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THE REHNQUIST COURT: WHAT IS IN STORE FOR CONSTITUTIONAL LAW PRECEDENT?

Carolyn D. Richmond

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I. INTRODUCTION

History will remember the Rehnquist Court for its unprecedented treatment of precedent. Although an exponent of consistency, the Court, on a search and destroy mission, had created rather than interpreted precedent. However, its 5-4 decision in *Planned Parenthood of South Eastern Pennsylvania v. Casey*,[1] reaffirming the central holding of *Roe v. Wade*,[2] taught Ronald Reagan and George Bush that five appointments to the Court did not assure them a conservative majority. And, on January 22, 1993, newly inaugurated President William Clinton put the Justices on notice that their decisions might not survive their tenure on the high court.[3]

The *Casey* opinion actually was grounded in an analysis of precedent and emphasized the importance of stare decisis in constitutional law decision making.[4] Remarkably, three Reagan-Bush apointees, Justices O'Connor, Kennedy and Souter, wrote the plurality opinion.[5] This new alliance appeared to take heed of Justice Thurgood Marshall's dissent in *Payne v. Tennessee*,[6] which criticized the Rehnquist majority's

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1. 112 S. Ct. 2791 (1992).

2. 410 U.S. 113 (1973) (holding that abortion was among a limited category of "fundamental" rights entitled to the highest degree of constitutional protection).

3. On January 22, 1993, President Clinton signed an Executive Order lifting the gag order on federally funded abortion clinics. *See* Steven Greenhouse, *Abortion Policy: Protest and Praise Over Clinton's Orders*, N.Y. TIMES, Jan. 24, 1993, at 21. The Rehnquist Court had previously sustained the gag rule in Rust v. Sullivan, 111 S.Ct. 1759 (1991). In addition, when the Court reconvened on the first Monday of October, 1993, Justice Byron White (a dissenter in both *Roe* and *Casey*) was replaced by Justice Ruth Bader Ginsburg. *See* Thomas L. Friedman, *Clinton's Sailing Isn't Smooth, But It's Sailing*, N.Y. TIMES, June 20, 1993, § 4, at 1. Prior to her appointment to the Court, Justice Ginsburg had been an outspoken supporter of both the right to privacy and the freedom of choice. *See generally* Neil A. Lewis, *Balanced Jurist at Home in the Middle*, N.Y. TIMES, June 27, 1993, at 20.

4. *See* discussion *infra* Part III.B.1, 2, and 3.

5. *Casey*, 112 S. Ct. at 2802. *Casey* was the first joint opinion issued since the Court reinstated the death penalty in 1976. *See* Ruth Marcus, *5-4 Court Declines to Overrule Roe; But Limits Permitted on Abortion*, WASH. POST, June 30, 1992, at A1.

6. 501 U.S. 808 (1991) (upholding the admission, during capital sentencing, of evidence relating to the victim's personal characteristics and the emotional impact of the crime on the victim or his family and friends). Chief Justice Rehnquist's majority opinion reversed two recent cases interpreting the Eighth Amendment to prohibit the admission of victim impact evidence in capital murder sentencing proceedings. *Id.*; *see*

willingness to overrule recent constitutional precedents without "the type of extraordinary showing that this Court has historically demanded."[7] In *Payne*, Justice Marshall sharply disputed the majority's notion that stare decisis exerted less force in constitutional decisions than in those involving economic entitlements.[8] He concluded that "[the majority's] campaign to resurrect yesterday's 'spirited dissents' will squander the authority and the legitimacy of this Court. . . ."[9] In *Casey*, the plurality noted that there was "a point beyond which frequent overruling would overtax the country's belief in the Court's good faith."[10] They recognized that, if that point were reached, "the legitimacy of the Court would fade with the frequency of its vacillation."[11] Although they did not mention Justice Marshall's scathing *Payne* dissent, clearly, the plurality had heard and incorporated his message.

This note discusses the role of precedent in constitutional law.[12] The discussion focuses on two recent Supreme Court opinions to determine whether the individual Justices utilize a mechanical, objective approach to stare decisis,[13] or whether they use a more subjective one.[14] Specifically, this note contrasts Chief Justice Rehnquist's *Payne* majority opinion with both Justice Marshall's *Payne* dissent, and the plurality opinion in *Casey*.[15] Finally, this note concludes that there is little adherence to precedent and virtually no predictability to be found on the Rehnquist Court. The standards have become so distorted that stare decisis may no longer be relied upon as a consistent indicator of the direction of constitutional law jurisprudence in the Supreme Court.

Booth v. Maryland, 482 U.S. 496 (1987), and South Carolina v. Gathers, 490 U.S. 805 (1989).

7. *Payne*, 501 U.S. at 848 (Marshall, J., dissenting).

8. *See id.* at 851-54 (Marshall, J., dissenting). Justice Marshall adopted a broader view of the Chief Justice's distinction between "cases involving contract and property rights" and "evidentiary and procedural" precedents. *Id.*

9. *Id.* at 856 (Marshall, J., dissenting).

10. *Casey*, 112 S. Ct. at 2815.

11. *Id.*

12. *See* discussion *infra* parts II.A. and B.

13. Throughout this note the terms "precedent" and "stare decisis" are used interchangeably.

14. *See* discussion *infra* Part III.A.1, 2, 3, and B.1, 2, 3.

15. *Id.*

II. STARE DECISIS AND CONSTITUTIONAL LAW

A. *The Historical Foundation of Precedent in Constitutional Law*

Stare decisis, or adherence to case precedent, is deeply rooted in American jurisprudence.[16] Justice William O. Douglas once wrote that it "serves to take the capricious element out of law and to give stability to a society. . . ." and that "[i]t is a strong tie which the future has to the past."[17] Running throughout American legal history is the concept that judicial decisions serve as precedent for future cases by providing both stability and predictability to the system. As Judge Frank H. Easterbrook has said, "precedent decentralizes decisionmaking and allows each judge to build on the wisdom of others."[18] And, in a 1989 decision, Justice Kennedy wrote:

> The [Supreme] Court has said often and with great emphasis that "the doctrine of stare decisis is of fundamental importance to the rule of law." . . . [I]t is indisputable that stare decisis is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon "an arbitrary discretion."[19]

Justices Douglas and Scalia and Judge Robert Bork have all espoused an originalist approach towards constitutional interpretation.[20] Justice Douglas maintained that a judge looking at a constitutional decision remembers "above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it."[21]

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16. *See* Christopher E. Smith, *The Supreme Court in Transition: Assessing the Legitimacy of the Leading Legal Institution*, 79 KY. L.J. 317, 335 (1990-91).

17. William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949).

18. Judge Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 423 (1988).

19. Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989) (quoting Welch v. Texas Dep't of Highways and Pub. Transp., 483 U.S. 468, 494 (1987); and THE FEDERALIST No. 78 at 490 (Alexander Hamilton) (H. Lodge ed., 1888)).

20. ROBERT H. BORK, THE TEMPTING OF AMERICA 159 (1990) (arguing that those who adhere to a philosophy of original intent are more likely to respect precedent than those who do not).

21. Douglas, *supra* note 17, at 736; *see also* South Carolina v. Gathers, 490 U.S. 808, 825 (1989) (Scalia, J., dissenting) (quoting Douglas, *supra* note 17, at 736); Ronald M. Dworkin, *The Bork Nomination*, 9 CARDOZO L. REV. 101 (1987).

Other critics have argued that in constitutional cases stare decisis functions unpredictably, if not arbitrarily.[22] Many agree with Professor Henry P. Monaghan[23] that it strikes "with all the predictability of a lightning bolt."[24] This view was most recently reinforced in *Payne*,[25] which explicitly overruled both *Booth v. Maryland*[26] and *South Carolina v. Gathers*,[27] precedents barely three years old.[28] More than any other court, the Supreme Court is less predictable precisely because it is bound only by its own decisions and the actual text of the Constitution.[29] In his often cited *Burnet v. Coronado Oil & Gas* dissent,[30] Justice Brandeis argued that the Court should treat past decisions with less deference in constitutional cases than in ordinary litigation.[31] He noted that in most cases "it is more important that the applicable rule of law be settled than for it to be settled right."[32] Justice Brandeis argued that even when a serious mistake occurs in a non-constitutional decision, the failure of the judiciary to overrule the decision will not necessarily leave the mistake permanently ensconced in the law;[33] the legislature may always statutorily correct the error.[34] However, Justice Brandeis argued,

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22. *See* Note, *Constitutional Stare Decisis*, 103 HARV. L. REV. 1344 (1990).

23. Professor Monaghan is the Harlan Fiske Stone Professor of Constitutional Law, Columbia University.

24. Note, *supra* note 22, at 1345 (quoting Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 390 (1981)).

25. 501 U.S. 808 (1991).

26. 482 U.S. 496 (1987).

27. 490 U.S. 805 (1989).

28. Another example of the Court's unpredictability appears in Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (revisiting fundamental questions of federalism for the third time in a period of only 17 years, and overruling National League of Cities v. Usery, 426 U.S. 833 (1976) (overruling Maryland v. Wirtz, 392 U.S. 183 (1968))). *See id.* at 557. According to Professor Monaghan, *Garcia* is the most dramatic illustration of the view that the Supreme Court is largely unconstrained by its own precedents. *See* Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 742 (1988).

29. *See* Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 74 (1991).

30. 285 U.S. 393, 405-13 (1932) (Brandeis, J., dissenting).

31. *Id.* at 412 (Brandeis, J., dissenting). *See also* Earl M. Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467, 468.

32. *Burnet*, 285 U.S. at 406 (Brandeis, J., dissenting).

33. *Id.* (Brandeis, J., dissenting).

34. *Id.* (Brandeis, J., dissenting).

legislative correction in constitutional cases is virtually impossible.[35] Thus, when faced with an error, the Court must defer "to the lessons of experience and the force of better reasoning" and overrule the erroneous precedent.[36] Although rarely successful, the amendment process remains the only legislative option available to overrule a constitutional decision.[37] The Court has overruled itself more than 260 times since 1810.[38]

The lesson learned from Justice Brandeis's dissent is that rigid adherence to stare decisis may be inappropriate because the resolution of every issue presented to the Court will lie permanently at the mercy of the first Court that faced the issue. As noted by Professor Earl Maltz,[39] the danger of this is particularly great when the Court has moved too far in an activist direction.[40] In this situation, it is highly unlikely that legislative correction of the error is possible.[41] A rigid adherence to precedent would mean that this country might still be living with the holdings of *Plessy v. Ferguson*[42] or *Lochner v. New York*.[43] As a result, Justice Brandeis felt that the doctrine must be especially flexible because, realistically, the Court is the only institution capable of correcting its own errors.[44]

The importance of stare decisis in the lower federal courts is significantly different than it is in the Supreme Court. As Chief Justice John Marshall wrote in *Marbury v. Madison*,[45] it is the province of the Court to "say what the law is."[46] Justices on the Supreme Court are at greater liberty to stray from past precedent because they are the final

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35. *Id.* (Brandeis, J., dissenting).

36. *Id.* (Brandeis, J., dissenting).

37. James C. Renquist, *The Power Shall be Vested in a Precedent: Stare Decisis, The Constitution and the Supreme Court*, 66 B.U. L. REV. 345, 351 (1986) (noting only four instances where cases were overruled by constitutional amendments).

38. *See* Linda Greenhouse, *The Nation: A Longtime Precedent for Disregarding Precedent*, N.Y. TIMES, July 21, 1991, § 4, at 4.

39. Professor Maltz is an assistant Professor of Law, University of Arkansas at Little Rock.

40. *See* Maltz, *supra* note 31, at 493.

41. *Id.*

42. 163 U.S. 537 (1896).

43. 198 U.S. 45 (1905).

44. *See* Note, *supra* note 22, at 1348 (citing *Burnet*, 285 U.S. at 407 (Brandeis, J., dissenting)).

45. 5 U.S. (1 Cranch) 137 (1803).

46. *Id.* at 177.

interpreters of what the Constitution says.[47] However, judges sitting in the federal and state courts throughout the country are bound more strictly by Supreme Court precedent than they are by original understandings of the Constitution.[48]

B. *The Value of Precedent*

Precedent often promotes public confidence in the law, and in turn legitimizes the Court in the public eye.[49] Some scholars defend judicial adherence to precedent by pointing to the values in decisionmaking it promotes: consistency, coherence, fairness, equality, predictability and efficiency.[50] Professor Monaghan has noted that those values are usually obtained without any formal doctrine of stare decisis.[51] As former Assistant Attorney General Charles J. Cooper[52] has remarked, stare decisis, like so many other "principles," is "a doctrine of convenience to both conservatives and liberals."[53] "Its friends . . . are determined by the needs of the moment."[54] Often, when the Supreme Court finds a particular holding unworkable, rather than explicitly overrule it, the Court will find the means that its predecessors chose to be inadequate.[55] The contemporary Court will then apply a more effective means to accomplish the requisite ends.[56]

At the height of Warren Court "activism," conservatives routinely criticized the Justices' disregard for precedent.[57] In 1970, they suggested that the Court's overruling of precedent "threatened the legitimacy of its

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47. *See* discussion *infra* part III.A.1. *But see* Graves v. O'Keefe, 306 U.S. 466, 491 (1939) ("The ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it.").

48. *See* Gerhardt, *supra* note 29, at 97.

49. *See* Monaghan, *supra* note 28, at 748.

50. *Id.* (quoting RICHARD WASSERSTROM, THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION 60-81 (1961)).

51. *See id.*

52. Mr. Cooper was an Assistant Attorney General in the Office of Legal Counsel, United States Department of Justice, during the Reagan administration.

53. Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 402 (1988) (footnote omitted); *see also* Monaghan, *supra* note 28, at 743.

54. Cooper, *supra* note 53, at 402.

55. *See* Note, *supra* note 22, at 1347.

56. *See id.*

57. *See* Gerhardt, *supra* note 29, at 72; *see also* BORK, *supra* note 20, at 348-49.

decisionmaking."[58] Ironically, the very same conservatives have faced a similar attack when the Rehnquist Court overruled Warren Court precedents.[59] Stare decisis is, as Professor Frederick Schauer[60] has stated, conditional; precedent will be binding unless there is a showing of a substantial countervailing consideration.[61]

Thirty years before President Reagan made his first appointment to the Court, Justice Douglas, then only a decade into his thirty-six year tenure on the Court,[62] wrote that when a majority of the Court is suddenly reconstituted, there is likely to be a period of substantial unsettling of constitutional ideology, which can last a decade or more.[63] He explained that the Court would remain unsettled until the new Justices developed their doctrinal positions.[64] The alternative, he wrote, was to "let the Constitution freeze . . . [b]ut the Constitution was designed for the vicissitudes of time," he warned, "it must never become a code which carries the overtones of one period that may be hostile to another."[65] Justice Douglas saw it as a "healthy practice (too infrequently followed) for a court to reexamine its own doctrine."[66]

Justice Douglas' expressions ring true today. It is only now, fourteen years after Justice O'Connor led the new Republican appointments to the Court,[67] that new alliances are taking a firm hold on the Court.[68] The problem the Court now faces is in deciding which overtones from the past have become counterproductive. Although the criteria are applied very subjectively, different standards for dealing with precedent are emerging

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58. PHILIP B. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT 37-38 (1970).

59. *See* Cooper, *supra* note 53, at 404.

60. Professor Schauer is a professor of law at the University of Michigan.

61. *See* Monaghan, *supra* note 28, at 757; *see also* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 591-95 (1987) .

62. President Franklin D. Roosevelt appointed Justice Douglas to the Supreme Court in 1939, where he served until 1975. He was succeeded by Justice John Paul Stevens. *See* STONE ET AL., CONSTITUTIONAL LAW, at lxi (2d ed. 1991).

63. *See* Douglas, *supra* note 17, at 736.

64. *See id.*

65. *Id.* at 737.

66. *Id.* at 746.

67. In 1981 President Ronald Reagan appointed Justice Sandra Day O'Connor as the first woman to the Supreme Court; Justice O'Connor succeeded Justice Potter Stewart. *See* Ed Magnuson, *The Brethren's First Sister: A Supreme Court Nominee—and a Triumph for Common Sense*, TIME, July 20, 1981, at 8.

68. *See* Linda Greenhouse, *Liberal Giants Inspire Three Centrist Justices*, N.Y. TIMES, Oct. 24, 1992, at A1.

from various chambers.[69] The battle lines have been drawn. Among the Reagan-Bush appointees, Chief Justice Rehnquist,[70] along with Justices Scalia and Thomas, urge the overruling of virtually any precedent that they consider "erroneously reasoned" or that were determined by 5-4 decisions,[71] while Justices O'Connor, Kennedy and Souter appear to be using a more rigid standard, taking into account additional factors ignored by the former group.[72]

III. THE REHNQUIST COURT: CRITERIA FOR OVERRULING SUPREME COURT PRECEDENT

Historically, the Supreme Court has proffered several reasons for overruling precedent: changed conditions have undermined the basis of a challenged precedent;[73] proven unworkability;[74] decisions that were "wrongly" reasoned;[75] court difficulties in applying the challenged rule;[76] conflicting precedents;[77] and overruling a decision which itself overruled precedent.[78] However, the Justices have often fashioned the criteria to suit their own purposes, either by emphasizing certain criteria, de-emphasizing others, or creating new ones altogether. Several members

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69. *See id.*

70. Chief Justice Rehnquist was appointed to the Supreme Court by President Richard Nixon in 1971, and was named Chief Justice by President Reagan in 1986.

71. *See Casey*, 112 S. Ct. at 2861 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (stating that the Court has a "duty" to reconsider "when it becomes clear that a prior constitutional interpretation is unsound").

72. *See* Gerhardt, *supra* note 29, at 75; *see generally Payne*, 501 U.S. at 808; *Casey*, 112 S.Ct. at 2791.

73. *See* Brown v. Bd. of Education, 347 U.S. 483 (1954) (overruling Plessy v. Ferguson, 163 U.S. 537 (1896)).

74. *See* Garcia v. San Antonio Metro. Tansit Auth., 469 U.S. 528 (1985) (overruling National League of Cities v. Usery, 426 U.S. 833 (1976)).

75. *See Casey*, 112 S. Ct. at 2813 (explaining that "*Plessy* was wrong the day it was decided").

76. *See* Payne v. Tennessee, 501 U.S. 808, 849 (1991) (Marshall, J., dissenting) (citing Patterson v. McLean Credit Union, 491 U.S. 164 (1989) as an example of a showing that a particular precedent has become a "detriment to coherence and consistency in the law").

77. *See* Note, *supra* note 22, at 1346 ("the Court will also overrule when a precedent has been so eroded by changes in the law that it no longer has an acceptable legal basis"); *see, e.g.*, Puerto Rico v. Brandstad, 483 U.S. 219 (1987) (overruling Kentucky v. Dennison, 65 U.S. (24 How 66) 66 (1861)).

78. *See* Jerold H. Israel, Gideon v. Wainright:*The "Art" of Overruling*, 1963 SUP. CT. REV. 211 (1963) (analyzing these factors).

of the Rehnquist Court have made an art of fashioning criteria to suit their fancy.[79] The Chief Justice's majority opinion in *Payne* provided him with an opportunity to rework his criteria for reversing constitutional law doctrine.[80]

A. *Payne v. Tennessee*

1. Chief Justice Rehnquist's Criteria for Overruling Precedent

In *Booth v. Maryland*[81] and *South Carolina v. Gathers*,[82] the Supreme Court interpreted the Eighth Amendment as prohibiting the admission of victim impact evidence in capital murder sentencing proceedings.[83] In *Payne v. Tennessee*,[84] the Court sharply turned away from that analysis by upholding the admission, during capital sentencing, of evidence relating to the victim's personal characteristics and the emotional impact of the crime on the victim, his family, and his friends.[85] The decision vitiated a basic principle of constitutional

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79. *See* discussion *infra* part III.A.1 and 2.

80. *See Payne*, 501 U.S. at 811. Chief Justice Rehnquist first presented his views of precedent in his *Garcia* dissent, in which he advocated future reversal of the majority's holding. *See Garcia*, 469 U.S. at 580 (Rehnquist, J., dissenting). Although the Court did revisit the issue in New York v. United States, 112 S. Ct. 2408 (1992) (holding that statutes which affirmatively command states to act violate the Tenth Amendment and the federalist principle encompassed by the Constitution), Justice Rehnquist's dissent still did not garner enough support to reverse the *Garcia* doctrine.

81. 482 U.S. 496 (1987). A Maryland law required consideration of a victim impact statement (VIS), which the state included in its presentence report. MD. ANN. CODE, art. 41, 4-609(c) (1986). In this case, 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. *See id.*

82. 490 U.S. 805 (1989). *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. *Id.* at 809. The defendant argued that the prosecutor's use of such information rendered the imposition of the death sentence unconstitutional under the Eighth Amendment. *See id.*

83. *Id.* at 810-11;*Booth*, 482 U.S. at 502.

84. 501 U.S. 808 (1991).

85. *Id.* at 830; *see also* Note, *The Supreme Court: 1990 Term - Leading Cases*, 105 HARV. L. REV. 177 (1991).

criminal law, that capital sentencing should focus solely on the individual culpability of the defendant.[86]

Payne involved the imposition of the death penalty in a case that arose from the savage murder of a mother and her two year old daughter.[87] The victim's three year old son witnessed the murder and was brutally assaulted, but survived.[88] During the penalty phase of the trial, the prosecutor focused heavily on the effect of the murder on the son.[89] By a 6-3 vote, the Court overruled *Booth* and *Gathers* and refused to vacate the sentence.[90]

The most significant attribute of *Payne* may have been the reasoning used to overrule both *Booth* and *Gathers*.[91] Chief Justice Rehnquist, writing for the majority, noted that *Booth* and *Gathers* were based on two premises: "that evidence relating to a particular victim or to the harm that a capital defendant causes a victim's family do not in general reflect on the defendant's 'blameworthiness,' and that only evidence relating to 'blameworthiness' is relevant to the capital sentencing decision."[92] The Chief Justice rationalized his departure from precedent by noting that an "important concern" of criminal law had been to assess the harm caused by the defendant as a result of the crime charged.[93] This is apparent, he wrote, in determining the elements of the offense and in determining the appropriate punishment.[94] Chief Justice Rehnquist concluded that "two equally blameworthy defendants may be guilty of different offenses solely because their acts cause differing amounts of harm."[95] In opinion of Guido Calabresi, former Dean of Yale Law School,[96] Chief Justice Rehnquist articulated a novel theory of precedential value that declined to

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86. *See* Zant v. Stephens, 462 U.S. 862, 879 (1983).

87. *Payne*, 501 U.S. at 811-13.

88. *See id.*

89. *Id.* at 814-16.

90. *Id.* at 830.

91. *See id.* at 808.

92. *Id.* at 819.

93. *Id.*

94. *Id.*

95. *Id.*

96. Dean Calabresi has since been appointed and is currently sitting on the United States Court of Appeals for the Second Circuit.

require the "extraordinary showing that this Court has historically demanded before overruling one of its precedents."[97]

In *Booth* and *Gathers* (both 5-4 decisions), the Court held that evidence and arguments relating to the victim and the impact of the victim's death on the victim's family were *per se* inadmissible at a capital sentencing hearing.[98] In contrast, *Payne* held that, if the state chose to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erected no *per se* bar.[99] Justice Marshall's dissent restated the reasoning behind *Booth* and *Gathers*.[100] He explained that admitting evidence of the victim's character and the impact of the murder upon the victim's family predicated the sentencing on "factors . . . wholly unrelated to the blameworthiness of [the] particular defendant."[101] Marshall believed that admission of victim impact evidence created an "unacceptable risk of sentencing arbitrariness."[102]

Chief Justice Rehnquist began his analysis in *Payne* by invoking Justice Brandeis's dissent in *Burnet*.[103] He noted that conceptually, stare decisis is a "principle of policy and not a mechanical formula of adherence to the latest decision."[104] The Chief Justice then proceeded to analyze briefly when precedent may be cast aside in favor of the contemporary Court's reasoning.[105] He explained that, because a constitutional issue was involved, and legislative overrule was practically impossible, stare decisis would exert less authority.[106] The only other alternative would be to rely on the amendment process; however, that option was too unreliable.

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97. Guido Calabresi, *The Supreme Court 1990 Term: Foreword: Antidiscrimination and Constitutional Accountability (What the Bork - Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 139 (1991); *see also Payne*, 501 U.S. at 848 (Marshall, J., dissenting).

98. *Gathers*, 490 U.S. at 811; *Booth*, 482 U.S. at 507.

99. *Payne*, 501 U.S. at 808.

100. *Id.* at 844-48 (Marshall, J., dissenting).

101. *Id.* at 845-46 (Marshall, J., dissenting) (quoting *Gathers*, 490 U.S. at 810, and *Booth*, 482 U.S. at 504).

102. *Id.* at 846 (Marshall, J., dissenting).

103. *Id.* at 827 ("Adhering to precedent 'is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right'") (quoting Burnet v. Coronado Oil & Gas, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)).

104. *Id.* at 828 (quoting Helvering v. Hallock, 309 U.S. 106, 119 (1940)).

105. *See id.* at 827-30.

106. *See id.* at 828 (citing *Burnet*, 285 U.S. at 407 (Brandeis, J., dissenting)).

Rehnquist explained that stare decisis was strongest when property and contract rights were at issue, and because *Payne* involved neither of these, the Court was not bound to the past by the same force.[107] The Chief Justice argued that reliance on precedent in property and contract cases was somehow more deserving of protection than reliance interests in constitutional law.[108] His reasoning implied that the burden of demonstrating a substantial reason for overruling precedent was higher in the former types of cases rather than in the latter. The latter group, according to Rehnquist, included cases involving procedural and evidentiary rules.[109] But both the Court and society have relied heavily on precedent in the area of constitutional law.[110] Unlike typical contract or property claims, constitutional law issues often involve the resolution of crucial distinctions, such as between life and death.[111] In deciding those cases, the judiciary often employs an exhausting level of scrutiny and analysis, balancing the decisions and passions of previous Courts with the realities, demands and legislation of contemporary society.[112]

The Court has a more limited scope in analyzing a property or contract case where reliance interests are involved. Often the Court's focal point is on only the actual contract or perhaps an applicable code.[113] Reliance interests do play an essential role in settling the dispute. However, although constitutional cases do not generally involve interpretations of contract, the parties involved have relied on the state of

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107. *Id.*

108. *Id.*

109. *Id.*

110. Because of the holdings in cases such as Griswold v. Connecticut, 381 U.S. 479 (1965) (recognizing the right to privacy of married persons), Eisenstadt v. Baird, 405 U.S. 438 (1972) (extending the right to privacy to the distribution of contraceptives to unmarried persons), and Zablocki v. Redhail, 434 U.S. 374 (1978) (recognizing the right to marry as a part of the fundamental right to privacy implicit in the Fourteenth Amendment's due process clause), people have planned their lives around the rights that nine justices found protected by the Constitution. *See* Planned Parenthood of South Eastern Pennsylvania v. Casey, 112 S. Ct. 2791, 2812 (1992).

111. *See, e.g.*, Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261 (1990) (upholding a state's ability to require by clear and convincing evidence that an incompetent person would desire to order the withdrawal of life sustaining treatment).

112. *See id.*

113. *See, e.g., Burnet*, 285 U.S. at 393 (holding that a lease was an instrumentality of the state in carrying out its duty with respect to public schools, and that taxing the income of the lessee arising from the lease would amount to an imposition on the lease itself).

the law at the time the issue arose, just as the parties involved in a contract dispute have.[114]

Consider the following hypothetical: An offeror enters into a multi-million dollar real-estate agreement, and relies on the law permitting such an agreement and receives the necessary zoning approvals. A woman relies on the legal option of an abortion when deciding to have intercourse without the intent to conceive. Several months later, a new Court, hostile to both big business and to the right to privacy, decides that the offeror's type of agreement is now forbidden; the zoning approval revoked, the agreement now retroactively invalidated. The offeror loses millions. The Court also overrules *Roe* and recognizes abortion only in proven cases of rape. As it happens, contraception fails, and the woman wants to abort, but cannot. The offeror's livelihood is now destroyed, and the land valueless. The woman is now forced to consider an illegal abortion or to have a child that she does not want.

Both parties relied on the Court's precedent and the state of the law, and now both suffer tremendously, not because of proven unworkability or a wrongly decided decision, but because the Court's composition has changed. Neither a "'special justification' nor 'subsequent changes or developments in the law' that undermined the decision's rationale,"[115] occurred in the aforementioned hypotheticals. The Court changed because the political winds changed direction.

Now suppose that the Court in the hypothetical implements Chief Justice Rehnquist's *Payne* analysis. That analysis would most likely protect the offeror's reliance on precedent. However, it probably would not protect the woman's reliance on precedent. Chief Justice Rehnquist would hold the offeror's financial interests in higher regard than the fundamental right to privacy. Both parties had strong reliance interests. However, one was based primarily on the common law (essentially a doctrine of precedent), and the other on the Due Process Clause of the Fourteenth Amendment.[116] It is ironic that the Chief Justice shows more deference to common law that has developed through decisions of the lower courts, than he does to the decisions of his brethren.

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114. *See Casey*, 112 S. Ct. at 2809 ("[P]eople 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.").

115. *Payne*, 501 U.S. at 849 (Marshall, J., dissenting) (quoting Arizona v. Rumsey, 467 U.S. 203, 212 (1984) and Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989)).

116. The plurality opinion in *Casey* notes that the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment. *See Casey*, 112 S. Ct. at 2804.

The Chief Justice argued in *Payne* that cases decided by the "narrowest margins, over spirited dissents . . ."[117] and those that "defied consistent application by the lower courts,"[118] were ripe for overruling.[119] Instead of satisfying the "special justification" burden that Justice Marshall and past Courts had established, Chief Justice Rehnquist's decision added a new criterion that left stare decisis without a constraining force.[120] Analyzing the *Payne* decision, one commentator has noted that, "if a decision is unanimous or determined by a strong majority, subsequent adherence to the precedent probably stems not from the power of stare decisis itself, but from continuing support for the original holding."[121]

When *Gathers* was decided in 1989, it was a 5-4 decision finding a *per se* violation of the Eighth Amendment.[122] Justice Brennan wrote for the majority.[123] One year later, Justice Brennan retired and was replaced by Justice Souter.[124] When *Payne* was decided that year, the change in Court personnel shifted the balance. Justice Souter provided the critical vote to hold that the Eighth Amendment did not erect a *per se* bar against victim impact evidence.[125] The *Payne* opinion turned stare decisis into what was described as a doctrine of "judicial politics, not law, holding that like cases need not be treated alike, as long as they are treated by different judges."[126]

Rigid adherence to every past decision is not a court's wisest choice. However, no adherence does not seem appropriate either. Chief Justice Rehnquist's *Payne* opinion erred not only because precedent was cast aside, but also because the means to his conclusion did not rest on firm ground. As Justice Marshall explained in his *Payne* dissent, "neither the law nor the facts supporting *Booth* and *Gathers* underwent any change in the last four years."[127] The Chief Justice displayed little respect for, or faith in a doctrine that helped American jurisprudence develop and mature over the past three centuries.

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117. *Payne*, 501 U.S. at 829.

118. *Id.* at 830.

119. *See id.*

120. *See* Note, *supra* note 85, at 183.

121. *Id.*

122. *Gathers*, 490 U.S. at 810.

123. *Id.* at 806.

124. *See* Fred Strasser et al., *New Term*, NAT'L L.J., Oct. 15, 1990, at A15.

125. *See Payne*, 501 U.S. at 839 (Souter, J., concurring).

126. *See* Note, *supra* note 85, at 184.

127. *Payne*, 501 U.S. at 844 (Marshall, J., dissenting).

2. The Concurring Opinions in *Payne*: The "Special Justification" Standard

Concurring in *Payne*, Justice Scalia, joined by Justices O'Connor and Kennedy, argued that, contrary to Justice Marshall's dissent, it was *Booth*, and not *Payne* that compromised "the fundamental values underlying . . . stare decisis."[128] Justice Scalia's argument was premised on the idea that *Booth*'s prohibition of victim impact evidence at the sentencing level conflicted with a "public sense of justice" and diminished respect for both the courts and the law.[129] By overruling *Booth*, the Court might disregard the "special justification" requirement of stare decisis, but would instead be following the general principle that "the settled practices and expectations of a democratic society should generally not be disturbed by the courts."[130]

Justice Souter, in a concurrence joined by Justice Kennedy, defended the notion that the Court should offer a "special justification" before departing from precedent.[131] However, unlike Justice Marshall, Justice Souter found that the Court did have a special justification.[132] He found that *Booth* fell into the category of wrongly decided and unworkable precedent.[133] Justice Souter's concurrence tried, but failed, to narrow the scope of both the majority's and Justice Scalia's opinions.[134] Although Justice Souter made reference to the doctrine of precedent, he too did little more than tip his hat.

3. Justice Thurgood Marshall: The Conscience of the Court

The *Payne* dissent was Justice Marshall's last opinion before he announced his retirement after a quarter century on the Court.[135] It was also one of his most bitter dissents. Justice Marshall accused the majority of relying on "[p]ower, not reason" in overruling the *Booth* and *Gathers* decisions.[136] He strongly criticized the majority's willingness to

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128. *Id.* at 835 (Scalia, J., concurring).

129. *Id.* at 834 (Scalia, J., concurring).

130. *Id.* at 835 (Scalia, J., concurring).

131. *Id.* at 842 (Souter, J., concurring) (citing Arizona v. Rumsey, 467 U.S. at 212).

132. *See id.* (Souter, J., concurring).

133. *See id.* at 842-43 (Souter, J. concurring).

134. Note, *supra* note 85, at 180.

135. *Marshall Retires from U. S. Supreme Court*, N.Y.L.J., June 28, 1991, at A1. Justice Marshall retired from the Court on June, 27, 1991. *Id.*

136. *Payne*, 501 U.S. at 844 (Marshall, J., dissenting).

overrule recent constitutional precedents without "the type of extraordinary showing that this Court has historically demanded."[137] Justice Marshall also saw the majority as declaring itself "free to discard any principle of constitutional liberty which was recognized or reaffirmed over the dissenting votes of four Justices and with which five or more Justices *now* disagree."[138] Marshall warned that the majority's clear message was that "scores of established constitutional liberties" were now "ripe for reconsideration . . . ."[139]

Chief Justice Rehnquist's majority opinion and Justice Marshall's dissent indicate that different theories of stare decisis were competing with each other on the High Court. Justice Marshall applied a higher level of scrutiny when determining whether a precedent should be overruled.[140] He quoted the majority in *Akron v. Akron Center for Reproductive Health*,[141] as stating, "this Court has repeatedly stressed that fidelity to precedent is fundamental to 'a society governed by the rule of law' . . . ."[142]

Justice Marshall began with the understanding that a departure from precedent should not occur without a "special justification."[143] He refuted the majority's criteria for overruling precedent, rather than setting out his own specific criteria.[144] He noted that "'special justifications' have often included the emergence of 'subsequent changes or developments in the law' that undermine a decision's rationale,"[145] or a showing that a particular precedent has become a "detriment to coherence and consistency in the law."[146] Justice Marshall could not understand how the majority could "seriously claim that any of these traditional bases for overruling a precedent" applied to *Booth* or *Gathers*.[147] The Justice noted that the majority did not even claim that

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137. *Id.* at 848 (Marshall, J., dissenting).

138. *Id.* at 845 (Marshall, J., dissenting).

139. *Id.* (Marshall, J., dissenting).

140. *See id.* at 848-49 (Marshall, J., dissenting).

141. 462 U.S. 416 (1983).

142. *Payne*, 501 U.S. at 848 (Marshall, J., dissenting) (quoting *Akron*, 462 U.S. at 420).

143. *Id.* at 849 (Marshall, J., dissenting).

144. *Id.* at 844 (Marshall, J., dissenting).

145. *Id.* at 849 (Marshall, J., dissenting) (quoting Arizona v. Rumsey, 467 U.S. 203, 212 (1984) and Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989)).

146. *Id.* (Marshall, J., dissenting) (quoting *Patterson*, 491 U.S. at 173).

147. *Id.* (Marshall, J., dissenting).

the legal rationale of *Booth* and *Gathers* had been undercut by changes or developments in doctrine during the two years preceding *Payne*.[148]

The *Payne* majority and dissent did agree that an important factor in the analysis of precedent was whether a holding has "defied consistent application by the lower courts," with the majority asserting that both *Booth* and *Gathers* had.[149] Justice Marshall saw the majority's evidence as a "feeble attempt" to support its claim.[150]

Marshall noted that, until *Payne*, a change in Court personnel had "almost universally [been] understood not to be sufficient to warrant overruling a precedent . . . ."[151] The majority, he asserted, was attempting to rationalize its decision by arguing that constitutional claims and 5-4 decisions deserved less consideration in favor of stare decisis than do cases involving property and contract rights.[152] Justice Marshall lashed out at Chief Justice Rehnquist's argument:

> This truncation of the Court's duty to stand by its own precedents is astonishing. By limiting full protection of the doctrine of stare decisis to cases involving property and contract rights, the majority sends a clear signal that essentially all decisions implementing the personal liberties protected by the Bill of Rights and the Fourteenth Amendment are open to reexamination.[153]

Marshall ominously warned that "the continued vitality of literally scores of decisions must be understood to depend on nothing more than the proclivities of the individuals who *now* comprise a majority of the Court."[154] Chief Justice Rehnquist's logic seems to imply that when constitutional doctrine is examined by the Court it lies first at the mercy of the executive branch and its judicial appointments, and then it depends on the subjectivity of the judiciary's interpretation of precedent.

The *Payne* dissent concluded that the majority's conception of stare decisis would destroy the Court's capacity to "resolve authoritatively the abiding conflicts between those with power and those without."[155] Justice Marshall invoked language from a concurrence by Justice Stevens

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148. *See id.* (Marshall, J., dissenting).

149. *Id.* at 830.

150. *Id.* at 850 (Marshall, J., dissenting).

151. *Id.* (Marshall, J., dissenting).

152. *See id.* at 851 (Marshall, J., dissenting).

153. *Id.* at 851 (Marshall, J., dissenting) (citation omitted).

154. *Id.* (Marshall, J., dissenting).

155. *Id.* at 853 (Marshall, J., dissenting).

to accentuate his point.[156] Justice Stevens had once written, "[i]t is the unpopular or beleaguered individual not the man in power who has the greatest stake in the integrity of the law."[157] Justice Marshall explained that "[i]f this Court shows so little respect for its own precedents, it can hardly expect them to be treated more respectfully by the state actors whom these decisions are supposed to bind."[158]

Justice Marshall's strongest attack was reserved for the majority's idea that any constitutional liberty recognized by a 5-4 vote "over a spirited dissent" is ripe for reconsideration.[159] The majority would be inviting state actors to renew the policies that a previous Court had held unconstitutional "in the hope that this Court may now reverse course, even if it has only recently reaffirmed the constitutional liberty in question."[160]

Overruling *Booth* and *Gathers* was "but a preview of an even broader and more far-reaching assault upon this Court's precedents,"[161] Justice Marshall wrote in the final paragraph of his *Payne* dissent. He feared that the majority's opinion would surely be the death knell for future victims, who may include minorities, women, or the indigent.[162] His final statement foreshadowed what would consume the *Casey* plurality 368 days later. Justice Marshall ended his quarter-century reign as the conscience of the Court with these words: "[I]nevitably, this campaign to resurrect yesterday's 'spirited dissents' will squander the authority and the legitimacy of this Court as a protector of the powerless."[163]

B. Planned Parenthood v. Casey: *The Emergence of A New Plurality*

The *Payne* opinions set the stage for the decisive battle that would engulf the Supreme Court the next term. The debate over stare decisis came to a climax in the *Casey* decision, perhaps because President Bush had replaced Justice Marshall with Clarence Thomas. Justice Thomas immediately aligned himself with Chief Justice Rehnquist and Justice Scalia. Alignments on the Court were beginning to shift. After *Casey* it

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156. *See id.* (Marshall, J., dissenting).

157. *Id.* (Marshall, J., dissenting) (quoting Florida Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n, 450 U.S. 147, 153-54 (1981) (Stevens, J., concurring)).

158. *Id.* (Marshall, J., dissenting).

159. *See id.* at 854 (Marshall, J., dissenting).

160. *Id.* (Marshall, J., dissenting).

161. *Id.* at 856 (Marshall, J., dissenting).

162. *See id.* (Marshall, J., dissenting).

163. *Id.* (Marshall, J., dissenting).

looked as if a new center was taking control of the Court,[164] and stare decisis would be the great divide.

In 1992 the Rehnquist Court could no longer put off what it had only hinted at through a line of cases that slowly chipped away at the right to abortion recognized two decades earlier in *Roe v. Wade*.[165] The *Casey* decision surprised many when it came down.[166] The Court had the opportunity, and it was thought, the necessary votes and inclination, to overrule *Roe*.[167] However, led by an unlikely trio, Justices O' Connor, Kennedy, and Souter, the Court concluded that "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed."[168] The plurality opinion cried out for debate. The lengthy discussion of precedent was in sharp contrast to the Rehnquist majority opinion in *Payne*, which lowered the Court's burden in protecting constitutional law precedent.[169]

Before the five provisions of a new Pennsylvania abortion statute could take effect, the petitioners[170] brought suit seeking a declaratory judgment that each of the provisions was unconstitutional on its face.[171]

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164. *See* Marcia Coyle, *New Trio Stands Up to Court's Hard Right*, NAT'L L.J., Aug. 31, 1992, at S1, S3; *see also* Lee v. Weisman, 112 S. Ct. 2649 (1992) (a 5-4 decision holding that the Establishment Clause of the First Amendment prohibited public school officials from including nonsectarian prayers in a middle school graduation ceremony).

165. 410 U.S. 113 (1973); *see, e.g.*, Ohio v. Akron Center for Reprod. Health, 497 U.S. 502 (1990) (upholding a statute that required a doctor to give notice to one of a minor's parents or, under some circumstances, to another relative of a minor, before performing an abortion); Hodgson v. Minnesota, 497 U.S. 417 (1990) (upholding a statute prohibiting an abortion performed on a minor until at least 48 hours after both parents are notified); Webster v. Reproductive Health Servs., 492 U.S. 490, 529 (1989) (O'Connor, J., concurring) (demonstrating that a majority of the Court finds *Roe*'s trimester framework "unworkable" and "problematic").

166. *See* Ruth Marcus, *5-4 Court Declines to Overrule* Roe*; But Limits Permitted on Abortion*, WASH. POST, June 30, 1992, at A1 (explaining that the Supreme Court defied all predictions that it was prepared to eliminate the right to abortion and instead adopted a middle-ground approach).

167. *See* Kathleen M. Sullivan, *The Supreme Court 1991 Term: Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 24-25 (1992) (noting that the Court defied prophecies with the *Casey* decision because it was widely believed that with five newly appointed justices, a conservative Court would "gut the abortion right").

168. *Casey*, 112 S. Ct. at 2804.

169. *See* discussion *infra* Part III.A.1.

170. The petitioners included five abortion clinics and a physician representing himself and a class of doctors who provided abortion services. *Casey*, 112 S. Ct. at 2803.

171. *Id.*

The petitioners also sought injunctive relief.[172] The district court held all of the provisions unconstitutional and permanently enjoined their enforcement.[173] However, the court of appeals affirmed in part and reversed in part, striking down the spousal notification provision but upholding the other provisions.[174] The petitioners then challenged the constitutionality of the 1988 and 1989 amendments to the Pennsylvania abortion statute[175] on due process grounds.[176]

The Supreme Court held that the doctrine of stare decisis required the reaffirmance of *Roe v. Wade*'s essential holding, which recognized a woman's right to choose an abortion before fetal viability.[177] However, the *Casey* plurality opinion held that the undue burden test, rather than *Roe's* trimester framework,[178] should be used in evaluating abortion restrictions before viability.[179] In addition, the Court upheld all of the Pennsylvania restrictions as not unduly burdensome, except for the spousal notification provision, which the Court held did impose an undue burden and was therefore invalid.[180]

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172. *Id.*

173. *Id.*

174. *Id.*

175. 18 Pa. Cons. Stat. §§3203-3220 (1990). The provisions of the Pennsylvania Abortion Control Act challenged were: § 3205, requiring voluntary and informed consent of a woman seeking an abortion except in the case of a medical emergency, and outlining certain information which must be provided to a woman, at least 24 hours prior to the abortion, by the physican who is to perform the abortion; § 3206, requiring informed consent from both the pregnant woman and one parent, except in the case of a medical emergency, when the woman seeking the abortion is under 18 years of age or adjudged incapacitated, but under § 3206(c) allows for judicial bypass if the parents refuse to consent or if the woman chooses not to seek consent of her parents; § 3209, requiring, with certain exceptions, that a married woman seeking an abortion sign a statement that she has notified her spouse that she is about to undergo an abortion; § 3203, defining a "medical emergency" which would excuse a woman seeking an abortion from complying with the foregoing requirements; and §§ 3207(b), 3214(a), 3214(f), imposing reporting requirements on facilities providing abortion services.

176. *Casey*, 112 S. Ct. at 2804.

177. *Id.*

178. The plurality actually rejected the trimester framework in Part IV of their opinion, however, that part of the opinion was supported by only three justices: O'Connor, Kennedy, and Souter. *See id.* at 2818.

179. *Id.* at 2820.

180. *Id.* at 2830 (holding that the spousal notification provision was a substantial obstacle to a woman's choice to undergo an abortion).

The plurality opinion was divided into six parts, with a majority of Justices concurring in all but Parts IV, V-B, and V-D. Part I[181] was dedicated to an analysis of the specific controversy involving *Roe's* essential holding, and where it stood following subsequent Court rulings that limited its application.[182] The Court noted that *Roe's* essential holding, and the one that the *Casey* Court reaffirmed, had three parts.[183] First, the Court recognized the right of a woman to choose to have an abortion before viability and to obtain it without undue interference from the State.[184] Second, the Court confirmed the State's power to restrict abortions after fetal viability, only if the law contained exceptions for pregnancies that endanger a woman's life or health.[185] Finally, *Roe* recognized that the State had legitimate interests in protecting the health of the woman and the life of a fetus that could become a child.[186]

"Liberty finds no refuge in a jurisprudence of doubt."[187] With this statement, the plurality set the tone for its decision in which it would tackle the role of stare decisis in Supreme Court review.[188] They recognized that the Court's post-*Roe* decisions had "cast doubt upon the meaning and reach of its holding."[189] The plurality also noted that Chief Justice Rehnquist would "overrule the central holding of *Roe* and adopt the rational relationship test as the sole criterion of constitutionality."[190] Furthermore, the plurality felt it necessary for state and federal courts, as well as state legislatures, to have guidance as they address this issue "in conformance with the Constitution."[191] Given these premises, the plurality found "it imperative to review once more the principles that define the rights of the woman and the legitimate authority of the State respecting the termination of pregnancy by abortion procedures."[192] If ever a constitutional issue cried out to be "settled," this was it. However,

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181. Part I of the opinion was joined by Justices Blackmun and Stevens, in addition to Justices O'Connor, Kennedy, and Souter.

182. *Casey*, 112 S. Ct. at 2803-04.

183. *Id.* at 2804.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 2803.

188. *Id.* at 2804.

189. *Id.* at 2803.

190. *Id.* at 2803-04.

191. *Id.* at 2804.

192. *Id.*

contrary to Justice Brandeis's opinion in *Burnet*,[193] this area of the law not only has to be settled, it must be settled "right."

1. The Constitutional Protection of A Woman's Right to Choose: Reaffirmed

Part II of the *Casey*[194] opinion dealt with the constitutional protection of a woman's decision to terminate her pregnancy. The plurality recognized that a liberty right was involved[195] and reaffirmed that this right derives from the Due Process Clause of the Fourteenth Amendment.[196] "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."[197] With this statement the plurality cogently restated the link between *Roe* and the other liberty interests that the Court has protected from state interference by the substantive component of the Due Process Clause.[198] They noted that neither the Bill of Rights nor the specific practices of states at the time of the adoption of the Fourteenth Amendment marked the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects.[199] However, they explained, the Constitution does place "limits on a State's right to interfere with a person's most basic decisions about family and parenthood."[200]

The plurality also addressed the personal side of the abortion controversy.[201] They admitted that some of them as individuals found

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193. *See supra* text accompanying notes 30-36.

194. Part II of the opinion was joined by Justices Blackmun and Stevens in addition to Justices O'Connor, Kennedy and Souter.

195. *Casey*, 112 S. Ct. at 2804.

196. *Id.*

197. *Id.* at 2805.

198. *See, e.g.*, Turner v. Safley, 482 U.S. 78, 94-99 (1987) (invalidating a prison regulation that prohibited marriages between inmates or between inmates and other persons, unless permission for the marriage was given by prison authorities on the basis of compelling circumstances); Loving v. Virginia, 388 U.S. 1, 12 (1967) (invalidating a Virginia statute prohibiting interracial marriages); Griswold v. Connecticut, 381 U.S. 479, 481-82 (1965) (striking down a law which prohibited the use of contraceptives by married people); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (invalidating a state law which prohibited private religious schools).

199. *Casey*, 112 S. Ct. at 2805.

200. *Id.* at 2806. *See, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678, 681-82 (1977) (invalidating law prohibiting sale of contraceptives to persons under age 16); Eisenstadt v. Baird, 405 U.S. 438, 440-43 (1972) (invalidating a statute which prohibited distribution of contraceptives to unmarried persons).

201. *See Casey*, 112 S. Ct. at 2806.

abortion offensive to their most basic principles of morality, but they reconciled that with their obligation to "define the liberty of all, not to mandate [their] own moral code."[202] Indeed, this section of the opinion exemplifies the problem that the Justices have faced in addressing an area of the law that touches on such personal and private subjects.

The *Casey* decision was particularly surprising because the plurality seized upon the opportunity to address an area of constitutional doctrine that the Rehnquist Court usually avoided. The plurality noted that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[203] They began their analysis of a woman's interest in terminating her pregnancy by highlighting the balance that must occur between a woman's liberty interest and the interests of those who will face the consequences of her actions.[204] The plurality explained that, although abortion was conduct and not speech, it did not follow that the State was entitled to proscribe that conduct in all instances, because "the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law."[205] They noted that a woman's suffering is "too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture."[206]

The plurality concluded Part II by arguing that, although they had reservations about reaffirming the central holding of *Roe*, the reasons were "outweighed by the explication of individual liberty that we have given combined with the force of stare decisis."[207] It is at this point that the plurality embarked upon their analysis of stare decisis. Part III of the opinion would bring an aloof Court down from its bench and into the conscience of the country.

2. The Force of Stare Decisis in the Hands of the Plurality

Justices O'Connor, Kennedy, and Souter began their discussion of precedent by invoking the words of Justice Cardozo: "[w]ith Cardozo, we recognize that no judicial system could do society's work if it eyed each

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202. *Id.*

203. *Id.* at 2807.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 2808.

issue afresh in every case that raised it."[208] They noted that if a prior judicial ruling was seen as so clearly erroneous that its enforcement was doomed, continued respect for it would become dispensable.[209] They explained that whenever the Court re-examines a prior holding, its judgment is usually informed by "a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision and determining the costs of reaffirming and overruling a prior case."[210]

The plurality examined the viability of *Roe* by looking at five essential factors that became the plurality's "test" for determining the current applicability of a prior Court holding: whether the holding had been found unworkable;[211] whether the holding could be removed or adjusted without serious inequity to those who have relied upon it;[212] whether the law's growth in the intervening years had left the rule a doctrinal anachronism discounted by society;[213] whether the case's factual premise had changed in the ensuing years so as to render its holding irrelevant or unjustifiable in dealing with the issue it addressed;[214] and finally, the Court looked at these criteria in their entirety.[215]

The plurality clearly stated that, although *Roe* had faced considerable opposition, "it has in no sense proven 'unworkable'."[216] The Justices categorized *Roe* as representing merely a limitation "beyond which a state law is unenforceable."[217] They appeared to distinguish a difference between a particular holding necessitating periodic judicial assessment of state laws, and one that had been proven unworkable by the judiciary.[218]

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208. *Id.* (referring to BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921)).

209. *Id.*

210. *See id.*

211. *Id.*; *see, e.g.*, Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965).

212. *Casey*, 112 S. Ct. at 2808; *see, e.g.*, United States v. Title Ins. & Trust Co., 265 U.S. 472, 486 (1924).

213. *Casey*, 112 S. Ct. at 2809; *see, e.g.*, Patterson v. McLean Credit Union, 491 U.S. 164, 173-74 (1989).

214. *Casey*, 112 S. Ct. at 2809; *see, e.g.*, Burnet v. Coronado Oil & Gas, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting).

215. *See Casey*, 112 S. Ct. at 2812.

216. *See id.* at 2809 (citing Garcia v. San Antonio Metro.Transit Auth., 469 U.S. 528, 546 (1985)).

217. *Id.*

218. *See id.*

Next, the plurality examined the reliance interests that were based on the original *Roe* holding.[219] The Court inquired as to the cost of repudiating the rule to those who had reasonably relied on its continued application.[220] They called attention to the difference between reliance interests in the commercial setting and those in the area of individual liberty.[221] The difference had most recently been explained by Chief Justice Rehnquist in his *Payne* majority opinion.[222] The Chief Justice had argued that notions of stare decisis weigh more heavily in favor of contract and property cases because of the reliance interest that he hypothesized was not as relevant in constitutional issues.[223] The *Casey* plurality did note that there was "no surprise that some would find no reliance worthy of consideration in support of *Roe*."[224] The plurality explained that some Justices viewed *Roe* as not worthy of reliance precisely because it was not in the commercial context where, according to the *Payne* majority, "advance planning of great precision is most obviously a necessity."[225]

The plurality discussed the arguments that could be made by contrasting the reliance interests in contract and property cases with those in abortion cases.[226] They noted that abortion was usually chosen as an "unplanned response to the consequence of unplanned activity or to the failure of conventional birth control, and except on the assumption that no intercourse would have occurred but for *Roe's* holding, such behavior may appear to justify no reliance claim."[227] The plurality saw that situation as "unrealistic,"[228] and any reliance interest, they hypothesized, would be *de minimis*.[229] They also saw this argument as "premised on the hypothesis that reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions."[230] However, to eliminate the reliance issue that easily, the plurality noted

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219. *See id.*

220. *See id.*

221. *See id.*

222. *See* discussion *supra* Part III.A.1.

223. Payne v. Tennessee, 501 U.S. 808, 828 (1991).

224. *Casey*, 112 S. Ct. at 2809.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *See id.*

230. *Id.*

that cognizable reliance would have to be limited to "specific instances of sexual activity." [231]

The plurality reached beyond legal theory and suggested that, if the above argument was implemented, the judiciary would be refusing to "face the fact 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."[232] The plurality explained that "[t]he 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."[233] They also recognized that "[t]he Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed."[234]

Roe's stability was an essential part of the plurality's analysis,[235] which began by noting that "[n]o evolution of legal principle has left *Roe*'s doctrinal footings weaker than they were in 1973."[236] *Roe*, they wrote, "stands at an intersection of two lines of decisions."[237] The first path, and the one chosen by the *Roe* Court, was the succession of privacy and liberty cases exemplified by *Griswold*.[238]

The second path led to the rule of "personal autonomy and bodily integrity,"[239] comparable to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection.[240] The plurality felt that if one saw *Roe* through that line of cases, then a state "interest in the protection of life fell short of justifying any plenary override of individual liberty claims."[241] Another possibility was to classify *Roe* as *sui generis*. Viewed as such, there could be no erosion of its central holding. However, the twenty-year old *Roe* precedent had

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231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *See id.* at 2810.

236. *Id.*

237. *Id.*

238. *See id.*

239. *Id.*

240. *Id.*; *see* Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 278 (1990); *cf.* Riggins v. Nevada, 112 S. Ct. 1810, 1815 (1992).

241. *Casey*, 112 S. Ct. at 2810.

originally been supported by a concurrence of seven, and subsequently had been reaffirmed by a majority in 1983, in 1986, and again in 1989.[242]

The plurality next examined whether *Roe*'s premises of fact had changed so much in the ensuing twenty years as to render its central holding unjustifiable.[243] The plurality concluded that it had not.[244] They highlighted both the developments in neo-natal care that had advanced fetal viability to an earlier point, and the progress in maternal health care that now allowed for safe abortions to be performed later in a pregnancy.[245] However, "these facts go only to the scheme of time limits on the realization of competing interests."[246] The Court explained that "the divergences from the factual premises of 1973 have no bearing on the validity of *Roe*'s central holding, that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions."[247]

The plurality concluded that their precedential inquiry well illustrated that *Roe* had weathered the decades and had not been weakened in any way that affected its central holding.[248] Although *Roe* had met with disapproval, it had not proven unworkable.[249] They believed it relevant that "[a]n entire generation has come of age free to assume *Roe*'s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions; no erosion of principle going to liberty or personal autonomy has left *Roe*'s central holding a doctrinal remnant."[250] They saw the stronger argument in favor of reaffirming *Roe*'s central holding, despite "whatever degree of personal reluctance" any of them may have had in not overruling it.[251]

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242. *See id.*; *see* City of Akron v. Akron Center for Reprod. Health, Inc., 462 U.S. 416 (1983) (expressly affirming *Roe* by a majority of six in 1983); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) (affirming Roe by a majority of five); Webster v. Reproductive Health Servs., 492 U.S. 490, 518 (1989) (two of the present Justices questioned the trimester framework in a way consistent with *Casey*; a majority of the Court either decided to reaffirm or declined to address the constitutional validity of the central holding of *Roe*).

243. *See Casey*, 112 S. Ct. at 2811.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *See id.* at 2812.

249. *Id.*

250. *Id.*

251. *Id.*

Looking at this decision from the perspective of *Payne*, the plurality had already proved *Roe*'s viability under both Chief Justice Rehnquist's and Justice Marshall's analysis. However, the plurality applied a second level of scrutiny that analyzed the rare case involving a divisive controversy.

3. Part II of the *Casey* Analysis of Precedent

The *Casey* plurality went beyond the ordinary analysis of constitutional precedent; they saw *Casey* as the rare case encompassing the extraordinary.[252] The plurality placed *Roe* in the same category as other comparable "cases that have responded to national controversies."[253] They noted "two such decisional lines from the past century."[254]

The first example was "the line of cases identified with *Lochner v. New York*,[255] which imposed substantive limitations on legislation limiting economic autonomy in favor of health and welfare regulation . . . ." [256] According to the *Casey* plurality, the *Lochner* line of cases was exemplified by *Adkins v. Children's Hospital of D.C.*,[257] in which the Court held it to be an infringement of constitutionally protected liberty of contract to require the employers of adult women to satisfy minimum wage standards.[258]

Fourteen years after *Adkins*, in *West Coast Hotel Co. v. Parrish*,[259] the Court "signaled the demise of *Lochner* by overruling *Adkins*." [260] *West Coast Hotel* came before the Court during the Depression and, according to the *Casey* plurality, people believed that the interpretation of contractual freedom that was protected in *Lochner* and *Adkins* "rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimum levels of human welfare."[261] *Casey* noted that the facts upon which *Lochner* had been based had proved

252. *See id.*

253. *Id.*

254. *Id.*

255. 198 U.S. 45 (1905).

256. *Casey*, 112 S. Ct. at 2812.

257. 261 U.S. 525 (1923).

258. *Casey*, 112 S. Ct. at 2812 (discussing Adkins v. Children's Hosp. of D.C., 261 U.S. 525 (1923)).

259. 300 U.S. 379 (1937).

260. *Casey*, 112 S. Ct. at 2812.

261. *Id.*

to be untrue, and *West Coast Hotel*'s new choice of constitutional principle was "not only justifiable but required." [262]

The second line of cases invoked by the plurality involved the separate-but-equal rule and the application of the Fourteenth Amendment's equal protection guarantee.[263] The plurality based this analysis on *Plessy v. Ferguson*,[264] which held that legislatively mandated racial segregation in public transportation was not a denial of equal protection.[265] *Plessy* was premised on the idea that if "the colored race" saw legislated segregation as stamping them with "a badge of inferiority," then that was because "the colored race" chose to put that construction on it, and not because of anything found in the law.[266] This understanding of facts and law was repudiated in *Brown v. Board of Education*.[267]

The *Brown* Court addressed the difference between *Plessy*'s facts and those of *Brown*. It was clear by 1954 that legally sanctioned segregation stigmatized blacks with a "badge of inferiority to the point that racially separate public educational facilities were deemed inherently unequal . . . ." [268] The *Casey* plurality explained that society's understanding of the facts upon which *Brown* was based differed fundamentally from the *Plessy* facts in 1896.[269] The plurality noted that the *Plessy* Court's explanation for its decision was "so clearly at odds with the facts apparent to the Court in 1954 that the decision to reexamine *Plessy* was on this ground alone not only justified but required."[270]

The *West Coast Hotel* and *Brown* decisions rested on facts different from their progeny. Each case was understood for what the facts of that day encompassed.[271] When *West Coast Hotel* and *Brown* came before the Court, society had begun to change, and the facts and principles as they existed at the times of *Lochner* and *Plessy* could no longer withstand judicial scrutiny. The *Casey* plurality noted that "[i]n constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each

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262. *Id.*

263. *Id.* at 2812-13.

264. 163 U.S. 537 (1896).

265. *Casey*, 112 S. Ct. at 2813.

266. *Id.* (quoting *Plessy*, 163 U.S. at 551).

267. 347 U.S. 483 (1954).

268. *Casey*, 112 S. Ct. at 2813 (quoting *Brown*, 347 U.S. at 494-95).

269. *See id.*

270. *Id.*

271. *Id.*

decision to overrule a prior case as a response to the Court's constitutional duty."[272]

The *Casey* plurality found no changed circumstances that imposed new obligations on society between 1973 and 1992.[273] The Court explained "that neither the factual underpinnings of *Roe*'s central holding" nor the Court's understanding of it had changed.[274] The plurality could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently than the *Roe* Court in 1973.[275] The Court explained that a decision to overrule *Roe* would have to rest "on some special reason over and above the belief that a prior case was wrongly decided."[276]

The *Casey* plurality ended their analysis of precedent by examining the structural damage the Supreme Court could suffer if too many precedents were uprooted.[277] They noted that their analysis would not be complete without "explaining why overruling *Roe*'s central holding would not only reach an unjustifiable result under principles of *stare decisis*, but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law."[278]

The plurality showed great restraint in their attempt to preserve the "reputation" of the Court. They wrote, "[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."[279] The plurality feared that their respect and reputation would be destroyed if overruling settled areas of the law became commonplace.[280]

The *Casey* decision appeared to be directed at those who had suggested that recent appointees to the Court served merely as puppets of the conservative agenda that had placed them on the bench. The plurality explained that the Court must act in ways that will allow people to accept their decisions on the terms that the Justices set.[281] Those terms must

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272. *Id.*

273. *See id.*

274. *Id.*

275. *Id.* at 2813-14.

276. *Id.* at 2814.

277. *See id.* at 2814-16.

278. *Id.* at 2814.

279. *Id.*

280. *See id.*

281. *See id.*

be grounded in principle, and not serve as compromises between social and political pressures having "no bearing on the principled choices that the Court is obligated to make."[282] The plurality based the Court's legitimacy on "making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation."[283]

The Justices believed that "the country can accept some correction of error without necessarily questioning the legitimacy of the Court."[284] However, they argued that there was "a point beyond which frequent overruling would overtax the country's belief in the Court's good faith."[285] They explained that the decision to overrule must be perceived as a statement that a prior decision was wrong, and they believed that there was a limit to the amount of error that could be imputed to prior courts.[286] They concluded that "[t]he legitimacy of the Court would fade with the frequency of its vacillation."[287]

The plurality ultimately concluded that a case such as *Roe* should be overruled only for the most compelling reason.[288] They accepted their "responsibility not to retreat from interpreting the full meaning of the covenant [Constitution] in light of all precedents."[289] Justice Stevens concurred with the plurality's conclusion that stare decisis should control in a case such as *Casey*, "notwithstanding an individual justice's concerns about the merits" of a case.[290] In an interesting footnote, he explained that in the nineteen years between *Roe* and *Casey*, fifteen Justices had confronted the basic issue presented in *Roe*; of those, eleven had voted as the *Casey* majority did, and the four who did not are the same four who signed the *Casey* dissent.[291]

Concurring, Justice Blackmun reserved most of his discussion of stare decisis for a sharp criticism of Chief Justice Rehnquist's "narrow conception of individual liberty and stare decisis."[292] Blackmun's

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282. *Id.*

283. *Id.*

284. *Id.* at 2815.

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.* at 2833.

290. *Id.* at 2838 (Stevens, J., concurring in part and dissenting in part).

291. *Id.* at 2838 n.1 (Stevens, J., concurring in part and dissenting in part).

292. *Id.* at 2853 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

concluding words were haunting; he warned that as an 83 year old justice, he could not "remain on the court forever."[293]

The *Casey* plurality believed that if the Court overruled such a watershed decision as *Roe* without a compelling reason, it would subvert the Court's legitimacy beyond any doubt.[294] This fear served as the dividing point between Chief Justice Rehnquist's *Payne* opinion, Justice Marshall's *Payne* dissent, and the *Casey* plurality opinion. It is clear that the *Payne* dissent and the *Casey* plurality required a "most compelling reason" to reexamine a constitutional precedent. The Chief Justice, however, would have set a much lower standard.

4. The Rehnquist Dissent in *Casey*

Chief Justice Rehnquist, joined by Justices White, Scalia and Thomas,[295] began his *Casey* dissent by stating, in no uncertain terms, that *Roe* was wrongly decided, and that it "can and should be overruled consistently with the Court's traditional approach to stare decisis in constitutional cases."[296] Although the plurality and the dissent might agree that certain criteria govern the analysis as to *Roe's* viability, the results were very different.

Chief Justice Rehnquist first looked towards his *Payne* opinion in which he stated that the "reexamination of [a] constitutional decision is appropriate when [that] decision [has] generated uncertainty and [has] failed to provide clear guidance."[297] In *Casey*, the Chief Justice believed that the Third Circuit had been faced with excessive uncertainty and confusion in light of the post-*Roe* cases.[298]

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293. *Id.* at 2854 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

294. *See id.* at 2815.

295. *Id.* at 2855 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

296. *Id.* (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

297. *Id.* at 2858 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *see* Payne v. Tennessee, 501 U.S. 808, 825 (1991); *see also*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546-47, 557 (1985).

298. *Casey*, 112 S. Ct. at 2858 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). The earlier cases had fine-tuned *Roe*. *See generally* Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) (striking down a Pennsylvania regulation requiring that a woman be informed of the risks associated with the abortion procedure); City of Akron v. Akron Center for Reprod. Health, Inc., 462 U.S. 416 (1983) (holding that a state may not require a physician to wait 24 hours to perform an abortion after receiving the consent of a woman); Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52 (1976) (extending the Court's

In his *Casey* dissent, Chief Justice Rehnquist observed that the plurality's discussion of stare decisis did not apply to *Roe*, because the *Casey* opinion in his view was entirely dicta.[299] He argued that *Roe* had recognized a "fundamental" right to abortion, subjected such analysis to "strict scrutiny,"[300] and employed a trimester framework to balance the woman's right to privacy with the State's interest. However, the *Casey* plurality rejected a fundamental right to abortion, lowering the burden to an "undue burden" standard of analysis.[301] Chief Justice Rehnquist saw the plurality as revising precedent, rather than adhering to it.[302] He stated that what was left of *Roe* was a "mere facade to give the illusion of reality."[303] The Chief Justice was probably correct.

Chief Justice Rehnquist's dissent next discussed the criteria for overturning precedent.[304] He addressed the plurality's assertion that the main "factual underpinning" of *Roe* had remained the same, and "that its doctrinal foundation [was] no weaker now than it was in 1973."[305] The Chief Justice argued instead that there was no requirement "that a decision

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abortion jurisprudence and holding that a State could not require that a woman obtain the consent of her spouse before proceeding with an abortion).

The more recent abortion decisions revamped the *Roe* standard. *See Casey*, 112 S. Ct. at 2858 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). Rehnquist felt the task of the appellate court in *Casey* had been complicated by the most recent cases that did not command a Court majority. *See generally* Ohio v. Akron Center for Reproductive Health, Inc., 497 U.S. 502 (1990) (upholding a statute that required a doctor to give notice to one of the minor's parents before performing an abortion on the minor); Hodgson v. Minnesota, 497 U.S. 417 (1990) (upholding a requirement that both parents be notified of a minor's abortion, and that there be a 48-hour waiting period between notification and the performance of the abortion); Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) (upholding a state law that required a physician to exercise reasonable judgment in determining whether a fetus that was 20 or more weeks of gestational age was viable and to use a variety of age, fetal weight, and lung capacity tests for determining the viability of such a fetus).

299. *Casey*, 112 S. Ct. at 2860 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

300. *See Roe*, 410 U.S. 113, 162-64 (1973).

301. *Casey*, 112 S. Ct. at 2819.

302. *Id.* at 2860 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

303. *Id.* (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

304. *See id.* at 2861 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

305. *Id.* (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

be more wrong [today] than it was at the time [the decision] was rendered."[306]

Next, the Chief Justice attacked the plurality's "reliance interests" analysis.[307] He agreed with the plurality that any traditional notion of reliance was not applicable in this case.[308] But he criticized the plurality for adopting an "unconventional—and unconvincing—notion of reliance, a view based on the surmise that the availability of abortion since *Roe* has led to 'two decades of economic and social developments' that would be undercut if the error of *Roe* were recognized."[309] Chief Justice Rehnquist felt that this assertion was "undeveloped and conclusory."[310] His criticism of the plurality's opinion was based solely on "generalized assertions about the national psyche"; such as that "the people of this country have grown accustomed to the *Roe* decision over the last 19 years and have 'ordered their thinking and living around' it."[311]

Chief Justice Rehnquist labeled the plurality's approach to precedent a "post hoc rationalization" for overturning cases such as *Plessy* and *Lochner*, "despite the existence of opposition to the original decisions, only because both the Nation and the Court had learned new lessons in the interim."[312] He also addressed the plurality's second level of review. The Chief Justice noted that the plurality saw that "the propriety of overruling a 'divisive' decision depends in part on whether 'most people' would now agree that it should be overruled."[313] He interpreted the plurality as requiring "[e]ither the demise of opposition or its progression to substantial popular agreement" in order to reconsider a divisive decision.[314] Rather than explaining his requirements for an analysis, the Chief Justice was concerned with attacking the plurality's restatement of stare decisis principles.[315] Although the Chief Justice succinctly

306. *Id.* (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

307. *Id.* (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

308. *Id.* at 2861 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (referring to the plurality's opinion, *see id.* at 2809).

309. *Id.* at 2862 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

310. *Id.* (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

311. *Id.* (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

312. *Id.* at 2864 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

313. *Id.* at 2865 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

314. *Id.* (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

315. *See id.* at 2862-66 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

countered each criterion of the plurality's test, he left behind only his criticism; there was no countervailing approach to be found.

The Chief Justice closed his discussion of stare decisis by indicating that *Roe v. Wade* stood as a judicial "Potemkin Village"; behind the facade stood an entirely new analysis without any roots in constitutional law.[316] This was Rehnquist's most compelling insight into the plurality opinion. A fuzzy line exists between his *Payne* dissent and the plurality's *Casey* decision. Whether Rehnquist would overturn precedent because he thinks it was wrongly decided, or whether the *Casey* plurality would overturn precedent contingent on the public's response, neither pays homage to the doctrine of stare decisis.

5. Justice Scalia's *Casey* Dissent

In classic Scalia style, he berated Justice O'Connor's "undue burden" standard with a barrage of contemptuous prose.[317] Justice Scalia's analysis of precedent was also more limited than the plurality's. He said that he would not "swell the United States Reports with repetitions" of what he had said before: *Roe* should fall.[318] Justice Scalia suggested that in determining when stare decisis should be followed, a Court must ask, "how wrong was the decision on its face?"[319] The Justice believed that the plurality never answered this question, and he found that *Roe* "was plainly wrong."[320] He viewed the *Casey* plurality's reliance upon stare decisis as "contrived."[321] He explained, "stare decisis ought to be applied even to the doctrine of stare decisis," and he "confessed" to never having heard of the plurality's "new, keep-what-you-want-and-throw-away-the-rest version."[322]

Justice Scalia's problem with the plurality was based on a presumed discrepancy between what the substantive doctrine of *Roe* actually was, and what stare decisis was actually saving. Contrary to the plurality's

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316. *Id.* at 2866-67 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

317. *Id.* at 2876-78 (Scalia, J., concurring in the judgment in part and dissenting in part) (describing "[t]he rootless nature of the 'undue burden' standard, a phrase plucked out of context . . ."). *Id.* at 2878.

318. *Id.* at 2874-75 (Scalia, J., concurring in the judgment in part and dissenting in part).

319. *Id.* at 2875 (Scalia, J., concurring in the judgment in part and dissenting in part).

320. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part).

321. *See id.* at 2881 (Scalia, J., concurring in the judgment in part and dissenting in part).

322. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part).

opinion, Scalia thought that the discarded "arbitrary" trimester framework was "as central to *Roe* as the arbitrary viability test," which the Court retained in *Casey*.[323] The Justice found the plurality's ability "to call a 'central holding' whatever it wants to call a 'central holding'" to be one of the difficulties with their "modified version of stare decisis."[324] He criticized the plurality for "engaging in the hopeless task of predicting public perception"[325] in determining which constitutional doctrines would go or stay.[326] In his opinion the analysis should come down to two questions: Was *Roe* correctly decided? And, did *Roe* succeed in producing a settled body of law?[327] If the answer to both was "no," then Justice Scalia felt *Roe* should "undoubtedly be overruled."[328]

Where the *Payne* and *Casey* pluralities were concerned with setting out criteria for overturning precedent, the *Casey* dissenters were less concerned with policy than with highlighting the flaws in the plurality's logic and application. It is clear that the Rehnquist Court is fractionalized. Although the criteria called upon were similar, the applications varied according to the agendas that each Justice brought to the issue.

IV. CONCLUSION

As Professor Kathleen M. Sullivan has written, the Reagan and Bush appointees to the Supreme Court are divided into two camps: those who favor continuity with precedent; and those who would give continuity little independent value.[329] The surprise in *Casey*, noted the professor, was that the plurality did not use Chief Justice Rehnquist's overrule-when-wrong standard from *Payne*.[330] Instead, the *Casey* plurality's rule became: Never overrule constitutional decisions; but there are always exceptions.[331] Precedent can be overruled under the plurality's test only if the old case proved to be too "unworkable"; if the

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323. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part).

324. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part).

325. *Id.* at 2884 (Scalia, J., concurring in the judgment in part and dissenting in part).

326. *See id.* (Scalia, J., concurring in the judgment in part and dissenting in part).

327. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part).

328. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part).

329. *See* Sullivan, *supra* note 166, at 69-70 (noting that Chief Justice Rehnquist and Justice Scalia are strong proponents of the interpretive and operative rules approach).

330. *Id.* at 70.

331. *See* discussion *supra* Part III.B.3.

people's "reliance" on the old case was not too great; if the surrounding law changed too much; or, if the underlying facts changed too much.[332]

The aforementioned criteria fit fairly well with traditional stare decisis analysis, including that outlined by Justice Marshall in *Payne*.[333] However, the *Casey* plurality departs from Justice Marshall's analysis by implementing the "decisive" issue standard for overruling cases. Professor Sullivan interpreted the plurality's decision to mean that if there was a "decisive" issue before the Court, the Court should disregard the four-factor test, and instead should "stand fast unless there is something like a civil war."[334]

Although the *Casey* plurality stated that they were reaffirming the central holding of *Roe*, in fact, all that remains is a facade. It is as if the Court removed all of the nails in a house, and watched from across the street, waiting for the wind to blow it down. In fact, the plurality tore down the *Roe* trimester framework and replaced it with the ill-fitting undue burden standard.[335]

Justice Marshall's warning of endangered precedents still resonates throughout the courtrooms of America. The *Casey* plurality became stuck in the political quicksand of *Roe*, rather than wading through to more solid ground. The *Casey* dissenters stayed on their own wayward course and watched the plurality sink, taking *Roe* with them. However, neither opinion left a discernible track showing where the Court will go next. How the Rehnquist Court will rule on constitutional issues in the future remains unpredictable.

Carolyn D. Richmond

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332. *See Casey*, 112 S. Ct. at 2808-09.

333. *See* discussion *supra* Part II.

334. Sullivan, *supra* note 166, at 72.

335. *See* discussion *supra* Part II.B.