THE IMPACT OF LIBERTY ON STARE DECISIS: THE REHNQUIST COURT FROM *CASEY* TO *LAWRENCE*

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Although stare decisis is a firmly established doctrine tracing its roots to fifteenth-century English common law, the Rehnquist Court developed it in remarkable ways. The Court's decisions effectively made liberty considerations an important stare decisis factor in constitutional cases. Where prior decisions took an expansive view of the liberty protections of the Constitution, they were more likely to be upheld, and vice versa. This Note analyzes this development, perhaps best exemplified by the differing outcomes in Casey *and* Lawrence*, as well as its implications for the future jurisprudence of the Supreme Court.*

INTRODUCTION

After experiencing the second-longest period of unchanged membership in the history of the Supreme Court, the Court has recently undergone a dramatic change in the form of a new Chief Justice and the replacement of one of its most influential Associate Justices. With the end of the Rehnquist Court, commentators can now begin to analyze the full impact of its jurisprudence. For instance, one of the most striking aspects of the Rehnquist Court was its apparent willingness to acquiesce to constitutional decisions of prior Courts that it considered wrongly decided. While the Court was much less willing to recognize new constitutional liberty rights,[1] it repeatedly upheld older cases that created such rights and contained reasoning that the Rehnquist Court

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[1] *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 735 (1997) (refusing to recognize general right to assisted suicide); Nelson Lund & John O. McGinnis, Lawrence v. Texas *and Judicial Hubris*, 102 MICH. L. REV. 1555, 1572 (2004) (arguing that *Glucksburg* greatly tightened standard for creating new liberty rights under substantive due process and "promise[d] an end to the outright judicial improvisation reflected in the *Griswold-Roe* approach").

seemed to consider highly dubious.[2] While the Rehnquist Court did overrule a handful of cases,[3] it considered overruling a much greater number and ultimately chose not to. The pattern of cases the Court reaffirmed and overturned has proven difficult to explain under the stare decisis standard the Court claimed to be following. This divergence led to both criticism of the Court's approach to stare decisis[4] and some strident dissenting opinions by Justice Scalia.[5] The differing outcomes in *Planned Parenthood of Southeast Pennsylvania v. Casey*[6] and *Lawrence v. Texas*[7] in particular have drawn significant academic attention.[8]

This Note proposes a straightforward theory that reconciles the Rehnquist Court's pattern of decisions. The Court's approach to stare decisis in constitutional cases can be explained remarkably well with the addition of a single factor to the stare decisis analysis: the impact of the previous decision on individual liberty rights. Where a prior decision took an expansive view of constitutionally based liberty rights, it was much more likely to be respected as binding than were precedents that took a restrictive view. In a series of cases from *Casey* in 1992 to *Lawrence* in 2003, the Court suggested, explicitly and implicitly, that liberty is an additional and compelling factor in evaluating the force of stare decisis.[9] This view is supported not only by the

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[2] *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 857, 879 (1992) (affirming *Roe v. Wade* "whether or not [it was] mistaken").

[3] *See, e.g.*, Payne v. Tennessee, 501 U.S. 808, 828–30 (1991) (overruling *Booth v. Maryland*, 482 U.S. 496 (1987) and *South Carolina v. Gathers*, 490 U.S. 805 (1989)).

[4] *See, e.g.*, William S. Consovoy, *The Rehnquist Court and the End of Constitutional Stare Decisis:* Casey, Dickerson, *and the Consequences of Pragmatic Adjudication*, 2002 UTAH L. REV. 53, 105 (2002) ("[I]t is apparent that this haphazard and consequentialist application of stare decisis is not a benefit, but a detriment. . . . [S]tare decisis is merely [being used as] a tool . . . to reach a preordained outcome based on a blending of the merits of a case and public pressure.").

[5] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 586–87 (2003) (Scalia, J., dissenting) (accusing majority of "apply[ing] an unheard-of form of rational-basis review" and being "manipulative" in its application of stare decisis doctrine).

[6] 505 U.S. 833 (1992).

[7] 539 U.S. 558 (2003).

[8] *See, e.g.*, William N. Eskridge, Jr., Lawrence*'s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1060–62 (2004) (analyzing Justice Scalia's critique of apparent conflict).

[9] This Note will refer to stare decisis in the relatively narrow sense of how much weight the Court should accord one of its prior decisions when considering whether to overrule it. This Note is thus primarily concerned with whether, and under what circumstances, the Court should overrule itself. This form of stare decisis is often referred to as "horizontal" stare decisis. *See* Norman R. Williams, *The Failings of Originalism: The Federal Courts and the Power of Precedent*, 37 U.C. DAVIS L. REV. 761, 833 (2004). This is contrasted with "vertical" stare decisis, whereby a lower court is obligated to follow the precedent of a higher court. *Id.*

judgments in the cases, but also by the language used by the Justices in their opinions.

The exact scope of what constitutes a relevant "liberty interest" is not clear. However, as this Note will demonstrate, the Rehnquist Court applied this new standard to several fields of constitutional law, such as substantive due process and criminal process rights. Indeed, the Court seemed to apply this standard to every modern case that plausibly appeared to implicate a "liberty interest,"[10] suggesting that the standard has broad applicability.[11] For purposes of this Note, liberty interests involve all of the rights that are derived from the First through Eighth and Fourteenth Amendments to the United States Constitution.[12] While the thesis seems to fit at least the cases within this scope, it potentially has broader applicability.

Although this thesis can be applied to all liberty interests, this Note will focus on unenumerated rights, an area in which recent Courts have been quite active and which is perhaps the most hotly debated area of constitutional law, both in legal academia[13] and society generally.[14] Despite this attention, however, legal academic debate has primarily focused on what the individual Court's decisions meant for the relevant rights, and it has given scant attention to the implications of the decisions for stare decisis. Articles analyzing *Casey*, for example, have focused on the future of abortion rights,[15] women's rights,[16] judicial review,[17] and the "culture wars,"[18] while

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[10] *See infra* Parts I.B, II.

[11] *Vieth v. Jubelirer*, 541 U.S. 267 (2004), arguably represents the broadest application of the new standard, applying it to what was putatively an equal protection challenge to gerrymandered districts. The critical concurring opinion of Justice Kennedy analogized the issue to political participatory liberties and the First Amendment, and then applied the standard suggested by this Note. *Id.* at 314–17 (Kennedy, J., concurring).

[12] Although the cases analyzed in this Note might suggest that this doctrinal innovation serves to protect only politically "liberal" outcomes, *see infra* Part II, it could be applied with equal force to "conservative" decisions as well. The Court could, for example, take a more aggressive approach to regulatory takings, gun ownership rights, or protection of political contributions from congressional regulation. Any of these decisions would be similarly protected by the liberty thesis.

[13] *See* Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1210–11 (2002) (noting extensive debate in legal academia).

[14] *See, e.g.*, Joan Biskupic, *Court's Opinion on Gay Rights Reflects Trends*, USA TODAY, July 18, 2003, at A2 (reporting on debate over *Lawrence*); Alissa J. Rubin, *Where Are We Now?; In the 25 Years of* Roe v. Wade, *the Abortion Ruling Has Seen Some Changes—and So Has the Controversy Surrounding It*, L.A. TIMES, Jan. 22, 1998, at E1 (noting "divisive public battle" over abortion rights).

[15] *See, e.g.*, Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. (SPECIAL ISSUE) 22, 27–34 (1992) (discussing implications of *Casey* for future of abortion rights).

[16] *See, e.g.*, Elizabeth A. Cavendish, Casey *Reflections*, 10 AM. U. J. GENDER SOC. POL'Y & L. 305, 312 (2002) ("*Casey*, and a woman's right to choose, will likely be revisited

commentary on *Lawrence* has focused on its impact on gay rights,[19] gay marriage,[20] equal protection jurisprudence,[21] and even polygamy.[22] In contrast, commentators have not systematically analyzed what these cases mean for the future of stare decisis itself. While observers have certainly noted the apparently contradictory holdings of *Casey* and *Lawrence*,[23] none have yet attempted to reconcile them by analyzing the liberty implications of the prior decision under consideration, nor have any incorporated other stare decisis cases into the analysis. This Note presents a way to reconcile the Rehnquist Court's recent cases in a manner that has significant implications for the stare decisis doctrine and possible directions for future Courts.

Part I provides an overview of the doctrine of stare decisis and explains the selection of cases discussed in this Note. Part II analyzes several important cases of the Rehnquist Court and demonstrates how they support the liberty thesis. Part III contrasts these cases with other decisions of the Rehnquist Court and addresses potential counterarguments to the liberty thesis. Finally, Part IV considers the compatibility of this doctrinal evolution with the Court's role in our government and examines the implications of the liberty thesis for the direction of the Court in the years to come.

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in the relatively near future, and the clock could be turned back on women's rights and freedoms.").

[17] *See, e.g.*, Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 999–1000 (2003) (arguing that Court gives its "own decisions more authoritative weight than the Constitution itself").

[18] *See, e.g.*, Francisco Valdes, *Anomalies, Warts and All: Four Score of Liberty, Privacy, and Equality*, 65 OHIO ST. L.J. 1341, 1390–91 (2004) (analyzing *Casey*'s and *Lawrence*'s impact on "culture wars").

[19] *See, e.g.*, Lawrence H. Tribe, Lawrence v. Texas: *The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1945–51 (2004) (analyzing *Lawrence*'s impact on gay rights).

[20] *See, e.g.*, William C. Duncan, *The Litigation to Redefine Marriage: Equality and Social Meaning*, 18 BYU J. PUB. L. 623, 656–58 (2004) (analyzing *Lawrence*'s impact on gay marriage litigation).

[21] *See, e.g.*, Adrienne Butcher, Note, *Selective Constitutional Analysis in* Lawrence v. Texas*: An Exercise in Judicial Restraint or a Willingness to Reconsider Equal Protection Classification for Homosexuals?*, 41 HOUS. L. REV. 1407, 1421–25 (2004) (analyzing implications of *Lawrence* on equal protection jurisprudence).

[22] *See, e.g.*, Cassiah M. Ward, *I Now Pronounce You Husband and Wives:* Lawrence v. Texas *and the Practice of Polygamy in Modern America*, 11 WM. & MARY J. WOMEN & L. 131, 150–51 (2004) (suggesting *Lawrence* will not lead to legalization of polygamy).

[23] *See, e.g.*, Eskridge, *supra* note 8, at 1060–62.

I
STARE DECISIS DOCTRINE AND METHODOLOGY

A. *Stare Decisis Overview*

Stare decisis is a well-established and widely accepted core principle of American jurisprudence. The term originates from the Latin phrase *stare decisis et non quieta moevre*, which roughly translated means "to stand by matters that have been decided and not to disturb what is tranquil."[24] The doctrine evolved in England and became a firmly entrenched feature of both English and American common law.[25] At the Supreme Court level, it generally requires that the Court adhere to its prior resolution of a particular issue, even if a majority of the Court believes that the prior decision is flawed.[26] Stare decisis serves many important interests, including: (1) promoting judicial economy by avoiding relitigation of issues; (2) providing predictability and stability in the law, thus allowing individuals to structure their personal and business affairs in reliance on the Court's decisions; and (3) legitimating the Court as an institution by showing that principled reasoning, rather than ideology, guides the Court's decisionmaking.[27]

The Court has made it clear that stare decisis "is a principle of policy and not a mechanical formula of adherence to the latest decision."[28] "Stare decisis is not . . . a universal, inexorable command. The rule of stare decisis, though one tending to consistency and uniformity of decision, is not inflexible."[29] The factors that the Court applies in considering stare decisis claims are fairly settled. As set out in *Casey*, the relevant criteria include: (1) whether the prior decision has proven to be unworkable; (2) whether the rule has engendered a "kind of reliance that would lend a special hardship to the consequences of overruling"; (3) whether later cases have undermined its doctrinal basis so that it remains "no more than a remnant of aban-

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[24] *See* John Wallace, *Stare Decisis and the Rehnquist Court: The Collision of Activism, Passivism and Politics in* Casey, 42 BUFF. L. REV. 187, 189 (1994).

[25] *Id.* at 190–91.

[26] *See* Williams, *supra* note 9, at 832–33.

[27] *See* Consovoy, *supra* note 4, at 54.

[28] Payne v. Tennessee, 501 U.S. 808, 828 (1991) (quoting Helvering v. Hallock, 309 U.S. 106, 119 (1940)); *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 231 (1995); Patterson v. McClean Credit Union, 491 U.S. 164, 172 (1989).

[29] Burnet v. Colo. Oil & Gas Co., 285 U.S. 393, 405–06 (1932) (Brandeis, J., dissenting) (internal quotations omitted) (emphasis removed). Although this statement was originally in a dissenting opinion, it has since become very influential with the Court and is quoted frequently in discussions of stare decisis. *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 235 (1997) (citing Brandeis opinion); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) (same).

doned doctrine"; and (4) "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."[30] Stare decisis is considered to be at its "weakest" in constitutional cases, because the Court's "interpretation can be altered only by constitutional amendment or by overruling [its] prior decisions."[31] However, "even in constitutional cases, the doctrine carries such persuasive force that [the Court has] always required a departure from precedent to be supported by some 'special justification.'"[32] Although the Justices on the Rehnquist Court disagreed from time to time on the relative weight to be given to the factors, they all seemed to agree that these are the relevant ones.[33] However, these criteria alone cannot explain the Court's stare decisis decisions. Indeed, as this Note will demonstrate, there was another factor, liberty considerations, that effectively became an additional criterion that the Court considered.

B. Case Selection

The cases analyzed in this Note were selected from the relatively limited pool of cases in which the Rehnquist Court explicitly considered overruling its own precedents.[34] Furthermore, the prior case must have decided whether to recognize or expand a constitutionally

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[30] *Casey*, 505 U.S. at 854–55; *see also Adarand*, 515 U.S. at 233–34 ("It is worth pointing out the difference between the applications of stare decisis in this case and in . . . *Casey*.") (internal citation omitted) (emphasis removed); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1551–67 (2000) (treating *Casey* as setting forth modern stare decisis factors).

[31] *Agostini*, 521 U.S. at 235.

[32] Dickerson v. United States, 530 U.S. 428, 443 (2000) (quoting United States v. IBM Corp., 517 U.S. 843, 856 (1996)). For a history of the evolution of the "special justification" rationale, see generally Emery G. Lee III, *Overruling Rhetoric: The Court's New Approach to Stare Decisis in Constitutional Cases*, 33 U. TOL. L. REV. 581 (2002).

[33] *See* Lee, *supra* note 32, at 596 (noting that Justices have developed "'overruling rhetoric' which has found widespread acceptance on the contemporary Court, if not among Court commentators").

[34] A LexisNexis search was conducted using the search terms "stare decisis AND (overturn! OR overrule!)" within Supreme Court cases. The resulting search yielded 290 cases, and was then limited to cases decided after June 29, 1992 (i.e., post-*Casey*), of which there were seventy-four. These criteria led to the exclusion of two recent death penalty cases, *Roper v. Simmons*, 543 U.S. 551, 578–79 (2005), which found that the Eighth Amendment forbids execution of juveniles, and *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), which held that the Eighth Amendment prohibits execution of mentally retarded defendants. Both cases rendered previous decisions of the Court effectively overruled. However, in both instances, the Court based its decision on a new social consensus, rather than any claim that the previous case was wrongly decided, and thus never undertook any stare decisis analysis. To the extent that these opinions might have been relevant to this Note, however, it is worth recognizing that both reached liberty-expanding outcomes and relied on a new social consensus that had evolved over a surprisingly short period of time.

protected liberty right.[35] For purposes of this Note, the liberty right at issue must be derived from the First through Eighth and Fourteenth Amendments, and it must involve a right that is judicially enforceable against the government. These criteria resulted in a pool of nine cases.[36] From these, I selected the three that were the most prominent and most relevant to this analysis. The first was *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[37] which preserved the core holding of *Roe v. Wade*.[38] The second was *Dickerson v. United States*,[39] which declined to overrule *Miranda v. Arizona*.[40] Finally, I selected *Lawrence v. Texas*,[41] which dramatically overruled *Bowers v. Hardwick*,[42] the case in which the Court found no protected liberty right in consensual homosexual sex.

This Note will focus primarily on *Casey* and *Lawrence*, whose apparently divergent results have drawn the most attention and greatest efforts at reconciliation. As perhaps the most famous recent

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This willingness to effectively overturn past precedents (and in an unusually short period) in a liberty-expanding manner may be additional evidence of the liberty thesis at work.

[35] While there are few cases considering the inverse theory—that the Supreme Court is more likely to overturn precedents where no liberty interest is at stake—one example provides strong support. In *Seminole Tribe of Florida v. Florida*, the Court overruled a past precedent and held that Congress had no power under the Commerce Clause to abrogate state Eleventh Amendment immunity in state court. 517 U.S. 44, 72 (1996) (overruling Pennsylvania v. Union Gas, 491 U.S. 1 (1989)). Notably, the focus of the majority's discussion of stare decisis (i.e., why it was appropriate to overrule *Union Gas*) is primarily on the faulty reasoning of *Union Gas*. *Id.* at 64–66. The majority gives scant attention to the traditional stare decisis factors. *See id.* at 63–66. Instead, the Court cites language stating stare decisis is a "principle of policy" and "not . . . an inexorable command" and treats it as an easily overcome obstacle. *Id.* at 63. Furthermore, as the majority opinion notes, even the dissenters do not place much weight on *Union Gas* and its claim to stare decisis consideration. *Id.* at 66. Therefore, the Court's light treatment of stare decisis in *Seminole Tribe*, where structural rather than liberty-related constitutional concerns were at issue, supports this Note by illustrating the contrary proposition.

[36] This was accomplished by running an additional search term to limit the results to those cases discussing liberty interests, liberty rights, individual liberties, or enforceable rights (searching for: liberty interests, liberty rights, individual liberty/ies, or enforceable rights). These additional criteria were then reduced to the search term "((libert! w/3 right! or interest! or individ!) or (enforce! w/3 right!))." The resulting search yielded nineteen results. Several of these cases contained only brief treatment of stare decisis. A final restriction was therefore added that the case must have used the term "stare decisis" at least four times. This restriction left only nine cases.

[37] 505 U.S. 833 (1992).

[38] 410 U.S. 113 (1973) (recognizing right of women to obtain abortions in first and second trimesters of pregnancy).

[39] 530 U.S. 428 (2000).

[40] 384 U.S. 436 (1966) (requiring now-familiar *Miranda* warnings for any statements made during custodial interrogation). Because *Miranda* increases the burden on the government to convict individuals and deprive them of their liberty, it implicates a liberty right.

[41] 539 U.S. 558 (2003).

[42] 478 U.S. 186 (1986).

cases in this field of law, these decisions provide the strongest suggestions that the Rehnquist Court used liberty concerns to guide its stare decisis analysis.

The next Part will analyze each of the cases previously identified and demonstrate how they support the liberty thesis in their holdings, in their relationship to other jurisprudence, and in the reasoning and language they employ.

II
ANALYSIS OF THE COURT'S DECISIONS: *CASEY* TO *LAWRENCE*

A. Casey

Planned Parenthood of Southeastern Pennsylvania v. Casey[43] is perhaps the most famous case to consider stare decisis, and it contains an extensive treatment of the doctrine. In *Casey*, the Court considered overruling *Roe v. Wade*.[44] Three years earlier, a plurality of the Court stated in *Webster v. Reproductive Health Services*[45] that *Roe* had proven "unsound in principle and unworkable in practice."[46] The *Webster* plurality spent several pages discussing the doctrinal flaws of *Roe* and how it could be overruled under stare decisis doctrine, but then declined to consider overruling it in that instance because the case did not directly present the question.[47] At the time, many believed *Webster* signaled that the Court would soon overrule *Roe*,[48] whose prospects for survival looked even bleaker as two of its strongest supporters (Justices Brennan and Marshall) were replaced by nominees of President George H.W. Bush, who was committed to overturning the decision.

It therefore came as a surprise to many when *Casey* reaffirmed the core of *Roe*. In a joint opinion by Justices O'Connor, Kennedy,

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[43] 505 U.S. 833 (1992).

[44] 410 U.S. 113 (1973).

[45] 492 U.S. 490 (1989).

[46] *Id.* at 518.

[47] *Id.* at 518–21. The discussion of the flaws of *Roe* is extensive and focuses on how the "key elements of the *Roe* framework . . . are not found in the text of the Constitution or in any place else one would expect to find a constitutional principle," and on how *Roe* fundamentally misunderstood the state's interest in the life of the unborn. *Id.* However, Missouri had only criminalized post-viability abortions, whereas *Roe* considered Texas's ban on all abortions except where the mother's life was at stake. *Id.* at 521. The plurality therefore concluded that "[t]his case . . . affords us no occasion to revisit the holding of *Roe*." *Id.*

[48] *See, e.g.*, Ronald Dworkin, *Unenumerated Rights: Whether and How* Roe *Should Be Overruled*, 59 U. CHI. L. REV. 381, 410 (1992) ("*Webster* was widely viewed as . . . altering *Roe* . . . [and] many commentators expect the Supreme Court . . . to narrow *Roe* [further] or perhaps to overrule it altogether." (citations omitted)).

and Souter—three Justices placed on the Court by administrations strongly committed to overturning *Roe*[49]—the Court emphatically reaffirmed that abortion was a liberty right guaranteed by the Fourteenth Amendment. The joint opinion stressed the importance of stare decisis for the Court's legitimacy and reaffirmed *Roe* despite apparent concerns that it was wrongly decided.[50]

The joint opinion provided several direct suggestions that liberty was used as a component of its stare decisis analysis.[51] The Court first explicitly appeared to tie together liberty and stare decisis early in the opinion when it stated that "the reservations any of us may have in reaffirming . . . *Roe* are outweighed by the explication of individual liberty we have given combined with the force of stare decisis."[52] This sentiment emphasizes the role of liberty and adds strength to its relationship with stare decisis doctrine.[53] Then, before turning to the unique social factors in *Casey* that elevated the stare decisis concerns,

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[49] Both the Reagan administration and the first Bush administration had repeatedly filed amicus curiae briefs explicitly urging the Court to overrule *Roe*. *See* Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 LAW & CONTEMP. PROBS. 105, 137 (2004) (noting Reagan and Bush administrations filed five briefs urging Court to overturn *Roe*).

[50] *Casey* is replete with suggestions that *Roe* was wrongly decided. *See* Paulsen, *supra* note 17, at 1027–35. Among other suggestions, the Court notes that "*Roe*, however, may be seen . . . as a rule (*whether or not mistaken*) of personal autonomy and bodily integrity." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 857 (1992) (emphasis added). The Court later states: "[A] decision to overrule should rest on some special reason *over and above the belief that a prior case was wrongly decided*." *Id.* at 864. (citations omitted) (emphasis added); *see also id.* at 953–54 (Rehnquist, C.J., dissenting) (noting that at no point in joint opinion do authors manage to express view that *Roe* was correctly decided).

[51] This textual analysis differs from that of other commentators in a critical respect. The overwhelming number of articles on *Casey* have concentrated on the Court's language about the "intensely divisive controversy," *Casey*, 505 U.S. at 866, concerns regarding "overrul[ing] under fire," *id.* at 867, and the "sustained and widespread debate *Roe* has provoked," *id.* at 861. *See, e.g.*, Michael Abramowicz, *Constitutional Circularity*, 49 UCLA L. REV. 1, 26–29 (2001) (arguing "judicial integrity" did not influence Court's stare decisis analysis); Consovoy, *supra* note 4, at 86 (treating "[l]egitimacy of the Court" as de facto part of stare decisis analysis); Wallace, *supra* note 24, at 217–19 (noting apparent effect of political controversy in stare decisis analysis). The commentators have thus focused on the Court's sensitivity to the political controversy surrounding *Roe*, rather than on the liberty implications of *Casey*. This Note, in contrast, analyzes the portions of *Casey* that suggest liberty considerations are part of the stare decisis analysis. Unlike the political controversy and judicial legitimacy concerns, which effectively have their own sections of the joint opinion, *see Casey*, 505 U.S. at 861–69 (Parts III.B, III.C), the analysis of liberty concerns is more scattered throughout the opinion. This scattering may help explain the relative lack of scholarly notice and analysis. When these portions are considered together, however, as this Note will demonstrate, the implications become clear.

[52] *Casey*, 505 U.S. at 853 (emphasis removed).

[53] The Court addresses the relationship between liberty and stare decisis in *Casey*:

> An entire generation has come of age free to assume *Roe*'s concept of *liberty* in defining the capacity of women to act in society, and to make reproductive decisions; no erosion of principle going to *liberty* or personal autonomy has left

the Court said that "[w]ithin the bounds of normal stare decisis analysis . . . the stronger argument is for affirming *Roe*'s central holding, with whatever degree of personal reluctance any of us may have."[54] The Court gave a final indication that the liberty interest is crucial to the decision when it succinctly stated: "The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a *component of liberty we cannot renounce*."[55]

Additional support for the influence of liberty considerations is found in the substantive elements of *Roe* that survived *Casey*. While *Casey* reaffirmed *Roe*'s "central principle"—the liberty right to previability abortions—it abandoned much of the rest of the decision. *Casey* discarded the trimester framework and replaced the former strict scrutiny standard with the "undue burden" standard.[56] Of course, as Justices Blackmun, Stevens, and Scalia all pointed out, these discarded components were also central to *Roe*.[57] Nonetheless, only the central liberty interest in *Roe*, the part of the opinion to which the liberty thesis is most applicable, survived. The strength of stare decisis was apparently not compelling enough for the Court to preserve those other aspects of *Roe*. The other parts of *Roe*, which implicate liberty more tangentially by providing a standard by which the central right is enforced, fell by the wayside. Thus, by retaining only the part of the decision recognizing the liberty interest itself, the Court indicated that liberty interests are crucial in stare decisis claims.

The stare decisis factors on which the Court explicitly relied also tend to suggest that something else may have influenced the outcome.[58] While the Court stated that, as to the first stare decisis factor ("unworkability"), *Roe* "has in no sense proven unworkable,"[59] this contention seems dubious in light of the plurality opinion authors' declarations to the contrary in earlier opinions. For instance, a plurality of the Court, including Justice Kennedy, had declared in *Webster* that *Roe* had proven "unsound in principle and unworkable in prac-

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> *Roe*'s central holding a doctrinal remnant; *Roe* portends no developments at odds with other precedent for the analysis of personal *liberty* . . . .

Id. at 860–61 (emphasis added).

[54] *Id.* at 861 (emphasis removed).

[55] *Id.* at 871 (emphasis added).

[56] *Id.* at 874.

[57] *Id.* at 929–34 (Blackmun, J., concurring in part); *id.* at 914–16 (Stevens, J., concurring in part); *id.* at 984–85 (Scalia, J., dissenting).

[58] For a systematic critique of *Casey*'s stare decisis analysis, see Paulsen, *supra* note 30, at 1543–67.

[59] *Casey*, 505 U.S. at 855 (internal quotation marks omitted).

tice."[60] Furthermore, as Professor Consovoy notes, "One of the justifications for granting certiorari to *Casey* in the first place was the confusing and inconsistent application of *Roe* in the nineteen years since its announcement."[61]

The second factor, reliance interests, is also problematic. The joint opinion readily conceded that "it is no cause for surprise that some would find no reliance worthy of consideration in support of *Roe*."[62] But the Court went on to claim that "for two decades of economic and social developments, people have 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."[63] Academics seriously critiqued this novel and tenuous claim[64] and the dissent described it as "an unconventional—and unconvincing—notion of reliance."[65]

The joint opinion's analysis of the third factor, which declared that *Roe* had not been undermined by subsequent cases, is also weak. In *Webster*, for example, a majority of the Court either signed onto the statement that *Roe* was "unsound in principle and unworkable in practice"[66] or declared that *Roe* had improperly balanced the interests at hand and that the strict scrutiny analysis should be scrapped for the "undue burden" analysis (which ultimately did replace *Roe*'s framework).[67] On these grounds, the joint opinion's claim that *Roe* had not been undermined is at least suspect.

Finally, as to the fourth factor (changed facts), the joint opinion acknowledged that some changes in the factual circumstances had occurred,[68] noting that "advances in maternal health care allow for abortions safe to the mother later in pregnancy than was true in 1973 . . . and advances in neonatal care have advanced viability to a point somewhat earlier."[69] Thus, the changed factual circumstances seemed to support overruling *Roe* rather than affirming it. Notably, as a result, the joint opinion scrapped the aspects of the *Roe* opinion (principally the trimester framework) that conflicted with these devel-

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60 Webster v. Reprod. Health Servs., 492 U.S. 490, 518 (1989).

61 Consovoy, *supra* note 4, at 84.

62 *Casey*, 505 U.S. at 856.

63 *Id.*

64 *See* Paulsen, *supra* note 30, at 1553–56.

65 *Casey*, 505 U.S. at 956 (Rehnquist, C.J., dissenting).

66 Webster v. Reprod. Health Servs., 492 U.S. 490, 518 (1989).

67 *Id.* at 529–30 (O'Connor, J., concurring).

68 *Casey*, 505 U.S. at 860 ("We have seen how time has overtaken some of *Roe*'s factual assumptions . . . .").

69 *Id.*

opments. This factor therefore cannot be said to support affirming *Roe*.

As the foregoing shows, the stare decisis analysis in *Casey* is plausible, but not overwhelmingly convincing. As many commentators have suggested, some additional factor(s) may have motivated the Court to reaffirm *Roe*.[70] Many commentators have focused on the Court's discussion of its own legitimacy as that additional weight.[71] However, the liberty thesis can also serve this purpose—and as later cases show, it provides a more plausible reconciliation of the Court's recent decisions.[72]

An additional sign that a liberty interest affected the Court in *Casey* is the extraordinary and somewhat absurd level of rhetoric the Court employs in describing the importance of stare decisis for the liberty interest defined in *Roe*; this degree of rhetoric is not present in any other opinion of the Court, before or since. The joint opinion begins with a statement that "overrul[ing] [*Roe*] under fire . . . would subvert the Court's legitimacy beyond any serious question."[73] The opinion further states that overruling *Roe* "would be nothing less than a breach of faith [to the public], and no Court that broke its faith with the people could sensibly expect credit for principle."[74] However, to the Court, it was not simply its legitimacy at stake: "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."[75] The Court concludes that overruling *Roe*, even assuming it was wrong, would come at "the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law."[76] This elevation in the rhetoric of stare decisis, not previously seen in any other cases,[77] as well as the conspicuously sparse citations throughout the

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[70] *See, e.g.*, Consovoy, *supra* note 4, at 83–87, 98 (suggesting that *Casey*'s treatment of stare decisis is incoherent and can only be explained in terms of pragmatic political calculations); Paulsen, *supra* note 17, at 1040 (suggesting that Justices acted "out of concern for the Court's own image and power" and "out of vanity and self-interest. . . . on the basis of a doctrine of stare decisis that is deceptively appealing").

[71] *See supra* note 51.

[72] Furthermore, it helps explain the results without needing to characterize the Court as "incoherent," which fails to offer any meaningful insight into the Court's doctrines and what the implications for future decisions may be. *See infra* Part IV.

[73] *Casey*, 505 U.S. at 867.

[74] *Id.* at 868.

[75] *Id.*

[76] *Id.* at 869.

[77] *See* Abramowicz, *supra* note 51, at 26–30.

section, suggests that some other force is acting on the Court.[78] As the Court only employed this language to protect a liberty right—in strong contrast to its discussion of stare decisis in other cases (notably *Lawrence*)—the liberty thesis helps explain its use in *Casey* and the emphasis placed upon it by the joint opinion.

B. Dickerson v. United States

The next major case to consider stare decisis where a constitutional liberty interest was at stake came in 2000 when the Court considered *Dickerson v. United States.*[79] In *Dickerson*, the Court was forced to resolve two conflicting lines of cases: *Miranda v. Arizona*[80] and its progeny, which held that the Constitution required specific warnings be given before any statements obtained in custodial interrogation could be used; and a separate line of cases beginning with *New York v. Quarles*,[81] which limited *Miranda* on the rationale that *Miranda* warnings "are not themselves rights protected by the Constitution."[82] *Miranda* therefore reflected a more expansive view of the liberty rights contained in the Fifth Amendment. The Court was forced to confront this conflict when the Fourth Circuit "rediscovered" a congressional statute[83] intended to overrule *Miranda* and make voluntariness the sole requirement for admitting confessions in federal courts.[84] The Fourth Circuit's decision prompted the Court to

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[78] A final indication that something exceptional was influencing the Court is evident in the fact that all three of the joint opinion authors were placed on the Court with the specific intent to overrule *Roe v. Wade*. *See* Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV 893, 936 n.282 (2003) ("Presidents Ronald Reagan and George H.W. Bush expected Justices O'Connor, Kennedy, and Souter to overturn *Roe v. Wade* . . . ."). Justice Blackmun went so far as to describe it as an "act of personal courage." *Casey*, 505 U.S. at 923 (Blackmun, J., concurring in part and dissenting in part). That each of them decided the case against both the clearly expressed intentions of the Presidents that nominated them and seemingly against their own views, *see supra* notes 49–50, is telling. Though these Justices could not at any point bring themselves to say that *Roe* was correctly decided, they did decisively reject the top judicial priority of the administrations that appointed them.

[79] 530 U.S. 428 (2000).

[80] 384 U.S. 436 (1966).

[81] 467 U.S. 649 (1984).

[82] *Id.* at 654 (internal quotation marks omitted) (citations omitted).

[83] Congress passed 18 U.S.C. § 3501 in 1968 in response to *Miranda*, but "no attempt to enforce it [had] been made for decades." Michael R. Hartman, Note, *A Critique of* United States v. Bin Laden *in Light of* Chavez v. Martinez *and the International War on Terror*, 43 COLUM. J. TRANSNAT'L L. 269, 274–75, 274 n.27 (2004); *see also* 18 U.S.C. § 3501 (2000) (stating that "a confession . . . shall be admissible in evidence if it is voluntarily given" and setting forth factors judges shall consider in determining voluntariness).

[84] *See* Dickerson v. United States, 166 F.3d 667, 671 (4th Cir. 1999) (holding that voluntariness standard of 18 U.S.C. § 3501, not *Miranda* rule, governs admission of confessions in federal court), *rev'd*, 530 U.S. 428 (2000).

consider not only whether Congress had overruled *Miranda*, but whether it should do so itself as a result of the numerous cases undermining its doctrinal basis.[85] The Court was thus presented with a choice between two lines of cases, both of which had claims to stare decisis effects, but only one of which was more protective of a liberty right.

The Court's decision to retain the liberty-expansive *Miranda* line of cases gives further evidence of the influence of liberty in stare decisis analysis. Unlike in *Casey*, the Justices in *Dickerson* were required to weigh conflicting claims of stare decisis and reject one line of cases. The ultimate choice of the Justices is remarkable because three of the Justices in the majority (Rehnquist, O'Connor, and Kennedy) had each previously authored or joined opinions criticizing *Miranda* and holding that it was not constitutionally based.[86] Thus, in *Dickerson* they were (at least implicitly) repudiating their own statements. Similar to *Casey*, the majority opinion never states that *Miranda* was correctly decided, and it even strongly suggests that it was not.[87] Unlike *Casey*, however, the Justices had an easy path if they wanted to follow their previously expressed beliefs and overrule *Miranda*. They could have overturned *Miranda* by relying on a well-established, two-decades old series of cases with a potentially equally strong claim to stare decisis. Furthermore, they could have easily relied on the third prong of *Casey* (whether subsequent decisions had "undermined" the holding), as *Miranda* had unquestionably been undermined by subsequent cases explicitly describing it as not constitutionally mandated. The Court grudgingly admitted as much.[88]

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[85] *Dickerson*, 530 U.S. at 432, 437–38, 438 n.2 (2000) (holding that *Miranda* cannot be invalidated by act of Congress, and declining to overrule *Miranda* despite Court's numerous creations of exceptions to warning requirement).

[86] *Id.* at 445 (Scalia, J., dissenting) (citing six opinions of Chief Justice Rehnquist and Justices Kennedy and O'Connor that hold that violation of *Miranda* is not per se violation of Constitution); *see also* Davis v. United States, 512 U.S. 452, 457 (1994) ("[*Miranda* rights are] not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected.") (internal quotation marks omitted) (citations omitted); Duckworth v. Eagan, 492 U.S. 195, 203 (1989) ("*Miranda* warnings are not themselves rights protected by the Constitution . . . .") (internal quotation marks omitted) (citations omitted); Oregon v. Elstad, 470 U.S. 298, 305 (1985) (same); New York v. Quarles, 467 U.S. 649, 654 (1984) (same).

[87] *Dickerson*, 530 U.S. at 443 ("Whether or not we would agree with *Miranda*'s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of stare decisis weigh heavily against overruling it now.").

[88] *Id.* at 438 ("[W]e concede that there is language in some of our opinions that supports the view taken [by Fourth Circuit that *Miranda* was not constitutionally required].").
As Justice Scalia later noted, it is not just "a matter of *language*; it is a matter of *holdings*." *Id.* at 454 (Scalia, J., dissenting).

The decision to uphold *Miranda* and implicitly overturn the contrary line of cases (or at least the central principle upon which that line was based) is even more striking given that the strongest apparent reliance interest at issue in the contrary line of cases was that of law enforcement. The police had for nearly two decades relied on the proposition that at least some violations of *Miranda* were not violations of the Constitution in forming investigatory and interrogation procedures. By contrast, there has never been any recognized reliance interest of private citizens in *Miranda*, and it was certainly not raised by the majority in *Dickerson*.[89] Because *Miranda*'s doctrinal basis had been undermined and the reliance interest weighed toward retaining the countervailing line of cases and overruling *Miranda*, the Court's decision to retain *Miranda* (by a 7–2 majority) is striking and begs some additional explanation, which the liberty thesis provides.

C. Lawrence v. Texas

The final stare decisis decision that this Note discusses came in *Lawrence v. Texas*,[90] which stemmed from a criminal sodomy prosecution for consensual homosexual sex. In *Lawrence*, the Court granted certiorari to consider, inter alia, whether *Bowers v. Hardwick*[91] should be overruled. The Court also considered an equal protection challenge to the statute.[92] Despite the precedent of *Bowers* and the availability of a different ground for invalidating the convictions—the equal protection challenge, which the Court suggested was at least "tenable,"[93] and which did not require overruling *Bowers*—the Court instead overruled a prominent precedent and created a new liberty right. *Lawrence* essentially presented the mirror image of *Casey*. Here, a majority of the Court wanted to create a liberty right in a highly politically salient and morally based field, but prior precedent of the Court stood as an obstacle. In *Lawrence*, the Court refused to allow stare decisis to prevent it from recognizing a new liberty right. Instead, it took the dramatic step of overruling *Bowers*.[94]

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[89] *Id.* at 431–44 (majority opinion).

[90] 539 U.S. 558 (2003).

[91] 478 U.S. 186 (1986) (finding no constitutional right to consensual homosexual sex).

[92] *Lawrence*, 539 U.S. at 564 (noting that equal protection analysis was one issue for which certiorari was granted but resolving case under Due Process Clause instead); *see also* Christopher R. Leslie, Lawrence v. Texas *As the Perfect Storm*, 38 U.C. DAVIS L. REV. 509, 523–27 (2005) (examining "attractiveness" of equal protection approach taken by Justice O'Connor's concurrence).

[93] *Lawrence*, 539 U.S. at 574.

[94] In doing so, the Court explicitly sided with the dissent in *Bowers*. *Id.* at 578 ("Justice Stevens' analysis, in our view, should have been controlling in *Bowers* and should control here."). This aspect of *Lawrence* is remarkable, as it is rare for cases to get a "decent

The contrast in outcomes between *Lawrence* and *Casey*, probably the two best-known stare decisis cases of the Rehnquist Court, strongly supports the liberty thesis. Whereas the liberty right created in *Roe* was treated as inviolate, the restriction on liberty posed by *Bowers* was dismissed as ultimately unpersuasive and not controlling. While the issue in *Lawrence* was perhaps no less an "intensely divisive controversy"[95] than *Casey* presented, the Court did not hesitate to "overrule under fire."[96] The difference in outcomes in these two highly visible cases, in the same field of law (substantive due process), supports the proposition that liberty interests may strongly affect stare decisis.

The contrast in rhetoric is also revealing of the Justices' reasoning. Whereas *Casey* dramatically employed rhetorical excesses in describing the importance of stare decisis, *Lawrence* treated it as an easily overcome obstacle. While *Casey* devoted approximately sixteen pages and an entire section to the importance of stare decisis,[97] *Lawrence* gave it far less discussion.[98] *Lawrence* also abandoned the rhetorical flourishes of *Casey* regarding the Court's legitimacy[99] and replaced it with the more familiar and common refrain that stare decisis "is not, however, an inexorable command."[100] While *Lawrence* conceded that stare decisis is important in regards to the respect accorded to the "judgments of the Court and to the stability of the law,"[101] the majority declined even to consider whether there might be an impact on the legitimacy of the Court.[102] A final rhetorical signal stems from the prominent framing of "liberty" in both *Casey* and *Lawrence*. In *Casey*, the first and last word (before reiterating the

burial." Eskridge, *supra* note 8, at 1060. The uniqueness of this part of the opinion adds additional support for the liberty thesis and ironically is important for refuting one of the counterarguments that Eskridge raises. *See infra* Part III.B.

95 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 866 (1992).

96 *Id.* at 867.

97 *Id.* at 854–69.

98 *See Lawrence*, 539 U.S. at 577–78. Justice Scalia draws attention to this apparent conflict when he notes: "Today's opinions in support of reversal do not bother to distinguish—or indeed, even bother to mention—the paean to stare decisis coauthored by three Members of today's majority in *Planned Parenthood v. Casey*." *Id.* at 587 (Scalia, J., dissenting) (emphasis removed).

99 *See Casey*, 505 U.S. at 868; text accompanying notes 73–78.

100 *Lawrence*, 539 U.S. at 577.

101 *Id.* at 577–78.

102 *Id.* at 577–79 (failing to address legitimacy question in analysis of stare decisis); *see also id.* at 587 (Scalia, J., dissenting) (noting contrast to *Casey*'s legitimacy argument).

judgment) is "liberty,"[103] and in *Lawrence*, those same words are "liberty" and "freedom," respectively.[104]

In addition to the differing outcomes in the cases, the way in which *Lawrence* characterized *Casey* reinforces the influence, perhaps even the primacy, of liberty interests in stare decisis analysis. In discussing the strength of stare decisis with respect to *Bowers*, the *Lawrence* Court declared: "In *Casey* we noted that when a Court is asked to overrule a precedent recognizing a constitutional liberty interest, individual or society reliance on the existence of that liberty cautions with *particular strength* against reversing course."[105] Nonetheless, the Court went on to note: "The holding in *Bowers*, however, has not induced detrimental reliance comparable to some instances where recognized individual rights are involved."[106] These passages suggest that the extensively criticized reliance argument in *Casey* was at least partly serving as a proxy for the importance of liberty interests. In these statements, the Court not only made clear that liberty interests were a strong factor in considering the stare decisis claims in *Lawrence*, but it also made explicit what is implicit in *Casey*: The fact that *Roe* expanded individual liberty—rather than limited it—was a crucial factor in that decision. Thus, not only do the holdings support the liberty thesis, but the language in *Lawrence* explicitly tells us that liberty concerns affected the analysis.[107]

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[103] *Casey*, 505 U.S. at 844 ("Liberty finds no refuge in a jurisprudence of doubt."); *id.* at 901 ("Each generation must learn anew that the Constitution's written terms embody ideas and aspirations . . . . We accept our responsibility not to retreat from interpreting the full meaning of the covenant . . . . We invoke it once again to define the freedom guaranteed by the Constitution's own promise, the promise of liberty.").

[104] *Lawrence*, 539 U.S. at 562 ("Liberty protects the person from unwarranted government intrusions into a dwelling or other private places."); *id.* at 579 ("As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.").

[105] *Id.* at 577 (emphasis added).

[106] *Id.*

[107] This is similar to Professor Tribe's analysis of the *Lawrence* decision. Tribe focuses squarely on the liberty-expanding aspect of *Lawrence* and notes that "any such exercise in enumeration is a fool's errand that misconceives the structure of liberty and of the constitutional doctrines that provide its contents." Tribe, *supra* note 19, at 1934–35. Tribe further observes that "Justice Kennedy's opinion for the Court in *Lawrence* instead suggests the globally unifying theme of shielding from state control *value-forming* and *value-transmitting* relationships, procreative and nonprocreative alike . . . ." *Id.* at 1937. While Tribe correctly focuses on the centrality of expanding liberty to an explanation of *Lawrence* (especially when contrasted with stare decisis in *Casey*), his analysis only answers the first relevant question—why *Bowers* was incorrectly decided—and does not explain why *Bowers* was overruled, stare decisis notwithstanding. Merely noting that *Bowers* was vulnerable after *Casey* cannot explain why it was overruled. *Roe* was clearly imperiled after *Webster*, but the Court ultimately reaffirmed it. This Note adds to Tribe's analysis by explaining how *Bowers* was wrongly decided in a manner that left it vulnerable to being overruled; its weakness was the unduly narrow scope it gave to the relevant liberty inter-

Having examined the main cases in support of this Note, the next Part considers additional support for the liberty thesis in the contrast between these cases and the Court's other jurisprudence, as well as the inadequacy of other explanations for the Court's decisions.

III
CONTRAST TO OTHER JURISPRUDENCE AND RESPONSE TO ALTERNATIVE EXPLANATIONS

A. Contrast to Other Jurisprudence

The decisions described in Part II are significant because they stand in remarkable contrast to the general jurisprudence of the Rehnquist Court. While the Court reaffirmed many seminal liberty decisions, it was very reluctant to recognize new liberty rights. This reluctance is particularly apparent in the area of substantive due process.[108] For example, the Court refused to recognize a new substantive due process right to assisted suicide[109] or to be free from malicious prosecution.[110] Given this apparent hostility to recognizing new liberty rights, one might have expected the Court to act on its clearly expressed doubts about some of its precedents. Instead, the Rehnquist Court reaffirmed *Roe*, which is likely its most controversial substantive due process decision, and it did so with only two Justices willing to defend it as correctly decided.

When the Court decided to recognize a major new substantive due process right in *Lawrence*, however, it refused to allow stare decisis to stand in its way. Nor did the Court take the easier course of overturning the convictions on equal protection grounds as *Romer v. Evans*[111] and Justice O'Connor's concurrence in *Lawrence* suggested. *Lawrence* is thus a clear (though isolated) exception to the general trend of the Court's jurisprudence. Notably, in creating this excep-

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ests. The liberty thesis thus provides the "missing link" needed to explain the differing outcomes in *Casey* and *Lawrence*.

[108] *See* Stephen Reinhardt, *The Anatomy of an Execution: Fairness v. Process*, 74 N.Y.U. L. REV. 313, 316 (1999) ("The Rehnquist Court has drawn the line regarding substantive due process, refusing to recognize any new, unenumerated rights . . . ."); *see also supra* note 1 and accompanying text. While *Lawrence* is an exception, this general trend is unmistakable. Although Justice Scalia feared *Lawrence* would lead to the recognition of rights such as gay marriage or bigamy, *Lawrence*, 539 U.S. at 590, 599 (2003) (Scalia, J., dissenting), it has not been extended to create any other new substantive due process rights. Although *Lawrence* is a prominent and significant exception to the Rehnquist Court's substantive due process jurisprudence, it is an exception nonetheless.

[109] Washington v. Glucksberg, 521 U.S. 702, 735 (1997).

[110] Albright v. Oliver, 510 U.S. 266, 271 (1994) (holding that only Fourth Amendment provides such protection).

[111] 517 U.S. 620, 635 (1996) (striking down state constitutional amendment that prohibited nondiscrimination legislation protecting homosexuals).

tion, the Court treated stare decisis as an easily overcome obstacle. The contrast between the Court's unwillingness to recognize any new rights and its refusal to overrule cases that a majority of its members considered wrongly decided is further evidence that liberty considerations played an important role in stare decisis cases.

B. Response to Alternative Explanations

In analyzing the strength of the liberty thesis, it is useful to consider alternative explanations for the Court's decisions. These can be divided into internal and external critiques. Internal critiques argue that the existing stare decisis factors (such as reliance interests) explain the outcomes of the cases. External critiques argue that other factors, external to stare decisis doctrine, motivated the Court. This Part will consider two internal critiques: that either (1) reliance interests or (2) the legal weakness of the prior precedents explains the Court's decisions. It will also consider two external critiques: (1) that the Court merely used stare decisis doctrine to achieve its desired policy preferences (the "attitudinal model" critique); and (2) that moderation or caution explains the decisions.

1. Internal Arguments

The first internal argument—that reliance interests explain the divergence of results—cannot be reconciled with the cases. This argument is most prominently put forward by the Court itself in *Lawrence*.[112] However, even some scholars who hailed the result in *Lawrence* conceded that "[*Bowers*] had generated a fair amount of social and legislative reliance that the Court ignored."[113] Additionally, as noted above, *Casey*'s reliance argument was novel and not particularly strong.[114]

Even if reliance interests could plausibly explain *Casey* and *Lawrence*, *Dickerson* and some additional cases, such as *Vieth v. Jubelirer*,[115] effectively rebut this argument. In *Dickerson*, there were two separate lines of cases, and the reliance interests of law enforcement weighed toward overruling *Miranda* and retaining the opposing line of cases. This reliance interest was additionally buttressed by an entirely separate and well-developed line of cases that had an equally strong claim to stare decisis. If anything, *Dickerson* requires an expla-

[112] *See supra* notes 105–07 and accompanying text.

[113] Eskridge, *supra* note 8, at 1061.

[114] *See supra* notes 62–65 and accompanying text.

[115] 541 U.S. 267 (2004).

nation of why reliance interests did not mandate the opposite judgment; the liberty thesis provides this explanation.

Vieth also weakens the argument that reliance interests can explain the Court's decisions.[116] In *Vieth*, the Court, through a concurrence by Justice Kennedy, refused to overrule a prior liberty-expanding precedent, *Davis v. Bandemer*,[117] which held that political gerrymandering claims were justiciable.[118] Justice Kennedy declined to overrule *Bandemer* despite an implicit recognition that it had not created any reliance interests and an implicit concession that *Bandemer* had proved unworkable.[119] Thus, despite admitting that the traditional requirements of overruling a case were met (including a lack of reliance interests), Justice Kennedy nonetheless refused to overrule *Bandemer*. Such an outcome not only supports the liberty thesis, it also rebuts the suggestion that reliance interests can explain the Court's stare decisis jurisprudence. Thus, the reliance argument can explain at most two of the relevant cases and is at best an incomplete explanation.

A second internal argument, advanced most prominently by Professor Eskridge, argues that *Bowers* had been so undermined by intervening doctrinal developments and/or changes in facts that it was properly overruled,[120] while *Casey* was preserved because "[t]here was no comparable norm shift."[121] He argues that:

> [Where] a social fact or norm is the starting point or a key premise in precedents A–F, and the Supreme Court finds in precedent G that the social fact is false or the norm has been superseded, then stare decisis does not apply with much or any force for precedents A–F . . . .[122]

Eskridge continues: "Stare decisis in identity politics cases is a function of the social consensus as regards the trait or conduct

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116 *Vieth* was one of the nine cases originally identified by the search criteria. *See supra* note 36. Although it is not as directly relevant to this Note as the cases discussed in Part II, *supra*, it is useful in considering the reliance argument.

117 478 U.S. 109 (1986).

118 *Id.* at 125.

119 *See Vieth*, 541 U.S. at 309 (Kennedy, J., concurring) (refusing to overrule); *id.* at 312 (acknowledging *Bandemer*'s history of unworkability). Notably, Justice Kennedy agreed with the plurality that no existing standard had proved workable and did not suggest any standard that might be workable. *Id.* at 308–11. Furthermore, Kennedy did not sign on to any of the three dissenting opinions, each of which suggested its own "workable" standard. While Justice Kennedy believed that a standard might "emerge in the future," *id.* at 311, his opinion does nothing to rebut the plurality's suggestion that *Bandemer* had proved to be unworkable in the eighteen years since it was decided. *Id.* at 312.

120 Eskridge, *supra* note 8, at 1062. This argument is essentially a combination of the first, third, and fourth factors set out by *Casey*. *See supra* note 30 and accompanying text.

121 Eskridge, *supra* note 8, at 1061.

122 *Id.* at 1058.

involved in the case." Thus, "[l]ike *Brown* and unlike *Casey*, *Lawrence* overruled a precedent that had been overtaken by a normative revolution in the United States."[123]

This argument is directly at odds with *Lawrence*'s conclusion that *Bowers* was wrongly decided in 1986, as opposed to resting its decision on a new social consensus arising since *Bowers*.[124] By explicitly siding with the dissent in *Bowers*, the majority necessarily rejected any reliance on the notion of an intervening "normative revolution." Moreover, the seventeen years between *Bowers* and *Lawrence* is an exceptionally short time to complete the normative revolution suggested by Professor Eskridge.

Broadening this argument to legal developments generally, it still fails to explain the Court's decisions. If anything, the intervening *Glucksburg* case dramatically tightened the standard for creating new substantive due process rights.[125] *Bowers* actually may have been doctrinally stronger in 2003 than in 1986. Even if one accepted that *Bowers* had been weakened (principally by *Romer v. Evans*[126]), it could not possibly have been weakened as much as *Miranda*. Cases following *Miranda* had repeatedly stated (and depended upon the proposition) that *Miranda* was not constitutionally required.[127] *Miranda*, unlike *Bowers*, had been continuously and explicitly undermined by numerous decisions beginning in the 1980s.[128] Similarly, *Roe* had been explicitly undermined both by *Webster* and by Justice O'Connor's repeated insistence that "undue burden," and not strict scrutiny, was the correct standard. The doctrinal weakness of the past decision thus does not plausibly explain why *Bowers* was overruled while other precedents were affirmed.

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123 *Id.* at 1061–62.

124 "Justice Stevens' analysis [in his dissent in *Bowers*], in our view, should have been controlling in *Bowers* and should control here. *Bowers* was not correct when it was decided, and it is not correct today." Lawrence v. Texas, 539 U.S. 558, 578 (2003).

125 *See supra* note 1 and accompanying text.

126 517 U.S. 620, 635 (1996) (invalidating on equal protection grounds state law that forbade localities from specifically protecting gays and lesbians). As an equal protection holding, the case did not directly undermine *Bowers*. Indeed, in *Lawrence*, Justice O'Connor would have relied on *Romer* to invalidate the convictions while leaving *Bowers* intact. *Lawrence*, 539 U.S. at 579, 584 (O'Connor, J., concurring). Nevertheless, many commentators believed that *Romer*'s sensitivity to gay rights signaled the impending demise of *Bowers*. *See, e.g.*, Eskridge, *supra* note 8, at 1038 ("*Romer* left [*Bowers*] in constitutional limbo . . . .").

127 *See supra* Part II.B.

128 *See supra* Part II.B. *Miranda* in many ways represents the mirror image of Eskridge's example, *supra* note 122 and accompanying text, with *Miranda* representing precedent A, which was then undermined by precedents B–G.

2. *External Arguments*

One external argument, based on the attitudinal model of judicial decisionmaking, is that the Justices were merely using stare decisis doctrine as cover for their own political and policy preferences.[129] The divergent results would therefore stem from the Justices' policy preferences being insincerely expressed as an application of stare decisis doctrine. Justice Scalia explicitly made this argument in *Lawrence*, where he accused the majority of being "manipulative in invoking the doctrine."[130] This argument is problematic, however, because there are numerous indications that Justices in the *Casey* and *Dickerson* majorities considered the prior precedents wrongly decided and wanted to overrule them. In *Dickerson*, three Justices in the majority (Rehnquist, O'Connor, and Kennedy) each had previously written and/or joined opinions strongly criticizing *Miranda* and had repeatedly sought to limit its application.[131] They were all on record as stating that *Miranda* warnings were not required by the Constitution.[132] Had these Justices voted the preferences suggested by their past statements, *Miranda* would have been overturned by a 5–4 majority.

Similarly, *Casey* suggests that the preservation of *Roe* was not the desired outcome of a majority of the Court. As noted earlier, the joint opinion refused to say that *Roe* was correctly decided, and it hinted that *Roe* was wrong.[133] Only the two concurring Justices argued that *Roe* was correctly decided and should be preserved for that reason, rather than for reasons of stare decisis alone.[134] Several prior decisions signed or authored by Justice Kennedy and, to a lesser extent, Justice O'Connor showed their disagreement and frustration with *Roe*.[135] In particular, Justice Kennedy joined the plurality opinion in *Webster*, which proclaimed that *Roe* had proven "unsound in principle

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129 *See, e.g.*, Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150, 1157 (2004) (describing attitudinal model of judicial decisionmaking).

130 *See Lawrence*, 539 U.S. at 587 (Scalia, J., dissenting).

131 *See supra* notes 86–88 and accompanying text.

132 *See supra* notes 86–88 and accompanying text.

133 *See supra* note 50 and accompanying text.

134 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 927 (Blackmun, J., concurring) (arguing that *Roe* "correctly applied" "principle that personal decisions that profoundly affect bodily integrity . . . should be largely beyond the reach of government"); *id.* at 912 (Stevens, J., concurring) ("[*Roe*] was a natural sequel to the protection of individual liberty established in *Griswold* . . . .").

135 *See* Paulsen, *supra* note 17, at 1027 & n.78 (noting that "the decision in *Casey* was a change of positions for both Justice O'Connor and Justice Kennedy"). Professor Paulsen points out that:

and unworkable in practice," which hardly indicated that he favored preserving *Roe*.[136] The decision to reaffirm *Roe* despite apparent disagreement with its reasoning demonstrates that the attitudinal argument is flawed. Thus, *Dickerson* and *Casey* suggest that stare decisis doctrine compelled the Justices to reach outcomes they opposed, rather than allowing them to manipulate the law to reach the outcomes they desired. Thus, the attitudinal critique fails to provide a convincing account of the outcome of the cases discussed in this Note.

The second external argument—the desire for moderation and stability—has been most prominently advanced by Dean Starr.[137] Starr argues that "[s]tability and structural integrity, rather than fundamental principles, carried the day" in *Dickerson*.[138] Starr contends that the same principle motivated the Court in *Casey*.[139] However, the argument fails completely when applied to *Lawrence*. *Lawrence*, with a bare 5–4 majority, overturned *Bowers* after a comparatively short period of time. It did so despite an alternative ground for the outcome that the Court suggested was promising, and which would not have required the Court to take the radical step of overturning such recent precedent.[140] *Lawrence* also declined to take the more moderate step of suggesting that a change in social consensus required the departure, as it had in *Roper v. Simmons*,[141] and instead attacked *Bowers* directly, declaring it wrong on the day it was decided.[142]

> Justice Scalia makes the point acidly: "It is particularly difficult, in the circumstances of the present decision, to sit still for the Court's lengthy lecture upon the virtues of 'constancy[,] . . .' of 'remain[ing] steadfast,' and adhering to 'principle.' Among the five Justices who purportedly adhere to Roe, at most three agree upon the *principle* that constitutes adherence . . . [the joint opinion's "undue burden" standard] and that principle is inconsistent with Roe . . . .

Id. (quoting *Casey*, 505 U.S. at 997 (Scalia, J., dissenting) (citations omitted)).

136 Webster v. Reprod. Health Servs., 492 U.S. 490, 518 (1989).

137 *See* KENNETH W. STARR, FIRST AMONG EQUALS: THE SUPREME COURT IN AMERICAN LIFE 203–08 (2002).

138 *Id.* at 208.

139 *Id.* at 132–33.

140 *See supra* notes 90–94 and accompanying text.

141 543 U.S. 551, 567–68, 575 (2005) (forbidding imposition of death penalty on juveniles, thus nullifying *Stanford v. Kentucky*, 492 U.S. 361 (1989)); *see also supra* note 34. *Roper* is an Eighth Amendment "cruel and unusual punishments" case that explicitly takes into account social consensus, including considerations of "history, tradition, and precedent." 543 U.S. at 560–61. While substantive due process does not explicitly consider social consensus, it considers factors that are quite similar. For example, substantive due process analysis considers whether a right is "so rooted in the traditions and conscience of our people as to be ranked as fundamental," or whether an interest is "deeply rooted in this Nation's history and tradition." Washington v. Glucksburg, 521 U.S. 702, 721 (1997) (internal quotation marks omitted) (citations omitted).

142 *See supra* note 94 and accompanying text.

Lawrence is hardly a paragon of moderation; the moderation argument is simply unable to explain it.

The next Part examines the implications of the liberty thesis, and, while considering the desirability of the doctrinal development, looks at how it fits within the institutional traditions of the Court and asks whether the future Court should explicitly recognize the Rehnquist Court's doctrinal innovation. It further examines the apparent strength of liberty considerations and what this development suggests for the future of the Court's jurisprudence, especially given its recent change in membership.

IV
DESIRABILITY OF THIS TREND AND IMPLICATIONS FOR THE FUTURE

A. Constitutional Traditions and the Role of the Court

Having established that the liberty thesis is supported by the most recent jurisprudence of the Court, it is worth noting that it is also consistent with the history and traditions of the Constitution as well as the Framers' philosophy. Drafting the Constitution was an inherently value-driven endeavor. The Constitution created a structure with deeply embedded principles that the Framers believed were essential to legitimate government,[143] and the Bill of Rights and Reconstruction Amendments make clear that liberty is a central principle of the Constitution.[144] The principles expressed in the drafting of the Constitution should, and indeed have, guided the Court's interpretation of the Constitution.[145] These principles should guide not only the ultimate decisions of the Court when interpreting the Constitution, but also the methodologies, such as stare decisis, that it uses in arriving at those decisions. The inclusion of liberty in stare decisis analysis is faithful to these traditions, and it may even be required by them.

Additional support for considering liberty stems from what many (including several Justices on the Court) believe the role of the Court should be. As the only unelected branch and the interpreter of the

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143 *See, e.g.*, DAVID A.J. RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 19–20 (1989) ("It is a remarkable feature of the American constitutional tradition that Americans regarded both their revolution and their formation of these constitutions as raising the same tests of both moral legitimacy and political intelligence . . . .").

144 *Cf. id.* at 154–56 (noting importance Framers placed on "republican principle of equal liberty of all persons").

145 *See generally*, RONALD DWORKIN, Freedom's Law: The Moral Reading of the American Constitution (1996) (arguing that broad, abstract language of Constitution suggests that it should be interpreted to invoke ideas of morality, decency, and justice).

rights guaranteed by the Constitution, the Court is often viewed as the defender of individual and minority rights.[146] Unlike the other branches, which are responsive to majoritarian politics, the Court is insulated from those pressures by design. The Court has repeatedly served as a protector of unpopular minorities whose constitutional rights are threatened by popular majorities.[147] This protective role has perhaps been most evident in the Court's free speech and equal protection jurisprudence. In these fields, the Court has lent support to deeply unpopular and outright oppressed minorities in a manner now celebrated by many commentators.[148] The Court's recent stare decisis decisions support this conception of its institutional role. If the Court had eliminated a liberty right under popular pressure, as was the issue in *Casey*, it would have acted against both of these defining characteristics: defense of unpopular liberties and insulation from majoritarian pressures. In contrast, the Court's decision in *Casey* appeared to vindicate both of these aspirations. *Dickerson* and *Lawrence* are similarly faithful to this institutional role.

B. Explicit Adoption by the Court

As the discussion of the cases in this Note has shown, liberty considerations have become a de facto part of the stare decisis doctrine. For a variety of reasons, the Court should explicitly adopt liberty considerations as part of that doctrine. Doing so could lead to more careful and deliberate analysis of an issue that already seems to have a strong influence on the Court. If it is not explicitly incorporated into the doctrine and analyzed forthrightly, commentators will be forced to parse decisions finely,[149] as this Note has attempted to do.[150] Given the apparently strong effect of liberty concerns, specific discussion of

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146 *See* Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257, 1269 (2004) ("[T]he central assumption seems to be that the Court acts contrary to the majority's will. When critics express disenchantment . . . it is that the Court interferes with majoritarian politics. When supporters praise the Court, it is for the very same thing: standing against the majority to safeguard some cherished value.").

147 *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003) (finding criminalization of homosexual sodomy unconstitutional); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (holding public school segregation unconstitutional).

148 *See, e.g.*, Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 1–6 (1996) (noting that scholars who question Court's protective role "constitute a distinctly minority position").

149 *See, e.g.*, Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 973 (1995) ("[T]he absence of rules will force litigants and lower courts to guess, possibly for a generation or more, about what will turn out to be the real content of the law.").

150 *See supra* Part II.

them alongside other factors, such as reliance interests, could shed greater light on the Court's reasoning.

By explicitly making liberty considerations part of the doctrine, the Court can also provide more guidance to litigants.[151] The current doctrine fails to guide parties adequately as to what factors the Court will use to decide cases before it. This failure may lead parties to address liberty considerations insufficiently—or ignore them altogether—in their briefs to the Court.[152] This harms both litigants and the Court, which is less able to rely on the parties to inform its decisionmaking. Explicit adoption can also benefit lower federal courts by guiding them in applying the Court's decisions.

Explicitly adopting the liberty thesis could also further legitimate the Court as an institution. Through explication, the Court can articulate the principle that explains its past decisions and remove a potential delegitimizing influence.[153] By clarifying a previously unexplained conflict in the Court's jurisprudence—*Casey* and *Lawrence*—the Court can demonstrate that defensible legal principles, rather than less legitimate considerations, guide its decisions. The principle itself is also legitimating: The Court is acting as a defender and expander of liberty, and it will not lightly abandon established liberties. Furthermore, by making the Court's decisions more predictable, the liberty thesis can counter the perception that the Court's decisions are haphazard, unpredictable, or unprincipled. Explicit adoption of the liberty thesis could therefore serve the Court's interest in legitimizing itself as an institution.

If the Court wished to avoid the appearance of a major shift in stare decisis doctrine analysis, a less dramatic path is also available.[154] The Court could incorporate liberty considerations by specifically including them as one of the "special justifications" that it considers in deciding whether to overrule a prior case.[155] A finding that a previous decision took an unduly restrictive view of an important liberty right could become a "special justification." The lack of such a justification would therefore counsel against overruling the relevant precedent.

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151 *See* Sunstein, *supra* note 149, at 956 (discussing conception of legal judgment where courts should strive to "give guidance . . . through clear, abstract rules laid down in advance of actual applications").

152 *Id.* at 957.

153 The Court could, for example, respond to the criticism that its doctrine is incoherent and can only be explained in terms of pragmatism or desire for public support. *See supra* note 70 and accompanying text.

154 This approach is also more consistent with the "moderation" view taken by Dean Starr. *See supra* notes 137–39 and accompanying text.

155 For a discussion of the various "special justifications" accepted by the Court, see generally, Lee, *supra* note 32.

This approach might also be desirable in providing some guidance as to what "special justification" means, which has previously been nebulous.[156]

C. *Strength of the Doctrine*

Given the relatively small sample size of cases, it is difficult to determine the strength of the liberty thesis going forward. It may merely be a "thumb on the scale," or it may be the most important factor the Court considers. The cases seem to suggest that the doctrine's impact is significant. In *Dickerson*, *Miranda* was reaffirmed despite a reliance argument for overruling it and the unusually explicit undermining of its doctrinal basis by the very Justices who ultimately reaffirmed it. *Roe* was reaffirmed in a joint opinion by three Justices appointed by Presidents who had repeatedly urged its overruling and made it their top judicial priority. Lastly, *Lawrence* shows that stare decisis appears to be quite weak when the prior opinion adopted a restrictive view of liberty, as *Lawrence* treats stare decisis as an easily overcome obstacle and gives it only cursory treatment.

These cases thus suggest that liberty considerations may have a strong impact on the stare decisis analysis. Given the limited number of cases, however, it is difficult to make any conclusive claim concerning their weight. Considering the broad range of rights to which the doctrine has been applied, however, it is clearly versatile and capable of application in a variety of contexts.

D. *Future Direction of the Court*

The liberty thesis also provides some guidance as to the future direction of the Court's constitutional jurisprudence. First, it suggests that previously recognized rights are very likely to be retained, regardless of any misgivings about the soundness or wisdom of the cases establishing them. Just as *Roe* and *Miranda* survived unusually strong and explicit criticism by sitting Justices who ultimately voted to reaffirm their core holdings, other rights recognized by previous Courts are likely to survive.

Second, the liberty thesis suggests that the barrier to recognizing new rights in the face of contrary precedent is not insurmountable. If a majority of the Court wants to recognize a new right to assisted sui-

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156 *Cf.* Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. (SPECIAL ISSUE) 26, 81–82 (2000) (noting development of special justification requirement).

cide, *Glucksburg*[157] is unlikely to stand in their way. In contrast, *Lawrence*, despite receiving the support of only five Justices, is probably safe. Thus, while some have suggested that *Lawrence* is quite vulnerable and that additional Bush appointments could result in its demise,[158] the liberty thesis suggests that it is likely to be an enduring part of our constitutional tradition.

However, history suggests that while the barrier to creating new liberty rights has been lowered, the Court is reluctant to create new rights, even where no precedent stands in the way. The recent confirmations of Chief Justice Roberts and Justice Alito suggest this trend is likely to continue. The probable direction of the Court for the immediate future, especially in the area of unenumerated rights, seems fundamentally conservative: The Court is unlikely to eliminate previously defined rights and is similarly unlikely to create new ones.

The particular and idiosyncratic views of the Justices may ultimately determine what *Lawrence*-like decisions will emerge from what may otherwise be a steady Court. As *Lawrence* indicated, the views of a single conservative Justice along with the four liberal Justices can surprise Court watchers with a major new liberty right, and contrary precedents will not stop an otherwise determined majority. *Blakely v. Washington*[159] similarly stands out as a surprise decision that depended on the particular Sixth Amendment views of Justices Scalia and Thomas. Chief Justice Roberts and Justice Alito may therefore have more control over which new rights, if any, are created, than over which previously defined rights are overturned.

The critical Justice for this Note, and one whose replacement could dramatically change this direction, is Justice Kennedy. Justice Kennedy has been critical to most, if not all, of the decisions analyzed in this Note. Justice Kennedy was the swing vote in the majority in both *Casey* and *Lawrence*, and his concurrence in *Vieth* prevented *Bandemer* from being overruled. All of the direct textual suggestions that liberty is part of the stare decisis analysis come from opinions that Justice Kennedy authored or coauthored. Justice Kennedy therefore

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157 Washington v. Glucksberg, 521 U.S. 702, 735 (1997) (refusing to recognize general right to assisted suicide).

158 Professor Foley argues that:

> [T]he only way to protect *Lawrence* from being overruled the way *Bowers* was . . . is for the Democrats in the Senate to be successful in using the filibuster, or the threat of a filibuster, to stop a reelected President Bush from appointing more Scalias and Thomases to the Supreme Court.

Edward B. Foley, *Is* Lawrence *Still Good Law?*, 65 OHIO ST. L.J. 1133, 1134 (2004).

159 542 U.S. 296, 304–05 (2004) (finding new Sixth Amendment right to have any fact that increases potential sentence range within guideline system tried by jury).

appears to be the strongest proponent of the liberty thesis on the Court.

Four other current Justices (the rest of the *Lawrence* majority) have already signed on to Justice Kennedy's view. While it is too soon to determine whether Justice Alito or Chief Justice Roberts will also find this approach persuasive, it currently appears to command a majority of the Court. Justice Kennedy's view therefore appears to be at least influential with the other members of the Court, even if it is not yet doctrine. With the replacement of Justice O'Connor by Justice Alito, many have suggested that Justice Kennedy will become the critical "swing vote" on the Supreme Court.[160] As such, his views—including his apparent view on the role of liberty in stare decisis analysis—are likely to become even more influential. Thus, the impact of the liberty thesis is likely to grow stronger. By contrast, if Justice Kennedy retires from the Court, the liberty thesis presented in this Note could significantly change.

CONCLUSION

The foregoing cases establish that liberty considerations played a powerful role in the major stare decisis decisions of the Rehnquist Court. This conclusion is supported both implicitly by the outcomes of the cases and explicitly by textual suggestions that liberty is an important concern. This thesis also helps explain the pattern of Supreme Court decisions that many commentators have found inexplicable. The inclusion of liberty is a positive development in the Supreme Court's jurisprudence and is fully consistent with the traditions of the Constitution and the Court. Given the current membership of the Court, the liberty thesis suggests that the Court will take a fundamentally conservative view of liberty rights going forward, creating fewer new rights while preserving those that have already been recognized. However, if a majority of Justices wish to recognize a new liberty right, stare decisis is unlikely to pose a significant obstacle.

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[160] *See, e.g.*, Charles Lane, *Kennedy Seen As the Next Justice in Court's Middle; Alito Expected to Tilt Conservative*, WASH. POST, Jan. 31, 2006, at A4.