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ESSAY

Abortion, Precedent, and the Constitution: A Comment on *Planned Parenthood of Southeastern Pennsylvania v. Casey*

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The doctrine of stare decisis has been of diminishing importance in constitutional adjudication for a number of years. Rhetorically, appeals to precedent remain important features of Supreme Court opinions. However, to a number of observers, it has seemed that no precedent—particularly a precedent dealing with a politically-charged issue—is safe if five Justices disagree with it on the merits.[1]

Given this background, the structure of the analysis in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[2] is surprising. Concluding that the Constitution prohibits states from imposing "undue burdens" on the right of a woman to obtain an abortion, the majority opinion in *Casey* relied heavily on the doctrine of stare decisis[3] in refusing to overrule *Roe v. Wade*.[4] Moreover, there is every indication that for at least some of the Justices, the appeal to precedent was more than mere rhetoric, but actually had a substantive impact on their votes.

This Essay will discuss the proper role of precedent in the abortion controversy. The Essay will begin by juxtaposing two recent pre-*Casey* decisions that illustrate the Rehnquist Court's approach to stare decisis in other constitutional contexts. It will then

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1 *See, e.g.*, Philip P. Frickey, *A Further Comment on Stare Decisis and the Overruling of National League of Cities*, 2 CONST. COMM. 341, 351 (1985) ("stare decisis is probably often only a minor factor in each Justice's voting calculus."); Earl M. Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467, 467 ("[i]t seems fair to say that if a majority of the . . . Court has considered a case wrongly decided, no constitutional precedent—new or old—has been safe."). But see the sources cited in Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 82 n.46 (1991) (precedent still has significant impact in constitutional adjudication).

2 112 S. Ct. 2791 (1992).

3 *Id.* at 2808.

4 410 U.S. 113 (1973).

analyze the arguments that the *Casey* majority itself used to justify its refusal to overrule *Roe*. The Essay will conclude that, given the jurisprudential and political climate in which *Casey* was decided, precedent should have played no role in the Court's analysis of the substantive issues in the case.

I. PRELUDE: PRECEDENT IN THE REHNQUIST COURT PRIOR TO *CASEY*

Casey was, of course, not the first case in which the Rehnquist Court confronted a constitutional problem that had been addressed by the Court in earlier case law. Issues of stare decisis had previously arisen in a wide range of contexts. While no effort will be made here to comprehensively review the Court's performance in this area,[5] an examination of the role played by precedent in the resolution of two issues—the use of Victim Impact Statements and the extent of state taxing authority—is suggestive of the complex relationship between precedent and the judicial decisionmaking process.

A. Victim Impact Statements in Capital Punishment Cases

Prior to the decision in *Casey*, the shifting treatment of Victim Impact Statements ("VIS") had come to symbolize the Rehnquist Court's approach to the doctrine of stare decisis. The VIS issue first came before the Court in *Booth v. Maryland*.[6] In capital cases, Maryland law required consideration of a VIS, which the state included in its presentence report. In *Booth*, the VIS was based on information gathered from the family of two murder victims. The VIS described the victims' personal characteristics, the severe impact of the crimes on the family, and the family members' opinions and characterizations of the crime and the defendant.

Over four dissents,[7] the *Booth* Court found the introduction of the VIS unconstitutional. Justice Powell's majority opinion concluded that the admission of the VIS created a constitutionally unacceptable risk that the jury might impose the death penalty in an arbitrary and capricious manner. Powell based his conclusion in part on the argument that the VIS introduced factors that might be "wholly unrelated to the blameworthiness of a particular defen-

5 Gerhardt, *supra* note 1, provides such a detailed analysis.

6 482 U.S. 496 (1987).

7 *Id.* at 519-21 (Scalia, J., dissenting); *id.* at 515-19 (White, J., dissenting).

dant"[8] and that the consideration of such evidence "could result in imposing the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill."[9]

Two years later, the Court considered a similar question in *South Carolina v. Gathers*.[10] *Gathers* challenged the imposition of the death sentence on a defendant convicted of murder and first degree criminal sexual conduct. During the sentencing phase of the trial, the prosecutor read extensively from a religious tract that the victim had been carrying and commented on personal qualities he inferred from the victim's possession of the tract and a voter registration card. The defendant argued that the prosecutor's use of such information rendered the imposition of the death sentence unconstitutional under the Eighth Amendment. Again, by a 5-4 vote, the Court adopted the defendant's position.

Not surprisingly, the majority opinion in *Gathers* relied heavily on the reasoning in *Booth*. Indeed, speaking for the Court, Justice Brennan treated *Gathers* as a simple application of the principle of stare decisis:

> The statements placed before the jury in *Booth* included descriptions of the victims' personal characteristics . . . . While in this case it was the prosecutor rather than the victim's survivors who characterized the victim's personal qualities, the statement is indistinguishable in any relevant respect from that in *Booth*.[11]

The four dissenters in *Gathers* clearly recognized that the stare decisis issue raised by *Booth* created significant problems for their position. Speaking only for himself, Justice Scalia dealt with the issue by arguing that overruling *Booth* would not create many of the problems normally associated with abandoning precedent.[12] The remaining three dissenters joined an opinion by Justice O'Connor,[13] which took a different tack. While briefly noting her willingness to overrule *Booth*,[14] O'Connor devoted far greater ef-

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8 *Id.* at 504.
9 *Id.* at 505.
10 490 U.S. 805 (1989).
11 *Id.* at 810-11.
12 *Id.* at 823-25 (Scalia, J., dissenting).
13 *Id.* at 812-23 (O'Connor, J., dissenting).
14 *Id.* at 813-14.

fort to distinguishing that case from *Gathers*. Focusing on the fact that *Booth* did not involve comments by the prosecutor, she contended that it was not necessary to read the case as establishing "a rigid Eighth Amendment rule eliminating virtually all consideration of the victim at the penalty stage."[15] Instead, she contended, *Booth* was susceptible to "a narrower reading . . . which would allow jury consideration of information about the victim and the extent of the harm."[16] O'Connor relied on this approach in arguing that the defendant's constitutional rights had not been violated in *Gathers*.

Both the majority and dissenting opinions in *Gathers* clearly reflect the rhetorical significance of the concept of stare decisis in judicial decisions. Taken alone, however, these opinions do not establish the impact of that concept on the actual results of cases. Indeed, a comparison between Brennan and O'Connor's treatment of *Booth* supports one of the key tenets of critical legal theory—the idea that precedent is very malleable and thus not a real constraint on judicial decisionmaking.[17] Moreover, in *Gathers* almost all of the Justices read *Booth* in a manner consistent with the substantive views that they had expressed in *Booth*—an outcome also more consistent with critical theory than the view that precedent is an important element in the Court's decisionmaking process.

Justice White's action in *Gathers*,[18] by contrast, reflects the substantive importance of precedent to his analysis. White was the only *Booth* dissenter to join the *Gathers* majority. His vote was critical to the *Gathers* result. Subsequent to the decision in *Booth*, Justice Powell, the author of the majority opinion, had been replaced by Justice Kennedy, who joined the *Gathers* dissenters. Thus if White had remained with his erstwhile allies in *Gathers*, the case would have been decided differently.

A concern for stare decisis provides the only plausible explanation for White's vote. In his brief concurring opinion in *Gathers*, White stated that the majority's position would have to be accepted "[u]nless *Booth* is to be overruled."[19] Taken together with White's vote in *Booth*, two points are implicit in this conclusion. First, although O'Connor's reading of *Booth* might have been plau-

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15 *Id.*

16 *Id.* at 814.

17 Giradeau A. Spann, *Deconstructing the Legislative Veto*, 68 MINN. L. REV. 473, 529 (1984).

18 *Gathers*, 490 U.S. at 812 (White, J., concurring).

19 *Id.* (citations omitted).

sible, in White's view the most accurate reading of the case controlled *Gathers*. Second, White was not sufficiently disenchanted with the *Booth* result to overcome his allegiance to the doctrine of stare decisis.

The *Booth/Gathers* doctrine proved short-lived, however. It did not survive the 1991 decision in *Payne v. Tennessee*.[20] *Payne* involved the imposition of the death penalty in a case that arose from a particularly grisly murder of a mother and her two year old daughter. The three year old son of the victim, Nicholas, witnessed the murder and was brutally assaulted, but survived. During the penalty phase of the trial, the prosecutor focused heavily on the effect of the murder on Nicholas. By a 6-3 vote, with the *Gathers* dissenters joined by White and David Souter, who had replaced William Brennan, the Court overruled *Booth* and *Gathers* and refused to vacate the sentence.

Speaking for the majority, Chief Justice Rehnquist noted the general principle that the doctrine of stare decisis is typically accorded less weight in constitutional cases where legislative correction is impossible.[21] Rehnquist also argued that the reliance issues often present in cases involving rights of property or contract had no application to procedural issues.[22] Finally, he focused on the "spirited dissents" in *Booth* and *Gathers* and his view that the rule from those cases had "defied consistent application by the lower courts."[23] In his separate concurrence, Souter also focused heavily on what he viewed as the "unworkability" of the existing rule.[24]

The decision in *Payne* brought an impassioned dissent from Thurgood Marshall.[25] In one of his last opinions, he argued that the only relevant change since *Gathers* had been in the composition of the Court[26] and contended that "[the majority's] impoverished conception of *stare decisis* cannot possibly be reconciled with the values that inform the proper judicial function."[27] He further contended that "this Court can legitimately lay claim to compliance with its directives only if the public understands the Court to be implementing 'principles . . . founded in the law rather than

20 111 S. Ct. 2597 (1991).
21 *Id.* at 2610.
22 *Id.*
23 *Id.* at 2611.
24 *Id.* at 2618-19 (Souter, J., concurring).
25 *Id.* at 2619-25 (Marshall, J., dissenting).
26 *Id.* at 2622.
27 *Id.* at 2623.

in the proclivities of individuals.'"[28] He then stated that "[c]arried to its logical conclusion, the majority's debilitated conception of *stare decisis* would destroy the Court's very capacity to resolve authoritatively the abiding conflicts between those with power and those without."[29]

B. State Taxing Authority and Stare Decisis

Payne became a lightning rod for criticism of the Rehnquist Court's attitude toward precedent generally.[30] It did not, however, signal a complete abandonment of the doctrine of stare decisis—even by the most conservative Justices on the Court. *Quill Corp. v. North Dakota*[31] provides a dramatic illustration of the continuing power of precedent in some circumstances.

Quill involved a constitutional challenge to a state's attempt to require an out-of-state mail-order house that had neither outlets nor sales representatives in the state to collect and pay a use tax on goods purchased for use within the state. In 1967, the Court had held in *National Bellas Hess, Inc. v. Department of Revenue*[32] that the imposition of a tax where the company had not maintained a physical presence in the state was inconsistent with both the due process clause and the dormant commerce clause. Analogizing the taxing problem to personal jurisdiction questions, the *Quill* Court overruled the due process holding of *Bellas Hess*.[33] At the same time, however, the Court reaffirmed its commitment to the existing dormant commerce clause analysis.[34]

Admittedly, *Quill* was not a pure stare decisis case. In Justice Stevens' majority opinion, precedent-based arguments were closely intertwined with a defense of the merits of the *Bellas Hess* rule. Nonetheless, Stevens clearly identified stare decisis as one of the important factors which influenced his analysis.[35] In a concurring opinion, the impact of precedent on Justices Scalia, Kennedy, and Thomas was even clearer. They eschewed any discussion of the merits of the *Bellas Hess* rule. Instead, they contended that the

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28 *Id.* at 2624 (citation omitted).

29 *Id.*

30 *E.g.*, Kathleen M. Sullivan, *Marshall, The Great Dissenter*, N.Y. TIMES, June 29, 1991, at A23.

31 112 S. Ct. 1904 (1992).

32 386 U.S. 753 (1967).

33 *Quill*, 112 S. Ct. at 1909-11.

34 *Id.* at 1911-16.

35 *Id.* at 1916.

reliance interest of the mail-order companies and the possibility of congressional correction of any error mandated respect for the doctrine of stare decisis.[36]

C. *Summary: The Lessons of* Payne *and* Quill

The juxtaposition of the VIS cases and *Quill* reveals the complex interaction between precedent and other factors in Rehnquist Court jurisprudence. First, notwithstanding the theoretical uncertainty of the meaning of prior case law, stare decisis can have an important influence on the judicial process. White's concurrence in *Gathers* is inexplicable in any other terms. Further, this is the only obvious explanation for the Scalia concurrence in *Quill*. Second, the impact of prior decisions varies from issue to issue and from Justice to Justice.[37] Such impact depends on a variety of considerations, some of which are narrowly doctrinal and others of which are more broadly political.

In *Quill*, doctrinal concerns were clearly the most important factors in the Court's ultimate conclusions. While the economic stakes involved made the case of considerable practical significance, the sales tax issue that was at the heart of the case had no clear association with either the liberal or conservative political agenda. Thus, institutional considerations dominated the decisionmaking process, a point reinforced by the differences in the majority's analysis of the due process and dormant commerce clause issues.

The situation in *Gathers* and *Payne* was quite different. The attack on the attitude of more liberal judges toward the rights of criminal defendants generally, and the defense of the death penalty in particular, has been a staple of the contemporary conservative political agenda in the United States. Given this reality, it is not surprising that conservative Justices would be more willing to ignore or downplay the institutional concerns that underlie the doctrine of stare decisis in this context. Conversely, Justices with liberal political views could focus on precedent as a means to bolster their arguments.

All of these factors came into play in *Casey*. The interaction among them, however, produced a somewhat surprising result.

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36 *Id.* at 1923-24 (Scalia, J., concurring in part and concurring in the judgment in part).

37 Gerhardt, *supra* note 1, at 114-17, reaches a similar conclusion.

II. STARE DECISIS IN THE *CASEY* DECISION

A. *The Facts in* Casey

Planned Parenthood of Southeastern Pennsylvania v. Casey[38] arose from a constitutional challenge to a number of the provisions of the Pennsylvania Abortion Control Act of 1982[39] ("the Act"). Among other things, subject to certain exceptions for emergencies, the Act required (1) that all women seeking abortions be provided with certain specific information at least twenty-four hours before the abortion was performed; (2) that all minors seeking abortions obtain the consent of either their parents or a judge before the abortion takes place; and (3) that all married women notify their spouses prior to obtaining abortions. In addition, the Act imposed a number of reporting requirements on facilities that provide abortion services.

Casey created great excitement among both pro-choice and pro-life groups. Three years earlier, in *Webster v. Reproductive Health Services*[40] four Justices, William Rehnquist, Byron White, Antonin Scalia, and Anthony Kennedy had clearly indicated a willingness to directly overrule or dramatically scale back the constitutional protections for abortions provided by *Roe v. Wade*.[41] Further, a fifth Justice, Sandra Day O'Connor, had earlier evinced substantial discontent with *Roe*.[42] Moreover, in the interim, two of *Roe's* strongest supporters, William Brennan and Thurgood Marshall, had been replaced by David Souter and Clarence Thomas, both of whom were appointed by a President with a strong commitment to the pro-life position. Both sides of the debate believed that the stage was set for further erosion of the principles established by *Roe*.

Given this background, the ultimate resolution of *Casey* was somewhat of a surprise. The Court upheld all parts of the Act except for the spousal notification provision. Moreover, it jettisoned the trimester analysis which had formed the basis of post-*Roe* abortion jurisprudence. At the same time, however, a majority of the Justices also joined an opinion signed jointly by Justices

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38 112 S. Ct. 2791 (1992).

39 18 PA. CONS. STAT. §§ 3203-3220 (1990).

40 492 U.S. 490 (1989).

41 *Id.* at 532-37 (opinion of Scalia, J.); *id.* at 517-20 (opinion of Rehnquist, C.J.).

42 Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 452-75 (1983) (O'Connor, J., dissenting).

O'Connor, Kennedy and Souter, which reaffirmed what the opinion described as "*Roe's* essential holding"—that women may "choose to have an abortion before viability and to obtain it without undue interference from the State."[43] In reaching this conclusion, the authors of the opinion relied heavily on the doctrine of stare decisis.

Despite the majority opinion's heavy emphasis on the sanctity of precedent, only two members of the Court, Harry Blackmun and John Paul Stevens, actually voted to retain pre-existing law in its entirety.[44] The authors of the *Casey* opinion concluded that the state could make requirements that did not impose an "undue burden" on the women's right to choose to have an abortion. This is a test quite different from the trimester analysis that had formed the basis of the rule announced in *Roe* itself. Moreover, in upholding large parts of the Act, the Court explicitly overruled contrary holdings in cases such as *Thornburgh v. American College of Obstetricians and Gynecologists*[45] and *Akron v. Akron Center for Reproductive Health, Inc.*[46] Nonetheless, respect for precedent clearly loomed large in the minds of the majority opinion's three authors. Indeed, the opinion implied that, as a matter of first impression, some or all of the authors would have taken a contrary position on the constitutional status of abortion.[47]

B. Casey's *Defense of Precedent Based on Reliance Interests*

Initially, the majority opinion seeks to distinguish *Payne* by arguing that overruling *Roe* would implicate significant reliance interests. Quite sensibly, the opinion does not base this conclusion on the potential impact of the decision on a woman who might have engaged in a specific act of sexual intercourse with the expectation that she could obtain an abortion to terminate any resulting pregnancy. Instead, the Court argues that "for two decades of economic and social developments, 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," and that "while the effect of reliance on *Roe* cannot be exactly mea-

43 *Casey*, 112 S. Ct. at 2804.
44 *Id.* at 2838-43 (opinion of Stevens, J.); *id.* at 2843-55 (opinion of Blackmun, J.).
45 476 U.S. 747 (1986).
46 462 U.S. 416 (1983).
47 *Casey*, 112 S. Ct. at 2817.

sured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed."[48]

Close analysis, however, reveals the weakness of this argument. Admittedly, some people would almost certainly have been adversely affected if *Roe* had been overruled in its entirety. The interests of two groups stand out. First, many people clearly believe as a matter of moral/political philosophy that access to abortion in the United States should be largely unregulated. Second, the lives of some women (and those of some men as well) will undoubtedly be disrupted if pregnant women who desire abortions are unable to obtain them because of stringent state regulations. In making employment decisions, some of these women may have chosen particular career paths with both the hope that their working lives would not be interrupted by childbearing and the knowledge that existing law protected their right to choose abortion in the event that they should become pregnant. Apparently, the Court's opinion relies on this group for the source of its reliance interest.

The major difficulty is that even taken together, *knowledge* of existing law, *reasonable belief* that the law would not change, and *disadvantage* from a change in that law are insufficient to establish reliance. One must also show that some relevant decision was *decisively influenced* by the belief that the specific rule would remain unchanged. In other words, the Court's reliance argument is persuasive if, and only if, one believes that a substantial number of women would not have entered the workforce if they had believed that the constitutional protection for abortion might be removed.

The opinion provides no evidence to support this empirical judgment. Admittedly, the employment choices of some sophisticated women may have been consciously influenced by the general belief that they would have control over the reproductive process; however, the continued widespread availability of contraceptives provides a substantial degree of such control. Given this background factor, the suggestion that many employment decisions were decisively influenced by a belief that abortion per se would remain unregulated in the future is speculative at best. Thus, protection of justified reliance does not provide a firm basis for the Court's argument.

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48 *Id.* at 2809.

III. *CASEY* AND THE RULE OF LAW

Despite its discussion of reliance and attempts to distinguish cases such as *Payne*, much of the Court's argument emphasized themes analogous to those of Marshall's *Payne* dissent. The primary thrust of the defense of precedent in the opinion of Justices O'Connor, Kennedy, and Souter is an appeal to a particular conception of "the rule of law"—the idea that all decisions must be grounded in "neutral principles."[49] Focusing on "the source of [the] Court's authority, the conditions necessary for its preservation, and its relationship to the country's understanding of itself as a constitutional republic,"[50] the opinion makes two related but distinct arguments based on this conception. The first is based upon the need to ensure that the public will continue to accept the Court's decisions as binding. The second is that adherence to the rule of law is good in itself.

A. Stare Decisis and Public Acceptance of Judicial Authority

The idea of "legitimacy"—a much discussed term in the literature—is at the core of the first argument. The opinion begins with a paraphrase of Alexander Hamilton's famous description of the source of judicial power from *The Federalist*,[51] asserting that

> [t]he 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, ... [t]he Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make.[52]

While conceding that an inflexible adherence to precedent was not a necessary precondition for maintenance of the Court's legitimacy, the opinion contends that insufficient respect for the doc-

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49 The seminal discussion of the concept of neutral principles is Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

50 *Casey*, 112 S. Ct. at 2814.

51 THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter, ed. 1961).

52 *Casey*, 112 S. Ct. at 2814.

trine of stare decisis would undermine that legitimacy, and with it, the Court's ability to command public adherence to its edicts.[53]

At its core, this argument is essentially based on two empirical claims—that the public pays close attention to the Court's reasoning, as well as its results, and that massive disruptions in the fabric of precedent would bring the Court into disrepute and lead the public to ignore or disobey judicial authority. In fact, the evidence of the twentieth century on both points supports precisely the opposite conclusion. Such disruptions have taken place on two occasions, and the Court's authority has emerged intact.

The first major disruption occurred in the late 1930s. Prior to that time, the Court had actively intervened to both protect the freedom of contract from undue governmental interference[54] and to limit the scope of congressional power over economic affairs generally.[55] Beginning in 1937 with the decisions in *West Coast Hotel v. Parrish*[56] and *NLRB v. Jones & Laughlin Steel Corp.*,[57] the Justices reversed course and adopted a basically noninterventionist posture, deferring on almost all such issues to the decisions of other branches of government. This shift in approach of necessity required the Court to either explicitly overrule or eviscerate a number of important precedents.

The *Casey* opinion contends that this radical paradigm shift was justified because new empirical evidence had demonstrated the bankruptcy of the premises on which prior law had been based. This argument is not entirely satisfying; nonetheless, the shift to the *Parrish/Jones & Laughlin* model can be reconciled with the *Casey* model. The post-1937 paradigm shift did not require the Justices to invoke their own political predilections in preference to those of previous judges; instead, it generally left ultimate authority in the hands of a third group—governmental officials not serving on the federal courts. Thus the Justices could still claim to be adopting a neutral position on the political issues before the country.

No such claim can be made with respect to the second major disruption in precedent—that initiated by the Warren Court in the

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53 *Id.* at 2814-15.

54 *E.g.*, Adkins v. Children's Hosp., 261 U.S. 525 (1923); Lochner v. New York, 198 U.S. 45 (1905).

55 *E.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936); Hammer v. Dagenhart, 247 U.S. 251 (1918).

56 300 U.S. 379 (1937).

57 301 U.S. 1 (1937).

1960s and, in many cases, extended in the 1970s during the early Burger years. During the Warren and early Burger years, the Court once again assumed an interventionist posture. Warren Court interventionism was, however, quite different from that of the pre-1937 era. The early twentieth century Court had typically deployed the Constitution in defense of principles generally associated with a conservative political philosophy. By contrast, the Warren Court used the Constitution as a weapon *against* positions associated with conservatism. Statutory interpretation followed a similar course, with statutes dealing with such issues as habeas corpus[58] and civil rights[59] given new, expansive readings that advanced the liberal agenda.

As in the period immediately following 1937, the new interventionism of the 1960s and 1970s often required the Court to ignore or downplay the doctrine of stare decisis. On issues such as criminal procedure,[60] voting rights,[61] and gender-based discrimination,[62] the architects of the new interventionism were required to overturn case law that directly conflicted with desired results. In other cases, the Court reached conclusions which were fundamentally at odds with premises that lay at the core of the pre-existing legal structure.[63] So long as five Justices favored a particular result, these factors did not deter the liberal interventionists from reaching their conclusions.

The magnitude of the paradigm shift was reflected in the number of cases that were actually overruled. In the period from 1960 to 1972, the Court explicitly abandoned prior decisions on no less than twenty-nine occasions.[64] To put this number in perspective, Brandeis' famous opinion in *Burnet v. Coronado Oil and*

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58 *E.g.*, Fay v. Noia, 372 U.S. 391 (1963) (procedural default does not bar collateral attack on conviction).

59 *E.g.*, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (Civil Rights Act of 1866 prohibits private racial discrimination).

60 *E.g.*, Gideon v. Wainwright, 372 U.S. 335, 339 (1963), *overruling* Betts v. Brady, 316 U.S. 455 (1942) (right to counsel); Mapp v. Ohio, 367 U.S. 643, 653-55 (1961), *overruling* Wolf v. Colorado, 338 U.S. 25 (1949) (exclusionary rule).

61 *E.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972), *overruling* Pope v. Williams, 193 U.S. 621 (1904) (durational residency requirements); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 669 (1966), *overruling* Breedlove v. Suttles, 302 U.S. 277 (1937) (poll taxes).

62 Craig v. Boren, 429 U.S. 190 (1976), *overruling* Goesaert v. Cleary, 335 U.S. 464 (1948).

63 *E.g.*, Furman v. Georgia, 408 U.S. 238 (1972) (death penalty).

64 Maltz, *supra* note 1, at 494-95.

Gas. Co.[65] listed only twenty-eight instances in which the Court had overruled itself on constitutional issues in the entire period prior to 1932,[66] and used this list to demonstrate that the Court historically had shown less respect for precedent in constitutional cases.

With the exception of a reference to *Brown*, the *Casey* opinion ignores the dramatic changes in the Court's approach to precedent that characterized the Warren era. The impact of these changes was quite unlike that which occurred during the immediate post-1937 era. Warren Court interventionism required currently serving Justices to elevate their judgments over those of both other contemporary government officials *and* jurists who had preceded them on the Court. Thus, it elevated the Supreme Court to new heights as a national policy-maker, abandoning the studied neutrality that had characterized its earlier posture.

The reaction of the public to these two major disruptions belies the assertions of the Court in *Casey* regarding the centrality of stare decisis to the public acceptance of judicial review. If those assertions were correct, then one would expect these rapid, extreme paradigm shifts to severely damage the authority of the Court as an institution. In fact, no such damage is apparent. Despite vigorous opposition to specific decisions and even vituperative attacks on individual Justices, the institutional position of the Court remains basically intact.

The *Casey* opinion, however, argues that an about-face on the abortion issue would be far more damaging to the authority of the Court. Analogizing *Roe* to *Brown v. Board of Education*,[67] the opinion described the abortion decision as a "rare" instance in which the Court "calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in [the Court's] interpretation of the Constitution."[68] In such a case

> only the most convincing justification . . . could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure, and an unjustified repudiation of the principle on which the Court staked its authority in the first instance. So to overrule under fire in the absence

65 285 U.S. 393, 406-11 (Brandeis, J., dissenting).
66 *Id.* at 406-07 n.2, 409 n.4.
67 347 U.S. 483 (1954).
68 *Casey*, 112 S. Ct. at 2815.

> of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question.[69]

Even leaving aside the troubling theoretical implications of the argument, the accuracy of the empirical assumptions on which it rests is far from clear. The Court's analysis rests on the view that the public cares at least as much about the process of legal decisionmaking as the results that the Court reaches, and that even the appearance of a departure from the tenets of neutrality will undermine public confidence in the Court. The experience of the Warren Court, however, conditioned the public to view the Court as a kind of ultimate *substantive* authority on fundamental moral questions. Thus, particularly where divisive moral issues are involved, it seems more likely that the public will focus its attention primarily on substantive implications of the judgment itself, rather than the strength of the reasoning underlying the judgment.

The public response to *Casey* itself provides strong support for this observation. The analysis of the decision by the *Philadelphia Inquirer* was typical. Initially, its treatment of the case focused entirely on its substantive implications for the right to choose abortion, ignoring the institutional concerns that provided the focus for the majority's analysis of stare decisis. The *Inquirer* characterized *Casey* as "a good decision" because it "meshes with what most Americans think."[70] Moreover, the substantial excerpt of the opinion that the newspaper reproduced included very little of the Court's discussion of stare decisis.[71] Only several days later, as an afterthought, did the *Inquirer* praise the Court for its fidelity to "[t]he rule of law."[72]

Other reactions to the decision followed much the same pattern. Most often, public discussion was not primarily focused on institutional questions about the proper role of precedent in judicial decisionmaking, but rather on differing views on the substantive question of abortion rights itself. Pro-choice groups expressed relief that *Roe* had not been entirely overruled, but concern that the Court's support for their views had been eroded. Conversely,

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69 *Id.*

70 *The Abortion Decision*, PHILADELPHIA INQUIRER, June 30, 1992, at A10.

71 *Two Sharply Divergent Opinions Emerge on Roe v. Wade*, PHILADELPHIA INQUIRER, June 30, 1992, at A8.

72 *The Rule of Law*, PHILADELPHIA INQUIRER, July 5, 1992, at E6.

pro-life forces praised the Court for retreating from some of its more sweeping abortion rights decisions, but voiced disappointment over the continuation of substantial constitutional protection for abortion rights.[73] While the *Casey* opinion was at times praised for its fidelity to precedent,[74] this praise came entirely from those who supported substantial protection for abortion rights and had feared that *Roe v. Wade* would be completely overruled by the Rehnquist Court.

The theoretical problems with the Court's opinion are even more troubling. The implications of the argument are breathtaking. The analysis reverses the accepted view that interventionist constitutional decisions should be granted less protection under the doctrine of stare decisis because they cannot be corrected by other branches of government.[75] In essence, the opinion asserts that if one side can take control of the Court on an issue of major national importance, it can not only use the Constitution to bind other branches of government to its position, but also have that position protected from later judicial action by a kind of super-stare decisis.

Applying this approach to *Roe* itself is particularly inappropriate. In some respects, the Supreme Court's role in the abortion controversy is unique in its history. Admittedly, in cases such as *Dred Scott v. Sandford*[76] and *Brown v. Board of Education*,[77] the Court had attempted to invoke the Constitution to resolve fundamental moral issues on which the nation was deeply-divided. However, in those cases debates over those issues were already deeply-embedded in the national political process. Moreover, the ordinary workings of the process had failed to resolve the differences between the opposing positions; instead, the contending factions had

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73 Public reaction is summarized in Dan Balz & Maralee Schwartz, *Issue Passes to Politicians: Decision is Grist for Election-Year Mill*, WASH. POST, June 30, 1992, at A1; Roberto Suro, *The Supreme Court; Outside Court, Rival Rallies and Heavy Politicking*, N.Y. TIMES, June 30, 1992, at A15. *See also The Abortion Ruling*, WASH. POST, June 30, 1992, at A18 (editorial supporting abortion rights in wake of decision).

74 *E.g.*, *This Honorable Court*, N.Y. TIMES, June 30, 1992, at A22; *The Rule of Law*, *supra* note 72, at E6.

75 Justice Brandeis originally relied on this position to argue that the Court should feel relatively free to re-examine *all* constitutional precedents. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407-08 (1932) (Brandeis, J., dissenting). However, Congress does have the power to essentially overrule noninterventionist decisions by statute. Maltz, *supra* note 1, at 468-72; Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 742 (1988).

76 60 U.S. (19 How.) 393 (1856).

77 347 U.S. 483 (1954).

become polarized, with compromise impossible and the overall functioning of the process distorted.

The situation in *Roe* was quite different. Unlike cases such as *Dred Scott* and *Brown*, where the Court sought to decisively enter pre-existing national controversies, *Roe* actually played a large role in generating the intense national divisions over abortion rights. To understand this point, one must begin by examining the state of the abortion debate prior to the Supreme Court's entry into the picture. In the five years prior to *Roe*, state legislatures had gradually been moving toward the relaxation of the requirements for a legal abortion. Five states had adopted the position that abortions could be performed for any reason; two others allowed abortions for the limited purpose of preserving the life or health of the mother.[78] The most popular state reform, however, followed the pattern of the Model Penal Code, which provided that abortions would be lawful in any one of a number of circumstances: if the continuance of the pregnancy posed a substantial risk of gravely impairing the physical or mental health of the mother, or of ultimately producing a child with a grave physical or mental defect; if the pregnancy resulted from rape; or if the pregnancy resulted from incest or other felonious intercourse.[79] This pattern of reform (and in some cases lack of reform) reflected the classic American legislative process, which often generates compromise even on issues which involve deeply felt moral values.

Roe had the effect of polarizing the debate. Fortified by the oracular authority of the Court, pro-choice forces could now claim that their position was not only objectively correct, but that support for legal limits on abortion was inconsistent with the most basic values underlying American society. Conversely, pro-life elements were outraged that *Roe* had placed the imprimatur of the Constitution on a practice that they believed to be fundamentally immoral. The result was that both sides began to strongly resist even the most minor, reasonable concessions to the opposing viewpoint.

Given this background, the flaws in the *Casey* Court's analysis of the stare decisis issue emerge rather clearly. The analysis cites the political firestorm created by the holding in *Roe* as a reason for refusing to re-examine the holding itself. In essence, the opin-

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78 James A. Knight, Note, *A Survey of the Present Statutory and Case Law on Abortion: The Contradictions and the Problems*, 1972 U. ILL. L.F. 177, 179-80 & nn.27 & 29.

79 *Id.* at 180, 181 n.32.

ion places the defenders of abortion rights in a position much like that of the child who murders its parents and then asks for mercy on the grounds that he is an orphan. Such an approach cannot be the basis of sound doctrine.

B. Stability of the Law as an Independent Value

Even conceding that the authoritativeness of judicial decisions could survive an outright reversal of *Roe*, one might still conclude that the respect for precedent evinced by the three-Justice opinion in *Casey* serves significant, independent values. One might argue more generally that the system will function better if pre-existing legal rules, whatever those rules might happen to be, are generally left unaltered by the Court. This concern for the institutional structure of the legal system—reflected in the Court's repeated invocation of the concept of "the rule of law"[80]—transcends the simple need for public acceptance that dominates the *Casey* opinion.

Certain fundamental principles must underlie any evaluation of this argument in *Casey*. First, in deciding a case, a judge is exercising political power—a power inherent in his position. Second, by following a precedent with which he disagrees, the judge is sacrificing an opportunity to advance his own political agenda, choosing instead to enhance the authority of the judge or judges who decided the precedential case.

Why would a judge make such a choice? The only plausible reason is that his personal political interests are outweighed by the institutional benefits that accrue from a system based on precedent. Judges and commentators have cited a variety of such benefits.[81] All of these benefits, however, rest on a single, generally unstated premise: that the doctrine of stare decisis will control the actions not only of a single Justice, but of all (or at least of most) Justices. Put another way, if other Justices do not feel bound by precedent, a decision by a single judge to follow prior case law will generate few if any institutional benefits.

This point should not be overstated. Many of the benefits attributed to the doctrine of stare decisis can still be derived from a system where the Justices are free to make adjustments at the margins of existing case law. They might even make occasional

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80 *Casey*, 112 S. Ct. at 2808.

81 The purported institutional benefits derived from fidelity to precedent are summarized in Gerhardt, *supra* note 1, at 76-87 and Monaghan, *supra* note 75, at 744-48.

abrupt departures from established principles in narrowly-defined areas of the law. However, where most members of the current Court feel free to make sweeping changes in the basic paradigms underlying vast areas of the law, or where it seems likely that Justices appointed in the future will feel free to make such changes, it makes little sense for a Justice to sacrifice his own political interests by committing himself to a jurisprudence based on precedent.

The more conservative members of the Rehnquist Court operate against the background of just such a situation. Not only did the Warren Court itself feel free to disregard whatever precedents it found inconvenient; even after the architects of the Warren Court revolution lost their judicial majority, they made it clear that if they ever regained control of the Court, precedent would not stand in the way of further interventionism in support of their political agenda.

The death penalty cases provided a particularly clear example of this attitude. In 1972, retreating from a long series of decisions which clearly rested on the assumption that imposition of the death penalty was not cruel and unusual punishment,[82] the Court held in *Furman v. Georgia*[83] that under the procedures then in place, use of the death penalty constituted cruel and unusual punishment. The precise import of *Furman* was, however, extraordinarily unclear. The case was decided by a 5-4 vote, with all nine Justices issuing separate opinions[84] and only two—William A. Brennan and Thurgood Marshall—concluding squarely that any imposition of the death penalty was unconstitutional.[85]

Not surprisingly, *Furman* was followed by a flurry of legislative action, as both the state and federal governments strove to craft death penalty statutes which would satisfy a majority of the Justices. In a series of decisions beginning with *Gregg v. Georgia*,[86] the Court used cases arising under these statutes to clarify *Furman*.

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82 *E.g.*, McGautha v. California, 402 U.S. 183 (1971) (juries may be given untrammeled discretion to decide whether death penalty should be invoked); Witherspoon v. Illinois, 391 U.S. 510 (1968) (death qualified juries constitutional).

83 408 U.S. 238 (1972).

84 *Id.* at 465-70 (Rehnquist, J., dissenting); *id.* at 414-64 (Powell, J., dissenting); *id.* at 405-14 (Blackmun, J., dissenting); *id.* at 375-405 (Burger, C.J., dissenting); *id.* at 314-74 (Marshall, J., concurring); *id.* at 310-14 (White, J., concurring); *id.* at 306-10 (Stewart, J., concurring); *id.* at 257-306 (Brennan, J., concurring); *id.* at 240-57 (Douglas, J., concurring).

85 *Id.* at 314-74 (Marshall, J., concurring); *id.* at 253-306 (Brennan, J., concurring).

86 428 U.S. 153 (1976).

Ultimately, shifting majorities of Justices concluded that the death penalty could in fact be constitutionally applied in some cases, but imposed a detailed set of standards to govern its imposition.[87]

During their service on the Court, Brennan and Marshall expressly rejected the authority of those holdings which refused to strike down sentences of death in at least some circumstances. In addition to dissenting in these cases, Brennan and Marshall consistently dissented from denials of certiorari on death penalty issues, repeatedly expressing the view that the imposition of capital punishment was unconstitutional under all circumstances.[88] In essence, they concluded that they should not be bound by the doctrine of stare decisis when it conflicted with their personal views of the relationship of the death penalty to the Constitution.

C. The Liberal Judicial Ratchet

Viewed against this background, Marshall's vigorous defense of the doctrine of stare decisis in *Payne* is perhaps most charitably described as disingenuous. Taken together, his death penalty opinions treat the doctrine of precedent as a kind of liberal interventionist ratchet, preserving the death penalty constraints imposed by interventionist majorities, but permitting modification or even outright rejection of those decisions which allow states to continue to impose capital punishment under some circumstances. A similar attitude is reflected in the liberal approach to issues ranging from abortion funding to federalism.

Indeed, the language of the *Payne* dissent itself reflects this view fairly clearly. Marshall's opinion expresses less concern with the idea of neutrality generally than with protecting "the authority and the legitimacy of th[e] Court as a protector of the powerless," exemplified by "minorities, women, or the indigent".[89] He argues that "*stare decisis* is in many respects even *more* critical in adjudication involving constitutional liberties than in adjudication involving commercial entitlements."[90] The implicit message of the opinion is that stare decisis exists primarily to protect the ability of the Court to advance the Warren Court agenda. Where precedent

87 This process is summarized in WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW: CASES—COMMENTS—QUESTIONS 577-610 (7th ed. 1991).

88 *E.g.*, Grubbs v. Missouri, 482 U.S. 931 (1987) (Brennan and Marshall, JJ., dissenting from denial of certiorari); Wingo v. Butler, 482 U.S. 925 (1987) (Brennan and Marshall, JJ., dissenting from denial of certiorari).

89 *Payne*, 111 S. Ct. at 2625 (Marshall, J., dissenting).

90 *Id.* at 2623.

stands in the way of that agenda, like-minded judges should follow the Warren Court approach and feel free to disregard prior case law.

There is no reason to believe that liberal interventionists would give any greater respect to decisions which leave states free to impose some restrictions on abortion. Indeed, there is considerable evidence to the contrary. In *Harris v. McRae*,[91] only three years after the Court had held in *Maher v. Roe*[92] that states need not fund abortions under the Medicaid program, Justices Brennan, Marshall, and Blackmun clearly indicated that they would continue to vote to force governments to provide such funds for indigent women seeking abortions. One can expect the *Casey* analysis itself to receive similar treatment in the event that pro-choice activists regain control of the Court.

Against this background, the call by Justices O'Connor, Kennedy, and Souter for fidelity to stare decisis presented the conservative members of the Court with a one-sided bargain. They would be generally bound to respect Warren and early Burger Court precedents with which they disagreed—even when the case law establishing those precedents had itself ignored the doctrine of stare decisis. At the same time, however, if more liberal Justices became ascendant once again, conservative precedents would very likely have little constraining force. To expect fidelity to the doctrine of stare decisis in such circumstances is both illogical and unrealistic.

IV. CONCLUSION

The import of the *Casey* opinion for future treatment of the doctrine of stare decisis by the Rehnquist Court is very unclear. In *Payne* and other cases all or some of the adherents to the opinion have signaled their willingness to overrule important precedents in appropriate circumstance. Moreover, the *Casey* analysis itself focuses heavily on the unusually strong political crosscurrents that swirl around the abortion issue. Thus, even with respect to the three Justices who adhered to the opinion, it seems unlikely to have signaled a general re-emergence of precedent as a decisive factor in constitutional adjudication.

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91 448 U.S. 297 (1980).
92 432 U.S. 464 (1977).

Even in the narrow context of the abortion issue, however, the Court's appeal to the concept of precedent is seriously misconceived. One might, of course, argue that the extension of special constitutional protection to abortion rights is justified on the merits.[93] But stare decisis alone cannot justify adherence to *Roe*, even in the somewhat diluted form advocated in the *Casey* opinion.

93 *See, e.g.*, Michael J. Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. REV. 689 (1976) (defending *Roe*); Donald H. Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569 (1979) (same).