

# JUSTICE'S ILLUSION

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**D**uring their recent confirmation hearings, Supreme Court Justices John Roberts and Samuel Alito both spoke about the importance of precedent in judicial decision making. In this age of bitter partisan politics, the High Court is often viewed as the one branch of government that interprets the law and leaves politics aside. In theory, Justices serve life terms so that they are not subject to the whims of the public. Nonetheless, despite the aura of non-partisanship the Court displays, it can be said that the Justices manipulate precedent to effectively rule based on their personal policy preferences.

In 1996, two political scientists, Jeffrey A. Segal and Harold J. Spaeth, did a statistical study of dissenting Justices in landmark decisions to determine whether or not Justices are influenced by precedent. They look at dissenting Justices because their revealed choices are clearly different from the Court's decision, which makes it possible to see whether or not they change their opinions to comply with precedent in the future. Thus, "For each dissenting Justice, we will determine whether that Justice accepts the relevant decision in subsequent cases dealing with the same issue" (Segal and Spaeth 476). Certainly precedent does affect some decisions, but "the question is whether such behavior exists at systematic and substantively meaningful levels" (477).

Of the 346 votes Siegel and Spaeth analyzed, "90.8% of the votes conform to the Justices revealed preferences. That is, only 9.2% of the time did a Justice switch to the position established in the landmark precedent" (477). All Justices but Justice Stewart and Justice Powell voted more than 80% of the time according to their own policy preferences. Half of Justice Stewart's six precedential votes were from one case, and all five of Justice Powell's were from one case. The empirical results show that following *stare decisis*, otherwise known as precedent, is the exception.

Yet while the evidence may indicate that following *stare decisis* is rare, Justices often preach about its importance. During their confirmation hearings, both Chief Justice Roberts and Justice Alito said they felt deep respect for precedent. Furthermore, Justice O'Connor preached for the preservation of precedent in her decision in *Planned Parenthood v. Casey*. That case revisited *Roe v. Wade*, which gave women the right to an abortion and was perhaps the most famous and controversial court case in our nation's history. At the time, both Planned Parenthood and President Bush's solicitor general, Kenneth Star, asked the Supreme Court to end the uncertainty and either reverse or affirm *Roe v. Wade*. In the end, Justice Kennedy and Justice Souter signed onto Justice O'Connor's compromise opinion, which became the official opinion of the Court.

Justice O'Connor's decision focuses on the need to abide by *stare decisis* for the sake of the Court's legitimacy. She says, "Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is

sufficiently plausible to be accepted by the nation” (III). O’Connor argues that if Justices made decisions on non-legal principles, the nation would begin to lose respect for the Court. Therefore, she claims, “Within the bounds of normal *stare decisis* analysis, then, and subject to the considerations on which it customarily turns, the stronger argument is for affirming *Roe’s* central holding, with whatever degree of personal reluctance any of us may have, not for overruling it” (I). *Stare decisis* must be upheld even when Justices disagree with it.

Justice Scalia, however, rejects the Court’s reliance upon *stare decisis* as contrived: “It insists upon the necessity of adhering not to all of *Roe*, but only to what it calls the ‘central holding’” (Scalia). It appears that this picking and choosing of what part of the precedent the Court will follow is simply a way for the Justices to keep the parts of *Roe v. Wade* with which they agree, while leaving out those that they view as poor policy. To show how the court has done this, Justice Scalia focuses on the trimester framework, a part of *Roe v. Wade* that the Court rejects in *Planned Parenthood v. Casey*.

I must confess, however, that I have always thought, and I think a lot of other people have always thought, that the arbitrary trimester framework, which the Court today discards, was quite as central to *Roe* as the arbitrary viability test, which the Court today retains. It seems particularly ungrateful to carve the trimester framework out of the core of *Roe*, since its very rigidity (in sharp contrast to the utter indeterminability of the “undue burden” test) is probably the only reason the Court is able to say, in urging *stare decisis*, that *Roe* “has in no sense proven ‘unworkable,’” ante, at 13. I suppose the Court is entitled to call a “central holding” whatever it wants to call a “central holding”—which is, come to think of it, perhaps one of the difficulties with this modified version of *stare decisis*.

Justice Scalia then describes a number of different ways in which the majority decision ignores large portions of *Roe*. He essentially argues that the majority opinion, while claiming to uphold *Roe* based on precedent, essentially destroys the whole institution of *stare decisis* with its inconsistent holdings.

Justice O’Connor does believe that a certain amount of “correction of error” is permissible. Yet “only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but surrender to political pressure, and an unjustified repudiation of the principle which the Court staked its authority in the first place” (Scalia). While O’Connor upholds *Roe*, she does change certain aspects of it, such as the trimester framework, which essentially rules out any restrictions on abortion through the first two trimesters. She says, “We reject the trimester framework, which we do not consider to be part of the essential essence of *Roe*” (IV). In its place, O’Connor introduces the “undue burden” standard for determining whether an abortion-related law is constitutional.

So, if Justices do not follow *stare decisis*, why then do they preach of its importance? What, then, is the relationship between precedent and decision making? In effect, Justices use the appearance of *stare decisis* to cover their own policy beliefs and gain legitimacy. For example, in his dissent in *Planned Parenthood v. Casey*, Justice Scalia rips into Justice O'Connor's "outrageous arguments . . . which it is beyond human nature to leave unanswered." Responding to O'Connor's opening statement, "Liberty finds no refuge in a jurisprudence of doubt" (O'Connor I), Scalia claims that "The shortcomings of *Roe* did not include lack of clarity" (Scalia). Instead, Scalia claims, the new undue burden test's "efforts at clarification make clear only that the standard is manipulatable and will prove hopelessly unworkable in practice. . . . Consciously or not, the joint opinion's verbal game will conceal raw judicial policy choice concerning what is 'appropriate' abortion legislation."

In essence, Scalia argues that Justice O'Connor's majority opinion, which is, by extension, the majority opinion of the Court, conforms far more to the Justices' own personal preferences than it does to *Roe v. Wade*. As Justice Scalia points out, even though Justice O'Connor claims to uphold the "essential holding" of *Roe v. Wade*, she conforms more to her own personal preferences in *Planned Parenthood v. Casey* far more than she does to the prior case. For example, O'Connor's dissent in *Akron I*, while she was sitting on a lower court, first introduced the idea of an "undue burden," which she sets forth as the new test for admissibility in place of the trimester framework of *Roe*. In effect, she has masked her own policy preference on abortion with the image of *stare decisis*. While she claims to accept the central holding of *Roe*, she rejects large parts of it in order to replace the trimester framework with her own favored standard. This manipulation of *Roe* allowed Justice O'Connor to come up with the split decision on *Casey*, upholding the informed consent, twenty-four-hour waiting period, and parental consent portions of the law in question while striking down the spousal notification and reporting sections of that law. As Justice Scalia notes, "Under *Roe*, requiring a 24-hour waiting period between the time the woman gives her informed consent and the time of the abortion is unconstitutional, *Akron I*. Under the 'undue burden' regime (as applied today, at least) it is not" (Scalia). Through his scathing dissent, Justice Scalia has shown us perhaps the greatest illusion in American politics. Justices do not follow precedent; they manipulate it to gain legitimacy for their policy preferences. Segal and Spaeth have proven Justice Scalia right: "The Imperial Judiciary lives" (Scalia).

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## WORKS CITED

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