Has Mighty *Casey* Struck Out?: Societal Reliance and the Supreme Court's Modern Stare Decisis Analysis

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Introduction

Recent changes in the Supreme Court's composition have created some concern about how Chief Justice Roberts's and Justice Alito's views on stare decisis will effect the Court.[1] The principal controversy has been about how the newly appointed Justices will view *Roe v. Wade*, given that the Court—in recent cases—has found fault with *Roe*'s legal underpinnings and factual conclusions.[2] At their respective Judiciary Committee confirmation hearings, then-nominees Roberts and Alito both asserted that they would give precedents, like *Roe*, stare decisis effect unless special justifications existed for overruling them.[3] The special justifications analysis is of relatively recent vintage, and has endured some harsh criticism. The furor surrounding the special justifications analysis focuses on the credence the analysis gives to what may be termed "societal reliance."

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1. *See, e.g., Confirmation Hearings on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States*, 109th Cong. 549-555 (2005) (responses of Judge John G. Roberts, Jr., to written questions of Sen. Biden) [hereinafter *Roberts Hearings*]; *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States*, 109th Cong. 2-5 (2006) (opening statement by Sen. Specter, Chairman, S. Judiciary Comm.) [hereinafter *Alito Hearings*].

2. Roe v. Wade, 410 U.S. 113 (1973).

3. *Roberts Hearings, supra* note 1, at 550; *Alito Hearings, supra* note 1, at 775 (testimony of Judge Samuel A. Alito).

"Societal reliance" means how much the public or culture-at-large has come to rely on a particular precedent.

This Note looks at the Court's special justifications analysis and at the relative weight it gives to societal reliance. Part I presents a brief history of the Court's stare decisis analysis. Part II examines the continuing evolution of the modern special justifications analysis. Part III lays out three critiques of the analysis by constitutional scholars. Part IV examines the Court's revisitation of *Roe* in *Planned Parenthood of Southeast Pennsylvania v. Casey*, in light of the criticism.[4] Part V does the same for the Court's upholding of the *Miranda* warning in *Dickerson v. United States*[5] and its more recent decision in *Lawrence v. Texas*[6] to overrule a prior decision that allowed the criminalization of sodomy. Part VI, compares the modern approach to that used in a line of cases where the Court upheld Major League Baseball's antitrust exemption. I conclude that the inclusion of societal reliance in the special justifications gives the Court the flexibility it needs to address complex constitutional issues, while its insistence on a list of other countervailing factors provides greater guarantees of well-reasoned decision-making than the Court's previous stare decisis analysis.

I. Overview of Stare Decisis

While a full history of the stare decisis doctrine would be impracticable here, it is necessary to offer an overview of the doctrine and how it has developed to its current form.[7] Since its first concrete articulation in the Taney Court, the doctrine has been applied to both constitutional precedents and those involving interpretations of statutes.[8] The Taney Court applied the same stare decisis effect to

4. 505 U.S. 833 (1992) (declining to overrule Roe v. Wade, 410 U.S. 113 (1973)).

5. 530 U.S. 428 (2000) (declining to overrule Miranda v. Arizona, 384 U.S. 436 (1966)).

6. 539 U.S. 558 (2003) (overruling Bowers v. Hardwick, 478 U.S. 186 (1986)).

7. For a more detailed and complete history of stare decisis, see Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647 (1999).

8. *Id.* at 717-19. Lee notes "[t]he Marshall Court apparently perceived no stare decisis significance in the constitutional or statutory nature of a precedent." The possibility of a distinction only arose in the Taney Court as the earlier Court's body of constitutional precedents grew and thus were more often questioned. *Id.* at 712-13. Note that we are speaking here of horizontal stare decisis and not vertical stare decisis; inferior

decisions involving constitutional issues as it did to statutory interpretations.[9] Indeed, not until Justice Brandeis' dissent in *Burnet v. Colorado Oil & Gas Co.*, early in the twentieth century, did the modern distinction between the two kinds of precedents appear.[10] In *Burnet*, Justice Brandeis noted:

> [S]tare decisis is not . . . a universal and inexorable command. The rule of stare decisis . . . is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to answer a question once decided. . . . Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right . . . . This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions.[11]

This rationale became the "overruling rhetoric" that the modern Court cites when faced with the question of whether to overrule an existing precedent.[12] The Court first adopted this approach in 1944 with its decision in *Smith v. Allwright*.[13] But the Court continues to cite Justice Brandeis's view to the present day.[14]

Why did the Court's approach to stare decisis change? It appears to have been due as much to practical considerations as to an ideological shift.[15] In the twentieth century, the Court had more opportunities to address the distinction between constitutional and

courts in the United States have, of course, always recognized the binding effect of higher-court rulings.

9. *Id.* at 718-19.

10. 285 U.S. 393, 405-13 (1932) (Brandeis, J., dissenting). As Lee notes, however, the notion that the two types of precedent deserve different treatment dates back at least to Justice Strong's opinion in Knox v. Lee (*The Legal Tender Cases*), 79 U.S. (12 Wall.) 457 (1871), though Justice Strong's views were not adopted by any later decisions until Smith. Lee, *supra* note 7, at 720-22.

11. 285 U.S. at 405-06 (Brandeis, J., dissenting).

12. 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, 59.

13. 321 U.S. 649 (1944).

14. *See, e.g.*, Crawford v. Washington, 541 U.S. 36, 75 (2004) (Rehnquist, C.J., concurring in the judgment); Harris v. United States, 536 U.S. 545, 556 (2002); State Oil Co. v. Khan, 522 U.S. 3, 20 (1997); Agostini v. Felton, 521 U.S. 203, 235 (1997).

15. *See* Lee, *supra* note 7, at 649-50.

statutory precedents because more constitutional precedents came up for consideration than in the previous century.[16] By contrast, the nineteenth-century Court "often focused its efforts on important matters involving property rights."[17] The shift from property and commercial litigation to constitutional issues, Thomas R. Lee contends, was the major reason for its development of rules for overruling precedents—a Court that mainly considers only one kind of case does not need to distinguish those cases from those it rarely considers.[18] Though an increasing number of opportunities for deciding constitutional issues explains why the Court felt it necessary to develop a distinction between statutory and constitutional precedents, it does not explain why it took the approach that it did.

The factors that the Court used throughout its history to decide whether to overturn its precedents remained constant until very recently. The principal consideration for the early Court in deciding whether to give stare decisis effect to a prior decision on any issue was "whether reversal would 'disturb' any 'rights of property' or 'interfere with any contracts heretofore made.'"[19] We may restate this generally as an emphasis on economic reliance interests. William S. Consovoy identified two other factors involved in the Court's analysis of precedents: efficiency and "equality and legitimacy."[20] The efficiency concern is articulated as the value of judicial economy over that of constantly reevaluating prior decisions, and may involve valuing the settled rule over a new, more "correct" rule for the sake of saving time and resources.[21] The equality and legitimacy factor involves the Court's concern that it should appear less like the creator of law and more like the interpreter of law.[22] Justice Brandeis clearly had these factors in mind in his *Burnet* dissent.[23] These conceptualizations of stare decisis have continuing relevance for the Court and have influenced the development of the special justification analysis.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 718 (quoting The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 458-59 (1851)).

20. Consovoy, *supra* note 12, at 61.

21. *Id.*

22. *Id.* at 61-62.

23. 285 U.S. at 405-06 (Brandeis, J., dissenting).

However, the Court's recent development of the special justifications analysis has added some new elements to the mix. Most particularly, the Court has been more willing to take into account non-economic forms of reliance.[24] Because the Court has adopted Justice Brandeis' assertion that constitutional precedents are subject to a different level of deference than statutory precedents, the weight the Court should accord non-economic reliance has become a topic of considerable debate.[25]

II. The Evolving Special Justifications Doctrine

Reliance is the most confusing element of the Court's stare decisis analysis, but only because many of the other elements in the analysis have not yet been clearly elucidated. Given that the special justification analysis is only partly-formed—and deliberately so—and that only a few cases have expressly employed it, there are limits on the certainty with which the relative weights of its elements can be afforded.

The Court first mentioned the special justification analysis in *Arizona v. Rumsey*, though it did not articulate the content of the analysis.[26] Instead, the first detailed description of the analysis from the Court came in *Patterson v. McLean Credit Union*, in which the Court considered whether 42 U.S.C. § 1981 applied to private as well as public contracts.[27] Justice Kennedy's opinion cited the greater deference given statutory precedents and outlined the special justifications that may override such deference: (1) developments in the law since the precedent; (2) unworkability of the rule decided in the precedent; and (3) inconsistency with the "prevailing sense of justice" among the public.[28]

Reliance is not specifically mentioned in Justice Kennedy's analysis.[29] However, it is implicit in his other justifications. The extent to which a precedent influences—or does not influence—the

24. *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 443 (2000); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 857 (1992).

25. *See Burnet*, 285 U.S. at 405-06 (Brandeis, J., dissenting).

26. 467 U.S. 203, 212 (1984). The Court simply stated that "[a]lthough adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of stare decisis demands special justification." *Id.*

27. 491 U.S. 164 (1989).

28. *Id.* at 173-75.

29. *See id.*

development of the law is a gauge of the legal community's reliance on the old law. Justice Kennedy's second justification, unworkability, also contains a component of reliance, in that an unworkable legal rule is unlikely to be relied upon.[30]

The third justification, inconsistency with the public's understanding of justice, adds a new ingredient—societal reliance—to the mix. Emery G. Lee points out that this justification is related to Justice Brandeis's concern in his *Barnet* dissent with "how changed facts and circumstances, or changed understandings, can undermine the legitimacy of a precedent and justify its overruling."[31] Stated in a slightly different way, the Court's examination of the public's understanding of justice focuses on whether the precedent's view of justice conflicts with the public's, such that overruling it would not create a discord between law and common understandings of justice. Thus, the Court determines whether upholding a precedent would be in accord with the public's reliance on a particular understanding of justice. Interestingly, Justice Kennedy's formulation of reliance on precedent is not primarily concerned with economic reliance, but rather with the effect—or lack of effect—of the precedent on common practices and understandings.[32] This new tone in stare decisis analysis is more definitively sounded in *Planned Parenthood of Southeast Pennsylvania v. Casey*, discussed *infra*.[33]

The special justifications analysis did not immediately become the accepted vocabulary for the Court. In *Payne v. Tennessee*,[34] decided two years after *Patterson*, Chief Justice Rehnquist overruled two precedents without offering special justifications. As Emery Lee argues, "*Payne* was the turning point for the 'special justifications'

30. All of Justice Kennedy's justifications hinge on the extent to which intervening historical or technological changes have changed fundamental legal doctrine, made a precedent unworkable, or changed the common understanding of justice. Reliance tends to interact with these justifications as a counterweight. For example, if technology has made a precedent utterly unworkable, reliance on the precedent may be irrelevant to the issue of workability. The same is true if there has been an intervening change in legal or common understanding, in that a significant change in either may render moot any consideration of reliance interests.

31. Emery G. Lee III, *Overruling Rhetoric: The Court's New Approach to Stare Decisis in Constitutional Cases*, 33 U. TOL. L. REV. 581, 599 (2002).

32. *See Patterson*, 491 U.S. at 173-75.

33. 505 U.S. 833 (1992).

34. 501 U.S. 808 (1991). Chief Justice Rehnquist does note that the holdings of the two prior cases had proven difficult to apply, and thus indirectly offers unworkability as a justification for overruling. *Id.* at 828-30.

theory of stare decisis," if only because Justice Marshall's dissent in the case pointedly argued that the Court's legitimacy depended on its ability to adduce consistent justifications for overruling established precedents.[35]

The joint opinion in *Planned Parenthood of Southeast Pennsylvania v. Casey*, decided in 1992, indicates that the Court took Justice Marshall's dissent in *Payne* to heart.[36] This landmark decision, which upheld *Roe v. Wade*, does not use the term "special justification," but the joint opinion does lay out four "pragmatic considerations" the Court must look at when deciding whether to overrule a precedent, even if members of the Court believe it to be erroneously decided.[37] Three of the four considerations correspond to Justice Kennedy's justifications: unworkability, intervening developments in the law, and changes in facts or circumstances.[38] The fourth factor, however, returns to the tradition of stare decisis jurisprudence prior to *Patterson*: "[W]hether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation."[39] This aspect of *Casey* is controversial because the joint opinion chooses to view reliance outside of its traditional economic context. Instead of the traditional economic reliance argument, the joint opinion notes:

> F]or 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. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. . . . The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling

35. Lee, *supra* note 31, at 603; *see also Payne*, 501 U.S. at 853-54 (Marshall, J., dissenting) ("If this Court shows so little respect for its own precedents, it can hardly expect them to be treated more respectfully by the state actors whom these decisions are supposed to bind.").

36. *See Casey*, 505 U.S. 833.

37. *Id.* at 854.

38. *Id.*

39. *Id.*

> *Roe* for people who have ordered their thinking and living around that case be dismissed.[40]

The Court stresses both economic *and* social developments.[41] *Casey* thus expanded *Patterson*'s special justification doctrine to include an overt reliance component, while also expanding the traditional definition of reliance beyond commerce into a social context.

The Court tacitly employed the special justifications analysis in *Dickerson v. United States*,[42] in which the Court revisited its opinion in *Miranda v. Arizona*.[43] Following the *Miranda* opinion, Congress passed a statute in 1968 that required only a "totality of the circumstances" test for admissibility of confessions; a direct reaction to the Court's recommendation of the more stringent *Miranda* warning.[44] *Dickerson* thus presented the Court with a choice between upholding its precedent or allowing Congress to supercede it. The majority decision, written by Chief Justice Rehnquist, states that the Court must have a special justification for overruling a precedent. Surprisingly, Chief Justice Rehnquist cites neither *Casey* nor *Patterson* for this proposition, but instead draws on *United States v. International Business Machines Corp.*[45] Moreover, the opinion does not directly cite the four special justifications laid out in *Casey*, noting instead that the *Miranda* warning "has become embedded in routine police practice to the point where the warnings have become part of our national culture."[46] However, as Emery G. Lee pointed out the logic of the opinion implicates at least three of the four *Casey* justifications—reliance, development in the law, and unworkability.[47]

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40. *Id.* at 857.

41. *Id.*

42. 530 U.S. 428 (2000).

43. 384 U.S. 436 (1966).

44. *See* 18 U.S.C. § 3501 (2000), *invalidated by Dickerson*, 530 U.S. at 442-44.

45. *Dickerson*, 384 U.S. at 443 (citing United States v. Int'l Bus. Machines Corp., 517 U.S. 843, 856 (1996)). The *Int'l Business Machines Corp.* opinion cites neither *Casey* nor *Patterson*, as well, instead relying on a rather perfunctory statement that the Court "has always required a departure from precedent to be supported by some 'special justification.'" *Int'l Business Machines Corp.*, 517 U.S. at 856. (quoting Payne v. Tennessee, 501 U.S. 833, 842 (1992) (Souter, J., concurring)).

46. *Dickerson*, 384 U.S. at 443.

47. Lee, *supra* note 31, at 614-15. Lee posits that Chief Justice Rehnquist wished to avoid tying his opinion to *Casey*, in which he dissented, because of his belief that *Casey*'s analysis would hurt the Court's legitimacy. *Id.* at 616.

Most significantly, Chief Justice Rehnquist's invocation of "national culture" indicates the Court takes societal reliance seriously.

Lawrence v. Texas tested just how serious the Court was about applying the special justifications analysis in general and societal reliance in particular.[48] In *Lawrence*, the Court reexamined its holding in *Bowers v. Hardwick*,[49] which upheld a state law criminalizing sodomy. The *Bowers* Court had mainly relied on its findings that "[p]roscriptions against [sodomy] have ancient roots," and therefore are not prohibited by traditional understandings of due process.[50] The *Lawrence* Court, however, looked to different historical evidence, which showed that "laws targeting same-sex couples did not develop until the last third of the 20th century."[51] *Lawrence*, in overruling *Bowers*, did not explicitly employ *Casey*'s four special justifications, but its analysis tacitly relies on them. For instance, the Court invokes changes in facts or circumstances when it notes that "the deficiencies in *Bowers* became . . . apparent in the years following its announcement," as fewer states prohibited homosexual conduct or enforced their laws against it.[52] Further, *Bowers* is doctrinally out of step with decisions like *Casey* that recognize a right to personal autonomy in intimate matters, and thus intervening changes in the law had weakened its holding.[53] The Court also notes that *Bowers* proved unworkable, in that the laws it upheld served as "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."[54] As such, it failed in practice to protect homosexuals. The *coup de grace*, however, was that *Bowers*' anomalous due process holding created uncertainty about the law. The Court placed heavy emphasis on the fact that "there has been no individual or societal reliance on *Bowers* of the sort that could counsel against overturning its holding once

48. 539 U.S. 558 (2003).

49. 478 U.S. 186, 192 (1986), *overruled by Lawrence*, 539 U.S. 558.

50. *Id.*

51. 539 U.S. at 570.

52. *Id.* at 573.

53. *Id.* at 573-75. The Court notes that "[w]hen our precedent has been thus weakened, criticism from other sources is of greater significance," and goes on to note that legal scholars have largely disapproved *Bowers*' reasoning and "historical assumptions." *Id.* at 576.

54. *Id.* at 575.

there are compelling reasons to do so."[55] Thus, *Lawrence* employs the special justifications analysis, even if it does not acknowledge it is doing so.

Given that Chief Justice Rehnquist (who authored *Dickerson*) and Justice O'Connor (who co-authored the joint opinion in *Casey*) are no longer on the Court, the status of the special justifications analysis is in some doubt. At least one recent case, however, indicates that the Court is likely to retain at least the form of the special justifications analysis. In *Randall v. Sorrel*,[56] for instance, a plurality of the Court declined to overrule *Buckley v. Valeo*[57] after expressly discussing the special justifications.[58] Though only three Justices agreed with this portion of the opinion, it is notable that two of them were Chief Justice Roberts and Justice Alito.[59] Thus, there is some indication that the Court will not abandon the special justifications analysis.

III. Has the Court Gone Wrong?: Some Recent Arguments

Despite their differences, one thing is clear from *Casey*, *Dickerson*, and *Lawrence*: The Court is now free to consider non-economic reliance in deciding whether to overrule a precedent. This more inclusive attitude has caused some concern on the part of scholars who feel the emphasis on societal reliance will have negative effects on the Court's legitimacy and jurisprudence. However, the scholars disagree on just what those effects may be.

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55. *Id.* at 577. The Court somewhat controversially takes the pulse of international law on homosexual sodomy, and notes that "the right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries" and that "there has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent." *Id.* By looking to the views of "a wider civilization," the Court in some sense is defining "societal reliance" in the broadest possible way. *Id.* at 576.

56. 126 S.Ct. 2479 (2006).

57. 424 U.S. 1, 54-58 (1976) (holding that limits on campaign expenditures violate the First Amendment).

58. *Randall*, 126 S.Ct. at 2489-90.

59. Chief Justice Roberts joined in Justice Breyer's opinion, while Justice Alito joined it only in part. Justice Alito, in his concurring opinion, argues that the respondents in the case did not "discuss the doctrine of *stare decisis* or the Court's cases elaborating on the circumstances in which it is appropriate to reconsider a prior constitutional decision." *Id.* at 2500 (Alito, J., concurring). Thus, Justice Alito seems to *require* petitioners and respondents to state a case for overruling a precedent in terms of the special justifications analysis as a prerequisite to the Court's willingness to even consider doing so. *Id.*

A. Mark Tushnet

Mark Tushnet criticizes what he calls the "cultural theory of stare decisis," as typified by the *Casey* joint opinion.[60] In Tushnet's view, cultural preferences are legitimate limits on the actions of the executive and legislative branches. Tushnet argues:

> Treating culture as a constraint on overruling places substantial limits on the Court's ability to take a leading role in changing one constitutional order into another. For culture, in some of its dimensions, affects what the other institutions of the constitutional order are willing to do. A cultural theory of stare decisis will stop the Court from doing much until the other institutions repudiate the regime principles built upon the prior order's understandings.[61]

Tushnet essentially believes that precedents acquire cultural acceptance whether they are good constitutional law or not.[62] The role of the Court is to move the law past bad precedents toward a better "constitutional order."[63] If the Court relies on the weight given precedents by the culture at large, it will tend to refrain from overruling in most cases.[64] Because Congress and the President are also inclined to follow the expectations of culture, a cultural theory of stare decisis will freeze the law.[65] In sum, Tushnet argues that the Court's constitutional role is to make law despite social and cultural mores, and a stare decisis analysis that is highly deferential to those mores conflicts with that role.[66]

B. William S. Consovoy

William S. Consovoy takes an opposite approach, viewing the Court's analysis as overly flexible. He argues that the Court's willingness to entertain reliance-based arguments outside of the economic context is rooted in practical concerns.[67] In short, he contends that the Court's stare decisis analysis has no real content and that the opinions in *Casey* and *Dickerson* "are joined only in that each achieved the result the majority . . . wanted at that particular

60. MARK V. TUSHNET, THE NEW CONSTITUTIONAL ORDER 93 (2004).

61. *Id.*

62. *See id.*

63. *See id.*

64. *See id.*

65. *See id.*

66. *See id.*

67. *See* Consovoy, *supra* note 12, at 56.

moment, for their own particular reasons."[68] Consovoy notes that turning stare decisis into a pragmatic "tool" rather than a limiting principle has the effect of making precedents much easier to overturn.[69] He believes that the Court's analysis ultimately comes down to the question of whether overruling a precedent will be more or less popular than upholding it.[70] The special justifications analysis is simply a means to the end of maintaining the Court's legitimacy.[71] Consovoy proposes that the Court cease making references to stare decisis in constitutional cases, if only to match its words to its actions.[72]

C. Emery G. Lee

Emery G. Lee adopts a more conciliatory tone, arguing that the Court's unwillingness to overrule reasonably-decided constitutional precedents is a rational response to the contemporary political climate.[73] Lee admits that the demands of American culture influenced the Court in *Casey* and *Dickerson*.[74] However, Lee does not see any constitutional problem in letting precedents stand—or overruling them—in light of such demands, so long as there is room for disagreement on the underlying constitutional question.[75] Unlike Tushnet and Consovoy, Lee sees nothing wrong with the Court's concern with its legitimacy in the eyes of the public.[76] In fact, he notes that cases like *Casey* and *Dickerson* do not arise in a legal vacuum, but are instead battlegrounds between different "doctrinal schools" espousing credible constitutional arguments.[77] The Court must take care to decide such cases without appearing to be acting politically, and the special justifications analysis "will enable the Court to provide a plausible and satisfactory explanation of its decision to overrule a precedent."[78] Lee argues that the Court's recent emphasis

68. *Id.*
69. *Id.*
70. *Id.* at 98.
71. *Id.* at 105.
72. *Id.* at 104.
73. Lee, *supra* note 31, at 619.
74. *Id.*
75. *Id.*
76. *Id.* at 609.
77. *Id.* (citing *Casey*, 505 U.S. at 864).
78. *Id.* at 609.

on non-economic, societal reliance is tied to the fact that cases like *Casey* and *Dickerson* deal with civil rights and liberties and not economic issues.[79] Thus, public perceptions and expectations concerning those rights and liberties are a valid concern.[80] In sum, Lee views the special justifications analysis as a reasonable means by which the Court can protect its legitimacy.[81]

D. The Three Views Compared

There are two significant differences between the three viewpoints. First, the degree of flexibility they allow the Court in overruling its precedents. Second, the effects such actions have on the Court's legitimacy. Tushnet views the special justifications analysis as overly conservative, limiting the Court's ability to effectively respond to new circumstances and giving too much weight to the public's views.[82] Consovoy views it as allowing the Court to act in an unprincipled, pragmatic manner while hiding behind a "legitimate" legal analysis.[83] Lee views the special justifications as an effective means by which the Court may protect its legitimacy while maintaining the flexibility needed to address changed circumstances.[84] Tushnet and Consovoy argue, though from different points on the spectrum of judicial activism and conservatism, that the Court is using the analysis to hide its true motives.[85] All agree, however, that in adopting the the special justifications analysis the Court gave more legitimacy to its application of stare decisis.[86] The question is whether the analysis is really effective to meet the Court's goal of legitimacy and flexibility, or whether the older economic reliance analysis better met those objectives. A closer look at the Court's use of the special justifications analysis, and particularly its attention to societal reliance, shows that the special justification requirement effectively protects the Court's legitimacy while simultaneously giving the Court the flexibility to allow the law to develop.

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79. *Id.* at 617-18.

80. *Id.*

81. *Id.* at 609.

82. *See* TUSHNET, *supra* note 60, at 93.

83. Consovoy, *supra* note 12, at 105-06.

84. Lee, *supra* note 31, at 619.

85. *See* TUSHNET, *supra* note 60, at 93; Consovoy, *supra* note 12, at 105-06.

86. *See* TUSHNET, *supra* note 60, at 93; Consovoy, *supra* note 12, at 54-55; Lee, *supra* note 31, at 582-83;

IV. A Closer Look at *Casey*

The joint opinion in *Casey* reformulates the concept of reliance. Instead of focusing on the economic cost, the Court looked to those who rely on the availability of abortion in making decisions about their lives.[87] The joint opinion acknowledges that such societal reliance by itself might not be enough to justify adherence to precedent without the presence of other issues.[88] The Court further noted that in cases like *West Coast Hotel Co. v. Parrish*[89] and *Brown v. Board of Education*,[90] in which societal reliance on an unconstitutional legal rule favors upholding the rule, such reliance is inappropriate as the sole justification.[91] Thus, the *Casey* joint opinion addresses and refutes Tushnet's concern that using societal reliance as a limit on the Court's power to overrule precedents will prevent the Court from overturning unconstitutional or inequitable precedents.[92]

On the other hand, where there is no change in the facts or legal doctrine that led to a prior decision, the Court should generally not overrule the prior decision, because doing so undermines the Court's legitimacy.[93] This legitimacy is implicated in two interrelated instances: first, in the broad sense, where the Court is so often overruling itself that it comes to be seen as acting from political motives; and second, in a very few cases in which a prior decision "calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution."[94]

Both of these instances revolve around the public's expectations. First, the broader legitimacy concern with the public's view of the Court is aligned with the third special justification, which gauges how changes in facts or circumstances have affected the public's view of

87. *See* 505 U.S. 833, 857 (1992).

88. *Id.* at 861-66.

89. 300 U.S. 379 (1937) (overruling Lochner v. New York, 198 U.S. 45 (1905), and holding that a state minimum wage law does not violate due process).

90. 347 U.S. 483 (1954) (*Brown I*) (overruling Plessy v. Ferguson, 163 U.S. 537 (1896), by finding that segregated schools violate equal protection).

91. *See Casey*, 505 U.S. at 861-66.

92. *See* TUSHNET, *supra* note 60, at 93.

93. *Casey*, 505 U.S. at 861-66.

94. *Id.* at 866-67. The opinion summarizes its legitimacy argument thus: "A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, 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." *Id.* at 869.

justice. Though too-frequent overruling of precedents tends to undermine the Court's legitimacy, the joint opinion in *Casey* does not prohibit the Court from overruling in particular cases when the case is no longer thought to be a good decision. Instead, it is simply recommitting itself to the general proposition that "[s]tare decisis is usually the wise policy."[95] Note, however, that the public's views on justice correlate directly to the amount of reliance the public has placed on the precedent at issue, and thus a low level of societal reliance on a precedent may indicate that overruling it will not greatly affect the Court's legitimacy.

The second point is that the joint opinion's concern with societal reliance also ties directly to the notion that certain cases involving controversial issues should be given extra deference. The Court in *Casey* would not have found societal reliance to be a factor in its decision if it did not believe *Roe* to have had a substantial influence on the behavior of a great many citizens.[96] Likewise, the benchmark for a controversy worthy of consideration under the opinion's second legitimacy concern is *Roe*, "and those rare, comparable cases."[97] *Plessy* and *Lochner* are comparable to *Roe* as such cases in the joint opinion's view, and their potential for controversy must be at least partly understood as deriving from their application to large segments of the public.[98] The *Casey* Court wanted to ensure that overruling or upholding a longstanding precedent would not be overly disruptive of settled public expectations. Thus, the special justifications analysis aims to balance the Court's interest in its legitimacy against its need for flexibility in deciding whether to overrule precedents in light of changes in facts, legal doctrine or public expectations.

If we examine *Casey* in light of the views of Tushnet and Consovoy, we find that neither of their theories explains the Court's behavior in applying the special justifications. Tushnet argues that the Court uses stare decisis to refrain from responding to new circumstances.[99] However, the Court does in fact respond to a new factual situation, modifying the holding of *Roe* to reflect modern scientific understanding but without undermining its legal

95. Burnet v. Colo. Oil & Gas Co., 285 U.S. 393, 405-06 (1932) (Brandeis, J., dissenting).

96. *Casey*, 505 U.S. at 857.

97. *Id.* at 866.

98. *See id.* at 861-66.

99. TUSHNET, *supra* note 60, at 93.

assumptions.[100] In effect, the Court finds a middle ground that adapts its precedent without overruling it.[101] Tushnet's fear that a failure to overrule precedents may freeze the law is unfounded here, because the Court finds a way to prevent a misapplication of a legal principle from standing, even while applying stare decisis effect.[102]

Consovoy, by contrast, argues that the Court's special justifications analysis allows it to achieve the result that a majority of Justices would prefer, resulting in unprincipled decisions.[103] However, in *Casey*, the Justices who joined in the joint opinion agreed that the standard in *Roe* needed adjustment while giving deference to its understanding of fundamental liberties.[104] The difficulty with Consovoy's view is that to say that the Court in *Casey* was acting in an unprincipled manner—having decided a priori the result it desired—is to say that the Court in deciding *Roe* must have been similarly unprincipled, because Casey upheld the legal principles *Roe* first enunciated.[105] Only when the Court *overrules* its precedent can it substitute its own unprincipled view for the view of the earlier Court that decided the precedent. Otherwise, it is simply affirming the legal principles established in its precedent. Thus, Consovoy's argument only applies to cases in which the Court strikes down a precedent. Since the Court almost always upholds its precedents – this is the default rule of principled stare decisis—Consovoy's argument is inapplicable to the vast majority of cases. In *Casey*, as in most cases involving precedents, the Court begins with the principle that its precedent is presumptively valid.[106] Thus, Consovoy's argument also does not satisfactorily describe the Court's behavior in *Casey*.

Emery G. Lee's view more accurately describes the Court's analysis.[107] Lee argues that the Court uses stare decisis to carefully

100. The Court adopted the "undue burden" test to determine whether the state's interest in fetal life outweighs the rights of the mother, replacing the "rigid trimester framework" set in place by *Roe*. *Casey*, 505 U.S. at 878.

101. *Id.*

102. *See* TUSHNET, *supra* note 60, at 93.

103. Consovoy, *supra* note 12, at 56.

104. *See* Casey, 505 U.S. at 870.

105. Of course, Consovoy's argument logically extends to the Court's decisions in cases of first impression as well, because there is no reason why a Court that uses an unprincipled stare decisis analysis would not also engage in unprincipled decision-making when deciding an issue for the first time.

106. *See* Casey, 505 U.S. at 854.

107. *See* Lee, *supra* note 31, at 609, 617-19.

navigate the streams of constitutional controversy, and that the special justifications analysis allows it to justify its preferred landing point to the public.[108] The legal principles from *Roe* that the *Casey* joint opinion upheld were permissible readings of the Constitution, and thus are due much deference.[109] Lee defends the Court's concerns with its own legitimacy and with the current political climate as justified, as long as the resulting opinion falls somewhere on a continuum of constitutionally permissible outcomes.[110] Lee's argument applies more broadly even to cases of first impression—for instance, the original decision in *Roe* arguably sat on the spectrum of permissible readings of the Constitution as well.[111] For Lee, the flexibility of the Court's special justifications approach allows it to reach conclusions such as that in *Casey*, in which the precedent is upheld yet modified to fit new information.[112] This flexibility is necessary to allow growth in the law, but also allows the Court to pay due deference to its precedents.[113] Lee's analysis describes very well both the method and result in *Casey*, but it remains to be seen if applies to post-*Casey* cases involving stare decisis as well.

V. A Closer Look at *Dickerson* and *Lawrence*

A. Dickerson v. United States

Chief Justice Rehnquist's majority opinion in *Dickerson* is markedly different from the joint opinion in *Casey*, in that it name-checks reliance as a justification but in fact relies on other justifications.[114] Chief Justice Rehnquist offers three important observations on which he bases his opinion.[115] First, he notes that *Miranda*'s holding has been scaled down in subsequent opinions (many of them written by Chief Justice Rehnquist himself), but its core—"that unwarned statements may not be used as evidence in the

108. *Id.* at 609.
109. *Id.* at 619.
110. *Id.* at 617-18.
111. *Id.* at 619.
112. *Id.* at 617-18.
113. *Id.* at 619.
114. *See* Dickerson v. United States, 530 U.S. 428, 443 (2000).
115. *Id.* at 443-44.

prosecution's case"—has remained intact.[116] Second, he notes that the *Miranda* warning requires little of police officers, while the proposed alternative of a "voluntariness" test would likely prove unworkable.[117] Finally, he notes that "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture."[118] Thus, *Miranda* is upheld mainly because it affords protection to a constitutional right—the right against self-incrimination—and is less burdensome and more workable than other potential solutions.[119] The first two justifications for the decision are explained throughout the opinion, while the reliance argument is only articulated in a single sentence near the end.[120] Chief Justice Rehnquist's statement about cultural reliance on the *Miranda* warning thus only serves to buttress his main argument that the constitutional right involved requires more protection than the proposed alternative would give. Chief Justice Rehnquist is not necessarily giving great deference to the "national culture."

Additionally, it is not completely clear just who is included in Chief Justice Rehnquist's "national culture."[121] He cites Justice Scalia's dissent in *Mitchell v. United States*, which argued that a rule's acceptance by "the legal culture" was reason enough to not overrule it.[122] He also cites with approval Chief Justice Burger's concurring opinion in *Rhode Island v. Innis*, in which the Chief Justice notes that "law enforcement practices have adjusted to [*Miranda*'s] strictures."[123]

116. *Id.* at 443-44. Chief Justice Rehnquist cites New York v. Quarles, 467 U.S. 649 (1984), Michigan v. Tucker, 417 U.S. 433 (1974), and several other cases which all found that the *Miranda* warning was not constitutionally required. *Id.* at 437-38, 438 n.2

117. *Id.* at 444. Congress created the "voluntariness" test—in 18 U.S.C. § 3501—two years after *Miranda* was decided. The test left it to the judge to determine whether a confession was voluntarily, based on five factors. Though two of the factors considered whether the defendant knew of his or her rights to remain silent and to assistance of counsel, the absence of these factors would not preclude the judge from finding "voluntariness." *Dickerson*, 530 U.S. at 435-36.

118. *Id.* at 443.

119. *See id.* at 444.

120. The bulk of the opinion deals with whether Congress's alternative protective scheme is workable and whether prior decisions revisiting *Miranda* had completely weakened its legal underpinnings. The comment about the national culture appears in the third-to-last paragraph, after the principal arguments have already been made. *See id.* at 443.

121. *Id.*

122. *See* 526 U.S. 314, 331-32 (1999) (Scalia, J., dissenting).

123. *Dickerson*, 530 U.S. at 443 (citing Rhode Island v. Innis, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring)). Chief Justice Rehnquist cites *Innis* for the proposition that the

The "national culture" that Chief Justice Rehnquist has in mind appears therefore to be limited to lawyers, judges and possibly law enforcement officials.[124] If so, an opinion that seems very deferential to "societal reliance" at first glance is in fact quite conservative.

Chief Justice Rehnquist is in fact applying the special justifications analysis to the case in a fairly uncontroversial manner.[125] As already noted, he views the Miranda warning as "workable," while the proposed alternative is not.[126] He also notes that the legal basis for the *Miranda* warning—the core understanding of the right against self-incrimination—is still valid.[127] He does not mention whether the factual circumstances on which the original *Miranda* ruling was based are outdated, though the nature of the constitutional right involved would seem to foreclose such an inquiry.[128] The Chief Justice does, of course, give reliance some weight, but, as noted above, it is unclear whether he is weighing reliance by the public or by the legal community. What is clear is that he considers *Miranda* presumptively valid because it is a precedent, even though his treatment of the case in the past suggests that he has not always viewed the warning as constitutionally required.[129] In short, the Court applies the same basic analysis as it did in *Casey*, though ultimately with less emphasis on the reliance factor.

Chief Justice Rehnquist made three choices, however, that combined to create confusion about the Court's stare decisis analysis. First, he failed to explicitly cite *Casey*'s special justifications analysis. Second, he put his reliance-by-national-culture argument first when summarizing his reasons for upholding *Miranda*, suggesting it was the Court's leading rationale.[130] Third, he failed to explain whether

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Court should give a presumption of validity to *Miranda*, even though it might not now reach the same result in the case. However, Chief Justice Burger's rationale appears to mirror Chief Justice Rehnquist's own.

124. *Id.*

125. *See* Lee, *supra* note 31, at 614-15.

126. *Dickerson*, 530 U.S. at 444.

127. *Id.* at 443-44.

128. A change in factual circumstances that would no longer require protection of the right against self-incrimination during arrest and interrogation is difficult, if not impossible, to contemplate.

129. Justice Scalia points out in dissent that a majority of the Justices on the Court had, in previous cases, stated that the Miranda warning was not constitutionally required, including then-Justice Rehnquist in his opinion in *Quarles*. *Id.* at 445 (Scalia, J., dissenting).

130. *See id.* at 443.

"national culture" meant the general public or the national legal culture.[131] These failures in explaining the Court's analysis are largely responsible for the confusion about the special justifications analysis that *Dickerson* has engendered.

Chief Justice Rehnquist's opinion in *Dickerson* provides Tushnet with his chief example of the Court's "departure" from a flexible stare decisis analysis.[132] For Tushnet, the Court is abandoning its responsibility to use stare decisis sparingly, in order to allow the law to evolve.[133] As I have demonstrated, however, the Court in *Dickerson* and *Casey* takes account of changes already visited on the holdings of *Miranda* and *Roe*, respectively.[134] The Court in both cases is simply defining the new limits of the holdings of those cases in light of the limitations put on them by more recent cases. The Court is not holding up cultural reliance as a deciding factor, but only as one among several justifications for not completely overruling its precedents. Thus, Tushnet is incorrect in assuming that *Casey* and *Dickerson* spell the beginning of a "cultural theory of stare decisis."[135]

Consovoy's argument suffers from precisely the same problem, in that it focuses too much on the societal reliance aspects of the Court's decisions. Though it may in fact be true that the Court is using reliance by the broader culture as a public relations tool, at least in part, the fact remains that the opinions in *Casey* and *Dickerson* do not depend on the weight of such reliance.[136] Instead, the Court views other factors, such as change in either the factual or legal circumstances or unworkability as more important. The Court may well be using societal reliance as a means by which to sell its opinion to the public, but this fact by itself does not compel the conclusion that the Court is using its stare decisis analysis to push its own policy agenda. As noted above, we would expect to see the Court overruling precedents more often than it upholds them if Consovoy's

131. As noted *supra*, these cases are Mitchell v. United States, 526 U.S. 314, 331-32 (1999) (Scalia, J., dissenting), and Rhode Island v. Innis, 446 U.S. 291, 304 (1980) (Burger, C.J, concurring).

132. *See* TUSHNET, *supra* note 60, at 91-93.

133. *Id.* at 93.

134. *See Dickerson*, 530 U.S. at 441; Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 860 (1992).

135. TUSHNET, *supra* note 60, at 91-93.

136. *See* Consovoy, *supra* note 12, at 55-56.

view accurately reflected the Court's practice—but this has not occurred.

Emery G. Lee's view, that the Court is reacting to the contemporary political climate by creating a stare decisis analysis that considers society's views, is more persuasive.[137] However, Lee's argument gives too little emphasis to the other justifications employed by the Court. Indeed, Lee finds *Dickerson*'s analysis "short and under-developed," and suggests that the Court could just as easily have overruled *Miranda* on the grounds that its legal basis had been undermined by subsequent cases.[138] As I have noted supra, however, the Court refrained from overruling *Miranda* chiefly because the proposed alternative was not sufficient to protect a defendant's right against self-incrimination.[139] Thus, Lee goes too far in suggesting that the Court, after finding the "voluntariness" test unworkable, could do anything other than uphold *Miranda*. It is notable in this regard that Justice Scalia's dissent turns on his view that the "voluntariness" test was in fact adequate—i.e., workable—to protect the rights of defendants.[140] Thus, the *Dickerson* case revolved largely around the issue of the workability of the proposed alternative, and not as much on any societal reliance on the *Miranda* warning. Lee is probably correct to suggest that Chief Justice Rehnquist included his statement about the national culture as an attempt to give legitimacy to his opinion.[141] Like both Consovoy and Tushnet, however, he gives too little weight to the Court's other justifications for its decision.

B. Lawrence v. Texas

As noted supra, the *Lawrence* Court tacitly employed *Casey*'s special justifications analysis.[142] The Court's principal reason for

137. *See* Lee, *supra* note 31, at 581.

138. *Id.* at 614-15.

139. *Dickerson*, 530 U.S. at 444 ("[E]xperience suggests that the totality-of-the-circumstances test which § 3501 seeks to revive is more difficult than *Miranda* for law enforcement officers to conform to, and for courts to apply in a consistent manner.").

140. *Id.* at 463 (Scalia, J., dissenting).

141. Lee, *supra* note 31, at 615.

142. One commentator has noted that the Court's opinion in *Lawrence* "stresses the incorrectness of Bowers and eschews a lengthy discourse directly regarding the doctrine of stare decisis.... Casey and Lawrence are actually consistent in their reasons for overruling, but this perceived inconsistency has been extensively debated in the national media." Julie E. Payne, Comment, *Abundant* Dulcibus Vitiis, *Justice Kennedy: In*

overruling *Bowers* was that its foundations had "sustained erosion from our recent decisions in *Casey* and *Romer*."[143] *Bowers* was no longer in accord with other Supreme Court decisions, state law, current legal scholarship and international law.[144] The opinion notes that "*Bowers* was not correct when it was decided, and it is not correct today,"[145] which echoes *Casey*'s assertion that *Plessy v. Ferguson* "was wrong the day it was decided."[146] Only after having established that *Bowers* stands on shaky legal ground does the Court note that it "has not induced detrimental reliance comparable to some instances where recognized individual rights are involved."[147] In fact, the Court finds that the anomalous nature of *Bowers*' holding prevented it from inducing such reliance.[148] In effect, the Court weighs the extent to which the legal community has, in this case, declined to rely upon *Bowers* against the "individual or societal reliance" it has engendered.[149] In other words, the Court distinguishes between two kinds of reliance—reliance by courts and legislatures and societal reliance. The Court looks mainly, as did Chief Justice Rehnquist in *Dickerson*, to the national legal culture's reliance on a precedent.[150] Finding none where *Dickerson* found a great deal of reliance, the *Lawrence* Court then goes on to ask whether there is any other reason not to overrule *Bowers*, such as societal reliance.[151] Thus, the Court only looks to societal reliance as a factor when there is little reliance by the legal community.[152]

Lawrence v. Texas, *an Eloquent and Overdue Vindication of Civil Rights Inadvertently Reveals What is Wrong with the Way the Rehnquist Court Discusses Stare Decisis*, 78 TUL. L. REV. 969, 1008 (2004).

143. Lawrence v. Texas, 539 U.S. 558, 576 (2003) (citing Planned Parenthood of Southeast Pennsylvania v. Casey, 505 U.S. 833 (1992), and Romer v. Evans, 517 U.S. 620 (1996)).

144. *See id.*

145. *Id.* at 578.

146. *Casey*, 505 U.S. at 863 (discussing Plessy v. Ferguson, 163 U.S. 537 (1896)).

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

148. *Id.*

149. *Id.*

150. Dickerson v. United States, 530 U.S. 428, 443 (2000).

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

152. The majority's finding that courts and legislatures had not relied on *Lawrence* was the central focus of Justice Scalia's scathing dissent. *See id.* at 589-91 (Scalia, J., dissenting). Justice Scalia cites numerous cases in both federal and state courts, as well as state and federal laws, that relied on *Bowers*. *Id.* He cites these cases, however, as showing substantial individual and societal reliance on *Bowers*, concluding "[w]hat a

Lawrence's stare decisis analysis, because it tacitly employs *Casey*'s special justifications to *overturn* a precedent, presents a better case for evaluating Consovoy's allegation that the Court uses societal reliance as an unprincipled means to achieve the results it desires.[153] Justice Scalia's dissent extensively argues this exact point, charging that "the Court has taken sides in the culture war."[154] However, Justice Scalia totally discounts the majority's valid—and principal—argument that legal doctrine has changed in the years following *Bowers* to render its outcome an anomaly among cases involving personal autonomy in sexual matters.[155] For the majority in *Lawrence*, the important factor in deciding whether society has relied on *Bowers* is not the number of cases that have cited it, but the fact that the public has received contradictory messages from the Court on the issue of personal autonomy.[156] If the rationale for stare decisis is that "it is more important that the applicable rule of law be settled than that it be settled right"—i.e., consistency is valued higher than certitude—then the Court is simply bringing a wayward strand into alignment with the bulk of modern substantive due process doctrine.[157] For the Court, upholding *Bowers* and then having to reconcile it with *Casey* and *Romer* would be more unsettling of both kinds of reliance than to simply overrule it and bring the doctrine into

massive disruption of the *current social order*, therefore, the overruling of *Bowers* entails." *Id.* at 591 (emphasis added). Justice Scalia apparently fails to see the majority opinion's distinction between reliance by the legal community and societal reliance. Thus, he conflates the two to offer a highly illogical argument that, because lower courts have relied on a Supreme Court decision—as they must under horizontal stare decisis—the "current social order" has therefore relied upon it as well. *Id.* By advancing such an argument, Justice Scalia's dissent inadvertently demonstrates the necessity of distinguishing between reliance by courts and legislatures and societal reliance.

153. Consovoy, *supra* note 12, at 55-56.

154. *Lawrence*, 539 U.S. at 602 (Scalia, J., dissenting). Justice Scalia goes even further to assert that "[t]oday's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda . . . ." *Id.*

155. *Id.* at 587 (arguing that Washington v. Glucksberg, 521 U.S. 702, 721 (1997), undermined *Romer* and *Casey* in that *Glucksberg* held only fundamental rights "deeply rooted in this Nation's history and tradition" should receive greater due process protection).

156. *See id.* at 577.

157. Burnet v. Colo. Oil & Gas Co., 285 U.S. 393, 405-06 (1932) (Brandeis, J., dissenting).

harmony.[158] Contrary to what Justice Scalia alleges, the majority is not simply finding a means to its preferred end, but is trying to reconcile contrary constitutional precedents in a manner least disruptive to settled expectations.

The *Lawrence* Court's overruling of *Bowers* likewise directly counters Tushnet's assertion that the Court will use societal reliance on precedents as an excuse to uphold precedents rather than taking "a leading role in changing one constitutional order into another."[159] Instead, the Court recognized that *Bowers* conflicted with the emerging constitutional right to personal sexual autonomy and struck it down.[160]

Emery G. Lee's view of the Court's consideration of societal reliance as a proper means by which the Court protects its legitimacy finds some support in *Lawrence*, but again fails to fully consider the necessary role of the other justifications as counterweights.[161] Lee argues that the Court may justifiably choose to uphold precedents in light of societal reliance if there is genuine disagreement about the underlying constitutional question, in order to protect its legitimacy.[162] In *Lawrence*, the Court found little disagreement about the underlying question, either in the United States or around the world.[163] Having found no reason to uphold *Bowers* as a matter of law, it then looked to societal reliance to see if there was a reason to not strike it down and found none.[164] Thus, the fact that *Bowers* had little support as a matter of law was the decisive factor in *Lawrence*, and not its failure to engender societal reliance. Thus, what *Lawrence* suggests is that societal reliance is more of a tie-breaker than a decisive factor—it comes into play when there are more-or-less equivalent legal arguments for upholding or overruling a precedent. While Lee is correct that the Court may be considering its own legitimacy when it invokes societal reliance as a special justification, it

158. *See Lawrence*, 539 U.S. at 577 (quoting from Planned Parenthood of Southeast Pennsylvania v. Casey, 505 U.S. 833, 844 (1993) that "[l]iberty finds no refuge in a jurisprudence of doubt.").

159. TUSHNET, *supra* note 60, at 93.

160. *See Lawrence*, 539 U.S. at 573-74.

161. *See* Lee, *supra* note 31, at 581.

162. *Id.* at 619.

163. *See generally*, *Lawrence*, 539 U.S. at 573-77.

164. *Id.* at 577.

has done so thus far only as a supplementary argument for upholding or overruling.[165]

The arguments against the special justifications approach typically revolve around whether a flexible stare decisis analysis—particularly one that allows the Court to consider societal reliance—encourages the Court to insert its own cultural and political preferences into the decision-making process. So far, this note has argued that a more flexible approach that adds societal reliance on prior decisions to the analysis in fact still tends to favor upholding precedent, but gives the Court an additional and legitimate justification for overruling precedents that no longer accord with contemporary legal and social understandings. Further, the role of societal reliance in the analysis has not been a prominent one in practice—it has been viewed as a more decisive factor than in it has in fact been. The special justifications analysis is nuanced and complex—as such, it is more suited to an increasingly complex world in which contemporary cultural understandings increasingly inform the content of constitutional law.[166] One way to see this more clearly is to look at how the Supreme Court analyzed its precedents before it formulated the special justifications analysis.

VI. Looking Backward: A Comparison with the Economic Reliance Approach

Any argument that the modern Court has changed its stare decisis analysis must be evaluated with reference to the method it employed in the past. If we look backward, we find that the Court's special justifications analysis is no more, and probably less, subject to the whims and policy preferences of the Court. The reason for this is that the special justifications analysis, by forcing the Court to explain

165. One might wonder what the Court will do if presented with a precedent that, like *Bowers*, has been little followed and seemed to conflict with other decisions, but, unlike *Bowers*, has engendered significant societal reliance. In such a situation, Lee's argument might have more application because it allows the Court to give determinative weight to societal reliance. Thus far, however, in *Casey*, *Dickerson* and *Lawrence*, the Court has declined to do so.

166. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110 (1989) (upholding a law that denied visitation rights to the natural father of a child); Zablocki v. Redhail, 434 U.S. 374 (1978) (holding unconstitutional a law requiring individuals paying child-support to obtain court permission to marry); Moore v. City of E. Cleveland, 431 U.S. 494 (1977) (holding unconstitutional a housing ordinance that prevented some grandchildren from living with grandparents). This line of cases, for instance, involves the problem of defining and regulating "the family" in our complex, modern world.

its rationale for its decisions and take several countervailing factors into consideration, serves to keep the Court "honest."

A fine example of the Court's prior approach to stare decisis may be found in the line of cases beginning with *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*,[167] and ending with *Flood v. Kuhn*.[168] In *Federal Baseball*, the independent Federal League sued the National and American Leagues under the Sherman Act for monopolistic practices.[169] The Federal League argued that the other leagues, composed of eight baseball clubs apiece, were engaged in interstate commerce when their member teams crossed state lines to play one another.[170] The Court, in an opinion authored by Chief Justice Holmes, held that "the business of giving exhibitions of base ball" is solely a state affair, because mere transport is not enough to implicate interstate commerce.[171] The opinion was in line with contemporary understanding of the extent of the Commerce Clause, and thus was arguably correct when decided.[172]

In 1953, two minor-league players petitioned the Court to revisit its decision to exempt professional baseball from antitrust laws.[173] In the intervening thirty years, the interstate nature of professional baseball had changed dramatically. National and American League teams bought minor-league "farm teams" through which they were able to maintain legal control of individual players' entire

167. 259 U.S. 200 (1922).

168. 407 U.S. 258 (1972).

169. 259 U.S. at 207.

170. *Id.* at 209.

171. *Id.* at 208-09.

172. *See* G. EDWARD WHITE, CREATING THE NATIONAL PASTIME: BASEBALL TRANSFORMS ITSELF, 1903-1953, at 80 (1996). Though this book is an academic study of the history of baseball, its author is a legal historian and constitutional scholar, and extensively discusses the *Federal Baseball* case. *Id.* He views the *Federal Baseball* decision as legally orthodox, though lacking relation to reality given the large amounts of broadcast money involved in professional baseball. *Id.* White notes that the principal issue involved in the case and ignored by the Court was not the transport of players, but the interstate market in player services. *Id.* A year after the Court decided *Federal Baseball*, Chief Justice Holmes held, in Hart v. B.F. Keith Vaudeville Exchange, 262 U.S. 271 (1923), that traveling vaudeville shows did implicate interstate commerce. Roger Abrams, *Before the Flood: The History of Baseball's Antitrust Exemption*, 9 MARQ. SPORTS L.J. 307, 309 (1999). This inconsistency of result between two cases involving traveling performers within a year's time may suggest that the Court gave baseball special treatment.

173. Toolson v. N.Y. Yankees, Inc., 346 U.S. 356 (1953).

professional careers.[174] Radio and television broadcast rights became increasingly more valuable.[175] Further, the "territoriality principle," by which certain clubs had exclusive rights to compete within geographic territories, served to preclude the establishment of competitive professional leagues.[176] Given the drastic increase in the amounts of money involved in professional baseball and the increasingly monopolistic nature of major-league baseball—in addition to the radical expansion of the Commerce Clause in the intervening thirty years—one might have expected a challenge to *Federal Baseball* to be at least deserving of thoughtful discussion.[177]

One would have been mistaken. In an extraordinarily brief per curiam opinion joined by seven Justices, the Court cited the major leagues' reliance on *Federal Baseball* and Congress' failure to overrule it as compelling it to give full stare decisis effect to its precedent.[178] As Roger Abrams points out, the Court's deference to Congressional inaction is particularly ironic, given that Congress had a year earlier tabled hearings on the antitrust exemption specifically in order to allow the Court to decide the issue.[179] In any case, *Toolson* gave absolute stare decisis effect to *Federal Baseball*'s antitrust exemption.[180]

In 1972, Curt Flood, a prominent major-league outfielder, challenged the major league reserve clause, arguing that the time had come for *Federal Baseball* to be overturned.[181] The reserve clause, included in all professional baseball contracts, allowed a player's club to indefinitely renew a player's contract, effectively maintaining "ownership" of the player for his entire career and severely limiting his ability to attain a higher salary.[182] The majority opinion, written by

174. WHITE, *supra* note 172, at 296-97.

175. *Id.* at 297.

176. *Id.* at 297-98.

177. *Id.*

178. *Toolson*, 346 U.S. at 357.

179. Abrams, *supra* note 172, at 310. Abrams notes that the major leagues' counsel argued before Congress that it should defer to the Court's ruling, and then disingenuously argued before the Court that it should defer to Congress. *Id.*

180. *Toolson*, 346 U.S. at 357.

181. Flood v. Kuhn, 407 U.S. 258, 264 (1972).

182. WHITE, *supra* note 172, at 49. For the actual text of the Major League Rules in 1972, *see Flood*, 407 U.S. at 259 n.1.

Justice Blackmun, is, to put it mildly, unusual.[183] Section I of the opinion, entitled "The Game," offers a brief history of professional baseball, but then devolves into a listing of Justice Blackmun's eighty-eight favorite players.[184] After recounting the legacy of *Federal Baseball* through *Toolson* and beyond, Justice Blackmun concludes matter-of-factly with a list of the factors relevant to the Court's decision.[185] The Court notes that, though baseball's antitrust exemption is an "aberration," it is long-lived and entitled to stare decisis effect.[186] Further, the growth of broadcast media and the increase in the amount of money involved in the game does not require the Court to overrule *Federal Baseball.*[187] Most important—at least judging by the fact that Justice Blackmun reiterates the point throughout the opinion and then concludes on it—is the fact that Congress had not acted to overrule the Court in the fifty years since *Federal Baseball.*[188] For these principal reasons, the Court declined to overrule *Federal Baseball* and *Toolson.*[189]

The fact that the *Federal Baseball* line of cases turns on a statutory construction does not necessarily make a difference in the application of stare decisis it is due. The *Federal Baseball* case turns on the interpretation of the Commerce Clause, which was outdated by the time the Court decided *Toolson.*[190] This arguably puts it in the category of "cases involving the Federal Constitution," in Justice Brandeis' oft-quoted formulation.[191] Thus, it is possible to compare

183. Abrams calls it an "embarrassing display of sentimentality combined with rigid adherence to notions of stare decisis." Abrams, *supra* note 172, at 311.

184. *Flood*, 407 U.S. at 263. Justice Blackmun concludes his roll-call by noting, "The list seems endless." *Id.* Indeed, it does. In two footnotes to this section, Justice Blackmun gives the full texts of poems by Grantland Rice and Franklin Pierce Adams. *Id.* at 263-64 nn.4-5.

185. *Id.* at 282-83.

186. *Id.* at 282.

187. *Id.* at 283.

188. *Id.* at 283-85. In 1998, Congress did in fact partially overrule the antitrust exemption by passing the Flood Act. 15 U.S.C. § 27(a) (2000). The Act declared that the exemption would no longer apply to the reserve clause, effectively outlawing it. Thus, the exemption now serves only to maintain the "territoriality principle," preventing teams from relocating without Major League Baseball's consent. *See id.*

189. *Flood*, 407 U.S. at 285.

190. *See* Toolson v. N.Y. Yankees, Inc., 346 U.S. 356, 357-59 (1953) (Burton, J., dissenting).

191. Burnet v. Colo. Oil & Gas Co., 285 U.S. 393, 405-06 (1932) (Brandeis, J., dissenting).

the stare decisis analysis used in the *Toolson* and *Flood* with the modern special justifications analysis. Such a comparison suggests that the modern approach has many advantages over the traditional analysis.

It appears likely that, had either the *Toolson* or *Flood* Court employed the special justifications analysis, the antitrust exemption would have been overruled. For one thing, the exemption was based on a factual situation that had changed dramatically from 1922 to 1950 (and even more so by 1972), as professional baseball generated greater revenues than ever contemplated by Justice Holmes.[192] The legal underpinnings of the exemption, based on the Commerce Clause, also changed between 1922 and 1950.[193] Thus, two of the justifications are directly implicated. The exemption is not unworkable in one manner of speaking, in that it had been in force for twenty-eight years in *Toolson* and fifty in *Flood* and yet baseball had continued and prospered. However, the Court might have found it unworkable because it did not protect the rights of the ballplayers who were prevented by the monopoly from putting their services on the open market.[194] Thus, there were several justifications for overruling the exemption at the Court's disposal.

However, there would also have been the countervailing force of the reliance of professional baseball on the exemption. Under the analysis the Court employed in *Toolson* and *Flood*, the major leagues' reliance on the exemption was not counterbalanced by other considerations, such as unworkability or changes in facts or law.[195] Had the Court weighed the changes in legal and factual circumstances, it might not have found the case to be so simple. Considering the drastic increase in the amount of money accruing to the baseball clubs—and not to the players—as a result of the

192. *See* H.R.REP. NO. 82-2002, at 5 (1952) [hereinafter HOUSE REPORT], cited in *Toolson*, 346 U.S. at 359 n.3 (Burton, J., dissenting). The Congressional report shows that Major League Baseball made *no* money from broadcast rights in 1929, seven years after *Federal Baseball* was decided. *Id.*

193. Cases such as Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (recognizing Congress' power to regulate public lodging under the Commerce Clause), and Katzenbach v. McClung, 379 U.S. 294 (1964) (recognizing Congress' power to regulate public restaurants under the Commerce Clause), would certainly have allowed Congress to regulate a professional sport governed by a national organization and played among several states.

194. In fact, the reserve clause was not even addressed in *Federal Baseball*, further calling into question the weight of the precedent.

195. *Flood*, 407 U.S. at 283; *Toolson*, 346 U.S. at 357.

exemption, the Court may well have held that the there was good reason to reconsider the question of whether baseball should be governed by the Sherman Act.[196] The comparatively perfunctory analysis applied in both *Toolson* and *Flood* would not have been acceptable under modern special justifications analysis.[197] First, the Court would have been required to actually explore the effects of the growth of broadcast television and radio rights on baseball revenues, instead of dismissing them outright.[198] Second, the Court would have had to address the expansion of the Commerce Clause, since the legal basis for *Federal Baseball* had clearly changed since 1923.[199] The special justifications analysis thus would have been more protective of the rights of the players, and would have allowed the Court more flexibility to find an equitable solution.

Note also, however, the role that societal reliance plays in *Flood*. The *Flood* Court gives much rhetorical weight to reliance by the public on the antitrust exemption. Justice Blackmun's thumbnail history of baseball in *Flood*, while not an argument as such, can be seen as arguing that the tradition of baseball should not be disrupted, for the sake of the fans.[200] This is particularly true if the elegiac tone of the opinion is considered alongside Justice Blackmun's contention that baseball's exemption "rests on a recognition and an acceptance of baseball's unique characteristics and needs." [201] Justice Blackmun does not specify what it is about baseball that makes it "unique" and deserving of an exemption from antitrust, but he does quote extensively from the trial court's opinion.[202] The Court reproduces the lower court's note that "[b]aseball's status in the life of the nation is so pervasive that it would not strain credulity to say the Court can

196. HOUSE REPORT, supra note 192 at 5.

197. The *Toolson* opinion is, as already noted, only one paragraph. *See* 346 U.S. at 356-57. The *Flood* opinion, though it runs twenty-six pages, contains only four pages of analysis—the remainder is largely a historical digression. *See* 407 U.S. at 282-85.

198. *Flood*, 407 U.S. at 283. Since, as noted in Justice Burton's dissent in *Toolson*, there were no revenues from broadcasting when *Federal Baseball* was decided, it would seem necessary to at least examine the issue briefly in *Flood*. *Toolson*, 346 U.S. at 359 n.3 (Burton, J., dissenting). However, the Court does not even explain how it reaches the conclusion that broadcast revenues do not affect *Federal Baseball*'s holding. *Flood*, 407 U.S. at 283.

199. Justice Blackmun never re-examines the Commerce Clause issue; nor had it been re-examined in *Toolson*.

200. *See Flood*, 407 U.S. at 260-64.

201. *Id.* at 282.

202. *Id.* at 266-67 (quoting Flood v. Kuhn, 309 F. Supp. 793 (S.D.N.Y. 1970)).

take judicial notice that *baseball is everybody's business.*"[203] Clearly, the Court is well aware of and at least somewhat deferential to the reaction of the public to any decision it might make that would change the game.[204] Additionally, the Court's deferral to Congress' decision to not overrule the exemption is likewise a deferral to the views of the public on the issue, as expressed in the electoral process.[205] Thus, the *Flood* Court is effectively employing the kind of "cultural theory of stare decisis" that Tushnet and Consovoy deplore.[206] Just as Tushnet warns, using cultural reliance as the determining factor does in this case prevent the Court from moving the law forward by applying the modern view of the Commerce Clause to baseball.[207] *Flood* demonstrates that societal reliance is not a new tool in the Court's kit, but also demonstrates the danger of relying upon such reliance to uphold a precedent.

Conclusion

By comparison with more modern cases like *Patterson*, *Dickerson* and *Casey*, that have considered the expectations of the public, *Flood* is notable on the one hand for the mysteriousness with which it handles the issue, and on the other for the apparent deference it gives to societal reliance.[208] The comparison demonstrates that the value of the analytical framework provided by the special justifications is less in their content than in their tendency to require the Court to more fully address the issues at play in any consideration of precedent. In other words, the special justifications keep the Court honest. Thus, while Emery G. Lee is correct to note

203. *Id.* at 266 (quoting *Flood*, 309 F. Supp. at 797) (emphasis added). The rest of the quoted paragraph is worth reproducing to show the great weight which the lower court was willing to give to public opinion: "To put it mildly and with restraint, it would be unfortunate indeed if a fine sport and profession, which brings surcease from daily travail and an escape from the ordinary to most inhabitants of this land, were to suffer in the least because of undue concentration by any one or any group on commercial and profit considerations. The game is on higher ground; it behooves every one to keep it there." *Flood*, 309 F. Supp. at 797.

204. It is not clear what sort of change the Court feared would result from a decision overturning *Federal Baseball*. The closest it comes to an explanation is to say that it is concerned about the "confusion and retroactivity problems that inevitably would result." *Flood*, 407 U.S. at 283.

205. *Id.* at 281-82.

206. TUSHNET, *supra* note 60, at 93.

207. *Id.*

208. *Flood*, 407 U.S. at 260-64.

that the Court protects its legitimacy when it takes cognizance of the reliance society has placed on a precedent, the Court is also restrained from putting too much emphasis on societal reliance by the requirement that it consider the other factors.[209] Though the fears of Consovoy and Tushnet that the Court may use the analysis to push individual Justices' policy preferences, the more recent analysis appears far less capable of such manipulation than the amorphous analysis at use in *Flood*.[210] Though at least one commentator has criticized the Court for damaging its legitimacy by not uniformly and explicitly following the step-by-step special justifications analysis outlined in *Casey*,[211] there are indications that the Roberts Court is committed to doing just that.[212] Employing that analytical framework allows the Court to take into account important issues of societal reliance, particularly "when a court is asked to overrule a precedent recognizing a constitutional liberty interest."[213] At the same time, the analysis counterbalances any potential that the Court may give such interests too much weight by forcing the Court to consider other relevant factors. On balance, the special justifications analysis is more likely to result in well-considered outcomes than the more open-ended and manipulable approach of the past.

209. *See* Lee, *supra* note 31, at

210. *See* TUSHNET, *supra* note 60, at 93; Consovoy, *supra* note 12, at 55-56.

211. *See* Payne, *supra* note 142, at 1008. Payne argues that "[b]y renewing its commitment to the comprehensive Casey factors, the Court could avoid unnecessarily causing such a backlash." *Id.*

212. *See* Randall v. Sorrell, 126 S.Ct. 2479, 2489-90 (2006). Moreover, Justice Stevens argues essentially the same in his dissent in *Randall*, where he employs the special justifications analysis to argue "for revisiting the constitutionality of statutory limits on candidate expenditures." *Id.* at 2506-07 (Stevens, J., dissenting). Three Justices (Justices Breyer and Alito and Chief Justice Roberts) joined the majority opinion, which employed the special justifications analysis. *Id.* at 2485. Thus, if Justices Souter and Kennedy, who joined the opinion in *Casey*, are added to the aforementioned four, a solid majority of the Justices on the Court today appear willing to employ the special justifications analysis when revisiting precedents. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 843-44 (1992).

213. Lawrence v. Texas, 539 U.S. 558, 577 (2003). For an argument that recent decisions by the Court to uphold or overrule its precedents may be reconciled by taking into account "the impact of the previous decision on individual liberty rights," *see* Drew C. Ensign, *The Impact of Liberty on Stare Decisis: The Rehnquist Court from* Casey *to* Lawrence, 81 N.Y.U. L. REV. 1137, 1138 (2006).