INTRODUCTION:
THE CASE OF PLANNED PARENTHOOD V. CASEY

That the Court was ready to overturn Roe v. Wade (1973) in June 1992 appeared indisputable. Three years earlier, Justice Antonin Scalia concurred with a judgment of the Court that he and Justice Harry Blackmun believed effectively overturned Roe (Webster v. Reproductive Services 1989, p. 532). And while the plurality judgment in Webster, written by Rehnquist and joined by White and Kennedy, declared that Roe was “unsound in principle and unworkable in practice” (p. 518), it left the 1973 decision standing, claiming that the limited impact of the Missouri statute on abortion rights “affords no occasion to revisit the holding of Roe” (p. 521).¹

Thus, with four justices ready to overturn Roe, the replacement of the pro-choice justices William Brennan and Thurgood Marshall with David Souter and Clarence Thomas, respectively, made a fifth vote to overturn Roe, and possibly a sixth, all but certain. Souter kept his views on abortion secret, but few believed that President George Bush would nominate to the Supreme Court a man who supported abortion rights (Lewis 1990). Thomas, on the other hand, had gone so far as to suggest not only that Roe was wrong, but also that constitutional mandates actually prohibited states from allowing abortions (Lewis 1991).


The plurality’s explanation of why it voted the way it did focused heavily on the doctrine of stare decisis. Opening with the stirring claim

¹ Rehnquist actually had little choice in the matter, as the fifth vote to uphold the statute belonged to Justice O’Connor, who, as we shall see, generally supports abortion rights.
“Liberty finds no refuge in a jurisprudence of doubt” (p. 844), the Court declared. “After considering the fundamental constitutional questions resolved by Roe, principles of institutional integrity, and the rule of stare decisis, we are led to conclude this: the essential holding of Roe v. Wade should be retained and once again reaffirmed” (pp. 846–847). While noting that stare decisis in constitutional questions is far from an inexorable command (p. 854), the Court explained why Roe differed:

Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in Roe and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court’s interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.

The Court is not asked to do this very often, having thus addressed the Nation only twice in our lifetime, in the decisions of Brown and Roe. But, when the Court does act in this way, its decision requires an equally rare precedent force to counter the inevitable efforts to overturn it and to thwart its implementation. Some of these efforts may be mere unprincipled emotional reactions; others may proceed from principles worthy of profound respect. But whatever the premises of opposition may be, only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure, and an unjustified repudiation of the principle on which the Court staked its authority in the first instance. So to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court’s legitimacy beyond any serious question. (pp. 866–867)

Throughout the opinion, the commands of stare decisis ring, as if requiring the Court to reach a decision that it would not otherwise have reached on its own. This is, in a sense, as it should be, as “adherence to precedent must be the rule rather than the exception if litigants are to have faith in the evenhanded administration of justice” (Cardozo 1921, p. 34).

Journalists and scholars alike were quick to accept the triumvirate’s explanation that stare decisis influenced its decision. Linda Greenhouse’s (1992b) analysis accepts at face value the claim that adhering to Roe v. Wade was necessary even for justices who continued to have doubts about the decision. The Chicago Tribune declared that the “decision relied on the time-honored doctrine of respecting legal precedent” (Neikirk and Elsasser 1992, p. A1; also see Daly 1995, Howard 1993, and Maltz 1992).

At the risk of flouting the conventional wisdom, we would at least like to question the influence of stare decisis on the Court’s decision. We do so by starting with the notion that those wishing to assess systematically
the influence of precedent must recognize that in many cases Supreme Court decision making would look exactly the same whether justices were influenced by precedent or not. Consider the Court’s decision in Roe v. Wade (1973). The majority found a constitutional right to abortion that could not be abridged without a compelling state interest. The dissenters found no such right. In subsequent cases, Justices Blackmun, Brennan, Marshall, and others, continued to support abortion rights. While we could say that choices in these cases were based on the precedent set in Roe, it is just as reasonable – if not more so – to say that those justices would have supported abortion rights in subsequent cases even without the precedent in Roe. Thus, even in a system without a rule of precedent Justice Scalia would continue to support the death penalty, nonracial drawing of congressional districts, limited privacy rights, and so on. When prior preferences and precedents are the same it is not meaningful to speak of decisions as being determined by precedent. For precedent to matter as an influence on decisions, it must achieve results that would not otherwise have been obtained. As Judge Jerome Frank stated, “Stare decisis has no bite when it means merely that a court adheres to a precedent that it considers correct. It is significant only when a court feels constrained to stick to a former ruling although the court has come to regard it as unjust or unwise” (United States ex rel. Fong Foo v. Shaughnessy 1955, p. 719).

Did the plurality opinion in Casey give any indication that its authors considered the ruling in Roe to be unwise or unjust? For the most part, the answer is no. While the authors pointed out that “time has outstripped some of Roe’s factual assumptions” (p. 860), and that some parts of Roe were unduly restrictive, the decision “has in no sense proven unworkable” (p. 855), has facilitated “the ability of women to participate equally in the economic and social life of the nation” (p. 856), and fits comfortably with doctrinal developments before and after 1973 (pp. 857–8). Indeed, the Court refers to Roe as an “exemplar of Griswold liberty” (p. 857).

While it is true that there are instances where the Court finds fault with Roe, each and every time it does it substitutes its own judgment for that of Roe! Thus the Court supplants the trimester framework with viability (p. 870) and exchanges the compelling interest standard for an undue burden standard (p. 876). Additionally, the Court reversed holdings in Akron v. Akron Center for Reproductive Health (1983) and Thornburgh v. American College of Obstetricians and Gynecologists (1986). In sum,

2 Sandra Day O’Connor, Anthony Kennedy, and David Souter. For what appears to be the first time in history, a prevailing opinion was jointly written by less than all the justices. An opinion listing each justice as an author has occurred a time or two, however.
nowhere in the plurality opinion does the Court clearly substitute *Roe*’s judgment, or that of any other case, for its own contemporary preference.

Our answer about the influence of *Roe* changes a bit if we look to the past for the views of the justices. Perhaps, the strongest case for precedential impact can be made for Justice Kennedy. As noted previously, Kennedy joined Rehnquist’s opinion in *Webster* (1989), which, among other things, questioned why the “State’s interest in protecting human life should come into existence only at the point of viability” (p. 436). But as a federal court of appeals judge, Kennedy “only grudgingly upheld the validity of naval regulations prohibiting homosexual conduct,” citing *Roe v. Wade* and other “privacy right” cases very favorably in the process (Yalof 1997, p. 353). According to the dossier Deputy Attorney General Steven Matthews prepared on Kennedy for the Reagan Justice Department, “This easy acceptance of privacy rights as something guaranteed by the constitution is really very distressing” (Yalof 1997, pp. 353–54). Thus his opposition to *Roe* was never as strong as popularly believed.

Even more ambiguous is the position of justice Souter. Though appointed by a purportedly pro-life President, Souter had sat on the Board of Directors of a New Hampshire hospital that performed voluntary abortions, with no known objections from Souter. Without any clear indications of his prior beliefs about *Roe*, it is nearly impossible to determine the extent to which *Roe* influenced his position in *Casey*.

Alternatively, no ambiguity surrounded Justice Sandra Day O’Connor’s preferences. She supported abortion rights while a legislator in Arizona (“It’s About Time” 1981) and, once on the Court, frequently found problems with the trimester format of *Roe* but never doubted that a fundamental right to abortion existed (e.g., *Webster v. Reproductive Services* 1989, and *Thornburgh v. American College of Obstetricians and Gynecologists* 1986). Indeed, *Casey*’s attacks on *Roe*’s trimester framework and its adoption of the undue burden standard come directly from O’Connor’s dissent in *Akron v. Akron Center for Reproductive Services* (1983). So too, *Casey*’s overruling of *Akron* and *Thornburgh* comport perfectly with her dissents in those cases. It is extraordinarily difficult to argue that *stare decisis* influenced O’Connor in any manner in the *Casey* case. Where *Roe* and her previously expressed preferences met, she followed *Roe*. But where any majority opinion in any abortion case

---

3 Bush supported abortion rights until Ronald Reagan nominated him to be Vice President in 1980. He had even been an active supporter of Planned Parenthood (Lewis 1988).
differed from her previously expressed views, she stuck with her views. Justice O’Connor “followed” precedent to the extent that she used it to justify results she agreed with, but there is no evidence whatsoever that these precedents influenced her positions.

**MEASURING THE INFLUENCE OF PRECEDENT**

While we believe our position on the justices’ votes to be reasonable, we are struck by a lack of hard evidence as to how Justices O’Connor, Kennedy, and especially Souter actually felt about *Roe*. For example, O’Connor’s early Court positions on abortion, which generally accepted a right to abortion, could readily have been affected by the precedent established in *Roe*. But for *Roe*, she might not have taken that position. Thus, the best evidence about whether justices are influenced by a precedent would come not from justices who joined the Court after the decision in question, for we usually cannot be certain about what their position on the case would have been as an original matter. Nor can we gather such evidence from those on the Court who voted with the majority, for the precedent established in that case coincides with their revealed preferences (whatever their cause). Rather, the best evidence for the influence of precedent must come from those who dissented from the majority opinion in the case under question, for we know that these justices disagree with the precedent. If the precedent established in the case influences them, that influence should be felt in that case’s progeny, through their votes and opinion writing. Thus, determining the influence of precedent requires examining the extent to which justices who disagree with a precedent move toward that position in subsequent cases.

This is not an unobtainable standard. Examples of justices’ changing their votes and opinions in response to established precedents clearly exist. In *Griswold v. Connecticut* (1965), Stewart rejected the creation of a right to privacy and its application to married individuals. Yet in *Eisenstadt v. Baird* (1972) he accepted *Griswold’s* right to privacy and was even willing to apply it to unmarried persons. Justice White dissented when the Court established First Amendment protections for commercial speech (*Bigelow v. Virginia* [1975]); he thereafter supported such claims. (See *Virginia Pharmacy Board v. Virginia Citizens Con-

---

4 Rehnquist’s dissent, which White joined, emphasized the fact that the advertisement in question pertained to abortion providers rather than commercial speech per se. Arguably, White’s objection rested on his opposition to abortion (he and Rehnquist had dissented in *Roe v. Wade*) rather than to commercial speech.
6  Majority Rule or Minority Will

somer Council [1976], and Bates v. Arizona State Bar [1977])). And while Justice Rehnquist dissented in the jury exclusion cases Batson v. Kentucky (1986) and Edmonson v. Leesville Concrete Co. (1991), he concurred in Georgia v. McCollum (1992), providing an explicit and quintessential example of what it means to be constrained by precedent: "I was in dissent in Edmonson v. Leesville Concrete Co. and continue to believe that case to have been wrongly decided. But so long as it remains the law, I believe it controls the disposition of this case.... I therefore join the opinion of the Court" (p. 52).

We believe that this operational definition of precedential influence is both reasonable and, unlike other definitions, falsifiable. Compare our definition to one that counts a justice as following precedent as long as she cites some case or cases that are consistent with that justice’s vote. Since there are always some cases supporting both sides in virtually every conflict decided by the Court, such a definition turns stare decisis into a trivial concept, at least for explanatory purposes. Moreover, a justice-centered view of precedent makes precedent a personal decision, not the institutional decision that it so clearly is supposed to be.

Analyzing precedent from our perspective should yield important substantive and theoretical insights into the nature of judicial decision making. The doctrine of stare decisis is a fundamental part of the American legal system. Lawyers fill their briefs with previously decided cases; jurists at all levels of the federal and state court systems cite cases in virtually all of their written opinions; law school professors dissect these citations in the pages of their journals; and most important for our study, justices of the Supreme Court of the United States make mention of them in their private discussions (Epstein and Knight 1997) and endorse them in their opinions.

Indeed, one could readily claim that to the justices stare decisis remains the heart of the rule of law. In Payne v. Tennessee (1991), Thurgood Marshall argued in dissent that “this Court has repeatedly stressed that fidelity to precedent is fundamental to ‘a society governed by the rule of law.’... Stare decisis... is essential if case-by-case judicial decision-making is to be reconciled with the principle of the rule of law, for when governing standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will” (p. 849). The

5  Also see Schubert (1963) for an examination of Justice Clark’s changing his position in three court-martial cases decided in the 1999 term in response to newly established precedents. Clark also dissented in Miranda v. Arizona (1966) before acceding to it in his opinion in United States v. Wade (1967).
6  Lee Epstein contributed language and ideas to the following three paragraphs. We thank her for her assistance.
majority opinion’s “debilitated conception of stare decisis would destroy the Court’s very capacity to resolve authoritatively the abiding conflicts between those in power and those without” (p. 853). Justices O’Connor, Kennedy, and Souter noted in Planned Parenthood v. Casey (1992) that “no judicial system could do society’s work if it eyed each issue afresh in every case that raised it. . . . Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable” (p. 854). In short, appeal to precedent is the primary justification justices provide for the decisions they reach.7

But with all this attention to stare decisis, a critical question has gone unaddressed, at least in a systematic fashion, for far too long: Do previously decided cases influence the decisions of Supreme Court justices? That is, does precedent actually cause justices to reach decisions that they otherwise would not have made? Of course, as we have shown, in some cases, the answer clearly appears to be yes. But we still do not know how frequently such behavior occurs. The real question is not whether such behavior exists at all, for surely it does, but whether it exists at systematic and substantively meaningful levels.

This is the central question we address in this book, and it is of no small consequence, at least in part because the legal and scholarly communities disagree over its answer. At one end of the spectrum are those who herald the importance of stare decisis as perhaps the single most important factor influencing judicial decisions. These are supporters of what we will call “precedential” models. At the other end of the spectrum are those who argue that precedent is not influential, that it merely cloaks the justices’ personal policy preferences. These are supporters of what we will call “preferential” models. Finally, in the middle are those who argue that precedent can occasionally influence the justices but also believe that nonlegal factors can be just as important. We label these scholars “legal moderates.”

While this study can theoretically and empirically advance our understanding of how the Supreme Court makes decisions, it is important as well to highlight some of the claims we will not be able to make:

• Our approach does not and cannot speak to normative arguments about precedent, those suggesting what judges should and should not do.

• Our approach does not and cannot examine the role of stare decisis as

7 One recent study, for example, found that over 80 percent of the constitutional arguments raised by Justices Brennan and Rehnquist in majority opinions were based on precedent (Phelps and Gates 1991, p. 594).
Majority Rule or Minority Will

a tool used to enhance the legitimacy of courts as adjudicative bodies (Shapiro 1972).

- Though our approach could be used to examine vertical stare decisis, where lower courts appear to be influenced by higher court commands (Songer, Segal, and Cameron 1994), such inquiries are beyond the scope of this study. Indeed, we readily recognize that Supreme Court justices might be the set of judges least likely to be influenced by stare decisis (Segal and Spaeth 1993), so conclusions from this study may not be generalizable to the judicial system as a whole. But conclusions about the Supreme Court, even if not generalizable, are important enough to merit the careful consideration we provide.

With these caveats in mind, we conclude this chapter with a further exploration of the differing views of the influence of stare decisis.

Precedential and Preferential Models

In this section we examine a variety of different views that attempt to explain the conditions under which stare decisis will influence the decisions of judges and justices: those of precedentialists, preferentialists, and legal moderates.

Precedentialists

We begin with the precedentialists, and clearly the least defensible doctrine within this camp, mechanical jurisprudence. Edward Levi, though no believer in mechanical jurisprudence, describes it well as a three-step process “in which a proposition descriptive of the first case is made into a rule of law and then applied to a next similar situation. The steps are these: similarity is seen between cases; next, the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case” (1949, pp. 1–2). As Cardozo notes, “Some judges seldom
get beyond that process in any case. Their notion of their duty is to match
the colors of the case at hand against the colors of many sample cases
spread out along their desk. The sample nearest in shade provides the
applicable rule” (1921, p. 21).

Mechanical jurisprudence traces its roots at least as far back as the
eighteenth-century jurist Sir William Blackstone, who wrote that judges
“are the depositories of the laws; the living oracles who must decide all
cases of doubt” (Blackstone 1979, p. 69). They are sworn
to determine, not according to (their) own private judgment, but according to the
known laws and customs of the land; not delegated to pronounce a new law, but
to maintain and expound the old one. Yet this rule admits of exception, where
the former determination is most evidently contrary to reason; much more if it be
clearly contrary to the divine law. But even in such cases the subsequent judges
do not pretend to make a new law, but to vindicate the old law from misrepresen-
tation. For if it be found that the former decision is manifestly absurd or unjust,
it is declared, not that such a sentence was bad law, but that it was not law. (pp. 69–70)

If Blackstone’s following among legal scholars has waned, his follow-
ing among judges has not. No history of mechanical jurisprudence would
be complete without Justice Roberts’s statement for the Court in U.S. v.
Butler (1936):

It is sometimes said that the court assumes a power to overrule or control the
action of the people’s representatives. This is a misconception. The Constitution
is the supreme law of the land ordained and established by the people. All
legislation must conform to the principles it lays down. When an act of Congress
is appropriately challenged in the courts as not conforming to the constitutional
mandate, the judicial branch of Government has only one duty, to lay the article of
the Constitution which is invoked beside the statute which is challenged and to
decide whether the latter squares with the former. (p. 62)

Though it might be difficult to find modern legal scholars who believe
that this is all judges do, it is not difficult to find modern justices who so
profess. In one recent case, Justice Scalia declared, “To hold a govern-
mental act to be unconstitutional is not to announce that we forbid it, but
that the Constitution forbids it” (American Trucking Associations v.
Smith, p. 174).

two legal principles are not “finely-tuned standards,” comparable to the standards
of proof beyond a reasonable doubt or of proof by a preponderance of
the evidence. . . . They are instead fluid concepts that take their substantive content
from the particular contexts in which the standards are being assessed. (Ornelas v.
United States 1996, p. 918)

To assert that the undefinable standard of proof beyond a reasonable doubt is nonethe-
less “finely tuned” accords with the mindset of those who believe that words speak
more authoritatively than actions.

Dworkin (1978, p. 16) argues that even Blackstone was not really a mechanical
jurisprude.
Modern precedentialists instead often tend to fall into a category that can be called neolegalism. While recognizing that a variety of factors might influence the decisions of judges and justices, they still consider traditional legal factors, including adherence to precedent, to be important, if not primary.

We emphasize the writings of Ronald Dworkin, who is arguably this generation’s preeminent legal theorist. Though Dworkin arguably emphasizes normative claims over empirical assertions, in fact he often intermixes the two, as we will see. In doing so, he represents the empirical side of the neolegalist position exceedingly well.

In *Taking Rights Seriously* (1978), Dworkin critiques legal positivism in general and the writings of H. L. A. Hart in particular. While Dworkin’s larger goal is to demonstrate that certain rights inhere in civil society regardless of constitutional or statutory commands, his attack on positivism disputes the notion that judges are free to exercise discretion. While recognizing that precedent only inclines judges toward certain answers, rather than commands them, he nevertheless disputes the notion that judges are free to “pick and choose amongst the principles and policies that make up (this) doctrine” (p. 38), or that each judge applies “extra-legal” principles (e.g., no man shall profit from his own wrong) “according to his own lights” (p. 39). He insists instead that judges “do not have discretion in the matter of principles” (p. 47).

Precedent plays an important role in *Taking Rights Seriously* (Dworkin 1978, pp. 110–15; see also Dworkin 1986, p. viii, for a brief reflection on his precedential views in the earlier book), and needless to say that role is most important in hard cases, those where no preexisting rule of law exists. Dworkin argues that legal positivists err in claiming that judges legislate new rights in such cases, and again disputes the notion that in doing so they exercise discretion. “It remains the judge’s duty, even in hard cases, to *discover* what the rights of the parties are, not to invent new rights retrospectively” (p. 81, emphasis added).

When a new case falls clearly within the scope of a previous decision, the earlier case has an “enactment force” that binds judges. But even when novel circumstances appear, earlier decisions exert a “gravitational force” on judges (p. 111). This is not mechanical jurisprudence, as judges may disagree as to what the gravitational force is. Yet to Dworkin, there is a *correct* answer to that question that judges must *find*. And though his theory of precedent requires that a judge’s answer will “reflect his own intellectual and philosophical convictions in making that judgment, that is a very different matter from supposing that those convictions have