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The Pressure of Precedent: A Critique of the Conservative Approaches to Stare Decisis in Abortion Cases

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THE PRESSURE OF PRECEDENT: A CRITIQUE OF THE CONSERVATIVE APPROACHES TO *STARE DECISIS* IN ABORTION CASES

*Michael J. Gerhardt**

INTRODUCTION

The last thing one would have expected the Rehnquist Court to do was to reaffirm *Roe v. Wade*.[1] After all, Presidents Reagan and Bush had each campaigned in part on the ground that they would appoint Justices who would overturn *Roe*,[2] and the Justices they appointed to replace five out of the original seven-member majority in *Roe*[3] wasted little time in trying to dismantle *Roe*. By 1989, in

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1. 410 U.S. 113 (1973).

2. See, e.g., E.J. Dionne, Jr. *The Abortion Foes Hail Gains In Reagan Era*, N.Y. Times, Dec. 24, 1988, § 1, at 8, col. 1 (referring to President-elect Bush's "[p]residential campaign promise to appoint judges who opposed abortions"); Gerald M. Boyd, *Bush, in Iowa, Clarifies Stand on Legal Abortions*, N.Y. Times, Oct. 7, 1987, § B, at 9, col. 1 (quoting then-Vice-President Bush as declaring on the campaign trail, "I oppose abortion, I oppose Federal funding for abortion. [I] want to see the Roe v. Wade decision changed so that it won't legalize abortion."); Stuart Taylor, Jr., *Whoever Is Elected, Potential Is Great For Change in High Court's Course*, N.Y. Times, Oct. 21, 1984, § 1, at 30, col. 1 (citing President Reagan's endorsement of the Republican platform "call[ing] for [the] appointment of judges at all levels who respect 'the sanctity of innocent human life' " and "will[ingness] to continue to appoint Supreme Court and other Federal judges who share [his] commitment to judicial restraint").

3. The original majority in *Roe* consisted of Chief Justice Burger and Justices Douglas, Brennan, Stewart, Marshall, Blackmun and Powell. See *Roe*, 410 U.S. 113 (cited in note 1); id. at 168 (Stewart, J., concurring); see also *Doe v. Bolton*, 410 U.S. 179, 183-84, 207 (1973) (Burger, C.J., concurring) (applicable to *Roe* and *Doe*, in which the Court struck down Georgia's statutes (1) criminalizing most abortions, except those certified by a physician as being necessary to save the life or health of the mother and to prevent the birth of a child conceived through a rape or with severe and irremediable mental or physical defects, and (2) requiring all noncriminal abortions comply with nine conditions, including performance in a licensed hospital); id. at 179 (Douglas, J., concurring) (applicable to *Roe* and *Doe*). The two dissenters in *Roe* were Justices White and Rehnquist. See note 5. President Ford appointed Justice Stevens to replace Justice Douglas. President Reagan appointed Sandra Day O'Connor, Antonin Scalia and Anthony Kennedy to replace Justices Stewart, Rehnquist and Powell,

Webster v. Reproductive Health Services,[4] all four of President Reagan's appointees to the Court—Chief Justice Rehnquist and Justices O'Connor, Scalia and Kennedy—joined Justice White[5] to weaken *Roe* severely by broadening state authority to regulate abortions. Moreover, the nomination and confirmation of Justice Thomas in 1991 seemed to ensure a pivotal vote for *Roe*'s overruling: he had publicly condemned *Roe* prior to his becoming a federal appellate judge;[6] and, once on the Court, he joined many of Justice Scalia's calls for overruling various liberal precedents.[7] Justice Thomas also authored his own invitations to overrule well-established lines of decisions applying the Eighth Amendment to confinement conditions[8] and the Confrontation Clause of the Sixth Amendment to limit the admission of hearsay evidence in criminal trials.[9]

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respectively; and President Reagan appointed then-Justice Rehnquist to replace Chief Justice Burger. President Bush appointed David Souter to replace Justice Brennan and Clarence Thomas to replace Justice Marshall.

4. 492 U.S. 490 (1989).

5. Justice White and Justice Rehnquist dissented in *Roe*. See *Roe*, 410 U.S. at 171 (Rehnquist, J., dissenting); *Doe*, 410 U.S. at 221 (White, J., dissenting) (applicable to *Roe* and *Doe*).

6. See, e.g., Clarence Thomas, *Why Black Conservatives Should Look to Conservative Policies*, Speech to Heritage Foundation, June 18, 1987 (praising Lewis Lehrman's critique of *Roe* and discussion of "the meaning of the right to life [a]s a splendid example of applying natural law"); White House Working Group on the Family, *The Family: Preserving America's Future* 12 (1986) (a report to which then-Chairman Thomas of the EEOC was a signatory criticizing *Roe* and several other decisions as "fatally flawed" rulings that should be "corrected" either by constitutional amendment or through the "appointment of new judges and their confirmation in the Senate"); see also Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 Harv. J.L. & Pub. Pol. 63, 63 n.2 (1989) (after repeating the holdings of *Roe* and *Griswold v. Connecticut*, 381 U.S. 479 (1965), Thomas noted that he "elaborate[d] on my misgivings about activist judicial use of the Ninth Amendment" in Clarence Thomas, *Civil Rights as a Principle Versus Civil Rights as an Interest*, in David Boaz, ed., *Assessing the Reagan Years* 398-99 (Cato Institute, 1988) (describing *Griswold* as a judicial "invention" and defending Robert Bork's position that the Ninth Amendment and the Constitution do not authorize such judicial activism because it would give the Court a "blank check")).

7. See, e.g., Linda Greenhouse, *Judicial Activism: Justice Thomas Hits the Ground Running*, N.Y. Times, Mar. 1, 1992, § 4, at 1, col. 4; Ruth Marcus, *Early Returns Show Justice Thomas As Advertised: Conservative*, Washington Post, Mar. 1, 1992, at A6, col. 1.

8. See *Hudson v. McMillian*, 112 S. Ct. 995, 1004 (1992) (Thomas, J., dissenting) (joined only by Justice Scalia, Justice Thomas argued that the Eighth Amendment's ban on cruel and unusual punishment did not protect prisoners from beatings by guards unless the prisoners suffered serious injuries, and scolded the seven-member majority, including Chief Justice Rehnquist, for adhering to precedents requiring reconsideration because they "cut the Eighth Amendment loose from its historical moorings" by applying it to both punishment and confinement conditions).

9. See *White v. Illinois*, 112 S. Ct. 736, 746 (1992) (Thomas, J., concurring in part and concurring in the judgment) (arguing that the Court should have reexamined the Court's Confrontation Clause precedents because "[t]he standards that the Court has developed to implement its assumption that the Confrontation Clause limits admission of hearsay evidence have no basis in the text of the Sixth Amendment" and that he "wr[o]te separately only to suggest that our Confrontation Clause jurisprudence has evolved in a manner that is perhaps inconsistent with the text and history of the Clause itself").

Yet, in *Planned Parenthood v. Casey*,[10] the unexpected happened: a bare majority of the Rehnquist Court, surprisingly including Justices O'Connor, Kennedy and Souter, expressly reaffirmed *Roe*. *Casey* shattered the image of a monolithic mind-set among the Reagan and Bush Justices favoring the overruling of various liberal precedents, including *Roe*. *Casey* exposed deep-seated divisions within the Rehnquist Court's conservatives both about whether the Constitution protects the right to have an abortion and about the role of precedent in constitutional decisionmaking. The decision revealed an even split among the Reagan and Bush Justices over whether the legitimacy of the Court's decisionmaking depended more on upholding liberal constitutional precedents to promote stability, certainty and predictability in constitutional law or on overruling such decisions to restore certain fundamental constitutional values. *Casey* also severely undermined the conventional wisdom that precedents rarely, if ever, constrain the Justices to make decisions they would prefer not to make.[11]

This essay analyzes the ramifications of *Casey* for understanding contemporary conservative Justices' views on the role of precedent in constitutional decisionmaking. It evaluates not the substantive merits of *Casey* but rather the relative strengths of the different arguments regarding constitutional *stare decisis* put forward in *Casey* by the Reagan and Bush appointees to the Rehnquist Court.

Drawing on a series of decisions culminating in *Casey*, Part I examines the two conservative approaches to constitutional *stare decisis* competing for dominance on the Rehnquist Court. Justices O'Connor, Kennedy and Souter take a classically conservative approach (often the basis for criticizing the Warren Court)[12] that adherence to prior constitutional values breeds stability, certainty and predictability in constitutional law; disrupts constitutional doctrine as little as possible and only when necessary; and permits incremental decisionmaking building on the judgment of prior Justices and the lessons of experience. In contrast, Chief Justice Rehnquist and Justices Scalia and Thomas argue that overruling erroneously reasoned decisions will best preserve the legitimacy of the Court's decisionmaking, revive certain constitutional values and endure due to

10. 112 S. Ct. 2791 (1992).

11. See, e.g., Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 Cornell L. Rev. 401, 402 (1988); 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, 371-75 (1986).

12. See note 13.

the strength of their reasoning and the probability of a solid conservative majority on the Court for the foreseeable future.

Part II critiques the two conflicting conservative approaches to precedent in *Casey*. On the one hand, Justices O'Connor, Kennedy and Souter failed to reconcile their express reaffirmation of *Roe* with the full panoply of reasons for judicial fidelity to precedent *and* with their decisions in *Casey* to overrule *Roe*'s trimester framework and parts of two other abortion rulings. On the other hand, the Chief Justice and Justices Scalia and Thomas underestimated the degree to which their dissents in *Casey* seemingly rewarded political forces bent on reshaping the Court. These three Justices also overestimated the likelihood that a decision to overrule *Roe* would preclude substantial instability in constitutional law: if they had prevailed in *Casey*, their victory almost certainly would have provoked other presidents to appoint Justices who would resurrect *Roe* and overrule as erroneously reasoned the decision overturning *Roe*. Part II concludes that the Rehnquist-Scalia-Thomas approach is less likely to dominate the Court than the O'Connor-Kennedy-Souter alternative. Despite any problems in its application the latter approach tracks the overwhelming trend of Justices to overrule precedents only if there are compelling reasons to do so, and strikes a more reasonable balance between normative views of how the Court should decide abortion-rights cases and the Court's need to promote stability and continuity in constitutional law.

I

For years, conservatives have attacked the Warren Court for abandoning the values normally associated with judicial fidelity to precedent.[13] These values include the preservation of neutrality, consistency, equality and stability in constitutional decisionmaking and the legitimation of judicial review through the Court's acceptance of its own decisions as binding rules of law.[14] Yet, within the past year and a half, the conservatives on the Rehnquist Court have found themselves at odds over the degree to which they should adhere to precedents with whose reasoning or holdings they disagree.

13. See, e.g., Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 130, 348-49 (Free Press, 1990); Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* 344-46 (Harv. U. Press, 1977).; Philip B. Kurland, *Politics, the Constitution, and the Warren Court* 37-38, 90-91 (U. Chi. Press, 1970).

14. See generally Arthur J. Goldberg, *Equal Justice: The Warren Era of the Supreme Court* 75 (Nw. U. Press, 1971); Richard A. Wasserstrom, *The Judicial Decision: Toward a Theory of Legal Jusitification* 56-84 (Stanford U. Press, 1961); Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 Geo. Wash. L. Rev. 68, 70-71 (1991); Geoffrey R. Stone, *Precedent, the Amendment Process, and Evolution in Constitutional Doctrine*, 11 Harv. J.L. & Pub. Pol. 67, 70 (1988).

On at least three occasions, culminating in *Casey*, they have sharply differed over whether respect for the Court and the legitimacy of its decisionmaking depends more on their adhering to decisions of which some of them disapprove for the sake of maintaining stability and continuity in constitutional law *or* on their overruling such decisions and precipitating at least short-term disruption of constitutional law in the hope of firmly setting constitutional adjudication back on the right track.

One such disagreement occurred on the last day of the 1990 Term in *Harmelin v. Michigan*.[15] In *Harmelin*, the five-member majority (consisting of Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy and Souter) upheld Michigan's imposition of a life sentence without parole for drug possession, but split over the necessity and the criteria for overruling *Solem v. Helm*.[16] In *Solem*, the Court had found that a mandatory life sentence without the possibility of parole for the commission of at least three felonies violated the principle that the Eighth Amendment prohibits imposition of a sentence that is disproportionate to the severity of a crime. On behalf of himself and the Chief Justice, Justice Scalia argued that *Solem* should be overruled because it was erroneously reasoned, set forth an unworkable standard, and conflicted with the original understanding of the Eighth Amendment and other case law.[17]

But Justices O'Connor and Souter joined in Justice Kennedy's separate concurrence rejecting Justice Scalia's arguments for overruling *Solem*. Instead, Justice Kennedy maintained that even though *Solem* could have been better reasoned and could have articulated a more workable standard, the Court could remedy those problems by narrowing but not overruling *Solem*.[18]

A similar division among the Reagan and Bush appointees occurred near the end of the 1991 Term in *Lee v. Weisman*.[19] *Lee* raised, *inter alia*, the issue whether the Court should have overruled the besieged tripartite test set forth in *Lemon v. Kurtzman*[20] for

15. 111 S. Ct. 2680 (1991).

16. 463 U.S. 277 (1983).

17. *Harmelin*, 111 S. Ct. at 2686-2701.

18. Id. at 2702-05 (Kennedy, J., concurring in part and concurring in the judgment). In dissent, Justice White (joined by Justices Blackmun and Stevens) found that neither the history nor the case law regarding the Eighth Amendment supported Justice Scalia's conclusion that the Eighth Amendment contained no proportionality principle. As for Justice Kennedy's analysis, Justice White argued that it was "contradicted by the language of *Solem* itself and by our other cases interpreting the Eighth Amendment." *Harmelin*, 111 S. Ct. at 2709, 2714 (White, J., dissenting).

19. 112 S. Ct. 2649 (1992).

20. 403 U.S. 602 (1971).

determining whether governmental actions violate the establishment clause.[21] On behalf of the majority (consisting of himself and Justices Stevens, O'Connor, Souter and Blackmun), Justice Kennedy struck down a middle school graduation prayer on the grounds of constitutional *stare decisis*. Rather than expanding on his earlier criticism of the *Lemon* test,[22] he explained that

> the controlling precedents as they relate to prayer and religious exercise in primary and secondary public schools compel the holding here that the policy of the city of Providence is an unconstitutional one. We can decide the case without reconsidering the general constitutional framework by which public schools' efforts to accommodate religion are measured.[23]

Consequently, he declined to "accept the invitation of the petitioners and amicus the United States to reconsider our decision in *Lemon v. Kurtzman*."[24]

In a separate concurrence joined by Justices' O'Connor and Stevens, Justice Souter emphasized that "[h]ere, as elsewhere, we should stick to [the settled law] absent some compelling reason to discard it."[25] He found that "on balance, history neither contradicts nor warrants reconsideration of the settled principle that the Establishment Clause forbids support for religion in general no less than support for one religion or some."[26] He concluded that:

> [w]hile we may be unable to know for certain what the Framers meant by the Clause, we do know that, around the time of its ratification, a respectable body of opinion supported a considerably broader reading than petitioners urge upon us. This consistency [of the evidence of the framers' and ratifiers' intent] with textual considerations is enough to preclude fundamentally reexamining our settled law.[27]

In a dissent joined by the Chief Justice and Justices White and Thomas, Justice Scalia rejected the majority's reliance on establishment clause precedents. First, he argued that the majority misread those decisions, which he understood as turning on the incompati-

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21. See *Lee*, 112 S. Ct. at 2654 (describing *Lemon*'s three-part test as requiring "a governmental practice [to] (1) reflect a clearly secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) avoid excessive government entanglement with religion").

22. See, e.g., *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part).

23. *Lee*, 112 S. Ct. at 2655.

24. Id.

25. Id. at 2668 (Souter, J., concurring)

26. Id. at 2670.

27. Id. at 2676.

bility between prayer and the classroom setting "in which legal coercion to attend school . . . provides the ultimate backdrop" and therefore raised "special concerns regarding state interference with the liberty of parents to direct the religious upbringing of their children."[28] Second, Justice Scalia urged abandoning the Court's "religion-clause jurisprudence" (particularly *Lemon*) because it "reli[ed] on formulaic abstractions that are not derived from, but positively conflict with, our long-accepted constitutional traditions [including prayer at public school graduations]."[29]

Six days after the Court decided *Lee*, *Casey* gave rise to the most strident disagreements yet over the degree of deference that the Reagan and Bush Justices owed to a prominent liberal precedent, namely, *Roe v. Wade*. Justices O'Connor, Kennedy and Souter, joined by Justices Blackmun and Stevens, made a bare majority to reaffirm the central abortion-rights holding of *Roe*. The three swing Justices made a plurality to adopt a new "undue burden" standard for measuring the validity of state abortion regulations. Chief Justice Rehnquist and Justices White and Scalia, joined by Justice Thomas, would have overruled *Roe* and permitted state regulations and restrictions that are rationally related to a legitimate state interest.

In an extensive discussion of the doctrine of *stare decisis*, the majority initially acknowledged that, in reexamining precedents, the Court balances competing interests: "its judgment is informed by 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."[30] It explained that these concerns led the Court to:

> ask whether the rule has proved to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether the facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application or

28. Id. at 2684, 2685 (Scalia, J., dissenting).

29. Id. at 2685.

30. *Casey*, 112 S. Ct. 2808. Cf. Gerhardt, 60 Geo. Wash. L. Rev. at 116-22 (cited in note 14) (maintaining that the Court's review of its precedents typically consists of each Justice's balancing of his or her views on how the Constitution should be interpreted and the need to submerge those views for the sake of such social and institutional values as continuity and stability in constitutional law).

justification.[31]

The opinion dealt briefly with the workability question, finding that the determinations required under *Roe* "fall within judicial competence,"[32] and turned to the more difficult issue of reliance. "Since the classic case for weighing reliance heavily in favor of following the earlier rule occurs in the commercial context, [citing *Payne v. Tennessee*[33]], where advance planning of great precision is most obviously a necessity, it is no cause for surprise that some would find no reliance worthy of consideration in support of *Roe*."[34] "[C]ognizable reliance," however, goes beyond "specific instances of sexual activity."[35] The majority explained 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. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.[36]

The majority then considered *Roe* in the context of other decisions, finding its doctrine neither anomalous nor obsolete. And it saw supervening developments in medical knowledge and technology as requiring no more than flexibility in the application of *Roe*'s central holding, rather than its overruling.[37]

Recognizing that *Roe* is no ordinary precedent, the majority broadened its discussion to consider arguable parallels with two abandoned lines of cases, those identified with *Lochner v. New York*[38] and *Plessy v. Ferguson*.[39] It viewed the nullification of the constitutional doctrines of liberty of contract and separate but equal as resting on major changes in facts or understanding, beyond mere changes in Court membership or disagreement with the original holdings, that made reconsideration "not only justified but required."[40] With *Roe*, the majority saw not just a threat to the Court's legitimacy from too-frequent vacillation but an analogy to

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31. *Casey*, 112 S. Ct. at 2808-09 (citations omitted).
32. Id. at 2809.
33. 111 S. Ct. 2597 (1991), overruling *South Carolina v. Gathers*, 490 U.S. 805 (1989) and *Booth v. Maryland*, 482 U.S. 496 (1987).
34. *Casey*, 112 S. Ct. at 2809.
35. Id. at 2809.
36. Id.
37. See id. at 2809-11.
38. 198 U.S. 45 (1905).
39. 163 U.S. 537 (1896).
40. *Casey*, 112 S. Ct. at 2812.

Brown v. Board of Education[41] in that in both that case and in *Roe* the Court had called on "the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution."[42] The majority explained that

> [a] decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of *Roe*'s original decision[.][43]

In an unprecedented move, Justice Souter expressed similar sentiments in an oral statement from the bench after Justice O'Connor had announced the Court's ruling in *Casey*. Echoing his earlier concurrence in *Lee*, Justice Souter declared that, "To overrule [*Roe*] would subvert the Court's legitimacy beyond any reasonable question. If the Court were undermined, the country would also be so."[44] He agreed that "*Roe* has not proven unworkable in practice."[45]

The partial dissents of Chief Justice Rehnquist and Justice Scalia, each joined by the other and by Justices White and Thomas, would have found the overruling of *Roe* fully consistent with the respect due to constitutional *stare decisis*. Both opinions strongly emphasized the gravity of what they viewed as the error of *Roe*,[46] and Justice Scalia likened the case to the dishonor of *Dred Scott*[47] rather than to the abandonment of *Lochner* and *Plessy*.[48] Chief Justice Rehnquist's opinion contended that the prevailing opinion abandoned rather than adhered to *stare decisis*. He pointed to its modification of the *Roe* approach, including overrulings of *Roe*'s trimester framework[49] and parts of two other decisions.[50] He disagreed point-by-point with its arguments on precedent and the plu-

41. 347 U.S. 483 (1954).
42. *Casey*, 112 S. Ct. at 2815.
43. Id. at 2816.
44. Jeanne Cummings, *Supreme Court Upholds Most of Pennsylvania Abortion Law*, The Atlanta Journal and Constitution, June 29, 1992, § A, p. 1.
45. Id.
46. See *Casey*, 112 S. Ct. at 2855 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); and id. at 2875-76, 2882, 2884-85 (Scalia, J., concurring in the judgment in part and dissenting in part).
47. 60 U.S. (19 How.) 393 (1857).
48. See *Casey*, 112 S. Ct. at 2883 (Scalia, J., concurring in the judgment in part and dissenting in part).
49. Id. at 112 S. Ct. at 2817-18.
50. Id. at 2816 (overruling in part *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), and *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983)).

rality's reformulated "undue burden" standard.[51] He concluded that

> [s]trong and often misguided criticism of a decision should not render the decision immune from reconsideration, lest a fetish for legitimacy penalize freedom of expression. . . . The sum of the joint opinion's labors in the name of *stare decisis* and "legitimacy" is this: *Roe v. Wade* stands as a sort of judicial Potemkin Village, which may be pointed out to passers by as a monument to the importance of adhering to precedent. But behind the facade, an entirely new method of analysis, without any roots in constitutional law, is imported to decide the constitutionality of state laws regulating abortion. Neither *stare decisis* nor "legitimacy" [is] truly served by such an effort.[52]

Both the Chief Justice and Justice Scalia challenged what the majority characterized as the traditional rule of constitutional *stare decisis*. Relying on his opinion in *Payne*, which had overruled two Rehnquist Court decisions on the Eighth Amendment,[53] the Chief Justice suggested that ultimately the standard is error, and, once that is shown, then overruling is in order.[54] Justice Scalia strongly agreed with the latter point but argued further that precedents must give way when they conflict with the well established practices of popular majorities, which had for years prior to *Roe* had the chance to regulate abortions.[55]

II

Neither the plurality's nor the dissent's approach to constitutional *stare decisis* in *Casey* is without problems. Both fail to consider fully the best arguments for, or implications of, their respective positions.

For example, the *Casey* plurality—Justices O'Connor, Kennedy and Souter, made two basic errors with respect to constitutional *stare decisis*. First, it failed to show why the arguments it gave for reaffirming *Roe*'s central holding did not conflict with its joining the Chief Justice and Justices White, Scalia and Thomas in overruling the trimester framework set forth in *Roe* as well as parts of two other abortion decisions, in each of which the Burger Court had expressly reaffirmed *Roe*.[56] The plurality's only explanation for

51. Id. at 2857-64.
52. Id. at 2866-67.
53. Payne, 111 S. Ct. 2597.
54. *Casey*, 112 S. Ct. at 2860-64 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).
55. Id. at 2873-74 (Scalia, J., concurring in the judgment in part and dissenting in part).
56. See *Thornburgh*, 476 U.S. at 772; *Akron*, 462 U.S. at 419-20.

the latter two overrulings was that

> [t]o the extent [those two cases] find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the abortion procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus, those cases are inconsistent with *Roe*'s acknowledgement of an important interest in potential life, and are overruled.[57]

Yet the plurality did not hesitate to join the Chief Justice and Justices White, Scalia and Thomas in following other precedents to uphold Pennsylvania's requirements for informed consent; a 24-hour waiting period; and, for underage pregnant women, parental consent (with a judicial bypass).[58] The plurality's selective disdain for precedent undermined the credibility of its contentions that it was not articulating a different standard from what *Roe* had set forth for measuring the constitutionality of abortion laws and that case law subsequent to *Roe* had not undermined *Roe*'s workability and coherence.

If the *Casey* plurality had in fact applied Justice Souter's principle that decisions should be overruled only if there are compelling reasons to do so, it probably would not have overruled any aspects of *Roe* and the other two abortion decisions. The mere identification of some potential inconsistencies between cases hardly qualifies as a compelling reason for overruling. Justice Stevens showed in his concurrence, for example, that even under the plurality's "undue burden" standard, none of Pennsylvania's abortion regulations should have passed constitutional muster.[59] Justice Blackmun similarly argued that *Roe* required subjecting abortion regulations to strict scrutiny, under which none of the Pennsylvania abortion laws would have been found to have been constitutional,[60] and that ample precedent had already struck down state laws similar to the Pennsylvania regulations upheld by the majority.[61]

But by joining in overruling parts of three abortion cases, including *Roe*, the plurality clearly signaled that changes in the law would follow from its application of the "undue burden" standard and from its disagreement(s) with how previous Justices had applied *Roe* to various abortion regulations. *Casey* preserved only marginal certainty with regard to the constitutional law of abortion,

57. *Casey*, 112 S. Ct. at 2800.
58. See id. at 2832-33.
59. Id. at 2842-43 (Stevens, J., concurring in part and dissenting in part).
60. Id. at 2845-54 (Blackmun, J., concurring in part and dissenting in part).
61. Id. at 2850-54.

because it raised doubts about which kinds of abortion laws (including those previously adjudicated) could now pass constitutional muster under the "undue burden" standard.

The *Casey* plurality's second mistake was miscalculating the nature of the reliance interests at work in *Casey*. Even though the plurality had acknowledged that women rely on *Roe* in planning their intimate relationships, it did so in light of what it regarded as the basic rule of constitutional *stare decisis* announced in *Payne* (in which the plurality had joined Chief Justice Rehnquist and Justices White and Scalia) that "the classic case for weighing reliance heavily in favor of following the earlier rule occurs in the commercial context . . . where advance planning of great precision is most obviously a necessity."[62]

The *Casey* plurality erred, however, in imagining that the most pertinent reliance interests involved in abortion cases occur prior to conception *and* in assuming that concerns about reliance differ depending upon the kind of constitutional right. In fact, women do not just count on *Roe* prior to engaging in sexual intercourse; they also rely on *Roe* after they have become pregnant (many times against their wishes), at which moment they face the not-theoretical and often-difficult choice of whether to carry the pregnancy to term. It is at this latter point that women have depended on *Roe* in over a million cases a year because the Supreme Court has said that the Constitution protects women's autonomy in making reproductive choices.[63] Nor should the Court easily abdicate its responsibility for having made such reliance possible in the first place. Moreover, the autonomy to make these choices without governmental regulation means at least as much (if not more) to women as the expectation of the Court's continued adherence to its property and contract decisions means to commercial enterprises.

Finally, no Court prior to *Payne* had ever attempted to create a distinction among civil liberties for purposes of *stare decisis*. The idea that because commercial interests can arguably be defined more precisely than personal, noneconomic ones, the former somehow require more respect than the latter for purposes of *stare decisis*, trivializes the degree to which the Court's noncommercial, civil liberties decisions inalterably shape the ways in which many people live and even die. As Justice Thomas ironically argued (and echoed the Court's traditional practice) in his confirmation hearings, the Court's standard for overruling precedents "should be as uniform as

62. Id. at 2809 (citing *Payne*).

63. See David Lauter, *Decision Raises Question About "Undue Burden,"* L.A. Times, June 30, 1992, at A1, col. 6 (referring to approximately 1.5 million abortions annually).

possible"[64] and "the cases in the individual rights area deserve the greatest protection."[65]

The plurality's problems with precedent pale, however, in comparison with the magnitude of the four difficulties affecting Chief Justice Rehnquist's and Justice Scalia's approach to constitutional *stare decisis*. First, they both mischaracterized the Court's traditional position on *stare decisis*. The Chief Justice argued, for example, that the Court has generally followed the practice of overruling precedents it has deemed to have been erroneously reasoned.[66] Citing his opinion in *Payne*, he argued that "[o]ver the past 21 years[,] the Court has overruled in whole or in part 34 of its previous constitutional decisions."[67] But a close reading indicates that perhaps as few as five of the thirty-four opinions cited by the Chief Justice—all five of which he had written himself—involved the Court's overruling of some prior decision(s) on the sole basis of the precedent having been reasoned badly.[68] The remaining twenty-nine opinions, including two authored by then-Justice Rehnquist, appear to ground the overruling on the bases of erroneous reasoning and the unworkability or outmoded nature of the overruled precedent or the existence of subsequent, inconsistent case law. Thus, a more accurate restatement of the conventional practice regarding constitutional *stare decisis* came from Justice Souter, who argued in *Lee*[69] and again (in his oral statement) in *Casey*[70] that overrulings should occur only when error and some other serious development(s) require it.

For his part, Justice Scalia argued in *Payne*, *Lee* and *Casey* that the rule of *stare decisis* requires the Court to respect "longstanding traditions of American society . . . proscrib[ing] [certain conduct.]"[71] But no member of the Court other than Justice Scalia has ever recognized, much less endorsed, any similar rule of constitutional *stare decisis*. Indeed, if one were to follow Justice Scalia's edict that "*stare decisis* ought to be applied even to the doctrine of *stare decisis*,"[72] it is clear that no precedents (other than those

64. Ruth Marcus, *Thomas Refuses to State View on Abortion Issue: Nominee Steadfast amid Senators' Questions*, Washington Post, Sept. 12, 1991, at A1, A4, col. 1.

65. Id. at A4, col. 5.

66. See *Casey*, 112 S. Ct. 2808.

67. Id. at 2863 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

68. See Gerhardt, 60 Geo. Wash. L. Rev. at 112 (cited in note 14).

69. See *Lee*, 112 S. Ct. at 2668.

70. See Cummings, The Atlanta Journal and Constitution (cited in note 44).

71. *Casey*, 112 S. Ct. at 2874 (Scalia, J., concurring in the judgment in part and dissenting in part).

72. Id. at 2881.

which he wrote) support Justice Scalia's approach to precedent.

Moreover, Justice Scalia conceded that enduring practices of majorities do not deserve deference when they conflict with the clear textual mandates of the Constitution, as he suggested was the case in *Loving v. Virginia*,[73] in which the Court had struck down the longstanding practice of many states to outlaw interracial marriages.[74] Yet, if the longevity or political popularity of certain practices do not insulate them from being struck down when they conflict with the Constitution, then the question of their constitutionality does not turn on *stare decisis* but rather the clarity of the constitutional text (and other legitimate sources of constitutional decision).

Second, the Chief Justice's and Justice Scalia's preference for overruling erroneously reasoned decisions is susceptible to attack for being even more political in its origins and applications than the majority's decision to reaffirm *Roe*. Justice Scalia tried to sidestep the majority's charge that his vote to overrule *Roe* could be viewed as being at least in part attributable to political pressure on the Court:

> [W]e have been subjected to what the Court calls 'political pressure' by *both* sides of this issue. Maybe today's decision *not* to overrule *Roe* will be seen as buckling to pressure from *that* direction. Instead of engaging in the hopeless task of predicting public perception—a job not for lawyers but for political campaign managers—the Justices should do what is *legally* right by asking two questions: (1) Was *Roe* correctly decided? (2) Has *Roe* succeeded in producing a settled body of law? If the answer to both questions is no, *Roe* should undoubtedly be overruled. "[75]

Yet Justice Scalia's response obscured the political implications of the *Casey* dissents. He never commented on the striking coincidence that three of the four Justices urging the overruling of *Roe* had been appointed by presidents who had expressly pledged in their campaigns to appoint Justices who would do precisely that. Justice Scalia also neglected to acknowledge that any weakening of *Roe* strictly coincided with the arrivals on the Court of Presidents' Reagan's and Bush's appointees. For example, each of the three cases cited by the Chief Justice as showing that conflicts over *Roe* had prevented majorities from forming in recent abortion cases did so only as a direct result of the participation of these new Justices.[76]

73. 388 U.S. 1 (1967).
74. *Casey*, 112 S. Ct. at 2874 n.1.
75. Id. at 2884 (citations omitted).
76. See id. at 2858 (Rehnquist, C.J., concurring in the judgment in part and dissenting

Nor did Justice Thomas's vote in his first abortion case to overrule *Roe* surprise anyone who had read his pre-judicial writings and speeches.[77]

By being willing to go some distance from the expectations of the presidents who appointed them, Justices O'Connor, Kennedy and Souter reached more of a semblance of neutrality than the Chief Justice and Justices Scalia and Thomas achieved. Unlike Justice Scalia, they heeded (at least partially) Justice Stewart's warning that

> [a] basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve.[78]

While a President unquestionably has the power to shift the direction of constitutional law through his judicial appointments, overrulings that are attributable solely to—and occur immediately after—changes in the Court's composition leave the unmistakable impression of politics rather than legal judgment guiding the Court.

In his partial concurrence, Justice Stevens underscored the fact that it was only the Court's newer members who had made *Roe*'s overruling even a possibility: "[i]n the last nineteen years, fifteen Justices have confronted the basic issue presented in *Roe*. Of those, eleven have voted as the majority does today . . . [Only] four—all of whom happen to be on the Court today—have reached the opposite conclusion."[79]

Third, the Chief Justice and Justice Scalia's approach to constitutional *stare decisis* injects too much instability into constitutional law. Even if the dissent had prevailed in *Casey*, it is likely that their victory would have been short-lived. The appointment of Justices bent on overturning such precedents as *Roe* produces further instability in constitutional law by encouraging the future appointments of Justices who would try to undo decisions restricting abortion rights and who would probably not have any more respect for con-

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in part) (citing *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990); *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989)).

77. See generally Michael J. Gerhardt, *Divided Justice: A Commentary on the Nomination and Confirmation of Justice Thomas*, 60 Geo. Wash. L. Rev. 969, 981, 983, 986-87 (1992).

78. *Mitchell v. W.T. Grant*, 416 U.S. 600, 636 (1974) (Stewart, J., dissenting), cited at *Casey*, 112 S. Ct. at 2814.

79. *Casey*, 112 S. Ct. at 2838 n.1 (Stevens, J., concurring in part and dissenting in part).

stitutional *stare decisis* than the *Casey* dissenters. Such instability ultimately fosters an image of constitutional law as being nothing more than politics being carried on in a different forum.

Indeed, the plurality saw the dangerous potential in the instability brought about by the Chief Justice's and Justice Scalia's attitude about constitutional *stare decisis*:

> There is, first, a point beyond which frequent overruling would overtax the country's belief in the Court's good faith. . . . [T]here is a limit to the amount of error that can plausibly be imputed to prior courts. If that limit should be exceeded, disturbances of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term. The legitimacy of the Court would fade with the frequency of its vacillation. . . . [Second, when the Court tries to resolve a particularly controversial constitutional conflict,] only the most convincing justification under accepted standards of precedent 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 of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question."[80]

Fourth, the Chief Justice's and Justice Scalia's approach to constitutional *stare decisis* casts serious doubt on the legitimacy of judicial review itself.[81] Normally, the Court expects other branches to comply with its exercises of judicial review (even to strike down certain laws) as binding rules of law. The *Casey* dissenters' urge to overrule *Roe*—or any precedent with a heated and repeated dissent with which they agree—because it was wrongly decided shows that *they* lack confidence in and prefer not to follow the Court's previously articulated rules of law on abortion (and many other subjects). The dissent's reasoning invites the states to ignore existing rules of law in order to pass legislation to test the resiliency of any decision with which the dissent disagrees, including *Roe*.

In his final dissent, Justice Marshall in *Payne* denounced such invitations as fundamentally at odds with the rule of law. He chastised the majority for "invit[ing]" the states "to renew the very policies deemed unconstitutional in the hope that this Court may now

80. Id. at 2815.

81. In this regard, I refer to a strong version of judicial review under which the Court expects the other branches to follow its lead, see, e.g., *Cooper v. Aaron*, 358 U.S. 1 (1958), rather than a weaker form under which the Court might wait for the other branches to ask it to resolve their disputes.

reverse course, even if it has only recently reaffirmed the constitutional liberty in question."[82] As long as the states perceive that at least three Justices are determined to overrule *Roe* in accordance with the political will of the presidents who appointed them, it is likely that political forces will continue to vie for control of the power to appoint Supreme Court Justices.

Apart from the problems plaguing the Chief Justice's and Justice Scalia's statements on constitutional *stare decisis*, two other difficulties undermine Justice Scalia's position. First, Justice Scalia showed disdain for the very majoritarian process he has so often praised. In commenting on the degree to which the *Casey* majority's personal values rather than legal judgment dictated the outcome in the case, he suggested that one harmful byproduct was that

> confirmation hearings for new Justices *should* deteriorate into question-and-answer sessions in which Senators go through a list of their constituents' most favored and disfavored alleged constitutional rights, and seek the nominee's commitment to support or oppose them. Value judgments, after all, should be voted on, not dictated; and if our Constitution has somehow accidentally committed them to the Supreme Court, at least we can have a sort of plebiscite each time a new nominee to that body is put forward."[83]

Justice Scalia's concern was clearly with the efforts of senators trying to protect certain interests through judicial appointments rather than the legislative process. Nevertheless, he overlooked the well-established practice of the Senate to base confirmation decisions in part on the nominee's views regarding precedents and previously unrecognized rights.[84] Senatorial advice and consent remains a critical political (or majoritarian) check on the process of selecting Supreme Court Justices. By vesting confirmation power in an electorally accountable body, the Constitution makes it legitimate for the American people to share their concerns about the Court's direction with their senators. Majoritarianism is also at work in presidential elections, where the candidates—even in the most recent contest between President Bush and then-Governor Clinton[85]—often have promised certain kinds of Supreme Court appointments. While judicial nominees could refuse to answer ques-

82. *Payne*, 111 S. Ct. at 2619, 2621 (Marshall, J., dissenting).

83. *Casey*, 112 S. Ct. at 2885 (cited in note 10) (Scalia, J., concurring in the judgment in part and dissenting in part).

84. See Gerhardt, 60 Geo. Wash. L. Rev. at 975 (cited in note 77); see also Michael J. Gerhardt, *Interpreting Bork* (Book Review), 75 Cornell L. Rev. 1358, 1387 (1990).

85. See, e.g., Ruth Marcus, *At Issue: Abortion; On Support for Choice and Limits, Bush-Clinton Contrasts Are Sharp*, Washington Post, Aug. 16, 1992, at A21, col. 1.

tions during presidential interviews or confirmation hearings about which precedents they would like to perpetuate (as Justice Scalia refused to do to the Senate's lasting consternation), the people's preferences on which rights the Court should continue to protect is a plainly relevant criterion for appointment to the Court. For example, if most Americans agree with the Supreme Court that there is a fundamental right to choose to have an abortion but political forces are working within the system to change the Court and to take that freedom away, then the Constitution permits pro-choice Americans to voice their concerns in the elections of presidents and senators and in the confirmation process.

Second, Justice Scalia's argument that *Roe* should be overruled because it is as morally repugnant as *Dred Scott* loses force in his hands because he overuses it. Unquestionably, many people believe in good faith that the strongest argument for overruling *Roe* is that it is just like *Dred Scott* and *Plessy* in that it is so badly reasoned and has produced such morally reprehensible consequences that it requires overruling as soon as possible. Yet, according to Justice Scalia, the Court should overrule as erroneously reasoned and morally repugnant numerous precedents involving such varied subject matters as the religion clauses, separation of powers, substantive due process, proportionality of punishment, obscenity, criminal jury selection, negative commerce clause, takings and affirmative action.[86] If as many decisions are as morally defective (or governed by the personal values of other Justices) as Justice Scalia believes, then it is a wonder the Court still retains any authority at all.

The problem may be less with most constitutional doctrine being morally repugnant and wrongly reasoned—the two seem to go hand-in-hand in Justice Scalia's mind—than with Justice Scalia's having a constitutional vision that is seriously at odds with the moral tone of most twentieth century constitutional doctrine. In the final analysis, the pressures of being a Justice on a collegial court require someone with Justice Scalia's beliefs either to defend more openly (or persuasively) the serious social upheaval his deviation from standard judicial practice would entail or to be more willing to follow the lead of most Justices to balance his normative views on how the Constitution should be interpreted and the need to submerge those views for the sake of such institutional or social values as stability and continuity in constitutional decisionmaking.

86. See Gerhardt, 60 Geo. Wash. L. Rev. at 122-23 nn.249-59 and accompanying text (cited in note 14).

CONCLUSION

The debate over *Roe*'s future will hardly end with *Casey*. *Roe*'s fate depends on the composition of the Court[87] and on which approach to constitutional *stare decisis* continues to dominate the Supreme Court.

On the one hand, the O'Connor-Kennedy-Souter position holds that constitutional precedents should only be overruled if there are compelling reasons to do so and if no other less disruptive alternative is available. This approach has the advantage of ensuring a significant degree of stability and continuity in constitutional law and promoting decisionmaking that builds incrementally on the experiences of prior Justices. This approach is likely to prevail in constitutional adjudication because it tracks the popular practice of Supreme Court Justices to look for something more serious than mere error as the basis for overruling precedents and exhibits a reasonable willingness to balance the competing interests at play whenever a landmark Supreme Court decision is being reconsidered.

On the other hand, the need to overrule precedents deemed erroneous, as urged by the Chief Justice and Justices Scalia and Thomas, risks destroying the values associated with fidelity to precedent. Abandoning *Roe* (or any precedent for no better reason than that a majority can show that it could have been better reasoned) violates traditional notions of neutrality, equality, consistency, stability, and efficiency in constitutional decisionmaking. In addition, the Rehnquist-Scalia-Thomas approach raises serious questions about the appropriate standards for overturning well-entrenched decisions *and* about the legitimacy of judicial review as producing rules of law that can and should bind each branch of government, including the Court.

Perhaps most importantly, a majority of the Court should continue to reject the Chief Justice's and Justice Scalia's approach to constitutional *stare decisis* because it risks irreparable damage to the Court's prestige and to constitutional law. Their approach has the potential to increase politicization of the Court and instability in constitutional law. For example, despite Justice Scalia's hopes to the contrary,[88] the Court's overruling of *Roe* would not end the

87. Cf. *Casey*, 112 S. Ct. at 2854-55 (Blackmun, J., concurring in part and dissenting in part) ("I am 83 years old. 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. That, I regret, may be exactly where the choice between the two worlds will be made.").

88. In *Webster*, Justice Scalia explained his "compelling reasons" for overruling *Roe*: "[We] can now look forward to at least another Term with carts full of mail from the public, and streets full of demonstrators, urging us [to] follow the popular will . . . Of the four courses we might have chosen today—to reaffirm *Roe*, to overrule it explicitly, to overrule it

marches around the Court, because such a decision would positively reinforce the uses of protest and political muscle to influence the selection of Justices and the Court's position on abortion.

In addition, returning most, if not all, of the serious questions about abortion to the state and federal political processes would not end the controversy over the Court's role in protecting abortion rights. Until a majority of the Court holds a firm position supporting *Roe*, the political conflict over *Roe* will persist rather than end. Abandoning *Roe* at this juncture would make the Court's rulings on abortion appear to be guided more by certain political choices rather than responsible legal decisionmaking on the part of a majority of Justices. For as long as some Reagan and Bush appointees to the Court seek the overruling of *Roe* in striking conformity with the wishes of the presidents who appointed them, *Roe*'s defenders and abortion-rights advocates have little choice but to wonder that if politics could undo *Roe*, perhaps politics can restore it.

sub silentio, or to avoid the question—the last is the least responsible." *Webster*, 492 U.S. at 535 (Scalia, J., concurring in part and concurring in the judgment).