Planned Parenthood v. Casey, Two Theories of Precedent, and the Multidimensionality of the Law

Tommaso Pavone[1]
Department of Politics, Princeton University
December 3rd, 2013

I. Introduction

The law is a "thick" institution, and as such it has various dimensions that are occasionally in tension with one another, thereby producing disharmonies endogenous to the law (McCann 1994; Jacobsohn 2010). It should thus be of no surprise that particular components of the law – such as legal principles – are similarly multidimensional. Perhaps no case can better serve as a conduit to the exploration of the multidimensionality of legal principles than the US Supreme Court's *Planned Parenthood v. Casey*[2] (1992) decision generally upholding the controversial 1973 *Roe v. Wade*[3] decision. What renders the case particularly groundbreaking and *sui generis* is that "Part III of the Joint Opinion sets forth a full-blown judiciary theory of *stare decisis* – somewhat surprisingly, for the first time in the Court's history – and appears to make that theory the centerpiece of the decision" (Paulsen et al. 2013: 1541). Crucially for our purposes, the theory of precedent advanced by the Joint Holding authored by Associate Justices Sandra Day O'Connor, Anthony Kennedy, and David Souter is subsequently rebutted by the partial dissents offered by Chief Justice William Rehnquist and by Associate Justice Antonin Scalia. This essay provides a brief overview of *Casey* then proceeds to critically analyze the two theories of precedent articulated in the case and, in so doing, to argue that O'Connor, Kennedy, and Souter advance a fundamentally *political* theory of precedent whereas Rehnquist and Scalia offer a primarily *legalistic* alternative. After evaluating the shortcomings of each approach, the essay concludes by proposing that the multidimensionality of the law belies a simple evaluation that would privilege the adoption of one precedential theory over the other.

[1] Ph.D. Candidate. E-mail: tpavone@princeton.edu.
[2] *Planned Parenthood v. Casey,* 505 U.S. 833 (1992),
[3] *Roe v. Wade,* 410 U.S. 113 (1973).

II. An Overview of *Planned Parenthood v. Casey*

Before analyzing the divergent precedential theories articulated in *Casey*, it is important to contextualize the debate through a brief overview of the case itself. *Casey* concerns the constitutionality of the 1982 Pennsylvania Abortion Act (as amended in 1988 and 1989) that regulates and places restrictions on the provision of abortions within the state.[4] The grounds of the constitutional challenge are based on a substantive reading of the Fourteenth Amendment's Due Process Clause, within which *Roe v. Wade* located a fundamental right to privacy that "includes the abortion decision."[5] On these grounds, five components of the Pennsylvania law are challenged: 1) a requirement that women seeking abortions provide their informed consent prior to the procedure and that doctors inform women of the potential detriments to health arising from abortion procedures; 2) a mandate that minors obtain the informed consent of their parents/guardians in order to receive an abortion; 3) a requirement that married women sign a statement certifying that their husbands have been notified; 4) an imposed 24-hour holding rule subsequent to the fulfillment of the foregoing requirements before an abortion can be administered; and 5) a requirement that abortion clinics and hospitals keep records of abortion procedures.[6] Yet *Casey* concerns much more than the constitutionality of the statute, as the Court notes: "19 years after our holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages, *Roe v. Wade,* 410 U.S. 113 (1973), that definition of liberty is still questioned. Joining the respondents as amicus curiae, the United States, as it has done in five other cases in the last decade, again asks us to overrule *Roe*."[7]

In the end, *Casey* "explicitly reaffirm[s] *Roe*'s embrace of a constitutional right to abortion, at a time when most observers thought that *Roe* was destined to undergo a slow, *Lochner*[8]-style decline" (Paulsen et al. 2013: 1516). By applying most[9] of the logic in *Roe,* the

[4] 505 U.S. 833 (1992), at 844.
[5] 410 U.S. 113 (1973) at 154
[6] 505 U.S. 833 (1992), at 844.
[7] Ibid.
[8] *Lochner v. New York*, 198 U.S. 45 (1905)
[9] The Joint Holding rejects *Roe*'s trimester system, but considers this system to not be central to the precedent set by *Roe*, thus facilitating its overall defense.

Court's Joint Ruling upholds all of the provisions of the Pennsylvania statute except for its requirement that married women inform their husbands of their intent to receive an abortion. The holding reasons that because many women find themselves in abusive marriages "they may have very good reasons for not wishing to inform their husbands of their decision to obtain an abortion."[10] Therefore, the requirement that women sign a statement certifying that they have informed their husbands "operate[s] as a substantial obstacle to a woman's choice to undergo an abortion. It is an undue burden, and therefore invalid."[11] All other requirements are deemed not to constitute an undue burden on the woman's right to have an abortion, ensuring their constitutional compliance.

The ruling on the constitutionality of the Pennsylvania law is largely justified by the Joint Holding's application of the precedent set by *Roe.* "Liberty," begins the holding, "finds no refuge in a jurisprudence of doubt."[12] Yet to achieve this result, O'Connor, Kennedy, and Souter articulate a political theory of precedent that serves to justify the application of *Roe*, a theory to which we now turn.

III. O'Connor, Kennedy, and Souter's Political Theory of Precedent

The Joint Holding's political theory of precedent is derived from a canonical insight into the nature of judicial power articulated most explicitly by Alexander Hamilton in *Federalist 78* (2013 [1788]). Interestingly, it is not Hamilton's thoughts on the nature of precedent itself that attracts the attention of O'Connor, Kennedy, and Souter.[13] Rather, the Justices draw from what is arguably *Federalist 78*'s most oft-cited conjecture:

> "[T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or

[10] Ibid, at 893.
[11] Ibid, at 895.
[12] Ibid, at 844.
[13] Namely, *Federalist 78* argues that precedent both acts to "avoid [the] arbitrary discretion" of judges and "serve[s] to define and point out their duty in every particular case that comes before them." Hamilton proposes that because the number of precedents is likely to swell, "there can be but few men in society who will have sufficient skill in the laws to qualify them for the stations of judges," and thus judges must be selected from the most learned strata of American society (2013 [1788]: 134-138).

> injure them. The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse [...] and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments" (2013 [1788]: 134).

The Joint Holding's political theory of precedent pays homage to the foregoing statement by noting that "[a]s Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees."[14] What is crucial, however, is not so much where the holding aligns with Hamilton as much as where it departs from him, for it is this divergence that solidifies the political roots of the theory of precedent articulated in *Casey*. Hamilton's emphasis on the comparatively weak power of the judiciary aims to diffuse the widespread concerns articulated by Robert Yates in *Brutus No. 11*, namely that "[t]he judicial power will operate to effect, in the most certain but yet silent and imperceptible manner […] an entire subversion of the legislative, executive, and judicial powers of the individual states" (2013 [1788]: 132). The Joint Holding has no such objective – rather, its goal is to derive from *Federalist 78* a justification of *stare decisis* and its application to the controversial case at hand. Taking as a starting point the weakened authoritative foundation of judges vis-à-vis the executive and legislative branches, the Joint Holding argues that "[t]he Court's power lies, rather, 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."[15] O'Connor, Kennedy, and Souter's subsequent conclusion is worth quoting in full, for it lays out the heart of their political theory of precedent:

> "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

[14] 505 U.S. 833 (1992), at 865.
[15] Ibid.

> 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*[16] and *Roe*. But when the Court does act in this way, its decision requires an equally rare precedential force to counter the inevitable efforts to overturn it and to thwart its implementation [...] 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 [...] 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."[17]

The political, as opposed to legal, logic of this explication should be evident: the function of precedent is *not* to extend the shelf life of jurisprudentially correct holdings; rather, it is to protect the power of the Court. In fact, what is striking is precisely the fact that the holding's authors admit that "[s]ome of us as individuals find abortion offensive to our most basic principles of morality."[18] Agreement with the principles set out in *Roe* would facilitate the argument that political sensitivity to public opinion only motivates the otherwise principled defense of sound law. Instead, O'Connor, Kennedy, and Souter find that because the "facts" and the social context have not substantially changed since *Roe*, their theory of precedent requires them to defend *Roe*'s precedential force.[19] But by stating their disagreement with the principles in *Roe* and justifying its continued application in political terms, O'Connor, Kennedy, and Souter renounce a more legalistic logic.

The Joint Holding's retort that the Court's "obligation is to define the liberty of all, not to mandate [its] own moral code"[20] seeks to turn the tables on the foregoing conclusion. Yet this is ultimately a weak defense. First, it is generally accepted by constitutional scholars across the ideological and political spectrum that law and morality are interwoven. As Justice White argues

[16] *Brown v. Board of Education I,* 347 U.S. 483 (1954)
[17] Ibid, at 866-867.
[18] Ibid, at 850.
[19] Ibid, at 861-862.
[20] Ibid, at 850.

in *Bowers v. Hardwick*, "[t]he law, however, is constantly based on notions of morality."[21] Ronald Dworkin similarly posits that "in the end the magnet of political morality is the strongest force in jurisprudence" (1997: 127). In other words, declaring that personal moral views are being renounced does not rid the subsequent act of constitutional interpretation of its moral dimension. Second, it does not follow that because individual moral views are manifestly repudiated that the precedential theory constructed thereafter is politically aseptic and legalistic. A political theory of precedent can still be articulated by judges whose personal moral views would lead them elsewhere – the theory would perhaps be impersonal, but not necessarily apolitical. What renders a precedential theory political or legalistic is not whether it accords with the individual moral code of its authors, but the degree to which its premises and logical substantiation are political in nature.

In *Casey*, the political foundation of the Joint Holding's precedential theory is preeminent and distillable to the following logic:

I. The Court's power is derived from the public recognition of the impartiality and legitimacy of the Court;

II. Controversial cases are particularly threatening to the Court's power because they threaten to politicize the Court and erode its legitimacy;

III. Therefore, in order to not appear political in such caustic cases, the Court must demonstrate its lack of discretion by emphasizing the precedential foundations of its ruling.

What is particularly striking is just how openly the Court is willing to bear its cards. The argument that only the "most convincing justification under accepted standards of precedent could suffice to demonstrate that" a Court decision does not amount to a "surrender to political pressure"[22] is more so a discussion of *perception* than of *fact*. The Court may well be surrendering to political pressure, but it is less likely to be perceived to be doing so if it can portray itself as tightly chained by precedent.

[21] *Bowers v. Hardwick,* 478 U.S. 186 (1937), at 196.
[22] 505 U.S. 833 (1992), at 867.

Judicial sensitivity to public opinion is an inherently political consideration, and as such it has been studied primarily by political scientists. "Judicial reputation plays two important roles," write Garoupa and Ginsburg: "First, it conveys information to the uninformed general public about the quality of the judiciary [...] Second, reputation fosters esteem for the profession and the individual judge" (2009: 2). Given that "courts are commonly understood to suffer, in comparison to executives and legislatures, from a democratic deficit," their perception in the public eye as legitimate is essential to their ability to exercise their functions (Shapiro and Stone 1994: 414). For political institutions, a democratic deficit can be overcome via elections that allow voters "to throw the scoundrels out," thereby nurturing responsiveness to voter preferences and institutionalizing accountability (Weiler, Haltern, and Mayer 1995: 9). But for democratically unaccountable courts, legitimacy can only be nurtured via the "shared beliefs in the authority of the law and in the capacity of professional authorities to realize shared norms, values or goals" (Scharpf 2010: 71). It is for this reason that "reputation matters. Virtually every theory of judicial power is dependent, ultimately, on perceptions of judges […] Only if judges have a reputation for high quality will their decisions be respected and produce compliance" (Garoupa and Ginsburg 2009: 3). The Joint Holding's theory of precedent aligns seamlessly with this political science literature – all that is missing (for obvious reasons) is a series of citations.

Finally, just like many positivist political theories of law, the political theory of precedent advocated by O'Connor, Kennedy, and Souter seeks to bypass the normative dimension of the law it defends: *Roe* must be upheld, regardless of whether it is good or bad law. This point is leveraged by Chief Justice Rehnquist and Associate Justice Scalia in their partial dissents that explicate an alternative legalistic theory of *stare decisis*.

IV. Rehnquist and Scalia's Legalistic Theory of Precedent

Both Chief Justice Rehnquist and Justice Scalia agree that political considerations, in particular a sensitivity to public opinion, should not inform the Court in its decision making nor should they become the cornerstone of a theory of precedent. Rehnquist begins his critique by arguing that:

> "[T]he joint opinion advances a belief that retaining a portion of *Roe* is necessary to protect the "legitimacy" of this Court […] This is so, the joint opinion contends, because in those "intensely divisive" cases the Court […] must therefore take special care not to be perceived as "surrender[ing] to political pressure" and continued opposition. This is a truly novel principle […] Under this principle, when the Court has ruled on a divisive issue, it is apparently prevented from overruling that decision for the sole reason that it was incorrect, *unless opposition to the original decision has died away*" (emphasis in original).[23]

Rehnquist notes that it is often difficult to distinguish divisive cases from non-divisive ones, and regardless, "[i]n assuming that the Court is perceived as "surrender[ing] to political pressure" when it overrules a controversial decision, the joint opinion forgets that there are two sides to any controversy."[24] In other words, the political charge directed against the Court is not alleviated by simply upholding precedent rather than renouncing it. Failing to meet its own standard of success, Rehnquist proposes abandoning O'Connor, Kennedy, and Souter's political theory of precedent in favor of a legalistic one: "If one assumes instead, as the Court surely did in both *Brown* and *West Coast Hotel*,[25] that the Court's legitimacy is enhanced by faithful interpretation of the Constitution irrespective of public opposition, such self-engendered difficulties may be put to one side."[26] For Rehnquist, precedent should be followed when it is good law, not because it is politically wise for the court to do so. "We believe that *Roe* was wrongly decided," writes Rehnquist, who is joined by Justices Scalia, White, and Thomas in his partial dissent, "and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases."[27] Rehnquist notes that because the "historical traditions of the American people" are not in agreement as to whether women have a right to have an abortion, then "the Court was mistaken in Roe when it classified a woman's decision to

[23] Ibid, at 957-958.
[24] Ibid at 963.
[25] *West Coast Hotel Co. v. Parrish,* 300 U.S. 379 (1937)
[26] 505 U.S. 833 (1992), at 964.
[27] Ibid, at 940.

terminate her pregnancy as a "fundamental right.""[28] Since only fundamental rights have been recognized by the Court to be protected under the Fourteenth Amendment's "guarantee of personal privacy,"[29] Rehnquist argues that *Roe* should no longer be interpreted as valid law.

Justice Scalia delivers his parallel partial dissent (similarly joined by Chief Justice Rehnquist and Justices Thomas and White) and expands on Rehnquist's logic. He turns the tables on the Joint Holding by also drawing from Hamilton's *Federalist 78*, namely where Hamilton proclaims that "[the Judiciary] may truly be said to have neither Force nor Will, but merely judgment."[30] Hamilton's own views, implies Scalia, support a legalistic foundation for a theory of precedent. Indeed, for Scalia and Rehnquist it is judgment – in its apolitical, legalistic sense – that should be the sole driving consideration of the Court. "I am appalled," forcefully adds Scalia, "by the Court's suggestion that the decision whether to stand by an erroneous constitutional decision must be strongly influenced – against overruling, no less – by the substantial and continuing public opposition the decision has generated. The Court's judgment that any other course would "subvert the Court's legitimacy" must be another consequence of reading the error-filled history book that describes the deeply divided country brought together by *Roe*."[31] Scalia then takes his argument farther than does Rehnquist – for him, defending *Roe* "prolongs and intensifies the anguish,"[32] and thus fans the flames of the political controversy that the political theory of precedent advocated by O'Connor, Kennedy, and Souter sought to escape. By overruling *Roe*, concludes Scalia, the Court would "get out of this [political] area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining."[33]

On balance, if the political theory of precedent to which Scalia and Rehnquist are rebelling fails to tackle the heart of the issue – whether *Roe* is good or bad law – in favor of misplaced political pragmatism, then their legalistic alternative swings the pendulum too far in

[28] Ibid, at 953.
[29] See *Roe v. Wade,* 410 U.S. 113 (1973), at 152.
[30] 505 U.S. 833 (1992), at 996.
[31] Ibid, at 998.
[32] Ibid, at 1002.
[33] Ibid.

the direction of a naïve interpretation of the law. To cover one's ears and ignore the cries of the public does not render the task of constitutional interpretation any less political, particularly when it concerns, as in *Casey*, a series of politically and morally grounded public policies. Keith Whittington (1999a; 1999b) has convincingly argued that the US Constitution has both a legalistic dimension accessible via technical constitutional interpretation and an underlying political dimension accessible via inherently political constitutional construction. Could it be denied that the waters in which the Court finds itself in *Casey* are as political as they are legalistic, thereby necessitating some level of constitutional construction irrespective of how a particular precedential theory is justified? In this light, O'Connor, Kennedy, and Souter's holding is a rare and manifest admission of constitutional construction, whereas Rehnquist and Scalia's alternative merely falls back on the Court's tendency of concealing construction under the sheepskin of constitutional interpretation.

Consider, for example, Rehnquist's evocation of *Brown*. While it is true, as Rehnquist argues, that *Brown* represents the inverse of the Court's decision in *Casey* (namely, the rejection of precedent in defiance of public opposition), the considerations of the Justices in *Brown* were far from purely legalistic. It is well known that Chief Justice Earl Warren labored extensively to produce a unanimous ruling because "[a]ll of the justices knew that a 5-4 or 6-3 decision that overturned *Plessy*[34] would be a recipe for major civil unrest. *Any* decision that attacked segregated schools was sure to meet with resistance from white southerners, and the position of the pro-segregation forces would be that much stronger if they could claim the support of a number of justices themselves" (Maltz 2000: 138; emphasis in original). Warren and his colleagues were not so naïve as to believe that by simply following what they believed to be the correct interpretation of the Constitution they would be able to close the blinds on the political context that shapes and defines the Court's role in the American Republic. Thus even if O'Connor, Kennedy, and Souter are too eager to embrace political considerations in their theory of precedent, Rehnquist and Scalia are too quick to dismiss them.

[34] *Plessy v. Ferguson*, 163 U.S. 537 (1896)

V. Thick Law, Shallow Theories

The divergent theories of precedent articulated in *Casey* surely have redeeming qualities. The political theory formulated by O'Connor, Kennedy, and Souter offers pragmatism and forthrightness – a rarity in the catalog of constitutional pronouncements by the Court. The legalistic theory formulated by Rehnquist and Scalia offers an admirable aspirational call to return to first principles – to focus on the law and not on politics. Ultimately, both fail to offer a persuasive and comprehensive theory of precedent because their respective theories' unidimensionality is not sufficient to capture the multidimensionality of the law itself. The law is not reducible to politics – it has its own logic and principles that, while influenced by politics, remain nonetheless differentiable from it. Correlatively, the law is not reducible to itself – it arises within a political context and its application bears political consequences. A faithful interpretation of the law espoused by a theory of precedent would, instead of flattening the law in the name of parsimony, be sensitive to the complexity and tensions inherent in the thick, multilayered nature of its constituent legal principles.

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