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ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT

This book examines the influence of precedent on the behavior of U.S. Supreme Court justices throughout the Court's history. Under the assumption that for precedent to be an influence on the behavior of justices it must lead to a result they would not otherwise have reached, the results show that when justices disagree with the establishment of a precedent, they rarely shift from their previously stated views in subsequent cases. In other words, they are hardly ever influenced by precedent. Nevertheless, the doctrine of *stare decisis* does exhibit some low-level influence on the justices in the least salient of the Court's decisions. The book examines these findings in light of several leading theories of judicial decision making.

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for Jean, for forty-five years
Harold J. Spaeth

for Larry Segal and Sharon Schorr
Jeffrey A. Segal

Preface

The publication of our first book together, *The Supreme Court and the Attitudinal Model* (1993), argued that the decisions of the Supreme Court could be overwhelmingly explained by the attitudes and values of the justices, and that traditional legal factors, such as precedent, text, and intent, had virtually no impact.

The book met, not unexpectedly, with a variety of criticisms from jurisprudentially inclined scholars. Though few doubted that we had provided clear and convincing evidence of the influence the justices' attitudes had on their decisions, our analysis of the legal model was far less systematic and relied almost exclusively on anecdotal evidence.

At the time, we argued that the components of the legal model were so vague that they could not be subject to falsifiable tests. That is, if factors such as precedent can be used to support any position that a justice could take, such that one could not predict *a priori* how precedent might influence a decision, then precedent is completely meaningless as an explanation of the Court's decisions.

After the publication of our book, we began to consider possible falsifiable hypotheses that could be made about the influence of precedent on Supreme Court decisions. We began with the notion that for precedent to be such an *influence*, it must lead justices to decisions that they would not otherwise have reached. That is, if a justice supports abortion rights and continues to do so following the establishment of pro-choice precedents, we cannot claim that the justice was influenced by those precedents. But we can test the influence of precedent on those who disagree with the established position.

We first developed this idea in a 1996 article in the *American Journal of Political Science* and simultaneously provided some preliminary tests. The journal published a forum centered on our article, and we have since been able to benefit from the comments, criticisms, and analyses of Jack Knight and Lee Epstein, Saul Brenner and Marc Stier, Donald Songer

and Stephanie Lindquist, and Richard Brisbin. For this book we have refined our measures and provided a comprehensive analysis of the influence of precedent over the history of the Supreme Court, examining the population of the Court's landmark decisions as identified by Witt (1990) and a random sample of the Court's ordinary cases.

Chapter 1 introduces the subject matter of the book and explains why the notion of *stare decisis* is important for the Court and for our theoretical understanding of the Court. Chapter 2 describes in great detail our methodology for examining the influence of *stare decisis*. Chapters 3 through 8 examine precedential behavior chronologically through the history of the Court, focusing on landmark cases, but providing information on the often-neglected ordinary litigation facing the Court as well. Chapter 9 summarizes the results and provides tests for a variety of hypotheses we have derived.

In addition to the critics we mentioned earlier, we thank Ken Meier for publishing our original work in the *AJPS* and creating the forum on that article in the same issue. Lee Epstein deserves additional mention, for without fail she makes her insights available to us whenever we need assistance, which is more often than we would like to admit. She and Larry Baum of Ohio State University also read the entire manuscript, thereby appreciably enhancing its accuracy and readability. Aneu Greene provided research assistance for some of the materials in Chapter 1, and Kevin McDonnell put together the data set used for the statistical analyses in Chapter 9. Some of those data were gathered with support from NSF grants SES8313773, SES9211452, SBR9320509, SBR9515335, and SBR9614000.

Segal would like to thank his chair, Mark Schneider, for all of the support he has provided through the years, and the rest of his colleagues at the State University of New York at Stony Brook for providing what must be one of the most exceptional work environments anywhere. He also thanks his wife, Christine – not, as is typically done in these circumstances, for graciously accepting the time it took to write this book, but for just the opposite: for always wanting him to come home early.

Spaeth thanks the National Science Foundation for the support needed to construct archived databases. Without such support, the collection and compilation of the data on which work such as this rests would not be feasible.

We thank our Cambridge editor, Alex Holzman, who allows his authors to work without hindrance or interference. Andrew Roney and Susan Thornton ably performed the demanding and thankless tasks of production editor and copy editor, respectively.

Finally, the inverse alphabetical order of our names does not indicate that Spaeth wrote more of this book than Segal. Responsibility for its contents is equally divided. The order serves only to distinguish this book from its cowritten predecessor, *The Supreme Court and the Attitudinal Model*, which Cambridge University Press also published.

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Precedent and the Court

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 1992 decision upholding abortion rights (*Planned Parenthood of Southeastern Pennsylvania v. Casey*) surprised more than a few Court watchers, with the *New York Times* headlining Linda Greenhouse's article with the phrase "SURPRISING DECISION" (Greenhouse 1992a; see also Barrett 1992, Marcus 1992, and Savage 1992).

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 precedential 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 unwise or unjust" (*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[2] pointed out that "time has overtaken 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,[3] 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 overuling 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]);[4] 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.