedent has fostered confusion and inconsistency in the law, where the Court gives no guidance to lower courts, and where precedents conflict. *See* Richard A. Cordray & James T. Vradelis, Comment, *The Emerging Jurisprudence of Justice O'Connor*, 52 U. CHI. L. REV. 389, 398-402 (1985); California v. FERC, 495 U.S. at 499 (O'Connor, J., majority opinion); City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. at 458-59 (O'Connor, J., dissenting).

Justice Souter has been credited with writing the lengthy section on *stare decisis* in

the "special justifications" required is that little more than lip service is paid to the traditional notion that *stare decisis* applies with diminished force in areas of constitutional law.

Chief Justice Rehnquist and Justice Scalia also approach precedent as creating a rebuttable presumption. Their presumption, however, is that an erroneous precedent is ripe for reversal. In analyzing constitutional precedent, Chief Justice Rehnquist will accord it diminished *stare decisis* effect. While many Justices speak of "special justifications" in determining whether to overturn constitutional precedent or not,[70] Chief Justice Rehnquist's approach is "less constrained."[71] Additionally, his threshold for overruling precedent

---

Casey. See, e.g., Anita Allen, *Roe May Not Be Dead, But It's Life Has Been Altered,* N.J.L.J., July 13, 1992, at 22; Linda Greenhouse, *The Supreme Court: A Telling Court Opinion; The Ruling's Words Are About Abortion, But They Reveal Much About the Authors,* July 1, 1992, at A1(1); *Justice Souter, Out from the Egg,* ECONOMIST, July 4, 1992, at A30(1). As his opinion in *Casey* indicates, Justice Souter's approach to precedent involves a balancing test in which the he employs "a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case." Planned Parenthood v. Casey, 112 S. Ct. at 2808 (joint opinion). Justice Souter notes that the proper inquiry involves whether a rule has proved unworkable in practice, whether overruling would upset substantial reliance interests, whether the old rule is anachronistic, or whether there has been subsequent changes of fact. *Id.* at 2808-09.

Justice Stevens, on the other hand, has articulated his criteria for overruling as follows:

> [T]he question whether a case should be overruled is not simply answered by demonstrating that the case was erroneously decided and that the Court has the power to correct its past mistakes. The doctrine of *stare decisis* requires a separate examination. Among the questions to be considered are the possible significance of intervening events, the possible impact on settled expectations, and the risk of undermining public confidence in the stability of our basic rules of law.

John P. Stevens, *The Life Span of a Judge-Made Rule,* 58 N.Y.U. L. REV. 1, 9 (1983).

70. *See supra* note 69 and accompanying text.

71. Edelman v. Jordan, 415 U.S. 651, 671 (1974) (Rehnquist, J., majority opinion) ("Since we deal with a constitutional question, we are less constrained by the principle of *stare decisis* than we are in other areas of the law."); Fry v. United States, 421 U.S. 542, 559 (1975) (Rehnquist, J., dissenting) ("[I]mportant decisions of constitutional law are not subject to the same command of *stare decisis* as are decisions of statutory questions."); Weber v. Aetna, 406 U.S. 164, 177 (1972) (Rehnquist, J., dissenting) ("Since *Levy* was a constitutional holding, its doctrine is open to later re-examination to a greater extent than if it had decided a question of statutory construction or some other non-constitutional issue."); General Atomic v. Felter, 434 U.S. 12, 19 (1977) (Rehnquist, J., dissenting) ("Unless inexorably commanded by statute, a procedural principle . . . should not be kept on the books in the name of *stare decisis* . . . ."); *see also* City of Oklahoma City v. Tuttle, 471 U.S. at 818 (Rehnquist, J., plurality opinion); City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416 (1983) (O'Connor, J., with whom Rehnquist, J., joins dissenting); Webster v. Reproductive Health Servs., 492 U.S. at 518 (Rehnquist, CJ., majority opinion); Payne v. Tennessee, 111 S. Ct. at 2609-11 (Rehnquist, CJ., majority opinion).

is significantly lower than the other Justices.[72]

Similarly, Justice Scalia accords diminished *stare decisis* effect to constitutional precedent, and appears more apt to overrule prior decisions.[73] In fact, Justice Scalia maintains a presumption in favor of overruling what he considers to be erroneous precedent. Overcoming this predilection, while difficult, is not impossible.[74]

Justices White and Thomas, unfortunately, are not neatly classified into any particular group. Justice White's jurisprudence, for example, suggests that he is more likely than any other justice to adhere to the principle of *stare decisis*, even when it goes against his natural inclinations."[75] He has exhibited a particular disdain for what he perceives to be precipitous overrulings, and prefers to "reconcile our prior decisions rather than hastily overrule... them."[76]

---

72. For example, while the Chief Justice notes that the Court has never felt bound to follow precedent where the precedent is erroneous, wrongly decided, "unsound in principle," or "unworkable in practice," he has expanded upon these propositions substantially. He has taken the liberty to limit the effect of *stare decisis* in closely divided cases, or in cases in which there were vigorous dissenting opinions. *See* United States v. Scott, 437 U.S. 82, 86-87 (1978) (Rehnquist, J., majority opinion); Carlson v. Green, 446 U.S. 14, 32 n.1 (1980) (Rehnquist, J., dissenting) (overruling precedent decided "by a closely divided court unsupported by the confirmation of time"); Webster v. Reproductive Health Servs., 492 U.S. at 518 (Rehnquist, CJ., majority opinion); Vasquez, Warden v. Hillery, 474 U.S. at 269 (Powell, J., with whom Rehnquist, J., joins dissenting); Payne v. Tennessee, 111 S. Ct. at 2611 (Rehnquist, CJ., majority opinion) (noting prior precedent could be overruled, because they "were decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions").

73. *See* Quill Corp. v. North Dakota, 112 S. Ct. 1904, 1942 (1992) (Scalia, J., concurring in part); Harmelin v Michigan, 111 S. Ct. 2680, 2686 (1991) (Scalia, J., plurality opinion); South Carolina v. Gathers, 490 U.S. 805, 823-25 (1989) (Scalia, J., dissenting) (implying a violation of the judicial oath when the judge adheres to precedent which the judge believes to be wrongly decided in order to save face); Gerhardt, *supra* note 27, at 125; Scalia, *supra* note 67, at 597.

74. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989); Gerhardt, *supra* note 27, at 125. For example, *stare decisis* alone would be insufficient to uphold a hypothetical statute passed today permitting public flogging, even if it could be proved that "cruel and unusual punishment" did not include such treatment at the time the Eighth Amendment was passed. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861 (1989).

75. Bruce A. Green, *'Power, Not Reason': Justice Marshall's Valedictory and the Fourth Amendment in the Supreme Court's 1990 Term*, 70 N.C. L. REV. 373, 411-12 n.212 (1992).

76. RAV v. St. Paul, 112 S. Ct. 2538, 2551 (1992) (White, J., concurring); Irwin v. Department of Veteran's Affairs, 498 U.S. 89, 99-100 (1990) (White, J., concurring in part); *see also* Zschernig v. Miller, 389 U.S. 429, 462 (1968) (White, J., dissenting); Karcher v. Daggett, 462 U.S. 725, 766 (1983) (White, J., dissenting); Arizona v. Fulimante, 111 S. Ct. 1246, 1254 (1991) (White, J., majority opinion). Justice White is critical of courts which use *stare decisis* as a smoke screen to overturn unanimous, or nearly unanimous, precedent. Oregon v. Corvallis Sand & Gravel, 429 U.S. 363, 383 (1977) (Marshall, J., with whom White, J., joins, dissenting); Illinois Brick Co. v. Illinois, 431

Justice Thomas' views on *stare decisis* are not entirely clear. Testimony given at his confirmation hearings indicates that his theory of *stare decisis* creates a rebuttable presumption in favor of adhering to precedent.[77] However, his voting record, thus far, places him closer to Chief Justice Rehnquist's and Justice Scalia's line of reasoning.[78] In recent opinions, Justice Thomas has indicated that he is not opposed to overruling decision which he feels have been wrongly decided.[79]

Thus, while each Justice might claim to not apply *stare decisis* with any mechanical formula, each has routinely invoked two of the doctrine's fundamental tenets. First, the doctrine of *stare decisis* applies with diminished force in areas of constitutional law. Second, a precedent may be departed from when the prior decision has proved erroneous, unsound, or without constitutional foundation. In the *Casey* decision, an analysis of these two fundamental considerations is glaringly omitted.

II. ABORTION AND *STARE DECISIS*

Planned Parenthood v. Casey[80] is the Supreme Court's most recent major case on abortion, and the first case to directly reevaluate the landmark decision of *Roe v. Wade.*[81] Abortion cases prior to

---

U.S. 720, 736 (1977) (White, J., majority opinion).

77. During his confirmation hearings, Justice Thomas stated:

> I think of course overruling a case is a very—or reconsidering a case is a very serious matter. Certainly the case would have to be-you would have to be of the view that the case is incorrectly decided. But I think even that is not adequate. There are some cases that you may not agree with that should not be overruled. Stare decisis provides continuity to our system. It provides predictability, and in our process of case-by-case decision-making, I think it is a very important and critical concept.

Hearing of the Senate Judiciary Committee Morning Session Subject: The Nomination of Clarence Thomas to the Supreme Court, FEDERAL NEWS SERVICE, September 13, 1991, *available in* LEXIS, Nexis Library, FEDNEW file.

78. In *Casey*, for example, Justice Thomas joined in both Chief Justice Rehnquist's and Justice Scalia's concurring and dissenting opinions which called for the reversal of *Roe v. Wade*. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2855, 2873 (1992); *see also* Marcia Coyle, *New Trio Stands Up Tp Court's Hard Right*, NAT'L L.J., Aug. 31, 1992, at S1, S2 [hereinafter Coyle, *New Trio*]; Marcia Coyle, *Court Confounds Observers*, NAT'L L.J., July 13, 1992, at 1, 40 [hereinafter Coyle, *Court Confounds Observers*]; Linda Greenhouse, *Slim Margin: Moderates On Court Defy Predictions*, N.Y. TIMES, July 5, 1992, § 4, at 1; Terry Tang, *Muddying the Legal Waters-At Odds: The U.S. and Its Court-As Positions Shift, Ideological Balance Remains Uneasy*, SEATTLE TIMES, July 5, 1992.

79. *See* Graham v. Collins, 113 S. Ct. 892, 903, 913 (1993) (Thomas, J., concurring); Johnson v. Texas, 113 S. Ct. 2658, 2672 (1993) (Thomas, J., concurring); Helling v. McKinney 113 S. Ct. 2475, 2485 (1993) (Thomas, J., dissenting).

80. 112 S. Ct. 2791 (1992).

81. 410 U.S. 113 (1973).

Casey, while recognizing the fundamental right announced in *Roe,* avoided or declined to reconsider the Court's decision in *Roe.* It is, therefore, appropriate to begin this discussion with *Roe.*

A. Roe v. Wade

In March 1970, a pregnant single woman (alias Jane Roe), brought a class action suit challenging the constitutionality of several Texas criminal abortion laws. These laws outlawed the procurement or performance of abortion except on medical advice, and even then only for the purpose of saving the life of the mother.[82] Justice Blackmun, writing for the majority, struck down the abortion laws as comprising unconstitutional abridgments of a woman's right to privacy. While unwilling to pin down the exact location or nature of the privacy right, Justice Blackmun found it "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[83] However, Justice Blackmun conditioned this broad right with an important caveat: "[t]he privacy right in-

82. *Id.* at 120-21.

83. *Id.* at 153. To the extent that the right of "personal" or "zones" of privacy existed under the Constitution, it existed in a combination of the following: U.S. CONST. amend. I (prohibiting government interference and protecting a citizen's "free exercise" of speech, religion, press, and assembly); U.S. CONST. amend. IV (recognizing the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures); U.S. CONST. amend. V (prohibiting federal deprivation of a citizen's right to life, liberty, or property without due process of law); U.S. CONST. amend. IX (reserving rights not enumerated in the Constitution to the people); U.S. CONST. amend. XIV, § 1 (assuring the privileges and immunities of each citizen and his or her right to be secure from State deprivation of life, liberty or property without due process of law as well as the right of each person to equal protection of the laws); Meyer v. Nebraska, 262 U.S. 390 (1923) (recognizing a Fourteenth Amendment "liberty" interest in the right of teachers to teach and of students to acquire knowledge); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (recognizing the "liberty" of parents and guardians to direct the upbringing and education of children); Palko v. Connecticut, 302 U.S. 319 (1937) (recognizing the incorporation of the Bill of Rights' guarantees which involve "the very essence of a scheme of ordered liberty" into the Fourteenth Amendment and making them applicable to the States); Skinner v. Oklahoma, 316 U.S. 535 (1942) (striking down a compulsory sterilization law and recognizing that marriage and procreation are fundamental to the survival and existence of the human race); Prince v. Massachusetts, 321 U.S 158 (1944) (concluding that religious freedom does not include the right to harm the community or, more specifically, to expose a child to health risks or death); Poe v. Ullman, 367 U.S. 497 (1961) (striking down a Connecticut prohibition on the use of contraceptives and the giving of medical advice in the use of such devices); Griswold v. Connecticut, 381 U.S. 479 (1965) (recognizing the existence of a "zone" of privacy for married couples to use contraception); Loving v. Virginia, 388 U.S. 1 (1967) (striking down Virginia's miscegenation statutes as violative of the Equal Protection Clause of the Fourteenth Amendment); Eisenstadt v. Baird, 405 U.S. 438 (1972) (expanding on *Griswold* by recognizing the right of all individuals to be free from any unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision of whether to bear or beget a child).

volved . . . cannot be said to be absolute."[84]

As the Court recognized, the woman's right to abortion was tempered by the State's "important and legitimate interest in protecting the health of the pregnant woman . . . and the potentiality of human life."[85] The Court found both of these interests—the woman's interest in terminating her pregnancy and the State's interest in protecting the woman and fetus—to be separate and distinct. "Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes compelling."[86] This "point," the Court determined, was viability.[87]

To govern these competing interests the Court proceeded to set up what has since been termed a three-part or trimester test. During the first trimester (up to approximately the third month of pregnancy), "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician."[88] During this period, which is prior to viability, the State has no compelling interest in regulating abortion. The woman is free to procure an abortion, and the physician is free to conduct the abortion *"without regulation"* and *"free of interference"* from the State.[89] During this period, the interests of the woman in terminating her pregnancy are supreme, and the interests of the State in protecting the life of the mother, or health of the fetus, are not compelling.

It is not until the second trimester (covering the period after the first trimester and up to the point of viability) that a State's interests are recognized. During the second trimester, a State is permitted to regulate the abortion procedure only to the extent that the regulation "reasonably relates to the preservation and protection of maternal health."[90] It is only the interest in preserving the health of the mother in terminating her pregnancy that is recognized as "compelling."[91]

It is not until the third trimester (the point after fetal viability, occurring at approximately twenty-eight weeks) that the State's interests in protecting the fetus become "compelling." During this period, the State may "regulate, and even proscribe abortion except where it is necessary, according to appropriate medical judgment, for the preservation of the life and health of the mother."[92]

---

84. 410 U.S. at 152-53.
85. *Id.* at 162.
86. *Id.* at 162-63.
87. *Id.* at 164.
88. *Id.*
89. *Id.* at 163 (emphasis added).
90. *Id.*
91. *Id.*
92. *Id.* at 164.

Thus, under *Roe*, a woman has a fundamental right to terminate her pregnancy, and regulations abridging this right are subject to strict scrutiny.[93] That is, state regulations abridging this right will be upheld only if the regulation is narrowly drawn to achieve a compelling governmental objective, and the means chosen are the least restrictive way to effectuate that goal. This was the state of the law on January 22, 1973. Over the next nineteen years, the Supreme Court proceeded to befuddle its abortion jurisprudence, creating so much confusion that it ultimately became necessary to revisit *Roe*.

B. Planned Parenthood v. Casey[94]

The Court, in *Casey*, was presented with five provisions of the Pennsylvania Abortion Control Act of 1982, which impose several restrictions on abortions. Section 3205 requires that a woman give informed consent before undergoing an abortion, requiring specifically that she be provided with certain information at least twenty-four hours before the abortion.[95] Section 3206 requires that a minor seeking an abortion obtain the informed consent of at least one parent; however, the section provides for a judicial bypass procedure in some cases.[96] Section 3209 requires that a married woman seeking an abortion sign a statement indicating that she has notified her husband; however, this section also provides for some exceptions.[97] Sections 3207(b), 3214(a), and 3214(f) impose certain reporting requirements on facilities performing abortion services.[98] Section 3203 defines a "medical emergency" that excuses compliance with the foregoing requirements.[99]

Before any of these provisions took effect, the petitioners-[100] consisting of five abortion clinics and one physician representing himself and all other physicians similarly situated—filed suit in the District Court of the Eastern District of Pennsylvania. The District Court declared all five of the provisions to be unconstitutional, and entered a permanent injunction against enforcement of the regulations. The Court of Appeals for the Third Circuit affirmed in part and reversed in part, upholding all of the provisions except section 3209 (the husband notification provision). The Supreme Court granted *certiorari* in order to resolve the controversy generated by

93. *Id.* at 156.
94. 112 S. Ct. 2791 (1992).
95. 18 PA. CONS. STAT. ANN. § 3205 (1993).
96. *Id.* § 3206.
97. *Id.* § 3209.
98. *Id.* §§ 3207(b), 3214 (a),(f).
99. *Id.* § 3203.
100. 112 S. Ct. at 2803.

Roe's progeny, provide guidance to federal courts and state legislatures, and confront challenges to the continuing validity of *Roe*.[101]

After dispensing with procedural formalities, the Court issued a rare joint opinion authored by Justices O'Connor, Kennedy, and Souter. The decision handed down was fragmented. The O'Connor-Kennedy-Souter faction was joined at various points in the opinion by combinations of additional Justices. Consequently, a majority of the Court upheld the right of a woman to have an abortion (O'Connor-Kennedy-Souter and a combination of Blackmun and Stevens); and most of the Pennsylvania provisions restricting that right (O'Connor-Kennedy-Souter and a combination of White, Rehnquist, Scalia, and Thomas). As the joint opinion endeavored to prove, the "central holding" of *Roe* had to be reaffirmed for three reasons: (1) the fundamental constitutional question involved; (2) notions of institutional integrity; and (3) *stare decisis*.

According to the joint opinion, *Roe*'s "central holding" consisted of three separate principles:

> First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger a woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.[102]

After discussing these principles, the joint opinion then attempted to determine the applicability of *Roe*'s central holding to the facts of *Casey*. First, they affirmed that the constitutional protections surrounding a woman's decision to procure an abortion are derived from the Due Process Clause of the Fourteenth Amendment. In so doing, the Court declared the doctrine of "substantive due process" to be "settled."[103] The Court also recognized that the boundaries of substantive due process are not susceptible to simple rules. Rather, "[t]he inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts have always exercised: *reasoned judgment*."[104] Using such judgment, the Court concluded that the *Roe* Court properly invoked

101. *Id.* at 2804.
102. *Id.*
103. *Id.* at 2805-06.
104. *Id.* at 2806 (emphasis added).

the reasoning and tradition of its precedents[105] in concluding that a woman's decision to terminate her pregnancy is a "'liberty' protected against state interference by the substantive component of the Due Process Clause of the Fourteenth Amendment."[106]

The Court, then, in various combinations and coalitions, and sometimes without a majority, concluded the following:

- Although *Roe* has engendered a great deal of controversy and opposition, it has not proven unworkable.[107]
- *Roe* could not be overruled without grave harm to people who, for the last twenty years ordered their thinking and living, "have organized intimate relationships, and made choices that define their views of themselves and their places in society in *reliance* on the availability of abortion should contraception fail."[108]
- *Roe* fits in well with those cases exemplified by *Griswold,* and subsequent constitutional developments have not disturbed or diminished the liberty recognized in those cases.[109]
- No change in *Roe*'s factual underpinnings has made its central holding obsolete. Although advancement in medical technology has and will continue to push the viability line back towards contraception as opposed to birth, this goes only to the scheme of time limits on the realization of competing interests. The fact remains that viability is still the key test and central holding of *Roe.*[110]
- *Roe* fits in well with two decisional lines of cases of comparable significance; namely, *Lochner-West Coast Hotel* and *Plessy-Brown.* Unlike those cases which were over-turned because the factual bases of the earlier decisions had proved untrue, society understood and comprehended such changes, and there had been a subsequent weakening of the earlier decisions, this was not the case with *Roe.* In reality, to overrule *Roe* would seem nothing more than a present doctrinal disposition to decide *Roe* differently as an original matter.[111]
- Overruling *Roe* would violate *stare decisis* and compromise Court legitimacy. When, as here, the Court seeks to resolve intensely divisive controversies, a prior decision is entitled to rare precedential force. Thus, only the most convincing justification would permit its repudiation. To do otherwise, to overrule "under fire," would ruin public confi-

105. *See supra* note 83.
106. 112 S. Ct. at 2797.
107. *Id.* at 2809.
108. *Id.* (emphasis added).
109. *Id.* at 2810-11.
110. *Id.* at 2811-12.
111. *Id.* at 2812-14. The cases to which the Court refers are: Lochner v. New York, 198 U.S. 45 (1905), which was repudiated by West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), and Plessy v. Ferguson, 163 U.S. 537 (1896), which was overruled by Brown v. Board of Education, 347 U.S. 483 (1954).

dence and damage Court legitimacy and the rule of law.[112]

- To protect the two interests recognized in *Roe,* the undue burden test should be applied. Under this test, only those restrictions which impose a substantial obstacle in the path of the woman seeking an abortion before the fetus attains viability will be declared invalid.[113]
- *Roe*'s rigid trimester framework is rejected.[114]
- The State has a valid interest in potential life throughout the pregnancy and may take measures to ensure that a woman's choice to have an abortion is informed. Such measures are permissible at any stage as long as they do not constitute an undue burden.[115]
- As with any medical procedure, the State may enact regulations to protect the life of the mother as long as such regulations do not constitute an undue burden.[116]
- Adoption of the undue burden standard does not disturb *Roe*'s central holding that it is the woman's ultimate decision to terminate her pregnancy before viability.[117]
- *Roe*'s holding that a State may regulate and even proscribe abortion after viability is affirmed.[118]
- All of the Pennsylvania restrictions, except sections 3209 and 3214(a)(12) (requiring spousal notification and reporting) do not constitute an undue burden, and are therefore constitutional.[119]
- To the extent that the Supreme Court decisions in *City of Akron v. Akron Reproductive Health Services*[120] and *Thornburgh v. American College of Obstetricians & Gynecologists*[121] repudiate the State's important interest in potential life, they are overruled.[122]

The Court began its inquiry into the effect of *stare decisis* upon *Roe* by noting that: "[t]he obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit."[123] The

112. 112 S. Ct. at 2814-16.
113. *Id.* at 2820-21.
114. *Id.* at 2818.
115. *Id.* at 2821.
116. *Id.*
117. *Id.*
118. *Id.* at 2804, 2811-12, 2821.
119. *Id.* at 2822-33.
120. 462 U.S. 416 (1983) (upholding *Roe*'s fundamental right to abortion and striking down parental consent, informed consent, and hospitalization requirements under strict scrutiny), *overruled by* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2823 (1992).
121. 476 U.S. 747 (1986) (upholding *Roe*'s fundamental right to abortion and striking down informed consent and reporting requirements under strict scrutiny), *overruled by* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2823 (1992).
122. 112 S. Ct. at 2823.
123. *Id.* at 2808.

joint opinion then took note of Justice Cardozo's efficiency theory and the dichotomy of *stare decisis*.[124] At one extreme is the belief that precedent is indispensable, at the other is a recognition that precedent is dispensable "if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed."[125] The joint opinion then set off in pursuit of a happy medium.

The Court analyzed the case under the doctrine of *stare decisis* to determine whether or not it would be permissible to overrule *Roe v. Wade*. With that objective in mind, the Court delineated the scope of the *stare decisis* inquiry. In so doing, the Court was required to decide four questions.

The first question was whether *Roe*'s central rule had proven unworkable. The second question required the Court to decide if *Roe*'s central rule on state power could be removed without serious harm to those people who have relied upon it. Third, the Court had to decide whether subsequent changes in the law had left *Roe* a doctrinal anachronism discounted by society. Lastly, the Court had to conclude whether or not *Roe*'s factual underpinnings had rendered its central holding irrelevant or unjustifiable.[126] This inquiry comprised what the Court referred to as the "normal" *stare decisis* analysis.

Under the normal *stare decisis* inquiry, the Court concluded that *Roe* passed muster.[127] This "normal" *stare decisis* analysis resulted in the following:

> 1. A recognition that under the standard articulated in *Garcia v. San Antonio Metropolitan Transit Authority*,[128] the Court's decision in *Roe* had in no sense proven "unworkable."[129] While *Roe* has required continual judicial assessment of state abortion laws, and the *Casey* Court's decision will continue this requirement, it is not beyond judicial competence to

---

124. *Id.*; *see supra* notes 20, 56 and accompanying text.

125. 112 S. Ct. at 2808.

126. *Id.* at 2808-09.

127. "Within the bounds of normal *stare decisis* analysis . . . the stronger argument is for affirming *Roe*'s central holding . . . ." *Id.* at 2812.

128. 469 U.S. 528 (1985). The *Garcia* Court affirmed Congress' power under the Commerce Clause to enforce the minimum wage and overtime provisions of the Fair Labor Standards Act against the states in areas of traditional governmental functions. *Id.* at 546-47. In so doing, the Court overruled an eight year old precedent essentially because the decision had proven "unworkable" and "inconsistent" in practice. *Id.* The Court noted that "[w]e have not hesitated [to overrule] when it has become apparent that a prior decision has departed from a proper understanding of congressional power under the Commerce Clause." *Id.* at 557.

129. 112 S. Ct. at 2808. This inquiry into workability, the *Casey* Court stated, was also predicated by Swift v. Wickham, 382 U.S. 111, 116 (1965). *Id.*

apply the *Roe* standards.[130]

2. A recognition that under the standard articulated in *Payne v. Tennessee*,[131] people have, for the past two decades since *Roe*, so organized their thinking, activity, relationships, and lives around the availability of abortion should contraception fail that overruling *Roe* has become impossible.[132]

3. A recognition that under the standard articulated in *Patterson v. McLean Credit Union*,[133] no evolution of legal principle had weakened *Roe*'s doctrinal underpinnings.[134] No development in constitutional law has rendered *Roe* obsolete, regardless of whether one classified *Roe* as an extension of the *Griswold* line,[135] the *Cruzan* line,[136] or as *sui generis*.[137]

---

130. *Id.* at 2809.

131. 111 S. Ct. 2597 (1991). The *Payne* Court affirmed the admission of victim impact statements during the sentencing phase of a capital trial. In so doing, the Court overruled two precedents, Booth v. Maryland, 482 U.S. 496 (1987) and South Carolina v Gathers, 490 U.S. 805 (1989), essentially because the precedents were "wrongly decided," and the cases involved constitutional precedent which had been afforded diminished *stare decisis* effect. *Id.* at 2610-11. The Court noted that in cases involving property and contract rights, reliance interests are usually at their acme and require adherence to *stare decisis*. *Id.* at 2610. However, the *Payne* Court did not apply reliance interests with equal force because the case merely involved procedural and evidentiary rules. *Id.*

132. 112 S. Ct. at 2809.

133. 491 U.S. 164 (1989). The *Patterson II* Court held that title 42 of the United States Code, section 1981, prohibits racial discrimination in the making and enforcement of private employment contracts. *Id.* In so doing, the Court refused to overrule Runyon v. McRary, 427 U.S. 160 (1976) essentially because of the special force with which *stare decisis* applies in the statutory context. *Id.* at 173-74. Absent an intervening development in the law or conceptual weakening, the Court would not overturn statutory precedent. *Id.*

134. 112 S. Ct. at 2810.

135. *Id.* This line of cases recognizes a substantive due process "liberty" interest under the Fourteenth Amendment. *See supra* note 83 and accompanying text. Additionally, the Court offered Carey v. Population Services International, 431 U.S. 678 (1977) (striking down a state law forbidding advertisement of contraceptives) and Moore v. East Cleveland, 431 U.S. 494 (1977) (striking down an East Cleveland housing ordinance limiting occupancy of a dwelling unit to members of a single family) as further evidence that the substantive due process "liberty" interest had not been weakened. *Id.*

136. *Id.* This line of cases recognizes "liberty" interests for personal autonomy and bodily integrity. The Court intimated that *Roe* could be placed along this line of cases as well, citing: Cruzan v. Missouri Dept. of Health, 497 U.S. 261, 278-79 (1990) (affirming a State's application of a clear and convincing evidence standard in proceedings where a guardian seeks to discontinue lifesaving medical treatment of an incompetent and, in the process, recognizing a competent person's right to die [refuse lifesaving hydration and nutrition]); Rochin v. California, 342 U.S. 165, 172 (1952) (holding that forcible removal by police of two capsules swallowed by defendant violates the Due Process Clause of the Fourteenth Amendment); and Jacobson v. Massachusetts, 197 U.S. 11, 24-30 (1905) (affirming the power of States to enact compulsory vaccination laws). *Id.*

137. *Id.* at 2810-11. If classified as *sui generis*, the Court concluded, *Roe*'s central holding has not been overruled by examining: City of Akron v. Akron Reproductive Health Services, Inc., 462 U.S. 416 (1983) (upholding *Roe*'s fundamental right to abortion and striking down parental consent, informed consent, and hospitalization requirements

4. A recognition that under the standard articulated by Justice Brandeis in his dissent in *Burnett v. Coronado Oil & Gas Co.*,[138] no change of facts has made the application or justification of *Roe*'s central holding meaningless. Furthermore, even on the assumption that *Roe* was in error, the error would only strengthen the state interest in fetal protection.[139]

The Court found that in a less significant case, the normal *stare decisis* analysis would have ended here.[140] However, the widespread debate and controversy surrounding the abortion issue, and the Court's treatment of it, required the Court to go further. The abortion debate, this "intensely divisive controversy," required a more searching analysis.[141]

For this reason, the Court felt the need to compare the abortion controversy with what it identified as two other instances in American judicial history that had generated similar controversy. These two cases were the *Lochner-West Coast Hotel* and the *Plessy-Brown* lines of cases.

In *Lochner v. New York*,[142] the Supreme Court struck down a New York State law that prohibited bakers from being required to work more than ten-hours a day. In striking down this state health protection measure, the Court reasoned that such action was beyond the state's legitimate area of regulation and violative of the "freedom of contract" principle inherent in the Constitution.

In the opinion of the *Casey* Court, by the time *West Coast Hotel* repudiated *Lochner*, "the facts upon which the earlier case had premised a constitutional resolution of social controversy had proved to be untrue and history's demonstration of their untruth not only justified but required the new choice of constitutional principle that

---

under strict scrutiny); Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (upholding *Roe*'s fundamental right to abortion and striking down informed consent and reporting requirements under strict scrutiny); and Webster v. Reproductive Health Services, 492 U.S. 490 (1989) (abandoning the *Roe* trimester framework and strict scrutiny). *Id.*

138. 285 U.S. 393 (1932) (denying Congress' power, under the Taxation Clause, to tax income derived from certain state leases), *overruled by* Helverina v. Producers Corp., 303 U.S. 376 (1938). The *Burnett* Court refused to overrule Gillespie v. Oklahoma, 257 U.S. 501 (1922), which was later overruled by *Helverina v. Producers Corp.*, because the facts of the *Burnett* case could not be distinguished from the facts of the *Gillespie* case. *Id.* at 398. In dissent, Justice Brandeis stated that he would overrule *Gillespie*, essentially because of the diminished force with which *stare decisis* applies in the constitutional context. *Id.* at 406-07, 410-11. In expressing his preference for overruling, Justice Brandeis showed a willingness to discard precedent which had been subsequently abandoned or factually altered. *Id.*; *see supra* notes 23-25 and accompanying text.

139. 112 S. Ct. at 2810-11.

140. *Id.* at 2812.

141. *Id.* at 2812, 2815.

142. 198 U.S. 45 (1905), *overruled by* West Coast Hotel v. Parrish, 300 U.S. 379 (1937).

West Coast Hotel announced."[143] While conceding that the *West Coast Hotel* Court "lost something" by its lack of foresight, which was magnified by the Court-packing crisis, the reality was that the Court found that "the facts of economic life were different from those previously assumed," and this "warranted the repudiation of the old law." [144]

In *Plessy v. Ferguson*,[145] the Supreme Court upheld a state law requiring segregation of the races on public transportation. The Court held that under the Equal Protection Clause of the Fourteenth Amendment, a state could provide "separate but equal" facilities for blacks.[146]

In the opinion of the *Casey* Court, the Court in *Brown v. Board of Education* based its decision to overrule upon changed circumstances or mistaken assumptions. By the time *Brown* was decided, it was clear that legally sanctioned racial segregation stigmatized black school children with a "badge of inferiority." Thus, society's understanding of the facts upon which the *Plessy* decision was based had changed so much that its overruling was not only justified but required.[147]

Applying these interpretations of *West Coast Hotel* and *Brown,* the *Casey* Court felt that the circumstances surrounding these decisions were clearly not present in *Roe.* In *Brown* and *West Coast Hotel,* the Supreme Court was responding to facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions.[148] The joint opinion stated that these decisions were not simply victories of one doctrinal school over another, nor the result of headcounting,[149] but the product of society's realization that the factual bases that *Plessy* and *Lochner* were decided upon, had ceased to exist.

By the time of *West Coast Hotel* and *Brown,* the people of the day, or at least the "thoughtful part of the Nation" found that it "could accept each decision to overrule a prior case as a response to

143. 112 S. Ct. at 2812.

144. *Id.* For an explanation of the Court packing crisis, see *infra* part III.A.2.

145. 163 U.S. 537 (1896), *overruled by* Brown v. Board of Education, 347 U.S. 483 (1954).

146. *Id.* at 550.

147. 112 S. Ct. at 2813.

148. *Id.*

149. The term "headcounting," as used in this paper, refers to the numerical and ideological makeup of the Court. If, for example, the Court is composed of four conservative and four liberal Justices, the appointment of one more conservative Justice can lead to a victory by headcounting. This type of victory is, by no means, unusual. As Justice Scalia noted in *South Carolina v. Gathers*, "[o]verrulings of precedent rarely occur without a change in the Court's personnel." 490 U.S. 805, 824 (1988) (Scalia, J., dissenting).

the Court's constitutional duty."[150]

Unlike *West Coast Hotel* and *Brown*, where a terrible price would have been paid by adhering to *stare decisis*, the Court, in *Casey*, reasoned that the terrible price would be paid by overruling *Roe*. This "terrible price," was the Court's perceived damage to its institutional integrity that would result from an overruling of *Roe*. Overruling *Roe,* the joint opinion argued, would weaken the Court's authority and legitimacy. "The Court's power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands."[151] The underlying sources of this legitimacy are found in the Constitution and in the "lesser sources of legal principle" (Court opinions and contemporary understanding) on which the Court draws to make its decisions in cases like *Roe* and *Casey*.[152] When confronted with an intensely divisive issue, the Court must go to great lengths to ensure that the decision is grounded in principle, not pressure. Only these decisions will be accepted by the nation. This does not mean that the Court may never correct error, but that it should avoid, or steer clear of, overruling "intensely divisive issues" (i.e., abortion). It is these types of overrulings, of failure to follow *stare decisis,* that run the risk of Court illegitimacy and destruction of public confidence.

The Court went further and asserted that when it is asked to resolve intensely divisive issues,[153] its ultimate decision acquires "rare precedential force" to encounter the inevitable attempts and efforts to overturn it or thwart its implementation. Therefore, only the most convincing justification under accepted standards of precedent would permit a future Court to overturn such a decision, lest that Court appear to be doing nothing more that overruling "under fire."[154]

The Court concluded its analysis of *stare decisis,* and its resolution of *Roe* here. The joint opinion emphatically maintained that there was absolutely no requirement to decide *Roe* as an original matter. Such an analysis, they argued, was foreclosed under *stare decisis*.[155]

III. *CASEY* AND *STARE DECISIS*

"The opinion is at war with itself. And an opinion so divided

150. 112 S. Ct. at 2813.

151. *Id.* at 2814.

152. *Id.*

153. *Id.* at 2815 (listing only two such occasions: racial segregation in *Brown* and abortion in *Roe*).

154. *Id.*

155. *Id.* at 2816-17.

cannot last."[156] The Court's decision in *Casey* has been met with criticism from both sides of the abortion controversy. Supporters of the pro-choice movement applaud the Court's reaffirmation of a woman's right to terminate her pregnancy, but decry the Court's "undue burden" test in its support for State regulation of abortions. The sentiment from the pro-life movement is outrage over the Court's continuing support for the right of a woman to terminate a human life. Their only consolation is, however, that States are left free to impose obstacles in the path of a woman seeking abortion so long as they are not "undue."

While both sides have been able to claim victory and defeat, what many have missed throughout the whole ordeal is *Casey*'s menacing impact, not on abortion, but on the rule of law. It is upon the rule of law where *Casey* is so pernicious.[157] This opinion is destined to have deleterious effects upon abortion jurisprudence, *stare decisis,* the rule of law, and other controversial issues in American law.

A. Casey's *Internal Inconsistencies*

1. *Moral Relativism.* The joint opinion emphatically declared that while some of the Justices felt abortion offensive to the most basic principles of morality, they would not allow their feelings or opinions to control their decision. It is not, they argued, the obligation of the Court to "mandate [its own] moral code."[158] An examination of the opinion, however, shows that this is exactly what they did.[159]

This is no better illustrated than in the Court's affinity for "reasoned judgment" and "lesser sources of legal principle."[160] In attempting to ground the underlying foundation of *Roe* into law, the joint opinion stated that "[t]he inescapable fact is that adjudication of substantive due process claims may well call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: *reasoned judgment.* Its

156. Bruce Fein, *Court Sets Precedent Over Truth*, USA TODAY, July 6, 1992, at A10.

157. *See, e.g.*, Anita Allen, *The Politics of Precedent*, THE RECORDER, July 7, 1992, at 7; Robert H. Bork, *Again a Struggle for Soul of the Court*, N.Y. TIMES, July 8, 1992, at A19; Anthony J. DeVito, *Unholy Alliance*, N.Y.L. J., July 17, 1992, at 2; Bruce Fein, *Casey Plurality Presents a Menace to the Rule of Law*, CONN. L. TRIB., July 6, 1992, at 22; Thomas Sowell, *Court Politicians*, FORBES, Aug. 3, 1992, at 76; *The Case Against Casey*, NEW REPUBLIC, July 27, 1992, at 7 [hereinafter *The Case Against Casey*]; Lisa G. Zucker, *Casey Hardly Pro-Choice*, N.J.L.J., July 20, 1992, at 15.

158. 112 S. Ct. at 2806.

159. *See, e.g.*, Sowell, *supra* note 157; *The Case Against Casey*, *supra* note 157; Fein, *supra* note 157.

160. 112 S. Ct. at 2806, 2814.

boundaries are not susceptible of expression as a simple rule."[161] Additionally in explicating the populace's support or belief in the legitimacy of the Court, the joint opinion held that the underlying substance of this legitimacy is "warrant for the Court's decisions in the Constitution and the *lesser sources of legal principle* on which the Court draws."[162]

The joint opinion's embrace of these concepts is troubling. Use of so-called "reasoned judgment" and "lesser sources of legal principle" can be seen as nothing more than a departure from the Court's duty to interpret laws and not to make them. Reasoned judgment and lesser sources of legal principle are little more than justifications for a value-laden approach to constitutional decisionmaking. These notions prove fertile ground for the imposition of a judge's own moral or political views, or at the very least, the Court's interpretation of what "society's" mores and beliefs require or will endure.

2. *Circular Reasoning and Questionable Interpretation.* The joint opinion's spin on the *Plessy-Brown* and *Lochner-West Coast Hotel* lines of cases is little more than circular reasoning. As Chief Justice Rehnquist aptly noted in his dissent, "[t]his is at best a feebly supported, *post hoc* rationalization for those decisions."[163] Additionally, Chief Justice Rehnquist noted, "it appears very odd indeed that the joint opinion chooses as benchmarks two cases in which the Court chose not to adhere to erroneous constitutional precedent, but instead enhanced its stature by acknowledging and correcting its error, apparently in violation of the joint opinion's 'legitimacy principle.'"[164]

In fact, the joint opinion's treatment of the *Lochner-West Coast Hotel* and *Plessy-Brown* line of cases is questionable, if not tortured interpretation. While it is no doubt true that in *West Coast Hotel* "the facts upon which the earlier case [*Lochner*] had premised a constitutional resolution of social controversy had proved to be untrue,"[165] the joint opinion would have us believe that this was the real reason why Lochner was abandoned.[166] This is untrue.

In reality, the "change" which brought about a reversal of *Lochner* was threefold: (1) no longer could it be argued that the "invisible hand of economics" would adequately protect workers and

161. *Id.* at 2806 (emphasis added).
162. *Id.* at 2814 (emphasis added).
163. *Id.* at 2864.
164. *Id*; *see supra* notes 151-54 and accompanying text.
165. 112 S. Ct. at 2812.
166. *Id.*

maximize profit;[167] (2) a repudiation of error committed by the *Lochner/Adkins* Courts, and the vindication of Justice Holmes dissent in *Lochner,* that the Constitution does not embody a particular economic theory or "liberty to contract;"[168] and (3) Justice Roberts' change of mind.

Indeed, as Chief Justice Rehnquist noted in his opinion in *Casey,* the joint opinion's embrace of *West Coast Hotel* is not only interpretively questionable, but flies in the face of the joint opinion's "legitimacy" and "intensely divisive" arguments. "It is difficult to imagine a situation in which the Court would face more intense opposition to a prior ruling than it did at [the time of *West Coast Hotel*]."[169]

In the wake of the Great Depression, President Franklin Delano Roosevelt made it abundantly clear that he would use all of the powers of the federal government to lift the country out of depression.[170] In the early 1930's, President Roosevelt pushed through Congress a massive amount of "New Deal" legislation[171]—the cornerstone of his economic recovery package. Although the New Deal legislation sped through Congress, it ran up against a brick wall in the Supreme Court.

The Supreme Court in the early 1930's was a very old and bitterly divided Court. The Justices polarized into two hostile camps. The conservative faction was known as the "Four Horsemen"[172] and consisted of Justices Sutherland, Van Devanter, McReynolds, and Butler. The liberal faction consisted of Justices Stone, Brandeis, Cardozo, and Chief Justice Charles Evans Hughes. The rift between the two camps became so deep that each faction would meet outside the court to solidify their positions. The "Four Horsemen" would all ride to the Court together, while the liberal faction would meet weekly at Justice Brandeis' apartment to plan strategy.[173]

The "Four Horsemen" gained the upper hand with the appointment and conversion of Justice Owen Roberts into the conservative fold. Justice Roberts provided the fifth and crucial vote which allowed the conservative faction to declare unconstitutional many of

---

167. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 446 (1978).

168. Lochner v. New York, 198 U.S. 45, 74-76 (1905) (Holmes, J., dissenting), *overruled by* West Coast Hotel v. Parrish, 300 U.S. 379 (1937); Adkins v. Children's Hospital of D.C., 261 U.S. 525, 545-46 (1923).

169. 112 S. Ct. at 2863.

170. GERALD GUNTHER, CONSTITUTIONAL LAW 121 (11th ed. 1985).

171. BARBARA HABENSTREIT, CHANGING AMERICA AND THE SUPREME COURT 95-97 (1970). The author points out that in 1934, two years after Roosevelt's election into office, 557 basic codes had passed Congress. *Id.*

172. *Id.* at 110.

173. *Id.*

the President's New Deal programs.[174] Chaos would soon reign.

President Roosevelt became enraged at the Court's actions. The Court was bombarded with criticism from all corners: the public, the newspapers, labor leaders, scholars, and the Congress.[175] President Roosevelt decided to strike back at the Court. On the pretext of easing the workload of current Justices, and infusing "young blood" into the judicial system, the President proposed to add one additional Justice for every member of the Court over seventy years of age.[176] Given the age of the members of the Court in 1937, Roosevelt's plan would have meant the addition of six new Justices bringing the number of Justices on the Court from nine to fifteen, in effect, giving him complete control over the Court's ideological and political composition.[177]

President Roosevelt's plan produced public uproar. "[A]s predicted, all hell [broke] loose. Aside from the major issue of judicial independence, many people were angered by Roosevelt's emphasis on the age of the judges. Everyone knew it was not their age, but their opinions that had prompted Roosevelt's actions."[178] Attacks against Roosevelt poured in from all sides, even from his own party. His actions "hopelessly split the Democratic majority in the Senate; caused a storm of protest from bench and bar; and created an uproar among both constitutional conservatives and liberals."[179] The controversy swelled, bringing Court legitimacy, existence, and independence to a precipice.

It became clear that the Court could not function in such turmoil. Either the President or the Court had to give. The Court did just that when on March 29, 1937, in *West Coast Hotel v. Parrish*,[180] it overruled its prior opinion in *Adkins v. Children's Hospital of D.C.*[181] (applying the *Lochner* rationale to ban minimum wage laws) and upheld the power of the government to pass minimum wage laws. This decision was made possible when Justice Roberts, who less than a year earlier had struck down similar requirements in *Morehead v. New York ex rel Tipaldo*,[182] switched his vote from the conservative to the liberal faction, creating a new five-man liberal

174. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936); Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935); Railroad Retirement Board v. Alton Railroad Co., 295 U.S. 330 (1935).

175. HABENSTREIT, *supra* note 171, at 113.

176. C. HERMAN PRITCHETT, THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES 1937–1947 at 9 (1948).

177. *Id.* at 8.

178. HABENSTREIT, *supra* note 171, at 117.

179. *Id.*

180. 300 U.S. 379 (1937).

181. 261 U.S. 525 (1923).

182. 298 U.S. 587 (1936).

coalition. Justice Roberts remained in the liberal camp, and the new liberal coalition continually upheld New Deal legislation from that point forward.[183]

Newspapers and politicians boldly declared that the Court was caving in under the pressure of Roosevelt's "Court packing" bill.[184] While history would later prove that Justice Roberts' decision in *West Coast Hotel* was made two months prior to the date of the actual decision, and weeks before the announcement of Roosevelt's Court packing plan,[185] such disclosures did little to change public opinion and perception.

Once Justice Roberts had switched sides, several older members of the Court began to retire.[186] From 1937 to 1941, President Roosevelt appointed seven new Justices (Black, Reed, Frankfurter, Douglas, Murphy, Byrnes, and Jackson) which provided more than ample security for the New Deal. Justice Roberts' decision in *West Coast Hotel*, however, would forever be remembered, as future Justice Abe Fortas stated, as "the switch in time that saved nine."[187]

Thus, while the "switch in time" may be factually inaccurate, this did little to change public perceptions, or enhance the institutional integrity of the Court.[188] Thus, it is a questionable assumption that public perception and institutional integrity would be so irretrievably lost if the Court abandoned *Roe;* especially when one realizes that the *West Coast Hotel* Court's overt political/ideological maneuvering combined with the Court's publicly perceived capitulation in the face of President Roosevelt's Court-packing plan, could not shake public faith in the Court.

Similarly, the joint opinion's spin on *Plessy v. Ferguson* and *Brown v. Board of Education* is interpretively questionable. In discussing *Plessy*, the joint opinion would have us believe that *Plessy* was overturned solely because of changed facts or a changed understanding of facts (namely, that segregation did stamp a black child

183. See cases listed in *supra* note 42.

184. HABENSTREIT, *supra* note 171, at 121.

185. *Id.*

186. Justices Van Devanter retired in 1937, Justice Sutherland retired in 1938, and Justice Brandies retired in 1939. Further, Justices Cardozo and Butler died in 1938 and 1939 respectively. GUNTHER, *supra* note 170, at app. B-4, B-5.

187. HABENSTREIT, *supra* note 171, at 123.

188. HABENSTREIT, *supra* note 171, at 95-138; TRIBE, *supra* note 26, at 66-68; GUNTHER, *supra* note 170, at 122-25; HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 209 (2d. ed. 1985); CONGRESSIONAL QUARTERLY, THE SUPREME COURT: JUSTICE AND THE LAW 22 (2d. ed. 1922); C. Herman Pritchett, *The Chambermaid's Revenge, in* HISTORIC U.S. COURT CASES: AN ENCYCLOPEDIA 279 (John W. Johnson ed., 1992); *see also* TRIBE, *supra* note 167, at 448-49 (discussing, in capsule form, the extent and severity of public disfavor with the *West Coast Hotel* Court's and President Roosevelt's activity).

with a "badge of inferiority" which was found not to exist at the time of *Plessy*). Such a reading is too confined. While the *Brown* Court turned *Plessy's* factual assumption on its head, it can hardly be overlooked that *Plessy* was abandoned because *Plessy* erroneously concluded that "separate but equal" facilities passed muster under the Fourteenth Amendment.[189]

Additionally, the joint opinion's belief that the populace understood these changed understandings is highly questionable. One wonders how much of the South, in 1954, (and for that matter the North) constituted what the joint opinion in *Casey* calls the "thoughtful part of the Nation."[190] It seems, that a good portion of the nation did not accept, let alone "understand" the fact that blacks had been stamped with a "badge of inferiority."[191]

3. *Unprincipled Lawmaking*. In applying a rigorous *stare decisis* test to *Roe,* the joint opinion failed to do the same to *Akron*[192] and *Thornburgh*[193]. Indeed, the joint opinion believed that the decision in *Roe* was so significant, and the controversy and debate surrounding it so widespread, that it required more than a "normal" *stare decisis* inquiry.[194] Judging by the joint opinion's treatment of *Akron* and *Thornburgh*, the same may not be said of these two cases. Surely the abortion regulations at issue in these two cases were as controversial and intensely divisive as those in *Roe*. In fact, they must have been since several of these regulations (i.e., the informed consent, reporting, and 24 hour waiting period provisions) were practically identical to those controverted in *Casey*. Therefore, court legitimacy

189. Brown v. Board of Education, 347 U.S. 483, 495 (1954).

190. 112 S. Ct. at 2813; *see supra* note 150 and accompanying text.

191. The lack of understanding and acceptance of the Court's decision in *Brown* was seen in many forms, ranging from continued attempts at *de jure* and *de facto* segregation to Alabama Governor, George C. Wallace's, and Arkansas Governor, Orval Faubus', attempts to personally and physically bar school integration to a general Southern attitude that, to borrow from Andrew Jackson: Earl Warren has made his decision, now let him enforce it. ISIDORE STARR, THE SUPREME COURT AND CONTEMPORARY ISSUES 27-32 (1969); TONY FREYER, THE LITTLE ROCK CRISIS 87-115 (1984); Craig M. Bradley, *The Uncertainty Principle in the Supreme Court*, 1986 DUKE L.J. 1, 7-9; David Luban, *Legal Storytelling, Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152, 2165-85 (1989); *see also* Cooper v. Aaron, 358 U.S. 1, 7-10 (1958).

192. City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416 (1983) (invalidating those sections of Akron's Regulation of Abortions ordinance that concerned parental consent, informed consent, 24 hour waiting period and the disposal of fetal remains), *overruled by* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

193. Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (invalidating provisions of Pennsylvania's 1982 Abortion Control Act that concerned informed consent), *overruled by* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

194. 112 S. Ct. at 2812.

would have required adherence to *Akron* and *Thornburgh* as well as *Roe*. However, there is no mention, or any indication, that any sort of *stare decisis* analysis was done upon these two Supreme Court precedents before the *Casey* Court so casually overruled them. In fact, the Court's two overrulings are barely noticeable and do not occur until thirty-two pages into the opinion.[195]

The joint opinion's treatment of *Akron* and *Thornburgh* is deplorable. It is entirely unprincipled to invoke *stare decisis* to salvage one precedent, and then ignore it in destroying two. It seems nothing more than result-oriented. Furthermore, the joint opinion's entire discussion of *Akron*, *Thornburgh*, *Brown*, and *West Coast Hotel* is what Professor Shapiro would refer to as a "lack of candor."[196] Before overruling *Akron* and *Thornburgh*, the joint opinion utilized these two cases to buttress its contention that *Roe* had not been undermined.[197] Once finished, the joint opinion then overruled those portions of *Akron* and *Thornburgh* which were inconsistent with the joint opinion's interpretation of *Roe*. Further, by using *Brown* and *West Coast Hotel* to shore up its legitimacy argument, the joint opinion conducted a post-hoc rationalization of those decisions, each of which are truly distinguishable from the issues in *Casey*.[198]

To further shore up its legitimacy argument, the Court attempted to distance itself from the appearance of succumbing to political pressure or public whim. The joint opinion emphatically contended that to overrule "under fire" is to weaken public confidence in the Court and institutional integrity. What the joint opinion failed to mention, or failed to realize, is that there are, of course, at least two sides to any controversy. While the Court avoided the appearances of illegitimacy that may have been caused by overruling, it failed to recognize that it succumbs to the same challenges of illegitimacy by affirming "under-fire." To come down either way would alienate all of the losing side's supporters. In choosing the course it did, the Court became embroiled in exactly that which it

---

195. *Id.* at 2823. The joint opinion overruled *Akron* and *Thornburgh* with one terse sentence:

> To the extent *Akron I* and *Thornburgh* find a constitutional violation when government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of child birth, and the "probable gestational age" of the fetus, those cases go too far, are inconsistent with *Roe*'s acknowledgment of an important interest in potential life, and are overruled.

Id.

196. *See* Shapiro, *supra* note 20, at 732-38 ("[A] judge who believes that a particular precedent can fairly be distinguished . . . but who nevertheless describes it as 'controlling,' can properly be accused of lack of candor.").

197. 112 S. Ct. at 2810.

198. *See supra* part III.A.2.

sought to avoid: the appearance of unprincipled and judicially-contrived, result-oriented judicial decisionmaking.

4. *Confusion and Uncertainty.* The joint opinion agreed that the state of abortion law had become so confused and muddled that it was impossible for lower courts to implement. In fact, this problem was precisely one of the factors which led the Court to reconsider *Roe*.[199] The *Casey* decision does little to alleviate this doubt and confusion and facilitate lower court implementation of the rules announced. In fact, time will undoubtedly prove that the "undue burden" standard is as malleable, if not more confusing, to abortion jurisprudence than the standard articulated in *Roe.*

According to *Casey*, state regulations restricting access to abortion are unconstitutional if they "ha[ve] the principle purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[200] "An obstacle is 'substantial' we are told; if it is calculated[,] [not] to inform the women's free choice [but to] hinder it."[201] To assist lower courts in implementing the new "standard," the joint opinion enunciated a presumably nonexhaustive list of "guiding principles"[202] which will certainly be more difficult and confusing to implement than the Roe trimester framework.[203]

As Chief Justice Rehnquist stated, the "undue burden" standard will do nothing to prevent judges from "roaming at large in the constitutional field guided only by their personal views."[204] While the Court has set up equally open-ended balancing tests for lower courts to follow in other areas,[205] the joint opinion's use of one here is troublesome. Having cited confusion and uncertainty as a significant part of the reason to reexamine *Roe*,[206] the joint opinion has done little to ensure that the law will be more certain and less confusing. More importantly, in light of the joint opinion's professed concern for a woman's ability to order her life around the availability of abortion procedures, the undue burden standard provides little stability. This fact is demonstrated by Justice Stevens' concurring and dissenting opinion in *Casey,* which argues that even under the joint opinion's

199. 112 S. Ct. at 2804.

200. *Id.* at 2820.

201. *Id.* at 2877 (Scalia, J., concurring in part and dissenting in part).

202. *Id.* at 2821.

203. *Id.* at 2876-80 (Scalia, J., concurring in part and dissenting in part).

204. *Id.* at 2866 (citing Griswold v. Connecticut, 381 U.S. 479, 502 (1965)).

205. For a discussion of the application of balancing tests and their inherent problems, see T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 963-1005 (1987).

206. 112 S. Ct. at 2803-04.

"undue burden" test, the informed consent and 24 hour waiting period provisions of the Pennsylvania statute constitute "undue burdens."[207] The joint opinion, of course, reached a different conclusion. Consequently, in articulating the undue burden test, the joint opinion simply added confusion to an already confusing issue. In his opinion, Chief Justice Rehnquist remarked, the "undue burden" test "is a standard which is not built to last."[208] At best, the "undue burden" test is supported by only three Justices, and definitely "does not command a majority of this Court."[209] Obviously, such disagreement does little to promote stability and predictability.

5. *Intensely Divisive Controversies.* In announcing its "intensely divisive controversy" theory, the joint opinion was shirking its responsibility to interpret law. In essence, the Court refused to admit error, or truly reexamine *Roe* as an original matter, because of public protest. Lest it be forgotten, it is the Supreme Court's responsibility to adjudicate "cases and controversies."[210] The fact that there is controversy surrounding a given law, that Justices have doubts about the precedent's constitutional foundation, and that there is widespread public and scholarly debate on the underlying issues, all militate in favor, rather than against, reexamining the law as an initial matter and not disposing of the issues by use of a mechanistic judicial tool. Controversy does not give the Court license to simply follow precedent merely because it is precedential. Justice Black, in *Francis v. Southern Pacific Co.*,[211] stated that: "[w]hen precedent and precedent alone is all the argument that can be made to support a court-fashioned rule, it is time for the rule's creator to destroy it."[212]

---

207. *Id.* at 2842-43 (Stevens, J., concurring in part and dissenting in part). The fact is further illustrated in Justice Scalia's concurring and dissenting opinion in which he traces Justice O'Connor's varying and confusing implementation of the "undue burden" standard. *Id.* at 2878-79.

208. *Id.* at 2866.

209. *Id.* The authors of the joint opinion, Justices O'Connor, Kennedy, and Souter, are the only three Justices to have adopted the "undue burden" test. Justices Blackmun and Stevens would continue along the lines of the *Roe* trimester framework, subjecting abortion regulations to strict scrutiny. *Id.* at 2839-40 (Stevens, J., concurring and dissenting in part); *id.* at 2843-45 (Blackmun, J., concurring and dissenting in part). Chief Justice Rehnquist and Justices Scalia, Thomas, and White would follow the plurality decision in *Webster v. Reproductive Health Services*, subjecting abortion regulations to mere rational basis review. *Id.* at 2867.

210. U.S. CONST. art III; Judiciary Act of 1789, § 13, 28 U.S.C. § 1251 (1988). The "intensely divisive controversy" theory is truly one of the most disturbing aspects of *Casey*. The theory's support for avoiding resolution of controversial issues flies in the face of the Court's role as the independent, rational, and ultimate arbiter of constitutional dispute. *See* Cooper v. Aaron, 358 U.S. 1, 18-19 (1958).

211. 333 U.S. 445 (1948) (Black, J., dissenting).

212. *Id.* at 471.

In *Payne,* when challenged that the Court was exercising power and not reason, Justice Scalia explained that "[w]hat would enshrine power as the governing principle of this Court is the notion that an important constitutional decision with plainly inadequate rational support must be left in place for the sole reason that it once attracted [a majority of the Court]."[213] Similarly, Justice Powell noted that "[i]t is . . . not only [the Court's] prerogative but also [its] duty to re-examine a precedent [when] its reasoning . . . is fairly called into question."[214]

In announcing its intensely divisive theory, the joint opinion ignores constitutional history. While the *Brown* and *West Coast Hotel* decisions would satisfy the joint-opinion's intensely divisive issues test, other controversies apparently do not. Such analysis is confined, if not questionable. The joint opinion, for example, makes no mention of the *Legal Tender Cases.* The joint opinion avoids doing so for two reasons. First, the *Legal Tender Cases* are usually mentioned in support of the Court's willingness to allow an erroneous decision to stand because of the institutional, financial, and societal reliance interests at stake.[215] The joint opinion omits any discussion of the cases because an inconsistency arises when one realizes that the reliance interests at stake in the *Legal Tender Cases* are economic and societal (what can only be referred to as traditional notions of reliance), not social and individual.[216] Second, an examination of the *Legal Tender Cases* turns the joint opinion's intensely divisive issues test on its head.

The mid to late 1800's found the Supreme Court engulfed in controversy. During this period, two of the Court's the most controversial decisions ever, were handed down. The first was the *Dred Scott* decision[217] which is now viewed as having made the Civil War inevitable and brought about three amendments to the United States Constitution.[218] The second was the *Legal Tender Cases.*[219]

---

213. Payne v. Tennessee, 111 S. Ct. 2597, 2613 (1991) (Scalia, J., concurring).

214. Mitchell v. W.T. Grant Co., 416 U.S. 600, 627-28 (1974) (Powell, J., concurring).

215. *See supra* note 43 and accompanying text.

216. *See supra* notes 48-49 and accompanying text.

217. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856) (holding that no Negro, free or slave, could be considered a citizen of the United States and declaring the Missouri Compromise, which banned slavery in certain territories, to be unconstitutional).

218. DOROTHY TOMPKINS, THE SUPREME COURT OF THE UNITED STATES 153 (1959). The *Dred Scott* decision is considered one of the Court's most disastrous decisions. The Court, itself, was badly divided and muddled in its views. The case failed to resolve the slavery issue, and the decision contributed to the onset of the Civil War. "Both the Civil War and the provisions of the Fourteenth Amendment . . . were needed to overcome the *Dred Scott* ruling." JACK C. PLANO & MILTON GREENBERG, THE AMERICAN POLITICAL DICTIONARY 256 (8th ed. 1990).

219. *Dred Scott* and *Legal Tender,* while two distinct cases, must be read together

"The battle over legal tender is one of the most famous in the history of the United States generally as well as in its own judicial history."[220] There were three separate adjudications of the *Legal Tender Cases*, but only two are relevant here: *Hepburn v. Griswold*,[221] and *Knox v. Lee*.[222]

The problem of paper currency dated back to the time of the Framers and the Continental Congress. During the Civil and Revolutionary Wars, the United States government was compelled to issue paper money as legal tender to pay for the war effort. In a contemporarily interesting statement, one commentator noted that "[t]here had always been a feeling in this country against paper money, and this feeling had settled into a conviction in the most conservative part of the community that the use of such money was morally wrong."[223] The Legal Tender Acts of 1862 and 1863, for the first time, made paper money legal tender in the United States. Support for these laws split deeply along party lines, with Republicans in opposition and Democrats in support of the measures. Underlying the political/ideological split were two diametrically opposed interest groups: those of the banks and those of the railroaders.

Bankers held all of the major gold reserves in the country and were in a very powerful economic position if paper money were prohibited. The railroads, on the other hand, were in the midst of major expansion. They had been forced to borrow heavily and were in desperate need of the legalization of paper money. "If they were required to pay their fixed charges or contracts in gold, they would be so completely at the mercy of the banks that it would only be a short time before the banks would own outright virtually every railroad system."[224]

At the time of *Hepburn v. Griswold,* the Court consisted of seven members. The majority in *Hepburn,* consisting of Chief Justice Chase, and Justices Nelson, Clifford, and Field held that the

---

and in context in order to understand its impact on what the *Casey* Court calls institutional integrity and intensely divisive. For, as former Chief Justice Charles Evans Hughes noted, "[i]t was during this period, while the Court was still suffering from a lack of a satisfactory measure of public confidence, that another decision was rendered which brought the Court into disesteem. I refer to the legal tender cases decided in 1870." CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES: ITS FOUNDATION, METHODS AND ACHIEVEMENTS 51 (1928).

220. LOUIS B. BOUDIN, GOVERNMENT BY JUDICIARY vol. II at 151 (1932).

221. 75 U.S. (8 Wall.) 603 (1869), *overruled by* Knox v. Lee, 79 U.S. (12 Wall.) 457 (1870).

222. 79 U.S. (12 Wall.) 457 (1870).

223. BOUDIN, *supra* note 220, at 151-52.

224. GUSTAVUS MYERS, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 495-97 (1912).

Legal Tender Acts were unconstitutional. This decision sparked heated dissent by Justices Miller, Swayne, and Davis. "Every newspaper and politician subsidized by the railroad interests denounced the decision, and conversely, the banking journals praised it.... The bankers had won in the Supreme Court."[225]

The *Hepburn* decision was, in fact, decided with two vacancies on the Court. Only a few months prior to the *Hepburn* decision, Congress had, on April 10, 1869, expanded the number of Supreme Court Justices from seven to nine.[226] The increased membership gave President Grant the opportunity to fill two new vacancies. On the day the *Hepburn* decision came down, the President nominated William Strong and Joseph Bradley to fill the two empty seats. Both Strong and Bradley were prominent Republican lawyers with very strong railroad interests and ties. "It was alleged and not denied [that] they were both interested as shareholders in the Camden and Amboy Railroad Company. It was alleged that one or both of these gentlemen had formerly been employed as law counsel by that company, and as such counsel had given opinions affirming the legal tender to be constitutional."[227]

Four days after Justices Strong and Bradley were confirmed, Attorney General Hoar, cognizant of the numerical and ideological shift in the Court petitioned for reargument. Republicans and railroaders threatened dire political and financial results if the Court did not agree to reopen the issue. "[N]evertheless, the general public had assumed that the question of constitutionality was to be considered as completely settled in the *Hepburn Case.*"[228] Hence, when the Court agreed to reopen the case, the action produced public protest.[229]

With the additions of Justices Strong and Bradley, the outcome was pre-ordained. Justices Strong and Bradley, in *Knox v. Lee*, sided with the three dissenters from *Hepburn*, upheld the constitutionality of legal tender, and overruled *Hepburn*. President Grant, be it innocently or knowingly, had succeeded in "packing" the Court. Such activity by the Court produced public outcry. In the words of Chief Justice Hughes:

> The action of the Court, taken soon after [Strong's and Bradley's] confirmation, in ordering a reargument of the constitutional question and then deciding that the legal tender act was constitutional, the two new judges joining with the three judges, who had dissented in the *Hepburn* case, to

225. *Id.* at 509-10; BOUDIN, *supra* note 220, at 154.
226. MYERS, *supra* note 224, at 514.
227. *Id.* at 523.
228. Boudin, *supra* note 220, at 158.
229. *Id.* at 157-58.

> make a majority, caused widespread criticism. From the standpoint of the effect on public opinion, there can be no doubt that the reopening of the case was a serious mistake and the overruling in such a short time, and by one vote, of the previous decision shook popular respect for the Court.[230]

The reversal of *Hepburn* was overtly political and damaging to the Court's reputation. *"[T]here is no doubt that ever since that era the Court's action in reopening its first decision has been regarded as a very grave mistake*—and a mistake which for many years impaired the people's confidence . . . in the impartiality and good sense of the Court."[231] Despite criticism from the press, public, Congress, and legal profession, however, the Court re-examined *Hepburn.* Despite alienating these same people by overruling *Hepburn,* and thereby compromising the institutional integrity of the Court, the Court eventually won them back.

The *Legal Tender Cases,* and other cases, including *Brown* and *West Coast Hotel,* reveal a rather striking phenomenon in constitutional history; namely, the inalienable—though sometimes wavering—public faith in the Supreme Court and its role in the functioning of government. The Supreme Court has been the object of attack throughout its history.[232] "Jefferson retaliated with impeachment; Jackson denied its authority; Lincoln disobeyed a writ of the Chief Justice; Theodore Roosevelt proposed a recall of judicial decisions; Wilson tried to liberalize its membership; and Franklin Roosevelt tried to reorganize it."[233] Yet even though public perception and court legitimacy were weakened by all the criticisms, challenges, and protests, the Court has always emerged intact and powerful.

Chief Justice Hughes perceived this phenomenon over sixty years ago when he stated:

> When, however, we consider the hundred and thirty-six years of the Court's activities, the thousands of its determinations, the difficult questions with which it has dealt, and the fact that it has come out of its conflicts with its wounds healed, with its integrity universally recognized, with its ability giving it a rank second to none among the judicial tribunals of the world, and that today no institution of our government stands higher in public confidence, we must realize that this is due, whatever may be thought as to the necessity of the function it performs, to the im-

---

230. HUGHES, *supra* note 219, at 52 (citations omitted).

231. BOUDIN, *supra* note 220, at 159 (citations omitted).

232. TOMPKINS, *supra* note 218, at 152 (citing Herbert Brownell Jr., *The United States Supreme Court: Symbol of Orderly, Stable, and Just Government,* 43 A.B.A. J. 595-99 (1957); Robert E. Cushman, *The History of the Supreme Court Resume,* 7 MINN. L. REV. 275-305 (1923); Charles Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States; A History of the Twenty-fifth Section of the Judiciary Act of 1789,* 47 AMER. L. REV. 1-34, 161-89 (1963)).

233. *Id.* at 152 (citations omitted).

> partial manner in which the Court addresses itself to its never-ending task, to the unsullied honor, the freedom from political entanglements and the expertness of the judges who are bearing the heaviest burden of severe and continuous intellectual work that our country knows.[234]

This statement still applies today. The fact is that the Court has always confronted "intensely divisive" controversies. While the argument can be made that the abortion controversy is unprecedented, it seems difficult, if not impossible, to assess the "intensity" of relative constitutional controversies through hindsight. The fact remains that the Constitution requires the Court to decide controversies, not shirk from them. If the reasoning or validity of a precedent is called into question, the Court must reexamine it.[235] Thus, if there is anything unprecedented about the abortion controversy, it is the Court's treatment of it.

B. Casey's *Inconsistency With* Roe

1. Roe's *"Central Holding."* As Justice Scalia noted in his concurring and dissenting opinion, the joint opinion's reliance upon *stare decisis* is, at best "contrived."[236] While purporting to adhere to the "central holding" of *Roe*, the joint opinion, in reality, emasculates it. Justice Scalia is correct in asserting that, in essence, the majority is adopting a "keep-what-you-want-and-throw-away-the-rest" version of *stare decisis*.[237] It is precisely this type of approach which would, as Justice Scalia posited, justify the Court in stating that the power of judicial review extends to only those statutes concerning the jurisdiction of the courts. This, after all, was the "central holding" of *Marbury v. Madison*.[238]

In announcing its modified version of *stare decisis*, the joint opinion held that *stare decisis* did not require adherence to *Roe*, but only to its "central holding."[239] In addressing the impropriety of applying *stare decisis* in such a manner, Justice Scalia commented that under *Roe* the following were unconstitutional: (1) requiring that a woman seeking an abortion be provided with truthful information before giving her informed consent (if that information was designed to influence her choice); (2) requiring information be provided by a doctor, rather than by non-physician counselors; (3) a 24 hour waiting period; and (4) requiring detailed reports about each woman who

---

234. HUGHES, *supra* note 219, at 55.

235. *See, e.g.*, West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642 (1943); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 74-78 (1938).

236. 112 S. Ct. at 2881 (Scalia, J., concurring in part and dissenting in part).

237. *Id.*

238. 5 U.S. (1 Cranch) 137 (1803).

239. 112 S. Ct. at 2812.

seeks an abortion.[240] Under *Casey,* each of these is now constitutional.[241] More importantly, under *Roe* a woman had a fundamental right to abortion. Under *Casey,* she has only a "liberty", protected by the Due Process Clause of the Fourteenth Amendment.[242]

Roe v. Wade recognized that the right to abortion was fundamental and any restrictions on this right must survive strict scrutiny. State restrictions were permissible only when the State's interests became compelling. The trimester framework pinpointed the stages at which various state interests became compelling.

Casey, by contrast, held that the trimester approach was not a central or integral part of *Roe.* Additionally, according to the joint opinion, state regulations impacting on the right to abortion were not intended to be subject to strict scrutiny under *Roe.* Rather, the joint opinion insists that *Roe*'s central holding was "a recognition of a woman's right to choose to have an abortion before viability, and to obtain it without undue interference from the State."[243] An analysis of *Roe* shows that the *Casey* joint opinion's interpretation of *Roe* is pure fallacy.

There is no mention of an undue burden test in the *Roe* opinion. The joint opinion's conclusion that abortion regulations are permitted throughout the pregnancy, provided they do not constitute an undue burden, is clearly at odds with *Roe.* Even if one is willing to concede that the trimester scheme was not central to *Roe,* one must admit, however, that under *Roe* the State's interests in the period after contraception and before viability were viewed as *per se* uncompelling, therefore disallowing any restrictions on abortion, on behalf of either the mother or the fetus. The majority simply side-steps, or glosses over, this issue to reach its result.[244]

It seemed clear, at least to the majority in *Roe,* that abortion regulations were to be subject to strict scrutiny because of the fundamental nature of the rights involved. As Justice Blackmun stated in *Casey,* "limitations on the right of privacy are permissible only if they survive 'strict' constitutional scrutiny—that is, only if the governmental entity imposing the restriction can demonstrate that the

240. *Id.* at 2881 (Scalia, J., concurring in part and dissenting in part).

241. *Id.*

242. *Id.* at 2860-61, 2878.

243. *Id.* at 2804.

244. The fact that Justice Blackmun, in *Roe,* mentioned that the state had an "important and legitimate interest" in the mother and the potential life throughout the pregnancy did not make it central to *Roe*'s determination. Arguably, it was dicta. Roe v. Wade, 410 U.S. 113, 162 (1973). Yet, the joint opinion embraces the statement, considering it "central" to *Roe*'s holding. While the State's interests were "important and legitimate" throughout the pregnancy, it was only when the State's interest became "compelling" that the State could intervene. *Id.* at 162-63.

limitation is both necessary and narrowly tailored to serve a compelling governmental interest."[245] "We have applied this principle," Justice Blackmun argued, "*specifically* in the context of abortion regulations."[246] In fact, in *Akron*, all of the Justices in the *Roe* majority, save Justice Stewart who had been replaced by Justice O'Connor, explicitly rejected the undue burden analysis as incompatible with *Roe*.[247]

In articulating *Roe*'s "central holding", the joint opinion does nothing more than restate *Roe* in the joint opinion's own words. The purpose is clear. *Roe* must say what the joint opinion needs it to say. In so doing, the joint opinion received disapproval from Justice Blackmun, the author of the *Roe* opinion, who declared "the joint opinion and I disagree on the appropriate standard of review for abortion regulations."[248] The joint opinion's interpretation and imposition of the undue burden standard is irreconcilable with *Roe* and its progeny.[249] To accommodate its interpretation, the Court reworded *Roe* and overruled anything inconsistent with the joint opinion; namely, *Akron* and *Thornburgh*. The justifiable course of action was to overrule *Roe*, not torture it to keep up an appearance of fidelity to *stare decisis*.

Indeed, in rewording *Roe*, the joint opinion offended one of the most traditional tenets of *stare decisis*—that the binding force of precedent is attached not to the words chosen by a particular judge, but to the actual principles necessary for the decision of the prior case.[250] The joint opinion's surgical removal of key words and findings from the *Roe* opinion and subsequent reformulation come at the expense of one of *Roe*'s most basic premises—that only when the State's interest becomes compelling are regulations permissible.

C. Casey's *Misapprehension and Misapplication of* Stare Decisis

1. *The Scope of the* Stare Decisis *Inquiry*. The joint opinion's threshold inquiry into the scope of the *stare decisis* inquiry comprises a misunderstanding and misapplication of the doctrine. In

245. 112 S. Ct. at 2847.

246. *Id.* (emphasis added) (citing Roe v. Wade, 410 U.S. 113, 155-56 (1973) ("[W]here certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. We agree with this approach.") (citations omitted)).

247. City of Akron v. Akron Reprod. Health Servs., Inc., 462 U.S. 416, 420 n.1 (1983) (Powell, J., majority opinion, joined by Burger, C.J., and Brennan, Marshall, Stevens, and Blackmun, JJ.).

248. 112 S. Ct. at 2845 n.1.

249. 410 U.S. at 155-56; *see supra* part II.A.

250. *See* text accompanying *supra* note 14.

defining the issue, the joint opinion stated that it must answer four questions: (1) Had *Roe* proven unworkable?; (2) Had reliance on *Roe* made overruling impossible?; (3) Had any development in constitutional law made *Roe* obsolete or a mere remnant of abandoned doctrine?; and (4) Had there been any change in *Roe*'s factual findings which rendered its central holding meaningless?[251] According to the joint opinion, the answers to these questions did not permit the Court to overrule *Roe*.

Aside from being a non-exhaustive list of questions to be considered before overruling—and treating it as an all-inclusive one-the questions the Court does consider are exploited. In analyzing the first question, the joint opinion invoked the workability rule of *Garcia v. San Antonio Metropolitan Transit Authority*,[252] concluding that "[a]lthough *Roe* has engendered opposition, it has in no sense proven 'unworkable.'"[253] This conclusion, however, is at odds with the state of abortion jurisprudence prior to *Casey*. In fact, the *Roe* decision (most notably the trimester framework) had proven so confusing and unworkable in practice that it was repudiated in *Casey*. Under *Garcia*'s "workability" rule,[254] therefore, overruling *Roe* would have been permissible. Furthermore, in invoking *Garcia*'s workability rule, the joint opinion failed to mention the fact that *stare decisis* permitted the overruling of *National League of Cities v. Usury*,[255] by *Garcia*, because it had become apparent that *National League of Cities* had departed from a proper understanding of the Constitution. Thus, *Garcia*'s support for overruling badly reasoned or erroneous decisions was omitted from *Casey*, arguably because it applied *Roe*. This is an argument the joint opinion did not want to address.

In analyzing the second question, the joint opinion looked to its decision in *Payne v. Tennessee*[256] in order to assess the reliance interests at stake in *Roe*.[257] The joint opinion noted that "the classic case for weighing reliance heavily in favor of following the earlier rule occurs in the commercial context . . . ."[258] What the joint opinion fails to mention is that *Payne* overruled two prior decisions because they were "wrongly decided" and involved constitutional precedent which required a diminished *stare decisis* analysis.[259] The citation to *Payne* is inappropriate because *Payne*'s discussion of reliance is

251. 112 S. Ct. at 2808-09.
252. 469 U.S. 528 (1985).
253. 112 S. Ct. at 2809.
254. *See supra* note 128.
255. 426 U.S. 833 (1976).
256. 111 S. Ct. 2597 (1991); *see supra* note 131.
257. 112 S. Ct. at 2809.
258. *Id.*
259. 111 S. Ct. at 2610.

dicta.[260] If anything, *Payne* stands for the propositions that it is better to be right than consistent, and that reliance interests may be discounted if they do not arise in the commercial context.[261] Thus, the decision in *Payne* stands more appropriately for the proposition that it is permissible to overrule erroneous precedent and accord constitutional precedent diminished *stare decisis* effect. A discussion of these aspects of *Payne* in *Casey* is omitted because the same would apply to their treatment of *Roe*.

With respect to the third question, analyzing *Roe* under a standard which permits overruling when precedent is "obsolete" or "abandoned" is painfully extracted from prior decisions. While an argument can be made that the joint opinion extracts an overly restrictive interpretation of prior decisions (i.e., that precedent be "no more than a remnant of abandoned doctrine" before overruling), such an argument becomes unnecessary when one realizes that *Patterson v. McLean Credit Union* (*Patterson II*)[262] (the case the joint opinion relies upon in extracting this inquiry) involved a statutory precedent and should therefore be treated differently from the constitutional precedent at issue in *Roe*.[263]

Furthermore, in arguing that *Roe* had not been subsequently weakened, the joint opinion clearly ignored the Court and academia's general repudiation of the legitimacy of substantive due process.[264] The joint opinion does not so much as mention, let alone confront, the argument that the Court's own decisions in *Bowers v. Hardwick*[265] and *Michael H. v. Gerald D.*[266] signal an abandonment

---

260. The *Payne* Court stated that in cases involving property and contract rights, reliance interests are usually at their acme and require adherence to *stare decisis*. This, however, was not applicable in *Payne*, since *Payne* involved merely "procedural and evidentiary rules." *Id.*

261. *See id.* at 2609-10.

262. 491 U.S. 164 (1989).

263. *See supra* part I.B.1.

264. *See generally* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973). "Substantive due process" refers to the Supreme Court's use of the due process clause of the Fourteenth Amendment to articulate fundamental values not specifically mentioned in the Constitution, but thought to flow from it. In the 1900's, substantive due process was used to protect economic and property rights, and was no better employed than in *Lochner* and no more discredited than in *West Coast Hotel*. As Gunther notes, "[t]oday, the use of substantive due process to give special protection to economic and property rights is discredited. Yet in recent years, substantive due process has flourished once again, as a haven for fundamental values other than economic ones." GUNTHER, *supra* note 170, at 432.

265. 478 U.S. 186 (1986) (holding that the Federal Constitution does not confer a fundamental right upon homosexuals to engage in sodomy even in the privacy of one's home).

266. 491 U.S. 110 (1989) (holding that an adulterous, biological father has no fundamental right to visit his child born into an intact marriage).

of substantive due process—the theoretical foundation of *Roe v. Wade*. The right to abortion, recognized in *Roe*, was a product of the Court's deductions and extrapolations from a general fundamental right to privacy.[267] Placed along a continuum, *Roe* stands at the end of a long line of cases recognizing fundamental rights to marriage,[268] raising children,[269] procreation,[270] and contraception.[271] This line of reasoning, however, ended with *Roe*.[272] Consequently, the joint opinion's insistence that "[n]o evolution of legal principle has left *Roe*'s doctrinal footings weaker than they were in 1973"[273] is patently false. The fact is Court acceptance of substantive due process as a means of articulating fundamental values not specifically mentioned in the Constitution ended with *Roe*. Justice White's opinion in *Bowers v. Hardwick* is a case in point.[274]

In *Bowers*, the Court refused to extend the list of fundamental rights to include private, consensual homosexual sodomy.[275] The Court refused to do so because it risks violating its Constitutional mandate to interpret laws when it begins to enumerate laws and values with no foundation in the Constitution.[276] In so doing, the Court, in effect, repudiated the underlying foundation for privacy, namely, substantive due process. *Bowers*' holding, combined with the subsequent Court rulings restricting the scope of the abortion right (e.g., *Webster v. Reproductive Health Services*) must lead even the most staunch pro-choice supporter to conclude that there has been some weakening of *Roe*'s doctrinal foundation.

In analyzing the fourth question, the joint opinion admitted that "time has overtaken some of *Roe*'s factual assumptions."[277] For instance, the point of viability articulated in *Roe* no longer coincides with medical reality.[278] However, the joint opinion deemed these

---

267. *See supra* note 83.

268. Meyer v. Nebraska, 262 U.S. 390 (1923).

269. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

270. Skinner v. Oklahoma, 316 U.S. 535 (1942).

271. Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972).

272. The *Bowers* Court explicitly stated that the Court was no longer:

> inclined to take a more expansive view of our authority to discover new fundamental rights embedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.

478 U.S. 186, 194 (1986).

273. 112 S. Ct. at 2810.

274. 478 U.S. at 194.

275. *Id.* at 189.

276. *Id.* at 191.

277. 112 S. Ct. at 2811.

278. *Id.*

factual changes insufficient grounds to justify departing from *Roe*'s central holding. By discarding these changed factual underpinnings, the joint opinion failed to realize that their actual holding flies in the face of their entire discussion of *Brown* and *West Coast Hotel*.[279] If both *Brown* and *West Coast Hotel* stand for the proposition that overruling is permissible if prior factual assumptions have changed, and society understands these changes, then why doesn't the same apply to *Roe*? Surely our society understands that advancements in medical technology have and will continue to undermine *Roe*'s factual assumption. Overruling *Roe*, therefore, was permissible even under the joint opinion's post-hoc spin on *Plessy* and *Lochner*.[280]

2. *Diminished Force.* Missing from any part of the joint opinion's analysis is a recognition of the diminished force with which *stare decisis* applies in constitutional law. This is inappropriate, because *Roe* involves precisely the type of precedent about which Justice Brandeis voiced his concerns in *Burnett*.[281]

First and foremost, *Roe* is demonstrably the type of constitutional issue which is incapable of legislative correction. It is beyond the power of the Congress to prohibit abortion. Consequently, the only way to correct *Roe*, assuming that it was an erroneous decision, would be through constitutional amendment. This laborious, unattractive, and virtually impossible alternative was precisely the reason why the Court, and various Justices, including Brandeis, Taney, Stone, Cardozo, Strong, Douglas, and Jackson, have historically insisted that constitutional precedents have diminished force under *stare decisis*.[282]

The *Casey* Court, in refusing to consider or acknowledge this, was clearly violating one of the most fundamental and traditional tenets of *stare decisis*.[283] It was also inconsistent with each of the *Casey* Justice's prior treatment of constitutional precedent.[284] While this is not to say that the Court had to overrule *Roe*, it should have been a factor in its decision. Additionally, in ignoring the diminished *stare decisis* effect afforded constitutional precedent, the joint opinion offends the other justification for applying *stare decisis* with

279. *See supra* part III.A.2.

280. *See supra* notes 142-55 and accompanying text.

281. *See supra* note 26 and accompanying text.

282. *See supra* notes 23-37.

283. *See supra* note 24; LOUIS LUSKY, BY WHAT RIGHT? A COMMENTARY ON THE SUPREME COURT'S POWER TO REVISE THE CONSTITUTION 292-93 (1975); Mason, *supra* note 48, at 193; ALPHEUS T. MASON & WILLIAM M. BEANEY, THE SUPREME COURT IN A FREE SOCIETY 22 (1959); CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 16-17 (1969).

284. *See supra* note 66.

varying force; namely, that affording a constitutional precedent too much deference runs the risk of ensconcing a poorly reasoned, argued, or based decision into the law.[285] Thus, failing to give *Roe*'s constitutional precedent diminished *stare decisis* effect does not adequately address, or protect against, this possibility.

3. *It is Better to be Right than Consistent.*[286] It is simply wrong to go on being wrong. This notion harkens back to Justice Brandeis' statement that "it is more important that the applicable rule of law be settled than that it be settled right."[287] While this phrase appears inconsistent with the argument that it is better to overrule than commit error, one must not take things out of context. Justice Brandeis did make that statement, but he attached a proviso: "provided correction can be had by legislation."[288] Since this is a case where error cannot be corrected through legislation, it is one where even Justice Brandeis would have been unwilling to ensconce error.

Many Supreme Court Justices have agreed that an erroneous precedent should be corrected rather than perpetuated, including, at one point or another, each of the *Casey* Justices.[289] In fact, such a proposition predates Justice Brandeis. Justice Oliver Wendell Holmes, in arguing for the reversal of *Swift v. Tyson*,[290] stated that *Swift* amounted to "an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of

285. *See supra* note 38 and accompanying text. This may be the case with abortion as there is considerable scholarly opinion that Justice Blackmun, in compiling his history of abortion, relied primarily upon an article by Cyril Means which has been subsequently refuted and discredited. *See* Robert A. Destro, *Abortion and the Constitution: The Need for a Life Protective Amendment*, 63 CAL. L. REV. 1250, 1267-92 (1975); Joseph W. Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. PITT. L. REV. 359, 379-89 (1979); Dennis J. Horan & Thomas J. Balch, Roe v. Wade: *No Justification in History, Law or Logic in* ABORTION AND THE CONSTITUTION (Dennis J. Horan et al. eds., 1987); John R. Connery, *The Ancients and the Medievals on Abortion: The Consensus the Court Ignored in* ABORTION AND THE CONSTITUTION, *supra*; Joseph W. Dellapana, *Abortion and the Law: Blackmun's Distortion of the Historical Record in* ABORTION AND THE CONSTITUTION, *supra*; Martin Arbagi, Roe *and the Hippocratic Oath, in* ABORTION AND THE CONSTITUTION, *supra*.

286. Most commentators frame this proposition as a question, then proceed to debate the advantages and disadvantages of being right and being consistent. While support for both sides can be found, this article argues that the belief that it is better to be right than consistent is the stronger argument, at least for constitutional precedent. This is what Justice Brandeis argued when articulating the theory, and what many of the Court's most prolific Justices argued when applying *stare decisis*. *See supra* note 24.

287. Burnett v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting); *see supra* note 24 and accompanying text.

288. 285 U.S. at 406.

289. *See supra* note 67.

290. 41 U.S. (16 Pet.) 1 (1842), *overruled by* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

opinion should make us hesitate to correct."[291]

Chief Justice Roger Taney, in the *Passenger Cases*,[292] argued:

> I . . . am quite willing that it be regarded hereafter as the law of this Court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported.[293]

Justice Sutherland recognized that Justices "are not infallible, and when convinced that a prior decision was not originally based on, or that conditions have so changed as to render the decision no longer in accordance with, sound reason, [they] should not hesitate to say so."[294]

Justice Strong, in *Knox v. Lee*,[295] the second *Legal Tender* decision which overruled *Hepburn v. Griswold*,[296] held that not only in cases involving constitutional precedents, but "[e]ven in cases involving only private rights, if convinced we had made a mistake, we would hear another argument and correct our error."[297]

Justice Reed, in *Smith v. Allwright*,[298] which overruled *Grovey v. Townsend*[299] stated that "when convinced of former error, this Court has never felt constrained to follow precedent."[300]

Justice Douglas, in his work, *Stare Decisis*, asserted that "[r]espect for any tribunal is increased if it stands ready not only to correct the errors of others but also to confess its own. [It is] 'the duty of every judge and every court to examine its own decisions . . . without fear, and to revise them without reluctance.'"[301]

Justice Black, in *Connecticut General Life Insurance Co. v. Johnson*, emphatically stated that a "constitutional interpretation that is wrong should not stand."[302]

---

291. B. & W. Taxi Co. v. B. & Y. Taxi Co., 276 U.S. 518, 533 (1927) (Holmes, J., dissenting). Justice Holmes' argument was, in fact, seized upon by Justice Brandeis in Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), the case which overruled *Smith v. Tyson*.

292. 48 U.S. (7 How.) 283 (1849).

293. *Id.* at 470.

294. DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 211 (2d ed. 1990).

295. 79 U.S. (12 Wall.) 457 (1870).

296. 75 U.S. (8 Wall.) 603 (1869), *overruled by* Knox v. Lee, 79 U.S. (12 Wall.) 457 (1870).

297. 79 U.S. at 554.

298. 321 U.S. 649 (1944).

299. 295 U.S. 45 (1935), *overruled by* Smith v. Allwright, 321 U.S. 649 (1944).

300. 321 U.S. at 665.

301. Douglas, *supra* note 35, at 747 (quoting, in part, from Baker v. Lorillard, 4 N.Y. 257, 261 (1850)).

302. 303 U.S. 77, 85 (1938) (Black, J., dissenting); *see also* Rose v. Mitchell, 443 U.S.

Justice Stewart, in arguing to overrule *Sinclair Refining Co. v. Atkinson,*[303] stated that the Court is correct in overruling erroneous precedent and echoed Justice Frankfurter's belief that wisdom should not be discarded merely because it comes late.[304]

Justice Powell, in his work *Stare Decisis and Judicial Restraint*, stated that "where it becomes clear that a wrongly decided case does damage to the coherence of the law, overruling is proper."[305]

There is considerable scholarly support, as well, for the notion that it is better to correct an erroneous precedent than to perpetuate error.[306] Professor Laurence Tribe, for example, in speaking about the nominations of persons to the Court stated:

> [T]hose candidates who would . . . refuse even to consider modifying . . . *Roe v. Wade* . . . simply *because* [it is an] established precedent[], are . . . unsuited for a seat on the Supreme Court . . . . Justices who look upon precedents as divine edicts inscribed on stone tablets lack a sufficient appreciation of the evolutionary nature of constitutional law. *It is sometimes more important that the Court be right than it be consistent.*[307]

The Supreme Court has consistently held that it is better to admit and correct error, than to let it perpetuate and undermine the law. As Chief Justice Rehnquist noted in his concurring and dissenting opinion in *Casey*, *Roe* erred when it classified a woman's right to terminate her pregnancy as a "fundamental right".[308] The "right to abortion" is not found in the longstanding traditions of our society, nor is it found in the Constitution.[309] *Roe* reached too far when it analogized the right to abortion to the rights involved in the *Griswold* line of cases.[310] The court in *Roe* exceeded its authority and violated its duty to interpret and not make the law when it constitutionalized the right to abortion. Put simply, *Roe* was wrongly decided. Overruling *Roe*, therefore, would not have been inconsistent

---

545, 575 n.1 (1979) (Stewart, J., concurring).

303. 370 U.S. 195 (1962).

304. Boys Markets v. Retail Clerks Union, 398 U.S. 235, 255 (1970) (Stewart, J., concurring), *overruled by* Buffalo Forge v. United Steelworkers of America, 428 U.S. 397; *see also* Henslee v. Union Planters Bank, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting).

305. Powell, *supra* note 29, at 286.

306. *See, e.g.,* Raol Berger, *Original Intent and Boris Bittker*, 66 IND. L.J. 723 (1991); BORK, *supra* note 26, at 158; Rehnquist, *supra* note 26, at 345; Blaustein & Field, *supra* note 26, at 183; Filippatos, *supra* note 27, at 335; Note, *Constitutional Stare Decisis,* 103 HARV. L. REV. 1344, 1349 (1990).

307. TRIBE, *supra* note 26, at 102 (emphasis added).

308. 112 S. Ct. at 2859-60.

309. *See* City of Akron v. Akron Ctr. for Reprod. Health, Inc., 497 U.S. 502, 520 (1990) (Scalia, J., concurring).

310. 112 S. Ct. at 2860.

with the Supreme Court's history of repudiating error.

4. *Reliance.* The joint opinion's emphasis on reliance interests is both contrived and a misapplication of *stare decisis.* According to the joint opinion, *Roe* could not be overruled because "for two decades . . . people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail."[311] However, while some people have ordered their thinking around abortion as a fail-safe to defective contraception, this justification for keeping *Roe* is disingenuous. Even if the Court was genuinely worried about reliance interests, the fact remains that it is beyond the Court's power to declare abortion unconstitutional or illegal.[312] As such, the impact upon reliance interests from overruling *Roe* would not have been grave. What the Court fails to mention is that overruling *Roe* would not make abortion illegal. There are currently seventeen states which are firmly committed to protecting a woman's right to abortion.[313] As such, abortion would still be available in the United States. While it is likely that some states will restrict or deny women access to abortion,[314] it will not be impossible to obtain one. While many will complain that the burden of travel to an abortion state is too much to bear (and this may in fact be the case), this is nonetheless an entirely valid "fail-safe" for when contraception fails (the majority's purported justification for reliance interests).

Furthermore, as shown in Part I, if society has substantially relied on a precedent, such "reliance interests" militate against the overruling of the prior decision. While the presence of reliance interests may permit adherence even to erroneous decisions, these occa-

311. *Id.* at 2809.

312. This is so for the same reason that it should be impossible for the Court to declare abortion constitutional. The Constitution simply does not speak to abortion, and any justification given for it is therefore contrived. The Court's only recourse when the Constitution does not speak to an issue is to back out of the controversy and let the democratically elected branches decide.

313. These states include: Arizona, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Maine, Maryland, Massachusetts, New Mexico, New York, New Jersey, Oregon, Vermont, Virginia, and Washington. FOUNDATION OF NATIONAL ABORTION RIGHTS ACTION LEAGUE, WHO DECIDES? A STATE-BY-STATE REVIEW OF ABORTION RIGHTS 182 (1991) [hereinafter WHO DECIDES?]; Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, The Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451, 452 (1992).

Additionally, while Alaska, Delaware, Montana, and New Hampshire remain undecided, they are clearly leaning in the same direction. WHO DECIDES?, *supra.*

314. These states include: Alabama, Kentucky, Louisiana, Missouri, Nebraska, North Dakota, Ohio, Pennsylvania, South Dakota, Utah, West Virginia, and Wisconsin. WHO DECIDES?, *supra* note 313, at 182. The remaining fifteen states are undecided. *Id.*

sions are very limited.[315] Additionally, the presence of widespread controversy and opposition to a particular precedent weakens any claim of reliance.[316] For these reasons, according to Robert Bork, it will never be too late to overrule the cases recognizing the right of privacy, including *Roe,* "because they remain unaccepted and unacceptable to large segments of the body politic, and judicial regulation could at once be replaced by restored legislative regulation of the subject."[317]

Bork is correct in asserting that the reliance interests implicated by *Roe* are not sufficient to stay its repudiation as error. In the first place, as discussed above, the repudiation of *Roe* would not ban abortion, since the procedure would still be obtainable in many states. Second, it cannot be said that society has detrimentally relied upon the right to abortion because society as a whole, or even in part (i.e., those who are pro-choice), has not dramatically altered its life and thinking based upon the continued availability of abortion. *Roe* has engendered fierce and unrelenting opposition in American law since its inception. It has always been, and will remain, in a precarious situation.[318] Unless the pro-life movement dies down, *Roe* will always be controverted. As such, one can never order their life on the assurances that *Roe* will always be there. This is what the reliance interest protects. This is what is clearly missing in *Roe*. Pro-life supporters have always hoped, and pro-choice supporters have always feared, that one day *Roe* would be taken away.

Additionally, the joint opinion should once again be taken to task for its lack of candor. The joint opinion makes a duplicitous attempt to pigeon-hole *Roe* into the traditional reliance exception by noting that for two decades of economic and social developments people have ordered their lives around *Roe*'s guarantees.[319] Such a

---

315. For example, Robert Bork argues that only when erroneous precedent has "become so imbedded in the life of the nation, so accepted by society, so fundamental to the private and public expectations of individuals and institutions, that the result should not be changed now." BORK, *supra* note 26, at 158.

316. *See supra* notes 45-47 and accompanying text.

317. BORK, *supra* note 26, at 158.

318. Unless, of course, the Congress or all fifty states codify the right to abortion. The movement to codify *Roe v. Wade* is picking up momentum. The Freedom of Choice Act of 1993, while still in committee, currently has 113 co-sponsors in the House of Representatives (103 Democrats and ten Republicans) and forty-two co-sponsors in the Senate (thirty-seven Democrats and five Republicans). *See* H.R. 25, 103rd Cong., 1st Sess. (1993); S. 25, 103rd Cong., 1st Sess. (1993).

Congressional efforts to codify *Roe* reflect growing dissatisfaction with the Rehnquist Court's declassification of *Roe*'s fundamental right. The stated purpose of the act is to restore the trimester framework and "the strict scrutiny standard of review [as] enunciated in *Roe v. Wade* and applied in subsequent cases from 1973 to 1988." *Id.*

319. 112 S. Ct. at 2809.

statement is meant to place *Roe* among cases such as the *Legal Tender Cases*, as instances where reliance interests are at their strongest. It is, however, impossible to determine or imagine what economic reliance the joint opinion insists has accompanied *Roe*. One thing is certain, however, it is not the right to receive free abortion, or Medicare coverage.[320] Similarly, the Court's attempt to characterize social developments as requiring adherence to *Roe* is unpersuasive. To give but one example, the Warren Court expressed no qualms about instigating societal upheaval by ordering desegregation in *Brown*. If reliance interests did not prevent the overruling of *Plessy*, it should not prevent the overruling of *Roe*.

Doctrines upon which long-standing social institutions, economic theory, and criminal convictions were established have been overturned. The overruling decisions have, in most cases, produced significant upheaval and disruption—from the *Legal Tender Cases* to *West Coast Hotel* to *Brown* and beyond. The potential for social upheaval cannot justify the Court's abandonment of its responsibilities.

In truth, the reliance exception for overruling precedent, as articulated by the Supreme Court, has basically been limited to the commercial context.[321] The joint opinion's attempt to extend this exception to the reliance interests at stake in *Roe* is inconsistent with the traditional application of *stare decisis* and is unconvincing.

IV. THE FUTURE OF *CASEY*, *STARE DECISIS*, AND THE LAW

As Professor Schubert stated almost thirty years ago:

> It would be misleading to assume that justices can neatly be classified as either pro- or anti-*stare decisis* types . . . . They all follow precedent under some circumstances. Indeed it is quite possible for opposing factions of the Court to proclaim, both sincerely and vociferously, that they are each the true followers of precedent.[322]

These statements, while made in 1964, could not be more apropos to the Rehnquist Court. Current Justices clearly flip-flop on the applicability of *stare decisis*. When a Justice seeks to invoke the doctrine, he or she speaks of "special justifications," "heavy burdens," and "parades of horribles" in overruling. When a Justice seeks to discard precedent, he or she speaks of diminished force, and a prior lack of constraint in overruling a similar issue. It is hardly uncommon to see each Justice take a position of a prior one (even if

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

321. *See* 112 S. Ct. at 2809; Payne v. Tennessee, 111 S. Ct. 2597, 2610 (1991); *see also supra* note 48 and accompanying text.

322. SCHUBERT, *supra* note 35, at 217.

inconsistent with the invoking Justice's natural inclinations or ideology) when his or her interests—in overruling or adhering—are best served. While such practice is by no means novel, it is also by no means judicious.

At least for the short term, the *Casey* decision appears to have some foundation as a fixture in time, if not law. It is obvious that barring a "switch in time" the dissent is at least one vote shy of overturning *Roe v. Wade*.[323]

President Clinton has already appointed one Justice to the Supreme Court, and it would appear that he may have the opportunity to appoint at least one more. In obvious political maneuvering, Justice Blackmun stated in *Casey* that "I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor well may focus on the issue before us today."[324] Furthermore, Justice Stevens, a Ford appointee, but a frequent darling of the liberal theorists, might view the Clinton years as the best period in which to step down. While some will hope for a "mistake" equal to those made by Presidents Eisenhower and Nixon,[325] such an outcome is improbable.[326]

---

323. When the *Casey* decision was handed down, Chief Justice Rehnquist and Justices White, Scalia and Thomas were in favor of overruling *Roe v. Wade*. Since *Casey*, was handed down, Justice White has retired and been replaced by Justice Ruth Bader Ginsburg. While Justice Ginsburg has been critical of the Supreme Court's decision in *Roe v. Wade*, it appears that she is a strong supporter of a woman's right to abortion. *See, e.g.*, Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 381-83, 385-86 (1985); William H. Freivogel, *Ginsburg Shows Liberal Stance in her Writings*, ST. LOUIS DISPATCH, June 27, 1993, at B1; *Judge Ginsburg Gives Little Sway at Hearings*, NAT'L L. J., Aug. 2, 1993 at 5; Robin Toner, *Die-Hards in Opposite Camps on Abortion Fight Even After Battleground Deserts Them*, N.Y. TIMES, July 25, 1993, § 4 at 3.

324. 112 S. Ct. at 2854-55.

325. By the term "mistake" I refer to judicial appointments made by the President which resulted in Supreme Court Justices who became antithetical to, or at least not what was expected of, the President who appointed them. It is reported that Eisenhower later admitted to making two mistakes as President, both of which were seated on the Supreme Court [Chief Justice Earl Warren and Justice William Brennan]. *See generally* LAWRENCE BAUM, THE SUPREME COURT 41 (3d ed. 1989); TRIBE, *supra* note 26, at 51. Similarly, it would seem that President Nixon's appointment of Justice Harry Blackmun may now be viewed in a similar light.

326. As at least one commentator has suggested, President Clinton has expressed no qualms about nominating a Justice committed to *Roe v. Wade*. *See* Bruce Fein, *Clinton's Penchant to Pack the Court*, WASH. TIMES, July 28, 1992, at F1; Fein, *supra* note 157, at 22. In fact, during the campaign, President Clinton, while disavowing any so-called litmus test, stated:

> I wouldn't appoint someone who has a view of the Constitution [like] Professor [Robert] Bork and Judge [Clarence] Thomas.... [I would make sure, however, that t]hey have an expansive, broad view of the Bill of Rights, that they believe in the right to privacy, they believe that the right to privacy includes a woman's right to choose.

Lastly, while Chief Justice Rehnquist has, like Justice Blackmun, stated that he cannot remain on the Court forever, it seems unlikely that he would let a Democratic President fill his vacancy, and monopolize his Court.

A. *The New Centrists*

The question immediately raised by the *Casey* decision was what effect would the new centrist coalition, consisting of Justices O'Connor, Kennedy and Souter, have upon the Court. Many viewed the joint opinion in *Casey* as marking the beginning of the emergence of a bloc of what might best be called "legal conservatives."[327] These "legal conservatives" seemed to be characterized by a moderate, but generally conservative outlook, and a substantial respect for precedent. These Justices seemed to occupy a "centrist" position on an ideological scale, featuring Justices Stevens and Blackmun on the left and Chief Justice Rehnquist, and Justices White, Thomas, Scalia on the right.

Others viewed the new centrist coalition as temporary. The joint opinion in *Casey* was viewed as having sufficed for the moment, but was not built to last. As Robert Bork noted, "[n]o bloc votes as a unit all the time."[328] Indeed, prior to *Casey*, the three centrists had "rarely, if ever taken a similar tone in their own opinion."[329]

The statistics from the 1992-93 term show that the new centrist coalition is disintegrating. "In the areas of civil rights, church-state separation, voting rights and others, Justices O'Connor and Kennedy returned to the conservative fold . . . ."[330] More surprising, Justice Souter appears to have undergone a liberal transformation this past term, "moving a visible notch to the left, in subjects that range across the board."[331]

In non-unanimous decisions this past term, the centrist coalition disagreed more often than it stood together.[332] The voting alignments from the 1992-93 term showed that Justice O'Connor

---

Clinton: Would Ask Justices About Roe, But Not Restrictions, AM. POL. NETWORK ABORTION REP., Aug. 10, 1992, at § '92 Presidential, *available in* LEXIS, Cmpgn library, ABTRPT file.

327. Souter, *supra* note 69.

328. Bork, *supra* note 157.

329. Greenhouse, *supra* note 69. This provides further evidence that the *Casey* decision was a political one.

330. Marcia Coyle, *The High Court's Center Falls Apart,* NAT'L L.J., Aug. 23 1993, at S1.

331. Dick Lehr, *A Step Toward the Left: Souter's Surprise Shift May Alter High Court,* BOSTON GLOBE, July 1, 1993, at 1; *see also* Bruce Fein, *Does Souter's Leftward HO! Presage a Ginsburg Turn?,* N.J. L.J., July 12, 1993, at 18.

332. Coyle, *supra* note 330.

agreed most often with Justice Thomas (85% of the time); Justice Kennedy agreed most often with Chief Justice Rehnquist (90% of the time); and Justice Souter agreed most often with Justices White and Scalia (81% of the time).[333] Thus, from all appearances, the centrist coalition appears to be no more.

It is unclear what effect the addition of Justice Ginsburg will have upon the Court, and specifically, the "legal conservatives." Prior to her appointment, Justice Ginsburg was touted as a moderate centrist and a coalition builder.[334] Conceivably, Justice Ginsburg could bridge the gap between the splintered centrists thereby creating a powerful four-Justice coalition. As Professor Tribe noted, "[t]he Ginsburg nomination now takes on more importance than people originally assumed."[335] Similarly, Professor Gunther forecasted that Justice Ginsburg will fit in well with the newly emergent centrist bloc. "Her track record on the D.C. Circuit, which was just as ideologically split (as is the Supreme Court), was that of a peace maker. She was the bridge between left and right."[336] How she will vote on the Supreme Court, of course, remains to be seen.

Surprisingly, Justice Ginsburg's thirteen years on the D.C. Circuit Court of Appeals provide little insight as to how she will vote on the major issues of the day, and how she will employ *stare decisis*. Testimony given at her confirmation hearings, however, reveals that she will accord substantial weight to Court precedent. During her confirmation hearings, Justice Ginsburg stated that she would be "scrupulous in applying the law on the basis of legislation and precedent."[337] In discussing her criteria for overruling precedent, Justice Ginsburg commented:

> The soundness of the reasoning is certainly a consideration, but it shouldn't mean that we abandon a precedent. Justice Brandies said some things are better settled, and especially when the legislature sits. So if we're talking about a precedent that has to do with the construction of a statute—stare decisis—its more than just the soundness of the reasoning. It is—the reliance interests are important, the stability, certainty, predictability of the law.[338]

In the same vein, Justice Ginsburg indicated that she recognized and agreed with the distinction between constitutional and

---

333. *Id.*

334. Coyle, *supra* note 330; Bruce Fein, *And the Lucky Winner Is...; Status Quo Selection*, WASH. TIMES, June 16, 1993, at G1.

335. Lehr, *supra* note 331 (quoting Professor Tribe).

336. Stephen Games, *Political Forecast: Equal Justice Under the Law: Who Will Ginsburg Most Vote With?*, Oct. 3, 1993, at M(1)(1).

337. *Hearing of the Senate Judiciary Committee*, FEDERAL NEWS SERVICE, July 21, 1993, *available in* LEXIS, Nexis Library, FEDNEW file.

338. *Id.*

statutory precedent articulated by Justice Brandies in *Burnett*. However, she commented that "one doesn't lightly overrule precedent in the constitutional arena either."[339] Rather, before overruling precedent, a Judge should consider if any reliance interests have been built up around it.[340] Thus, to the extent she practices what she preached at her confirmation hearings, her respect for precedent would mesh well with that of the other so-called centrists.[341]

B. *The Law*

All members of the current Court have recognized that the restraints upon *stare decisis* are weakest in cases involving constitutional precedent.[342] This, combined with traditional conservative respect for precedent,[343] has led to a weakening, but few overrulings, of prior activist decisions such as *Roe*.[344] This signifies a Court majority "in favor of shielding pivotal jurisprudential doctrines endorsed in prior activist decades from further scrutiny."[345] In *Casey*, this was precisely the point stressed by the joint opinion in refusing to depart from Warren and Burger Court precedents despite arguable error. Consequently, the great collision between activist precedent and conservative jurisprudence was upstaged by the emergence of a passive group of centrists.

As Professor Robert A. Sedler believes, the centrists "are not likely to extend the precedents of the Warren and Burger courts, nor are they likely to make radical departures."[346] This means, as Bruce Fein observes, continued—but no doubt slightly altered—life for activist precedents affirming criminal convictions, police interrogation, one-person/one-vote, libel laws, and racial and gender preference rulings.[347] This also means, however, that certain controversies will find no solace in this Court.[348]

---

339. *Hearing of the Senate Judiciary Committee*, FEDERAL NEWS SERVICE, July 22, 1993, *available in* LEXIS, Nexis library, FEDNEW file.

340. *Id.*

341. *See supra* notes 68-69.

342. *See supra* note 66.

343. Norman Dorsen, *The United States Supreme Court: Trends and Prospects*, 21 HARV. C.R.-C.L. L. REV. 1, 24-25 (1986).

344. O'BRIEN, *supra* note 294, at 211-12.

345. Bruce Fein, *Preserving Activist Precedents; Roe Basics Affirmed*, WASH. TIMES, June 30, 1992, at F1.

346. Coyle, *New Trio*, *supra* note 78.

347. Fein, *supra* note 345.

348. Perhaps the best example of this can be seen in the privacy right, or lack thereof, given to homosexuals. *See* Bowers v. Hardwick, 478 U.S. 186 (1986). *Stare decisis*, under the joint opinion's reformulation of the doctrine, would prevent that decision from being reexamined or overruled. Indeed, as Chief Justice Rehnquist noted, the joint opinion's message to opponents of that controversial decision "appears to be that they

CONCLUSION

Application of *stare decisis* does not come without its problems. As this paper shows, it may interfere with the Supreme Court's duty to settle important questions; and it often produces conflict and a lack of clarity. This is not necessarily an infirmity of the doctrine, but rather a cold fact that as the number of cases increases almost exponentially each year, so do the number of precedents which these decisions generate. Thus, with the increased number of available precedents, so increases the possibility of doctrinal inconsistency and conflict.[349]

The joint opinion's use of *stare decisis* in *Casey* was overtly political, and therefore, deplorable. Some have argued that such an outcome is inevitable because:

> The reason, quite simply, is that the Court can find previous discussions on most matters which support equally well either side of the issue. [P]recedents are by no means absolute barriers to the exercise of discretion and the making of policy. It is no breach of judicial etiquette for the Court to distinguish, limit, ignore, or overrule precedents relevant to the resolution of a given issue. In sum, the judicial decision appears in a form which on its face seems to possess an aura of objectivity, but in reality allows its author virtually untrammeled discretion.[350]

Dangers lurk in other areas as well. The reliance exception to abandoning *stare decisis* is troubling because it subordinates one's constitutional rights to the expectations of others. The "intensely divisive controversies" exception to abandonment of *stare decisis* is problematic because it encourages the Court to abandon its duties and obligations. The "exercise of reasoned judgment" and "lesser sources of legal principle" theories are disturbing because it gives impetus to value-laden constitutional interpretation. The fear of overruling "under fire" is pernicious because it grounds decisions of law on the basis of public opinion. The ability to re-write past decisions to conform to notions of *stare decisis* is deadly because it usurps the rule of law.

Stare decisis is vital to the functioning of the Court. Yet, the doctrine is prone to abuse. The trick is to find a definition of *stare decisis* which comports with the rule of law and prevents abuse.

> For most of us, the proper role of precedent in constitutional adjudication

---

must cease their activities in order to serve their cause, because their protests will only cement in place a decision which by normal standards of *stare decisis* should be reconsidered." 112 S. Ct. at 2791.

349. Craig M. Bradley, *The Uncertainty Principle in the Supreme Court*, 1986 DUKE L.J. 1, 32-33.

350. HAROLD J. SPAETH, THE WARREN COURT: CASES AND COMMENTARY 24 (1966).

> will be found at the end of a middle road. The nation needs and deserves to have a steady hand at the Constitution's wheel, but the Supreme Court occasionally must overrule its earlier cases because legislative correction of a *constitutional* decision is all but impossible.[351]

Such an outcome is possible if judges adhere to the traditional notions of American *stare decisis*: it applies to all principles of law necessary to the determination of the prior case; it applies with diminished force in constitutional law; it permits departure or, at the very least, reconsideration when precedent has become unworkable, factually different, eroded, inconsistent in application, abandoned, or erroneous.

The *Casey* Court's use of *stare decisis* has done nothing to end the abortion controversy or remove the doubts and confusion surrounding the right to abortion. The application of *stare decisis* to abortion, at least by this Court, has proven incoherent and inconsistent. Clearly, the *Casey* Court should have met the task presented. It could have reconsidered *Roe,* removed itself from this nasty controversy, and put the ultimate decision on abortion where it rightly belongs-with the people. But it chose not to, and for this, it is deserving of criticism.

For as Justice Scalia stated in his dissent, while it is no doubt true that liberty finds no refuge in a jurisprudence of doubt, "[r]eason finds no refuge in this jurisprudence of confusion."[352]

---

351. TRIBE, *supra* note 26, at 102.
352. 112 S. Ct. at 2880.