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Justice Souter's
"Keep-What-You-Want-and-Throw-Away-the-Rest" Interpretation of Stare Decisis

DAVID K. KOEHLER†

“Power, not reason, is the new currency of this Court’s decision-making.” The late Justice Thurgood Marshall advanced this scathing criticism in Payne v. Tennessee—a final angry dissent issued on the day of his retirement. Voicing tremendous consternation over the state of stare decisis at the Supreme Court, Justice Marshall asserted that the Court’s change of position in Payne was but a function of a change in the Court’s composition. He decried the majority’s opinion as an ominous one which would send “a clear signal that scores of established constitutional liberties are now ripe for reconsideration, thereby inviting the very type of open defiance of our precedents that the majority rewards in this case.”

According to Marshall, the “Court owe[d] more to its constitutional precedents.”

In stressing the need to remain faithful to precedent in Payne, Justice Marshall cited a dissent Justice David H. Souter wrote when he was on the New Hampshire Supreme Court. In this New Hamp-

† J.D., 1994, University at Buffalo School of Law.
1. Payne v. Tennessee, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting). In Payne, the Court overruled two cases—one decided just two terms prior—and held that victim impact statements may be admitted at the sentencing phase of a capital trial. See infra part II.B.
3. Responding to Marshall’s “power not reason” statement, Justice Scalia asserted to the contrary: “[W]hat would enshrine power as the governing principle of this Court is the notion that an important constitutional decision with plainly inadequate rational support must be left in place for the sole reason that it once attracted five votes.” Payne, 501 U.S. at 834 (Scalia, J., concurring).
4. Id. at 845 (Marshall, J., dissenting).
6. Payne, 501 U.S. at 849 (citing Appeal of Concerned Corporators of the Portsmouth
shire dissent, Souter quoted the United States Supreme Court in support of his argument for the essential need to follow stare decisis. 7 Rather than directly quote the Supreme Court’s language, Marshall instead opted to cite Souter’s dissent. 8 Ostensibly, Marshall’s unconventional act may be interpreted as acerbic criticism of Souter’s concurrence with the Payne majority; however, it also may be interpreted as a lesson from the elder departing Justice to the new kid in town.

This Comment addresses Souter’s interpretation and application of stare decisis9 during his first two terms on the United States


Policy of courts to stand by precedent and not to disturb settled point. Doctrine that, when a court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same; regardless of whether the parties and property are the same.

Id. at 1406 (citations omitted).

Stare decisis is a judge-made doctrine historically rife with ambiguity. The impetus for the doctrine dates back to the infancy of English Common Law during the thirteenth century when decisions first began to be recorded. See generally Robert A. Sprecher, The Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied, 31 A.B.A. J. 501, 501 n.9 (1945). By 1765, Blackstone indicated that it was “an established rule to abide by former precedents, where the same points come again in litigation.” Id. at 502 (citing BLACKSTONE, COMMENTARIES 69 (Cooley 3rd ed. 1884)). But there were exceptions to the “absolute” nature such as when following a precedent was plainly “unreasonable and inconvenient”—that is, if it is obviously contrary to statute or well established principle.” Id. at 503 (citations omitted).

During the early days of the Republic, Alexander Hamilton wrote: “To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents.” THE FEDERALIST No. 78 (Alexander Hamilton). Despite strict application of stare decisis in the United States during the nineteenth century, Justice
Supreme Court with a critical focus on Planned Parenthood v. Casey. Part I examines Souter’s early stare decisis jurisprudence as gleaned from his tenure as a judge in New Hampshire and his testimony at the Senate confirmation hearings. Part II presents an exposition of Souter’s pragmatic approach to the doctrine of stare decisis. Individual principles of this approach are articulated in three cases, James B. Beam Distilling Co. v. Georgia, Payne v. Tennessee.

Brandeis’ seminal dissent that the doctrine is not an “inexorable command” has been frequently cited. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting). Therein, Brandeis noted that although tending toward uniformity, the decision whether to follow stare decisis “is a question entirely within the discretion of the court.” Id. at 406 (quoting Hertz v. Woodman, 218 U.S. 205, 212 (1910)). Further, Brandeis noted that constitutional cases are “practically impossible” to correct by legislative action and consequently “this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the forces of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.” Id. at 406-08 (extensive citations omitted).

The doctrine of stare decisis has evolved over time and “interchangeably describes either obedience to precedent, or obedience to precedent absent some countervailing considerations.” Rehnquist, supra at 347 n.15 (comparing Harry W. Jones, Dyson Distinguished Lecture: Precedent and Policy in Constitutional Law, 4 PACE L. REV. 11, 19 (1983) and Stanley Reed, Stare Decisis and Constitutional Law, 9 PA. B. ASS’N Q. 131, 133 (1938)). For a contemporary example of the present lack of credence paid to the doctrine, see Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (overruling National League of Cities v. Usery, 426 U.S. 833 (1976) (overruling Maryland v. Wirtz, 392 U.S. 183 (1968))). In Garcia, both Chief Justice Rehnquist and Justice O’Connor dissented, stating that the majority’s ruling should be overruled at the first opportunity. Id. at 580, 589.

This Comment harbors no delusion of adding to the wealth of scholarship addressing the general issue of stare decisis and the Supreme Court. For a more detailed analysis of stare decisis, see Michael J. Gerhardt, The Role of Precedent in Constitutional Decision-making and Theory, 60 GEO. WASH. L. REV. 68 (1991); Henry P. Monaghan, Stare Decisis and Constitutional Adjudication, 88 COLUM. L. REV. 723 (1988); John Wallace, Comment, Stare Decisis and the Rehnquist Court: The Collision of Activism, Passivism, and Politics in Casey, 42 BUFF. L. REV. 187 (1994).

10. 112 S. Ct. 2791 (1992). Although the scope of this Comment addresses Souter’s first two terms on the Supreme Court, Souter’s subsequent opinions during his third term are not inconsistent with the arguments presented herein. See, e.g., United States v. Dixon, 113 S. Ct. 2849, 2881, 2891 (1993) (Souter, J., concurring in the judgment in part and dissenting in part) (noting that he would not invite the consequences of overruling what he considered correctly decided precedent concerning double jeopardy (citing Grady v. Corbin, 495 U.S. 508 (1990))); St. Mary’s Honor Center v. Hicks, 113 S. Ct. 2742, 2757, 2765 (1993) (Souter, J., dissenting) (stating that he could not join the majority in abandoning Title VII precedent because “stare decisis [has] special force in the area of statutory interpretation” (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 172-73 (1989))); Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2247-50 (1993) (Souter, J., concurring in part and concurring in the judgment) (asserting that since the decision in Employment Div. v. Smith, 494 U.S. 872 (1990), was overbroad, not adequately briefed or argued, and at odds with precedent, it should “be reexamined consistent with principles of stare decisis”).

see,12 and Lee v. Weisman,13 addressing the commercial, criminal, and constitutional contexts, respectively. From an examination of these cases, it is clear that for Souter context determines the interpretation and application of stare decisis. Part III analyzes Souter’s opinion in Planned Parenthood v. Casey,14 wherein he synthesizes the distinct principles articulated in Beam, Payne, and Lee to create a definitive construct within which the doctrine of stare decisis is to be interpreted. Part IV deconstructs Souter’s interpretation of stare decisis and concludes that his approach to stare decisis is merely a function of his pragmatic approach to the rule of law as the law of consequences.

I. SOUTER’S EARLY STARE DECISIS JURISPRUDENCE

When Souter was nominated to the United States Supreme Court in the summer of 1990, he was considered something of an enigma.15 The “stealth candidate,” as Souter came to be known, lacked a “paper trail” of clearly defined views and left many wondering just where the independent-minded and somewhat reclusive jurist from Weare, New Hampshire stood on the pressing issues of the day.16

15. At the time of Souter’s nomination, the late Justice Thurgood Marshall’s deprecating comment that he had never heard of Souter was a typical reaction. See e.g., Linda Greenhouse, Hot Words of a Justice are Hardly a Surprise, N.Y. TIMES, July 30, 1990, at A8. In many ways, the media’s appellation of Souter as the “stealth candidate” was an accurate description. One of President Bush’s senior advisors was quoted as saying that the President had purposely looked for a conservative jurist whose views on the subject of abortion were “a little fuzzed up.” Maureen Dowd, Dole Wary That Abortion May Color Court Selection, N.Y. TIMES, July 23, 1990, at A8. For a typical reaction of popular mass media to Souter’s nomination, see Richard Lacayo, A Blank Slate; Hoping to Place a Conservative on the Supreme Court Without a Bloody Confirmation Fight, Bush Picks a Man Nobody Knows, TIME, Aug. 6, 1990, at 16.
16. In the summer of 1990, the media was abuzz questioning who Souter was and what he stood for. The tension over the precarious balance struck between liberals and conservatives on the Court—a balance that was listing toward the right after more than two decades without a nomination by a president of the Democratic party—generated generous turmoil regarding Souter’s nomination. Inspired both by the polarized nature of the Court and the mystery surrounding the nominee, the public demanded that senators discover Souter’s precise stance on controversial issues. See, e.g., Linda Greenhouse, An Activist’s Legacy, N.Y. TIMES, July 22, 1990, at A1; Linda Greenhouse, Brennan, Key Liberal, Quits Supreme Court; Battle for Seat Likely, N.Y. TIMES, July 21, 1990, at A1;
A. New Hampshire Stare Decisis Jurisprudence

At the time of Souter’s nomination, he was a judge on the United States Court of Appeals for the First Circuit. Having been elevated to the First Circuit only five months prior to his nomination to the Supreme Court, he was not afforded much, if any, opportunity to participate in opinion writing at the federal appellate level. Consequently, there are no opinions to his credit from the First Circuit regarding the application of stare decisis. However, an indication of Souter’s early stare decisis philosophy is ascertainable from an examination of his New Hampshire opinions.

Prior to Souter’s nomination to the First Circuit, he had served as a judge on both the Superior Court and the Supreme Court of New Hampshire. His decisions displayed a marked respect for stare decisis. Oftentimes Souter found it necessary to adhere strictly to precedent, even when this position required following cases he considered improperly decided. For example, in Cacavas v. Maine Bonding & Casualty Co., Souter asserted that in the interest of consistency, he was bound to follow precedent even though he thought it was wrongly decided. The sentiments in Cacavas echo those of New Hampshire v. Meister, an earlier concurrence by Souter, in which he asserted: “The consequences of what I believe was an unsound conclusion in that case are not serious enough to outweigh the value of stare decisis.”

Souter’s respect for precedent at the state level was particularly apparent in the commercial and statutory context. His dissent in Appeal of Concerned Corporators of the Portsmouth Savings Bank expressed his adherence to stare decisis in the commercial context. Although acknowledging that the weight of precedent may vary with context, Souter argued that in the commercial context only the “weightiest of reasons” can compel overruling because “presumably, individuals may have arranged their affairs in reliance upon

Lacayo, supra note 15.

18. 512 A.2d 423, 426 (N.H. 1986) (Souter, J., concurring specially) (asserting the need for consistency in uninsured motorist cases).
19. Id.
20. 480 A.2d 200, 204 (N.H. 1984) (Souter, J., concurring specially) (questioning the eligibility of a petitioner to obtain a hearing to annul his criminal conviction record).
21. Id. (referring to a position he had taken as a trial judge in State v. Roger M., 424 A.2d 1139 (N.H. 1981), that was overruled on appeal).
22. 525 A.2d 671, 693 (N.H. 1987) (Souter, J., dissenting) (dissenting from the majority's holding that mutual savings depositors possessed property interests for cash distributions from a bank's surplus upon liquidation and acquisition).
23. Id. at 701.
the expected stability of decision.'” He asserted that the majority opinion engendered uncertainty and erred in overruling precedent because *stare decisis* is “‘a principle of policy’ which ‘is essential if case-by-case judicial decision-making is to be reconciled with the principle of the rule of law, for when governing legal standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable results.’” He concluded that the majority had “not faced the facts or the effects of overruling our prior law.”

Similarly, when interpreting statutory workman’s compensation benefits in *Petition of Robert Correia*, Souter concluded: “Our obligation is to construe the statute, not to render its language meaninglessly protean. Once the statute has been construed, *stare decisis* calls for a reasonable degree of certainty in applying that construction to future cases, subject always to the legislature’s power to modify the statute itself.”

### B. Senate Confirmation Hearings Testimony

For most observers living outside of New Hampshire, the first introduction to Souter and his judicial philosophy occurred at his September 1990 Senate confirmation hearings. When questioned about his view of *stare decisis*, Souter demonstrated respect for the doctrine, describing it as a “bedrock necessity if we are going to have in our judicial systems anything that can be called ‘the rule of law’ as opposed simply to random decisions on a case-by-case basis.” Souter also attempted to quell Senate fears—especially those on the


26. *Id.* at 704.

27. 519 A.2d 263 (N.H. 1986).

28. *Id.* at 266; see also Blue Jay Realty Trust v. City of Franklin, 567 A.2d 188, 194-95 (N.H. 1989) (holding that despite recent contrary *dicta*, the mandate of *stare decisis* dictated that a prior ruling prevails).

29. For a discussion of the partisan politics and underlying issues involved in Souter’s nomination and confirmation hearings, see David K. Koehler, *The Confirmation of David H. Souter as an Associate Justice of the United States Supreme Court* (1991) (unpublished manuscript, on file at Mudd Manuscript Library, Princeton University); see also supra notes 15-16 and accompanying text.

30. SENATE COMM. ON THE JUDICIARY, 101ST CONG., 2D SESS., NOMINATION OF DAVID H. SOUTER TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT, EXECUTIVE REPORT 60 (Oct. 1, 1990) [hereinafter EXECUTIVE REPORT].
conservative side of the aisle—of judges playing the role of “knight errant,” ruling as they see fit rather than within the dictates of the law: “I share the demand that we look outside ourselves, the demand that we guard against our views of morality or public policy, however passionately we may hold them and however profound our principles may be.”

Souter indicated, however, that he was not blindly intractable on the issue of stare decisis. Acknowledging that Brown v. Board of Education was settled doctrine, Souter asserted that it was a valid example of overturning precedent when dictated by societal change and pragmatic theory. Souter stated explicitly that it is not the principles that change, but the world around them: “[A]s I have said before that I think Plessy was wrongly decided . . . I would like to think, and I do believe, that the principle of equal protection was there and that in the time intervening we have gotten better at seeing what is before our noses.”

Souter suggested that cases in the criminal context may be more readily subject to review. He opined that certain cases in this area are an exercise of the Court’s “prudential power”—an attempt “to get the right result, to enforce the appropriate standard with the least amount of damage to the body politic . . . and with the least amount of damage to the judicial system, which is constantly overwhelmed with litigation.” Souter did “not rule out the possibility of [such issues] coming back before the Court”:

> I think what I can probably say to it is that—and I have said similar things from the bench in New Hampshire—that if that issue does come back or one similar to it, I think there is an obligation on those who want to raise it to address the pragmatic issues. How is it working today? How do we assess, if you say the price is high, how do we assess that price? What do we really know about what is going on?

> I think we are engaged in significant measure if such an issue comes up in a very pragmatic weighing, and it must be addressed that way.

Souter asserted that although precedent was a threshold inquiry, if a case was found to be wrongly decided, one must evaluate the “degree and kind” of reliance placed on the precedent by indi-

31. Id. at 55 (quoting Transcript, Sept. 14, 1990, at 6-7).
32. 347 U.S. 483 (1953).
33. EXECUTIVE REPORT, supra note 30, at 12-13 (discussing Plessy v. Ferguson, 163 U.S. 537 (1896)).
35. 16 THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE 1916-1990 (DAVID H. SOUTER) 384 (Compiled by Roy M. Mersky et al. 1992) [hereinafter MERSKY].
36. Id.
viduals, legislatures, and courts, as well as the hardship engendered by overruling the case. Souter elaborated:

If a precedent, in fact, is consistent with a line of development which extends from its date to the present time, then the cost of overruling that precedent is, of course, going to be enormously greater and enormously different from what will be the case in instances in which the prior case either has not been followed or the prior case has simply been eroded, chipped away at, as we say, by later determinations.

He further noted that such reliance considerations are not limited to the commercial context.

When pressed to address the controversial issue of abortion and its related precedents, Souter deftly and tenaciously exercised his "prerogative" not to answer. He stated: "I have not any agenda on what should be done with Roe v. Wade, if that case were brought before me. I will listen to both sides of that case. I have not made up my mind and I do not go on the Court saying I must go one way or I must go another way."

Although Souter invoked his "prerogative" not to comment on the "unsettled" issue of abortion, he did discuss the standard of review in gender discrimination and free exercise cases as well as the constitutionality of capital punishment, freedom of speech and criminal procedure issues. Arguably, these issues were no more settled than that of abortion. Similarly, Souter was willing to discuss his view of stare decisis regarding controversial First Amendment Establishment Clause cases. Souter asserted that he did not "have either an agenda or a personal desire" to bring about a reexamination of the Establishment Clause's "wall of separation" between church and state. He also noted that the three-part "Lemon test," enunciated in Lemon v. Kurtzman, was problematic and might bring the Establishment and Free Exercise Clauses into conflict, but that he harbored no inclination to change the Court's

37. EXECUTIVE REPORT, supra note 30, at 36-37.
38. Id. at 37 (quoting Transcript, Sept. 13, 1990, at 137-38).
39. Id.
40. Id. at 21 (quoting Transcript, Sept. 13, 1990, at 117).
41. Id. at 22 (quoting Transcript, Sept. 27, 1990, at 129 (discussing Roe v. Wade, 410 U.S. 113 (1973)).
42. See id. at 90.
44. 403 U.S. 602 (1971). According to the Lemon Court, "three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principle or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive entanglement with religion.'" Id. at 612-13 (citation omitted).
ruling. The Senate confirmation hearings created an impression of Souter as a jurist with great respect for precedent but also one willing to address pragmatic considerations such as reliance in the commercial context and to show less deference to precedent in the criminal context. Although he gave the impression of respect for constitutional precedent such as First Amendment doctrine, he failed to comment on the politically charged issue of abortion and the precedential value of Roe v. Wade. His statement that precedent which has been "eroded" or "chipped away" might be ripe for reconsideration left the fate of decisions such as Roe, which had been under siege for nineteen years, indeterminate.

II. FOUNDATIONS OF SOUTER'S EMERGENT STARE DECISIS JURISPRUDENCE

After his first two terms on the nation's highest court, Justice Souter was still considered something of a mystery. Inasmuch as his first two Supreme Court terms produced a relatively modest number of opinions, it may be too early to divine Souter's jurispru-
dential approach in most areas. However, he has assumed a remarkably definitive stance regarding the doctrine of *stare decisis*.

Souter articulated the foundational principles of an emergent *stare decisis* jurisprudence during his first two terms on the United States Supreme Court in *James B. Beam Distilling Co. v. Georgia*, *Payne v. Tennessee*, and *Lee v. Weisman*. In *Beam*, *Payne*, and *Lee*, Souter set forth three distinct contextual approaches to *stare decisis*: commercial, criminal and constitutional. In each context, his interpretation and application of the doctrine of *stare decisis* depends upon the consequences of precedential reliance or non-reliance.

A. James B. Beam Distilling Co. v. Georgia

Souter announced the judgment of the Court in *James B. Beam Distilling Co. v. Georgia*. The *Beam* Court considered whether its prior ruling in *Bacchus Imports, Ltd. v. Dias* should apply retroactively to litigants whose claims antedated that decision. In *Beam*, *Payne*, and *Lee*, Souter set forth three distinct contextual approaches to *stare decisis*: commercial, criminal and constitutional. In each context, his interpretation and application of the doctrine of *stare decisis* depends upon the consequences of precedential reliance or non-reliance.

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51. 501 U.S. 529 (1991). While Souter wrote for the Court, his opinion was joined only by Justice Stevens. To establish a majority, Justices White, Blackmun, Marshall and Scalia joined only in the judgment.
ports unconstitutional under the Commerce Clause. Therefore, a state could not tax out-of-state companies that imported products differently than it taxed in-state companies. In response to the decision in \textit{Bacchus}, James Beam Distilling Co., a Kentucky bourbon manufacturer, sued Georgia to recover excessive import taxes paid under Georgia state law.

Souter invoked \textit{stare decisis} to hold that the decision in \textit{Bacchus} applied retroactively. A contrary holding would breach "the principle that litigants in similar situations should be treated the same, a fundamental component of \textit{stare decisis} and the rule of law generally." Souter reasoned that a court must consider "the equitable and reliance interests of parties absent but similarly situated." He concluded: "The applicability of rules of law are [sic] not to be switched on and off according to individual hardship; allowing relitigation ... would only compound the challenge to the stabilizing purpose of precedent posed in the first instance by the very development of 'new' rules."

\section*{B. Payne v. Tennessee}

Unlike Souter's invocation of \textit{stare decisis} as settled law in \textit{Beam}, the Court in \textit{Payne v. Tennessee} was unwilling to rely on

\begin{itemize}
\item[54.] \textit{Bacchus}, 468 U.S. at 273.
\item[55.] \textit{Beam}, 501 U.S. at 533. Since Georgia amended its excise tax in 1985 to reflect the \textit{Bacchus} holding, petitioner sought a refund of 2.4 million dollars for the years 1982, 1983 and 1984. \textit{Id.} at 532-33.
\item[56.] \textit{Id.} at 532. Souter held that modified or selective prospectivity was impermissible. \textit{Id.} at 535-42. Quoting Justice Harlan, Souter argued that modified prospectivity is "[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases to flow by unaffected by that new rule." \textit{Id.} at 541-42 (quoting \textit{Mackey v. United States}, 401 U.S. 667, 679 (1971) (Harlan, J., concurring in the judgment in part and dissenting in part)).
\item[57.] \textit{Id.} at 537 (citing \textsc{Richard A. Wasserstrom}, \textsc{The Judicial Decision: Toward a Theory of Legal Justification} 69-72 (1961)).
\item[58.] \textit{Id.} at 543; \textit{see also id.} at 540 (discussing \textit{Griffith v. Kentucky}, 479 U.S. 314 (1987), and citing \textit{United States v. Estate of Donnelly}, 397 U.S. 286, 296 (1970) (Harlan, J., concurring)).
\item[59.] \textit{Id.} at 543.
\item[60.] 501 U.S. 808 (1991). The petitioner, Pervis Tyrone Payne, was convicted of two counts of first-degree murder for violently stabbing Charisse Christopher, a 28 year-old divorced mother, and her two-year-old daughter after the woman rejected his sexual advances. Payne was also charged with first-degree assault with intent to murder Christopher's three-year-old son, who managed to survive multiple knife wounds that fully penetrated his body. During the sentencing phase of his trial, the defense brought witnesses to testify to mitigating circumstances such as Payne's church attendance, slight mental retardation and previous good behavior. The prosecution brought the surviving child's grandmother who testified to the impact on the child who cried for the victims and did not understand why they did not come home. In arguing for the death penalty, the prosecutor
\end{itemize}
precedent. The Court held that the admission of victim impact evidence\(^1\) during the sentencing phase of a capital trial was not barred by the Eighth Amendment.\(^6\) In so ruling, the Court reconsidered and overruled its recent holdings in *Booth v. Maryland*\(^6\) and *South Carolina v. Gathers*.\(^6\) Although the *Payne* majority acknowledged the importance of *stare decisis*,\(^6\) it found *Booth* and *Gathers* badly reasoned and unworkable.\(^6\)

Souter's concurrence cautioned that overruling precedent based stressed the effects of the crime upon the victims' family and asked the jury to consider how to answer the child when he grows up and asks if justice was done. The jury returned a sentence of death. *Id.* at 810-16.

Victim impact evidence refers to the admission of evidence regarding the effects that a crime has upon the victim or individuals close to the victim. Although such evidence does not determine the blameworthiness of a particular defendant, it is designed to portray an actual assessment of the harm caused by the crime for the sentencing authority. See *id.* at 817-24.

\(^{61}\) The Eighth Amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

\(^{62}\) See *Payne*, 501 U.S. 805 (1989) (holding that prosecutor's description of victim's traits was indistinguishable from victim impact statements found inadmissible in *Booth*).

*Booth* and *Gathers* were decided, respectively, four and two terms prior to *Payne*. Subsequent to the decision in *Booth*, the composition of the Court changed with the addition of two new members, Justices Kennedy and Souter. Kennedy and Souter voted with the majority in *Payne*, which was otherwise comprised of the dissenters from both *Booth* and *Gathers*. See *Payne*, 501 U.S. at 850 (Marshall, J., dissenting) ("It takes little real detective work to discern what has changed since this Court decided *Booth* and *Gathers*: this Court's own personnel.").

Writing for the Court, Chief Justice Rehnquist acknowledged: *Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. 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."

*Payne*, 501 U.S. at 827 (citations omitted).

Id. at 811, 827-30. Chief Justice Rehnquist laid out the general principles that had allowed the Court to overrule 33 constitutional decisions during the last 20 terms: Nevertheless, when governing decisions are unworkable or are badly reasoned, "this Court has never felt constrained to follow precedent." *Stare decisis* is not an inexorable command; rather it "is a principle of policy and not a mechanical formula of adherence to the latest decision." This is particularly true in constitutional cases, because in such cases "correction through legislative action is practically impossible." Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved, the opposite is true in cases such as the present one involving procedural and evidentiary rules.

*Id.* at 827-28 (citations omitted).
on constitutional error must be done "with painstaking care." Nevertheless, Souter justified overruling Booth and Gathers because they failed to reveal the victim's individuality and the consequent impact of the crime on survivors. According to Souter, murder has "foreseeable consequences" to "distinct" or "unique" individuals as well as the victims left behind. Since the consequences to the victim and survivors are foreseeable, evidence concerning the impact of the crime is necessarily "imbue[d] with direct moral relevance." Souter reasoned that there should be no bar to the admission of such evidence because "criminal conduct has traditionally been categorized and penalized differently according to consequences not specifically intended, but determined in part by conditions unknown to a defendant when he acted." Accordingly, he concluded that the Eighth Amendment's prohibition of cruel and unusual punishment would not require the exclusion of victim impact evidence, even in the unique circumstances of a capital sentencing hearing.

Coupled with the constitutional error justification, Souter defended overruling Booth because it "sets an unworkable standard of constitutional relevance that threatens, on its own terms, to produce such arbitrary consequences and uncertainty of application as virtually to guarantee a result far diminished from the case's promise of appropriately individualized sentencing for capital defendants." According to Souter, prohibiting the admission of victim impact evidence during the sentencing phase of a capital trial was unworkable because particulars about the impact of the crime on the victim and survivors would have been admitted previously during the guilt phase of the trial. Nothing short of two separate juries would prevent the evidence presented during the guilt phase from being con-

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67. Id. at 837 (Souter, J., concurring) (quoting Burger v. Kemp, 483 U.S. 776, 785 (1987)).
68. Id. at 835.
69. Id. at 838.
70. Id.
71. Id. Souter wrote that a murderer must take responsibility for the inevitable consequences of his acts:

Thus, when a defendant chooses to kill, or to raise the risk of a victim's death, this choice necessarily relates to a whole human being and threatens an association of others, who may be distinctly hurt. The fact that the defendant may not know the details of a victim's life and characteristics, or the exact identities and needs of those who may survive, should not in any way obscure the further facts that death is always to a "unique" individual, and harm to some group of survivors is a consequence of a successful homicidal act so foreseeable as to be virtually inevitable.

72. Id. at 837.
73. Id. (citing Booth v. Maryland, 482 U.S. 496, 502 (1989)).
74. Id. at 839-40.
sidered at the sentencing phase. Thus, the precedent "raise[d] a dilemma with very practical consequences."

Despite Souter's recognition that overruling precedent "is a matter of no small import, for the 'doctrine of stare decisis is of fundamental importance to the rule of law,'" he maintained that in prior cases, when faced with a wrongly decided or unworkable precedent, the Court has "chosen not to compound the original error, but to overrule the precedent." Further, Souter noted that stare decisis is not an "inexorable command," and it has not been applied rigidly by the Court in constitutional cases. Instead, stare decisis has always been applied with the caveat that a departure from the persuasive force of precedent requires only the support of some "special justification."

C. Lee v. Weisman

In Lee v. Weisman, Souter once again faced the proposition of overruling constitutional precedent. Lee concerned the constitutionality of invocations and benedictions at public high school graduation ceremonies. The Court held that the Establishment Clause prohibited state-sponsored prayer in public schools.

Souter joined "the whole of the Court's opinion" but wrote separately to address the issues of "whether the [Establishment] Clause applies to governmental practices that do not favor one religion or

75. Souter commented: "This would be a major imposition on the States, however, and I suppose that no one would seriously consider adding such a further requirement." Id. at 841.
76. Id.
77. Id. at 842 (quoting Welch v. Texas Dep't of Highways and Pub. Transp., 483 U.S. 468, 494 (1987)).
78. Id. at 843 (citing Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989); Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977); Swift & Co. v. Wickham, 382 U.S. 111 (1965)).
79. Id. at 842 (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting)).
80. Id. (citing Patterson v. McLean Credit Union, 491 U.S. 164, 172-73 (1989); Glidden Co. v. Zdanok, 370 U.S. 530, 543 (1962); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting)).
81. Id. (citing Arizona v. Rumsey, 467 U.S. 203, 212 (1984)).
83. Id. at 2661. Justice Kennedy wrote for the Court: The sole question presented is whether a religious exercise may by conducted at a graduation ceremony in circumstances where, as we have found, young graduates who object are induced to conform. No holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise. That is being done here, and it is forbidden by the Establishment Clause of the First Amendment.
Id.
denomination over others, and whether state coercion of religious conformity, over and above state endorsement of religious exercise or belief, is a necessary element of an Establishment Clause violation.\textsuperscript{84} He found that both issues could not be considered constitutionally permissible in light of long-standing precedent.

Invoking \textit{stare decisis}, Souter applied \textit{Everson v. Board of Education},\textsuperscript{85} a forty-five year-old "principle of constitutional law from which [the Court] has not strayed," which prohibited state practices that aid any or all religions.\textsuperscript{86} He wrote: "In barring the State from sponsoring generically Theistic prayers where it could not sponsor sectarian ones, we hold true to a line of precedent from which there is no adequate historical case to depart.\textsuperscript{87} Accordingly, Souter concluded that the Court should "stick to [settled law] absent some compelling reason to discard it."\textsuperscript{88}

Souter rejected the majority's assertion that state coercion is a necessary element of an Establishment Clause violation, since there was no compelling reason to refashion the settled Establishment Clause doctrine.\textsuperscript{89} Souter acknowledged that the Court's precedents "may not always have drawn perfectly straight lines. They simply cannot, however, support the position that a showing of coercion is necessary to a successful Establishment Clause claim."\textsuperscript{90} Addition-
ally, Souter explained, from a pragmatic standpoint, questions of “comparative theology” were not “amenable to the competence of the federal judiciary,” and should be “deliberately... avoided where possible.”

D. *Nexus of Beam, Payne, and Lee—Souter’s Pragmatic Subtext*

The principles articulated in *Beam, Payne,* and *Lee* highlight Souter’s approach to *stare decisis.* In *Beam,* Souter made clear his intent to follow precedent in the commercial context where the importance of reliance is stressed. In *Payne,* Souter took a much more cavalier approach to precedent in the criminal context and was therefore more amenable to overruling precedent in such cases. Despite the Court’s more lenient practice of overruling constitutional cases, Souter adhered to precedent in *Lee* since he found no compelling reason to alter prior Establishment Clause jurispru-


Although the Court has not officially established a “coercion test” per se, such an approach appears to be the current direction in which the Court is moving. *See* Kristin J. Graham, Comment, *The Supreme Court Comes Full Circle: Coercion as the Touchstone of an Establishment Clause Violation,* 42 B UFF. L. REV. 147 (1994).

91. *Lee,* 112 S. Ct. at 2671.

92. This stance reflects the Court’s general disposition favoring precedent in the commercial context. Chief Justice Rehnquist has written for the Court: “Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved.” Payne v. Tennessee, 501 U.S. 808, 828 (1991) (citing Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977); Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405-11 (1932) (Brandeis, J., dissenting); United States v. Title Ins. Co., 265 U.S. 472 (1924); The Genesee Chief v. Fitzhugh, 12 U.S. (How.) 443, 458 (1852)).

93. Souter’s cavalier approach to precedent in criminal cases is also apparent in Schad v. Arizona, 501 U.S. 624 (1991). In *Schad,* Souter wrote for the Court regarding Beck v. Alabama, 447 U.S. 625 (1980), which held that a state statute prohibiting lesser included offense instructions in capital cases is unconstitutional. Souter held that the statute was not applicable because the jury had the opportunity to convict of second degree murder even though the lesser included offense of robbery was not included as requested by defense counsel. *Schad,* 501 U.S. at 645-48. Despite Justice White’s dissent that the precedent in *Beck* wasn’t satisfied, *id.* at 660 (White, J., dissenting), Souter opined that the “[p]etitioner misapprehends the conceptual underpinnings of *Beck.*” *Id.* at 646. In *Schad,* Souter’s conception of the Constitution was displayed as a flexible set of evolutionary principles: “[H]istory and current practice are significant indicators of what we as a people regard as fundamentally fair,” but criminal holdings are “always open to critical examination.” *Id.* at 643.

94. *See* Payne, 501 U.S. at 828 n.1 (1991) (citing 33 constitutional decisions overruled in part or whole during the past 20 years); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-08 (1932) (Brandeis, J., dissenting) (indicating that the Court’s power to overrule constitutional precedent is vested in the practical impossibility of correction by the legislature, and citing many cases to that effect).
Although arriving at seemingly contradictory results, Souter applied an approach similar to what he called "pragmatic weighing" at his confirmation hearings. The difference in outcome of these cases depended upon the context in which they arose. The criminal context, as Souter indicated at his confirmation hearings, was an area more ripe for review than the statutory or constitutional context. If he had implemented Payne's unworkable test against the need for retroactive application in Beam or the difficulty of the courts applying the Lemon test's secular purpose prong in Lee, the outcome in those cases could have been quite different.

In Beam, Payne, and Lee, Souter cloaked himself in the mantle of a pragmatist, paying consideration to outcomes and effects when applying the doctrine of stare decisis. The protean nature of Souter's application did not reflect the inherent or relative worth of following or rejecting precedent, but rather reflected the consequences and practicality of decisions. Although Souter ostensibly discussed stare decisis in each of the three cases, the subtext of his dialogue was driven by pragmatic policy considerations: the harm to business reliance in Beam; the impact on survivors and the difficulty of administering two trials in Payne; and the inability of judges to become engaged and mired in comparative theology in Lee. In short, depending upon whether a particular decision and course of action was desirable or undesirable, Souter either applied or distinguished stare decisis to justify the desired result.

III. THE SYNTHESIS OF SOUTER'S STARE DECISIS INTERPRETATION IN CASEY

Souter synthesized the approaches taken in Beam, Payne, and Lee to articulate his most explicit stance on the doctrine of stare decisis in Planned Parenthood v. Casey. The decision was announced during the waning days of Souter's second term and, given the controversial issue of abortion, it came as no surprise that Casey caused the greatest stir of the 1991 term. Justices O'Connor, Kennedy,
and Souter—the newly dubbed "centrist" voting block—jointly authored the opinion which, much to the nation's surprise, real-

100. See, e.g., Robert H. Bork, Again, a Struggle for the Soul of the Court, N.Y. Times, July 8, 1992, at A19; Coyle, supra note 47, at S1; The High and Middle Ground, Economist, July 4, 1992, at 49.


101. It is a rare and dramatic event when more than one justice signs an opinion. Generally, a number of justices will do so in an attempt to add an air of legitimacy or at least make clear that the statement being made is meant to be emphatic. See, e.g., Gregg v. Georgia, 428 U.S. 153 (1976) (opinion of Stewart, Powell, Stevens, JJ.) (reinstating Georgia's amended death penalty statute as not necessarily violative of the Eighth or Fourteenth Amendment); Cooper v. Aaron, 358 U.S. 1 (1958) (opinion of Warren, C.J., Black, Frankfurter, Douglas, Burton, Clark, Harlan, Brennan, Whittaker, JJ.) (enforcing desegregation and asserting the duty of a state to follow federal court orders); see also Regents of Univ. v. Bakke, 438 U.S. 265 (1978) (Brennan, White, Marshall and Blackmun, JJ., concurring in part and dissenting in part) (noting that although racial classification calls for strict scrutiny, the importance of minority underrepresentation allows race to be used as a factor in university admission).

The joint opinion in Casey ostensibly made a bold statement to lead the Court out of the abortion controversy by supporting the "essential" holding of Roe on the grounds of stare decisis. Alternatively, the dissent in Casey would argue that the joint opinion was an attempt to legitimize the alteration of precedent. It is also quite possible, however, that the joint writing of the Casey opinion was not merely to emphasize the import of the decision, but a practical reflection of the difficulty in producing a lengthy opinion during the busiest part of the term with only nine weeks between oral argument and the issuance of the decision. In an attempt to put the abortion issue to rest, the opinion may have been divided to assure the strength of its reasoning and analysis.

102. At the beginning of the 1991 term, Justice Blackmun observed that "[t]he votes [were] there" to overturn Roe; he added playfully: "If I had any sense, I'd quit, but it's rather fun to sit in the middle of this and see what happens." Outlook: People, U.S. News & World Rep., Nov. 4, 1991, at 25.

Although President Bush had hoped to find a justice who was willing to overturn Roe, Souter appears to be independent of Bush's ideology. In response to Casey, Bush said: "I was telling the truth—that there was no litmus test on [abortion]." Greenhouse, supra note 47, at A16. One commentator noted:

What has really happened is this. Judges like Justice Souter have tired of being told to act like politicians and have started to act like judges. And therein lies a delicious irony. For when George Bush appointed Justice Souter that was, he said, exactly how he wanted judges to behave.


Other presidents have reportedly been surprised by the opinions of their appointees after taking the bench. For example, Dwight D. Eisenhower was surprised by Chief Justice Earl Warren and Justice William Brennan, while Richard M. Nixon was surprised by Justice Harry T. Blackmun. See, e.g., Henry J. Abraham, Justices and Presidents: A Political History of Appointments to the Supreme Court 258, 306-10 (3rd ed. 1992) (discussing the surprises of Warren and Blackmun); Laurence H. Tribe, God Save This
firmed the "essential holding"\textsuperscript{103} of \textit{Roe v. Wade}.
\textsuperscript{104} Although the opinion was jointly authored, Justice Souter read the section that he wrote addressing \textit{stare decisis} from the bench.\textsuperscript{105}

A. Exposition

In \textit{Casey}, clinics and physicians brought a due process claim to challenge the constitutionality of five provisions of the Pennsylvania Abortion Control Act of 1982.\textsuperscript{106} The provisions required: informed consent within twenty-four hours prior to an abortion procedure; parental consent for minors; spousal consent for married women; facility reporting requirements; and an exception to these three forms of consent in the case of a medical emergency.\textsuperscript{107}

The District Court for the Eastern District of Pennsylvania determined that these provisions were unconstitutional.\textsuperscript{108} The Court of Appeals for the Third Circuit reversed, upholding the constitutionality of all the provisions except the spousal notification requirement.\textsuperscript{109} The Supreme Court granted certiorari,\textsuperscript{110} finding it

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\textsuperscript{103.} \textit{Casey}, 112 S. Ct. at 2804.

\textsuperscript{104.} 410 U.S. 113 (1973).

\textsuperscript{105.} Linda Greenhouse, \textit{A Telling Court Opinion; The Ruling's Words Are About Abortion, But They Reveal Much About Authors}, N.Y. TIMES, July 1, 1992, at A1. Although the opinion was jointly authored, for the purposes of this Comment, those portions of the joint opinion dealing with \textit{stare decisis} will be attributed specifically to Souter.

\textsuperscript{106.} 18 PA. CONS. STAT. §§ 3203-3220 (1990).

\textsuperscript{107.} \textit{Casey}, 112 S. Ct. at 2803. The joint opinion discussed these restrictive provisions:

The Act requires that a woman seeking an abortion give her informed consent prior to the abortion procedure, and specifies that she be provided with certain information at least 24 hours before the abortion is performed. § 3205. For a minor to obtain an abortion, the Act requires the informed consent of one of her parents, but provides for a judicial bypass option if the minor does not wish to or cannot obtain a parent's consent. § 3206. Another provision of the Act requires that, unless certain exceptions apply, a married woman seeking an abortion must sign a statement indicating that she has notified her husband of her intended abortion. § 3209. The Act exempts compliance with these three requirements in the event of a "medical emergency," which is defined in § 3203 of the Act. See §§ 3203, 3205(a), 3206(a), 3209(c). In addition to the above provisions regulating the performance of abortions, the Act imposes certain reporting requirements on facilities that provide abortion services. §§ 3207(b), 3214(a), 3214(f).

\textit{Id.} (internal citations to 18 PA. CONS. STAT. (1990)).


"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 the pregnancies by abortion procedures" and to provide needed guidance to "[s]tates and federal courts as well as legislatures throughout the Union... as they seek to address this subject in conformance with the Constitution."\textsuperscript{111}

Despite the dissent's vehement argument that "Roe was wrongly decided, and that it can and should be overruled consistent with [the Court's] traditional approach to \textit{stare decisis} in constitutional cases,"\textsuperscript{112} the majority affirmed the "essential holding" of \textit{Roe}.

The joint opinion described \textit{Roe}'s "essential holding" as consisting of three parts:

First is a recognition of the right of the woman to chose to have an abortion before viability and to obtain it without undue influence from the State. ... Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger a woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.\textsuperscript{114}

The joint opinion concluded: "These principles do not contradict one another; and we adhere to each."\textsuperscript{115}

Applying an "undue burden" test,\textsuperscript{116} the Court held that abortions prior to viability could not be criminalized nor could spousal consent be required.\textsuperscript{117} The Court, however, did uphold provisions requiring parental consent for minors, a twenty-four hour waiting period, and informed consent.\textsuperscript{118} Additionally, the Court rejected the

\begin{itemize}
\item \textsuperscript{110.} Planned Parenthood v. Casey, 112 S. Ct. 931 (1992).
\item \textsuperscript{111.} Planned Parenthood v. Casey, 112 S. Ct. 2791, 2804 (1992).
\item \textsuperscript{112.} Id. at 2855 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (discussing the Court's greater propensity to overrule constitutional cases).
\item \textsuperscript{113.} Id. at 2804.
\item \textsuperscript{114.} Id.
\item \textsuperscript{115.} Id.
\item \textsuperscript{116.} "Only where state regulation imposes an undue burden on a woman's ability to make this decision [to have an abortion] does the power of the State reach into the heart of the liberty protected by the Due Process Clause." \textit{Id.} at 2819.
\item \textsuperscript{117.} \textit{Casey}, 112 S. Ct. at 2826-31.
\item \textsuperscript{118.} \textit{Id.} at 2822-26, 2832.
\end{itemize}
argument that the medical emergency exemption was too narrowly construed and ruled that the clinic recordkeeping and reporting requirements were constitutionally permissible. Despite the fact that it was affirming and overruling simultaneously, the joint opinion focused on *stare decisis* as its justification.

B. Stare Decisis

The joint opinion opened with the ringing, almost axiomatic, phrase: "Liberty finds no refuge in a jurisprudence of doubt." Souter hinged the legal underpinnings for such an "august and sonorous" assertion upon the doctrine of *stare decisis* and the value of precedent. According to Souter, "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."

Souter also acknowledged a contrary limiting necessity *not* to follow a prior ruling which is clearly in error. To this end, he detailed "prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming or overruling a prior case." The test consists of three prongs which respectively reflect the rationales of *Beam, Payne,* and *Lee:* whether the rule has engendered reliance such that overruling would create inequity and undue hardship; whether the rule has proven unworkable; and whether there was an evolution or development of legal principle so as to render the original rule insignificant or "a doctrinal anachronism discounted by society."

Applying this test to the facts in *Casey,* Souter concluded that the essential holding of *Roe* survived each criteria. First, Souter advanced a reliance argument in favor of abortion by asserting "that for two decades of economic and social developments, people have

119. Id. at 2822, 2832-33.
120. Id. at 2803.
121. Id. at 2876 (Scalia, J., concurring in the judgment in part and dissenting in part).
122. Id. at 2808-16.
123. Id. at 2808.
124. Id.
125. Id.
126. Id. at 2808-09; see supra part II.
127. *Casey,* 112 S. Ct. at 2808 (citing United States v. Title Ins. & Trust Co., 265 U.S. 472, 486 (1924)); see discussion of *Beam,* supra part II.A.
128. *Casey,* 112 S. Ct. at 2808 (citing Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965)); see discussion of *Payne,* supra part II.B.
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. This reliance has enabled and facilitated the ability of women to “participate equally in the economic and social life of the Nation.”

Second, Souter indicated that “[a]lthough Roe has engendered opposition, it has in no sense proven ‘unworkable,’” even though there still might be a necessity for ongoing judicial review of state laws. Finally, Souter found neither an evolution of legal principles undermining the foundation of Roe, nor a disturbance of Roe’s liberty interest framework by subsequent decisions.

Although Roe satisfied the three prongs of his precedential inquiry, Souter asserted that the “sustained and widespread debate” engendered by the decision called for an additional level of analysis. Souter asserted that the “dimension” of Roe’s controversy could be likened to only two other decisional lines from the past century—decisional lines culminating with the overturning of precedent in West Coast Hotel Co. v. Parish and Brown v. Board of Education. Souter distinguished these cases from Roe as resting “on facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions.” In Casey, Souter found no such change in the factual situation and therefore no occasion to overrule Roe. He further indi-

130. Casey, 112 S. Ct. at 2809.
131. Id. (citing ROSALIND P. PETCHESKY, ABORTION AND WOMAN’S CHOICE: THE STATE, SEXUALITY, AND REPRODUCTIVE FREEDOM 109, 133 n.7 (1990)).
132. Id. (citing Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985)).
133. Id.
134. Id. at 2810.
135. Id. at 2810-11 (citations omitted).
136. Id. at 2812.
137. Id. at 2812-13.
138. 300 U.S. 379 (1937) (explicitly overruling Adkins v. Children’s Hosp., 261 U.S. 525 (1923), and effectively overruling Lochner v. New York, 198 U.S. 45 (1905)). The Court’s decisions in Lochner and Adkins protected the contractual freedom and economic autonomy of individual employees from the efforts of the states to impose human welfare regulations. Fourteen years later, the Court in West Coast Hotel overruled Adkins, thus signaling the internment of Lochner as well. The West Coast Hotel Court held that freedom to contract and economic autonomy were to be subordinate considerations to the state’s efforts to legislate health and welfare standards. See Casey, 112 S. Ct. at 2812.
139. 347 U.S. 483 (1954) (overruling Plessy v. Ferguson, 163 U.S. 537 (1896)). The Court in Brown considered racial segregation in the realm of public education. This required the Court to directly reconsider Plessy, which held that racial segregation in public transportation did not constitute a denial of equal protection under the “separate but equal” maxim. Fifty-eight years later, the Brown Court definitively overruled Plessy, holding that separate but equal produced results that were inherently unequal.
140. Casey, 112 S. Ct. at 2813.
cated "that a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided." 141

C. Consequences

In Casey, Souter noted that "[a]bortion is a unique act... fraught with consequences for others." 142 The most detrimental consequence of overruling Roe would be to women who have relied on its protection of their liberty interest in terminating pregnancies. Such an infringement on reproductive freedom, Souter feared, would curtail a woman's ability to participate fully and equally in economic and social life. 143 He concluded: "The Constitution serves human values, and while the effect of reliance in 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." 144

In considering the alternative, Souter's hypothesis took an Orwellian tone:

If indeed the woman's interest in deciding whether to bear and beget a child had not been recognized as in Roe, the State might as readily restrict a woman's right to choose to carry a pregnancy to term as to terminate it, to further asserted state interests in population control, or eugenics, for example. 145

Souter further evidenced his apprehension over the uncertain consequences of overruling Roe when he questioned Solicitor General Kenneth Starr during the April 22, 1992, oral argument in Casey: "You're asking the Court to adopt a standard [by overruling Roe], and I think we ought to know where the standard would take us." 146

The consequences of overruling Roe are not limited to those who rely on it for constitutional protection, but also extend to the legitimacy of the Court itself. In his final and most passionate argument, Souter concluded that "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." 147 To overrule Roe without such a weighty reason not only

142. Id. at 2807.
143. Id. at 2809.
144. Id.
145. Id. at 2811 (citations omitted) (citing examples wherein Roe was implemented to stem infringements on reproductive freedom).
147. Casey, 112 S. Ct. at 2815.
would damage the Court's legitimacy, but would be "at the cost of both profound and unnecessary damage... to the Nation's commitment to the rule of law."\footnote{148} Souter reasoned that both the legitimacy and integrity of the Court were founded upon remaining steadfast to precedent; the frequency of the Court's vacillation would fade this standing and run afoul of the rule of law.\footnote{149}

Despite Souter's apparent reverence for \textit{stare decisis}, the true consequence of \textit{Casey} was that it ultimately overruled \textit{Thornburgh v. American College of Obstetricians \\& Gynecologists},\footnote{150} in part, by upholding a requirement that information dissuading a pregnant woman from having an abortion must be provided\footnote{151} and by permitting clinics to keep detailed patient records.\footnote{152} \textit{Casey} also overruled \textit{City of Akron v. Akron Center for Reproductive Health},\footnote{153} in part, by requiring that a doctor, rather than a counselor, provide information to pregnant women seeking abortions,\footnote{154} and by requiring a twenty-four hour waiting period before an abortion could be performed.\footnote{155} Apparently, \textit{Thornburgh} and \textit{Akron} were based on portions of \textit{Roe} that were not preserved by Souter's version of \textit{stare decisis}.\footnote{156}

Similarly, in contravention of its \textit{stare decisis} rhetoric, the joint opinion scuttled the trimester framework as not a part of \textit{Roe}'s essential holding because "in practice it undervalues the State's interest in potential life."\footnote{157} Further, although the joint opinion recognized a woman's liberty interest over her body, strict scrutiny review was supplanted with an undue burden test.\footnote{158} Since the liberty in-

\footnote{148}{Id. at 2816.}
\footnote{149}{Id. at 2814-15. Souter further extended this legitimacy to the Nation: "If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals. The Court's concern with legitimacy is not for the sake of the Court but for the sake of the Nation to which it is responsible." \textit{Id.} at 2816.}
\footnote{150}{476 U.S. 747, 759-68 (1986) (holding, \textit{inter alia}, that material provided by the state in an attempt to discourage abortion contravenes the privacy of the informed consent discussion between the woman and her physician, and that detailed reporting requirements are contrary to personal privacy rights and could possibly expose women to public harassment).}
\footnote{151}{Id. at 759-65.}
\footnote{152}{Id. at 765-68.}
\footnote{153}{462 U.S. 416, 428, 446-51 (1983) (holding, \textit{inter alia}, that it is unreasonable to mandate that a patient's attending physician is the only individual competent to provide information relevant to informed consent and that \textit{Akron} failed to demonstrate any legitimate state interest in an arbitrary and inflexible waiting period).}
\footnote{154}{Id. at 446-49.}
\footnote{155}{Id. at 449-51.}
\footnote{156}{It is interesting to note that the partial overruling of \textit{Thornburgh} and \textit{Akron} was not mentioned in the section of the joint opinion written by Souter concerning \textit{stare decisis}.}
\footnote{157}{\textit{Casey}, 112 S. Ct. at 2818 (1992).}
\footnote{158}{Id. at 2820-21; see supra note 116 and accompanying text.
terest established in *Roe* no longer requires strict scrutiny, it can no longer be considered a fundamental right. Consequently, although *Roe* was not technically overturned, very little of what remains after *Casey* resembles the original holding.

IV. THE RULE OF LAW AS THE LAW OF CONSEQUENCES

Although steeped in empathetic rhetoric concerning a woman's liberty over her body and "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life," the joint opinion in *Casey* was scant on legal substance, save Souter's section addressing *stare decisis*. Therein, Souter's almost evangelical stance and rhetorical flourishes of "legitimacy" and the "rule of law" belie the actions taken by the Court, which while "purporting to adhere to precedent," instead significantly revised it. In reality, Souter resorted to the neutral rhetoric of *stare decisis* to disguise his own value judgments and acknowledgment of social pressure.

A. The Law of Consequences

Souter's concern for the "rule of law" is balanced by his concern for consequences. The joint opinion in *Casey* referred to the "rule of law" nine times; six of these references were made by Souter. However, despite the frequency of reference, one is never enlight-
ened as to what constituted Souter's view of the rule of law other than its vague connection to the doctrine of *stare decisis*. He compensated for this absence of clarity by supplanting the rule of law with an overarching theme of consequences. For Souter, *stare decisis* may be the rule of law, but without consequences as his preunderstanding or field of reference, the rule would be without meaning.

Souter's conception of the rule of law differs from the traditional positivistic view of the rule of law as a law of rules. Indeed, the invocation of *stare decisis* conjures up images of this traditionalist legal theory; the very words connote a positivistic approach to decision making—the reliance on precedent.

In contrast to the rule of law as the law of rules, associated most closely with Justice Scalia, one commentator has described Souter's approach—exemplified by the joint opinion in *Casey*—as following a "rule of law as the law of standards," which "favors adherence to precedent in the face of intense popular division, but a standard-like interpretive approach and an operative constitutional jurisprudence of 'delicate and sensitive' line-drawing and context specific balancing tests." Souter's position, however, is somewhat different; it can be more accurately described as following a rule of law as the law of consequences. In other words, it is better to describe Souter's approach to *stare decisis* not as a matter of methodol-ogy, but as an interpretation influenced by the consequences of a given decision. His approach is not as much a methodological interpretation as it is a *post hoc* rationalization of the interpretation. *Stare decisis*, then, is not the rule of law, as conceived by Souter, but its rationalization.

162. All that is certain is that the rule of law is a metaphysical good, something that should be aspired toward. It is an ideal, the faith in which promises stability, predictability and legitimacy. As divined from the opinion, adherence to precedent, or *stare decisis*, is the embodiment of the rule of law. In fact, the two concepts almost become synonymous or interchangeable throughout Souter's opinion.


167. Sullivan, supra note 165, at 115 (citations omitted).
In analyzing Souter's interpretation of *stare decisis*, it becomes necessary to distinguish between his interpretation of the doctrine and his actual employment of it.\textsuperscript{168} The meaning of *stare decisis*—and *a fortiori*, the rule of law—is governed by his "interpretive commitment" to consequences.\textsuperscript{169} Souter does not really interpret *stare decisis* in the literal sense; *stare decisis* is simply the term of art he applies. Souter interprets the context or circumstances with which he is faced in terms of what he objectifies as the consequences of a given decision. By interpreting the context, Souter anticipates the consequences of his interpretation and judges accordingly. *Stare decisis*, then, is used as a rhetorical buttress to reinforce, legitimize, and claim authoritativeness for his interpretation of the consequences. As such, he uses the old positivistic vocabulary to justify his pragmatic judgments. *Casey* represents his struggle between the two vocabularies of positivism and pragmatism. For Souter, the act of interpreting *stare decisis* is an act of construction—constructing the doctrine to meet his interpretation of the context.

Although Souter aspires to the appearance of a foundationalist—relying on the rule of law or *stare decisis*—the decision in *Casey* establishes him as a pragmatist. Whereas a conservative positivist would overturn precedent when a case is wrongly decided and a natural law or liberal rights theorist would overturn precedent in order to reflect a particular right, Souter is not concerned about whether a precedent is absolutely right or wrong, but whether it still works. He is not as concerned with "getting it right" legally as he is with the practical consequences of a decision. Thus, in *Casey*, Souter did not ask whether *Roe* was wrongly decided or whether it was binding precedent; rather, he examined the consequences of overturning such a decision to society and the Court. Unfortunately, he has disingenuously chosen to shroud his brand of pragmatism with a veil of *stare decisis*. The invocation of *stare decisis* and the rule of law is a facade for Souter's pragmatism. Thus, *stare decisis* is not a sacred doctrine, but a convenient rhetorical tool at his disposal.\textsuperscript{170} Souter's commitment to the rule of law seems to be only a commitment to his rule of law.\textsuperscript{171}


\textsuperscript{170} Cf. Thomas C. Grey, *What Good is Legal Pragmatism?*, in *PRAGMATISM IN LAW AND SOCIETY* 14 (Michael Brint & William Weaver eds., 1991) ("For the pragmatist, custom is not sacred, it is just there.").

\textsuperscript{171} See generally Paul Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765, 772.
B. Souter’s Rhetoric and Narrative of Neutrality

In reality, the decision in *Casey* is not much more than rhetoric. Despite his attempt to create a definitive standard for neutral or objective adherence to precedent, Souter’s contribution only adds to the historical ambiguity of the doctrine. His quixotic attempt to forge a neutral test\(^1\) for the application or overriding of *stare decisis* founders upon the very criteria to be applied. *Stare decisis*, as the embodiment of the rule of law, denotes a positivistic sense of neutral predictability and stability.\(^2\) Ideally, it denotes judges who rule on precedent irrespective of their own ideological predilections. This is the neutral appearance that Souter labored to portray in *Casey*.\(^3\) Nonetheless, the generous definition of Souter’s criteria for determining when *stare decisis* should not be applied—unworkability, reliance, law’s evolution—defies objective application. Consequently, *Roe* will be further eroded and devalued over time until finally, so little remains that the “essential holding” may be considered something of an anachronism qualified for overruling under the third prong of Souter's test.\(^4\)

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173. See, e.g., Roberto M. Unger, *Law in Modern Society* 176 (1976) (“In the broadest sense, the rule of law is defined by the interrelated notions of neutrality, uniformity, and predictability.”).

174. Cf. Sanford Levinson, *Law as Literature*, 60 Tex. L. Rev. 373 (1982) (discussing the radical indeterminacy of legal meaning); Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 Yale L.J. 1 (1984) (arguing that since all legal doctrines or paradigms are indeterminate, attempts to ground them on neutral, objective considerations ignore the fact that such theories cannot ever be completely independent of one’s own view).

In discussing the rhetoric used by Justice Blackmun to transform the controversial *Roe v. Wade* decision into a matter of logical technique that Blackmun called “constitutional measurements, free of emotion and predilection,” Singer’s comments are equally applicable to *Casey*:

*I find this example typical because it demonstrates that even when everyone agrees that a legal issue is politically controversial and that its resolution depends on choosing between irreconcilable religious views and visions of social life, jurists persist in asserting that the issue must be decided in a manner that thrusts such considerations aside. It is obvious that a decision on the constitutional legitimacy of laws limiting access to abortions must reflect controversial judgments. Thus any intimation that the decision could be made in a logical manner is ridiculous.*

*Id.* at 32.

175. See supra part III.B.
Souter's objective tests are dependent upon subjective decisions. For example, unworkability—just like reliance or the evolution of the law—is a matter of degrees. He left the degree of unworkability required to overrule precedent to subjective interpretation. Given the potential for subjective influences, Souter simply cannot ensure the promised certainty, stability and rule of law allegedly embodied in his version of stare decisis. In attempting to achieve a clearer definition of when stare decisis should be applied, he has only accomplished a "new fuzziness." 176

In application, his theory will lend itself to increased indeterminacy and inconsistency of decisionmaking. How can the three-prong test be value-neutral? Each level of analysis—workability, reliance, legal evolution—provides more room for subjective interpretation. There is no bright-line test as to what is workable, what constitutes sufficient reliance, or what constitutes legal evolution. In effect, Souter has created a tool whereby judges, except in rare, glaringly obvious cases, have the flexibility to decide to follow precedent at their own whim or fiat. 177 As such, claims of adherence to stare decisis would amount to nothing more than masks for one's intentions or rhetorical allies of those favoring prior decisions. 178 In reaching for some form of determinacy, Souter has only achieved greater indeterminacy which is unlikely to engender stability or repose, but is likely to increase litigation over the abortion issue. 179

C. Social Policy

Souter implemented the doctrine of stare decisis in an attempt to fashion the rule of law as a science of rules that could be distilled to a three-prong test. His application of the doctrine, however, was an act of social policy. 180 In reality, Souter merely created a political


177. See Monaghan, supra note 9, at 743. Monaghan notes:
Because a coherent rationale for the intermittent invocation of stare decisis has not been forthcoming, the impression is created that the doctrine is invoked only as a mask hiding other considerations. As a result, stare decisis seemingly operates with the randomness of a lightning bolt: on occasion it may strike, but when and where can be known only after the fact. A satisfactory theory of constitutional adjudication requires more than that.

Id.

178. See id. at 747 n.143; Rehnquist, supra note 9, at 376 (arguing that the doctrine of stare decisis should be rejected altogether).


180. This is by no means a novel idea. See, e.g., OLIVER W. HOLMES, JR., THE
compromise—a policy consideration that balances the consequences of overruling a politically charged precedent. Thus, principle was used to justify a decision that was generated by policy.181

Souter acknowledged that "one could classify Roe as sui generis."182 Indeed, abortion may be considered one of the divisive issues of our day. Without a middle ground, the extremely polarized nature of the debate has been characterized as a "clash of absolutes."183 Having no sufficient answer to please everyone, Souter applied his creative interpretation of stare decisis in an attempt to strike a middle ground that would minimize the damage to the Court and society. In effect, the decision reflected social consensus.184

For the Court, reconciling the abortion debate created a legitimization crisis. Souter claimed that to overrule Roe "under fire" would devalue the Court's legitimacy. However, even in asserting that the Court cannot bow to political pressure, he caved in to it.185

COMMON LAW 35-46, 94-95 (1881) (asserting that public policy is at the heart of the common law and judicial behavior); see also Thomas C. Grey, Holmes and Legal Pragmatism, 41 STAN. L. REV. 787, 814 (1989) ("Law is more a matter of experience than of logic, and experience is tradition interpreted with one eye on coherence and another on policy." (discussing the truism of Holmes' pragmatism)).

181. See RONALD M. DWORIN, TAKING RIGHTS SERIOUSLY 83 (1977) (explaining that justifications for legislative programs usually require both principle and policy arguments).

182. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2810 (1992). Indeed, the abortion dispute might be considered the epitome of what Professor Dworkin would term a "hard case." See generally DWORIN, supra note 181, at 81-137. Souter attempted to fashion the uniquely correct answer.


184. Pollster Linda DiVall remarked: "What's quite interesting about the Supreme Court's decision is that it seems to perfectly reflect the consensus opinion of mainstream America." E.J. Dionne Jr., Justices' Abortion Ruling Mirrors Public Opinion: Polls Show Americans Would Keep Procedure Legal, But Are as Divided as Court on Limits, WASH. POST, July 1, 1992, at A4 (noting that in polls taken prior to the Casey decision, 55 compared to 38% of those polled favored the right of abortion in the first three months, 80 compared to 18% favored the requirement that a pregnant teenager notify her parents, and 56 compared to 41% favored limitations set by the states; however, unlike the Court, 63 compared to 30% favored the requirement of permission from a husband). But cf id. ("Paradoxically, the court found a principle that happened to fit with public opinion polls, but I don't think it was actually following the polls." (quoting Yale Law Professor Paul Gewirtz)). See generally ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH (1962) (arguing that ultimately the courts cannot enforce their judgments without the good will of the people or at least of the other branches of government); Stephen L. Carter, Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle, 94 YALE L.J. 821, 843 (1985) ("On this view, the ultimate brake on the courts is the judges' fear that if they go too far they will be ignored. To use the popular metaphor, if the courts squander their scarce constitutional capital, they will have none left when they need it most." (discussing BICKEL, supra)).

185. The institutional integrity argument, however, has its critics. No stranger to angry opposition, Robert Bork comments:

Institutional integrity turns out to mean the Court must not overturn a wrong
Essentially, Souter's consideration in deciding *Casey* was what would happen if *Roe* were overturned; what would be the consequences to society, to the Court, and to the Nation? His calculus was not the effect of *stare decisis* and the rule of law on the issues, but whether *stare decisis* could be used to affect the appropriate sociocultural response. Accordingly, the consequences colored his vision of *stare decisis* and the rule of law.

Souter's plea for applying *stare decisis* in *Casey*, while simultaneously overturning parts of *Roe*, *Thornburgh* and *Akron*, was a feat of clever marketing. To have overruled *Roe* outright would have caused tremendous social upheaval. To have simply overruled *Roe's* progeny would have convinced skeptics that politics had affected the Court and that *Roe* had already been overruled. By extolling the virtues of *stare decisis* and assuring that the "essential holding" of *Roe* was intact and affirm, Souter was able to overrule much of *Roe* while giving the appearance that it retained precedent value. As an act of social policy, the decision artfully offered a win-win—perhaps better described as a lose-lose—situation where neither side could necessarily claim a victory. In so doing, the decision "dampen[ed] the possible ideological response." As such, *Casey* has been aptly described as a "Trojan Horse." In this way,

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186. In comparison, cases in the criminal context, like *Payne v. Tennessee*, 501 U.S. 808 (1991), are not likely to engender such social upheaval. Those cases can be more easily overturned because they do not pose the same threatening, far-reaching consequences.

187. Sullivan, *supra* note 165, at 110. Professor Sullivan elaborates:

Complicated arguments about pluralities, concurrences, and undue burdens are hardly the stuff of political debate. It is much harder to mobilize pro-choice lobbying, voting, and fund-raising efforts if *Roe* is nicked-and-dimed away rather than frankly overruled. To the extent a moderate ruling grants partial victory to the pro-choice side, it makes their claims of total calamity look strident or churlish and leads even the party faithful to have some doubts.

Id. In short, "the Court stole their thunder." *Id.*

For example, the Freedom of Choice Act, H.R. 25, 102d Cong., 1st Sess. (1991), which proposed to legislate *Roe's* protections, was all but forgotten in the pacifying wake of *Casey*. *Freedom of Choice Act Gets Hung Up; Action Delayed on Abortion Bill as Legislators Rethink Strategy*, STAR TRIBUNE, Aug. 3, 1992, at 7A; Nat Hentoff, *The Fading Freedom of Choice Act*, WASH. POST, Sept. 12, 1992, at A19; Clifford Krauss, *Democrats Deferring Abortion Rights Legislation*, N.Y. TIMES, Aug. 7, 1992, at A13; Nancy E. Roman, *Abortion bill put on hold for '92 election*, WASH. TIMES, Sept. 21, 1992, at A2 ("Certainly before the Supreme Court decision the rhetoric from the other side was that it was going to be a much bigger issue in Congress, and it simply didn't happen." (quoting Mary Sadick)).

although the decision seems moderate and does not overturn *Roe* outright, much latitude remains for the lower courts to uphold restrictive statutes that essentially eviscerate *Roe*. 189

Essentially, Souter's creative application of *stare decisis* was necessary to defuse an impending crisis. The abortion controversy can be likened to a large, steam-filled vessel atop an open fire. Therein, the pressure is growing and has been since 1973. Each decision handed down by the Court which chipped away at *Roe* simply added fuel to the fire such that by 1992, the seams of the vessel were ready to burst from the increasing pressure. *Casey* acted as a safety valve and allowed the Court to let off a little steam, a little pressure. 190 The fire below, however, has not subsided.

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189. See id.

190. As a further policy consideration, one can speculate that Souter, like his coauthors in *Casey*, has filled a void left by the departure of Justices Brennan and Marshall, in the sense that the Court would be so far to the right that they are now the "left" even if that left is moderate in reality.

At the time of Souter's nomination, he noted that "Justice Brennan is going to be remembered as one of the most fearlessly principled guardians of the American Constitution that it has ever had and ever will have." 136 CONG. REC. S14,350 (daily ed. Oct. 2, 1990) (statement of Senator Kohl quoting David Souter). In the fall of 1992, Souter gave a speech paying homage to Justice Brennan stating that "[w]e see greatness in Justice Brennan" and that "the sight and sound and thought of our contemporary world is in a great measure the reflection of Justice Brennan's constitutional perceptions." Linda Greenhouse, *Liberal Giants Inspire Three Centrist Jurists*, N.Y. TIMES, Oct. 24, 1992, at A1.


Perhaps the presence of Brennan and Marshall on the Court caused O'Connor and Kennedy to move toward the right. With Marshall and Brennan's retirement, Justices O'Connor and Kennedy can drift toward the middle. See Sullivan, supra note 165, at 120 ("As Justices come and go, those left behind will fan out to ensure reasoned deliberation that takes the full range of ideological differences into account.").

At his confirmation hearings, Souter said that he brought to the Court the understanding that every decision affects the lives of people. It is quite possible that Justices Souter, O'Connor and Kennedy—in the absence of Justices Brennan and Marshall—are taking more closely to heart the fact that every decision the Court hands down has the potential to affect many people in profound ways. Perhaps a sense of duty is coloring their reasoning. Essentially, they can be seen as rising to the challenge that a change in the Court's personnel does not necessitate a change in its jurisprudence.
Tom Rath, a close friend of Souter, describes the Justice’s view of his role: “He has a vision of the Court as a moderating influence to serve as a unifying part of the country, between the more partisan executive and legislative branches. I think there is a central core of David Souter that sees the Court as a conciliator and legitimizer, bringing society together.” Rath claims that Souter has espoused this vision since his days as a judge in New Hampshire. Rath’s comments not only offer a window to view Souter as he views himself, but help explain what motivates his jurisprudence, particularly with respect to his interpretation of stare decisis. Souter uses stare decisis as the embodiment of the rule of law to legitimize the Court, but his rule of law is a rule of consequences—a pragmatic approach that acts as the unifying element or conciliator of society.

Stare decisis is something of a chimerical myth. In Souter’s hands, stare decisis’ promise of certainty and stability is no less mythical; however, in his hands, the myth is a palatable one. Regrettably, Souter’s grand, almost evangelical plea for the application of stare decisis is impoverished in practice. In Casey, as in Beam, Payne, and Lee, Souter presents something of a “keep-what-you-want-and-throw-away-the-rest version” of stare decisis. By picking and choosing which precedent to follow and affording much heed to sociopolitical consequences, he allows and invites the “rule of law” to be undermined and influenced by subjective decisions and value judgments. If Justice Marshall had intended his Payne dissent to instruct Souter in the sober need for stare decisis, it appears as if Souter embraced the rhetoric but neglected the underlying substance.

Nietzsche opined that “[t]he worst readers are those who act like plundering soldiers. They take out some things that they might use, cover the rest with filth and confusion and defame the whole.”


192. Id.

193. The purpose of this Comment is not to criticize the outcome of Casey; rather it simply questions the central paradox upon which it rests. There is really no question that stare decisis is and has always been something of an indeterminate, malleable doctrine. See supra note 9. What Souter does is to extol the virtues of determinacy and legitimacy (the rule of law), while exploiting the indeterminacy (overruling parts of Roe), and leaving the doctrine vulnerable to increased indeterminate interpretations (the three-prong test).


195. As such, future abortion decisions may become something of a “chain novel,” changing from judge to judge and holding an unknown mystery ending. See RONALD DWORKIN, A MATTER OF PRINCIPLE 150 (1985).

196. Richard Weisberg, On the Use and Abuse of Nietzsche for Modern Constitu-
Nietzsche's caveat concerning textual interpretation is quite poignant when considering the interpretation of precedent and the doctrine of *stare decisis*. While attempting to avoid a "jurisprudence of doubt," Souter succeeded only in creating a "jurisprudence of confusion," and defaming the doctrine of *stare decisis*. The impact of Souter's interpretation on the doctrine of *stare decisis* and the rule of law is yet uncertain; the mystery, however, is less than comforting.

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197. *Casey*, 112 S. Ct. at 2803.
198. *Id*. at 2880 (Scalia, J., concurring in the judgment in part and dissenting in part).