The Abortion Right, Decision Making, and the Failed Republican Revolution:

Explaining the *Planned Parenthood v. Casey* outcome

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Abstract

One of the major constitutional decisions of this century has been *Dobbs v Jackson Women's Health*, the Court case in 2022 that eviscerated the abortion right once and for all and handed power back to the states. But 2022 was not the first time that the abortion right hung on by a thread. In 1992, *Planned Parenthood v Casey* was the first opportunity that the religious right had to wave goodbye to *Roe*. With a newly furnished Court of six conservative appointed justices, it seemed inevitable. So how did abortion hang on by a single 5-4 vote for another 30 years? In this paper, I argue that Kennedy, O'Connor, and Souter were subject to numerous factors within the attitudinal and strategic model to influence the decision they jointly wrote in *Casey*. I examine primary research through a framework of individual factors such as approach to textual interpretation, approach to precedent, and approach to ideology, and interpersonal factors such as collegial dynamics and public perception of the Court. Framing the causal mechanism analysis with quantitative vote data demonstrating a clear difference between the way that constrained presidential choices vote vs unconstrained choices, I establish that the troika were all significantly influenced by different cocktails of those factors, suggesting that both the strategic and attitudinal models explain decision making in this area. My findings lead me to conclude that law is inherently tied to politics through the various factors that work on justices who interpret the law, and that the Court is a political institution in an ironic Catch-22 to chase an apolitical institutional legitimacy that is rapidly fading with the advent of the new Roberts Court.

Keywords: troika, interpersonal, individual, decision making, abortion, strategic

"ABORT THE COURT" read one of the hundreds of handmade signs hoisted high in the air in Atlanta, Georgia on June 25th, 2022; just one day after the Supreme Court took its largest step on abortion rights in 50 years by officially overturning the seminal *Roe v. Wade* case that had affirmed the fundamental right to abortion couched in the right to privacy (Ishak 2022). Pro choice forces across the country lamented the *Dobbs v. Jackson Women's Health Organization* decision that formally overturned the right to an abortion, and indignant cries rang out all over the nation at the abrupt death of the *Roe* precedent. But alongside *Roe* on that day, another key abortion case slid to a much quieter death: *Planned Parenthood v. Casey* (1992). The *Dobbs* opinion overturned both *Roe* and the 1992 decision that saved the abortion right in the face of a different conservative court revolution 30 years prior. So why did *Dobbs* carry out the execution of the abortion right that *Casey* failed to complete three decades prior?

First, let's set the scene. The year is 1992, and George H.W. Bush has made two recent appointments to the Supreme Court; David Souter, a little known hermit bachelor from New Hampshire, and Clarence Thomas, an outspoken conservative judge whose confirmation hearings had seen controversy not unlike that of our more modern Brett Kavanaugh (Cavendish 2002). *Roe* has survived for 20 years, but over the course of the 1980s, a string of abortion cases has narrowed its scope by closer and closer margins (Solis 2019). At face value, *Casey* and *Dobbs* are not unalike. In both the 1990s and the 2020s, the Court was sporting a fresh new conservative majority, primarily appointed by presidents who had been explicitly anti-*Roe* (Wharton & Kolbert 2013). A state had passed abortion restrictions that seemed to fly in the face of *Roe's* guidelines and what the decision stood for, and the case had made its way to the Supremes. Abortion was a hot button topic and, with an important federal election coming up, was dominating national conversation. In 2022, these circumstances coalesced into the perfect storm, and like a castle of cards, *Roe* and the abortion right tumbled to the ground. But why did it take this long--50 years--for the abortion right to fall when seemingly the same circumstance presented itself in 1992? Why did the Republican Court in *Casey*

fail to overturn the abortion right as their appointing presidents had wished and as they had been poised to do? In essence, why didn't the dog bark in *Casey* when 30 years later in *Dobbs*, the muzzle came off?

But it *did* happen eventually, one might argue. In 2022, the conservative coalition got it together, the abortion right went to the wayside, and the discussion was finally over. So why bother talking about the failure when evidence of the success is right in front of our eyes? I argue that it is critically important to understand why the abortion right didn't get overturned in *Casey* in order to understand why it did get overturned in *Dobbs*. The Court is not just a presiding body over abortion; it rules over issues and questions that touch nearly every aspect of American life. Certain factors motivated the judicial decision in *Casey* that may have either declined in importance or disappeared altogether in the 30 years leading up to *Dobbs*, and the presence or absence of these factors could indicate the direction the Court is moving in other areas as well.

Then, how to understand what happened in *Casey*? As alluded to previously, the decision was puzzling and disappointing to pro-life forces and pro-choice forces alike (Devins 2009). The Court's eight abortion decisions in the 1980s and early 1990s indicated that it was moving sharply away from the strict scrutiny approach espoused in *Roe* toward a much more lenient rational basis standard (Solis 2019). Five members of the Court had at one point or another demonstrated a willingness to significantly alter or completely scrap *Roe*, and with the addition of George H.W. Bush's nominees, the camp to completely overturn the abortion right seemed to command a majority of five (Cavendish 2002). Sandra Day O'Connor, Anthony Kennedy, and David Souter had all expressed reservations about *Roe* in the past, and the conservative bloc of hardcore *Roe* opponents on the court only needed one of their three votes to overturn the precedent. To most following the Court's agenda, the death of *Roe* seemed like a done deal. So it was shocking to nearly every spectator when those three justices banded together to pen a joint opinion preserving the core holding of *Roe* and further enshrining the

abortion right in constitutional law, while making some adjustments to the Court's jurisprudence on the issue (Cavendish 2002).

Different scholars have posed a variety of answers to this baffling turn of events by the three justice plurality in *Casey*, henceforth referred to as the troika. These explanations span a continuum as narrowly as individual justices' interpretational methods to factors as broad as national public outcry. On an individual level, some scholars suggest that the troika justices were driven by their higher regard for precedent (Gerhardt 1993). For example, Paul Foote suggests that "Justice Kennedy, more than any other Justice, changed his decisions and contradicted his previously stated positions to preserve precedent in cases concerning abortion" (2002). Others point to the troika's interpretational jurisprudence, which they argue relies on using standards and balancing of guarantees rather than strict rules (Sullivan 1992). Taking an ideological approach, another sector of Court scholars propose that the troika actually changed their position on abortion, arguing that "O'Connor's leftward drift helps account for the supposedly conservative Rehnquist Court's surprisingly liberal trend in recent years" (Taylor 2005).

Other literature leans more on Court politics to answer the *Casey* question, nodding to a more strategic model. Scholars like Christopher Smith and Kimberly Beuger argue that the complete failure of conservative leaders on the Court like Rehnquist and Scalia contributed to the troika's disloyalty to their fellow Republican president appointed justices (1994). Perhaps other external actors, like the public, swayed the troika; another theory asserts that the troika shared a concern about the Court's legitimacy were it to break so sharply from precedent, and the political ramifications of the decision (Smith & Beuger 1994). To these hypotheses, I add two of my own. First, not only did the conservative bloc on the court fail to persuade the troika to adopt their position and form strong coalitions, but that simultaneously, the liberal bloc succeeded in doing so. Second, the fact that the troika were all constrained choices when their presidents nominated them influenced the level of loyalty with which they could have ever been expected to adhere to Reagan's and Bush's agendas.

Having looked at final opinions, voting record analysis, and judicial archives in the Library of Congress, I argue that Kennedy, O'Connor, and Souter shared a more moderate, common law approach to both textual interpretation and precedent. Because they were constrained presidential choices, their jurisprudential style may have differed from the other Bush and Reagan nominees from the beginning because they viewed their roles differently. Coupled with weak coalition building by the conservative blocs and strong collegial dynamics exhibited by the liberal bloc, varying combinations of interpersonal and individual factors motivated the troika to go against Reagan and Bush I's goals in *Casey* to preserve the Court's lasting legitimacy. Attempting to boil down the mechanisms that operate on justices when making decisions to just one factor or even one set of factors proves near impossible (Friedman 2020). Thus, I separate my findings into two categories: interpersonal and individual factors. Between these two categories, I highlight the most primary influences on the troika both as a group and then individually to provide a holistic framework of the decision making factors at work in *Casey*.

My thesis finds support in several major findings from my primary research. Through a quantitative analysis of voting records from 1972-2022, my research demonstrates a clear difference in adherence to administration policies regarding abortion between Reagan and Bush I's constrained choices and their unconstrained choices. Throughout their tenures, the troika justices supported the abortion right to a noticeably greater extent than their other conservative counterparts. I found through private memos between the justices that Justice Stevens was instrumental and determined in pulling the troika members, but specifically Justice O'Connor, away from the conservative bloc and convincing them to revise *Roe* without entirely overturning it. Additionally, draft opinions and memos reveal a clear goal for the troika of prioritizing their conception of the Court's legitimacy over political or social ramifications that the decision might cause among conservatives. Further, conference notes and memos saved by Justice Blackmun demonstrate a high reliance on the value of precedent by the troika justices, particularly Justice Souter.

The analysis of primary research and especially the individual application highlight one key takeaway: there is no one size fits all explanation for judicial interpretation. Understanding the mechanics behind *Casey* helps to understand what factors were not at work 30 years later in *Dobbs*. To conclude my analysis, I will explore the applicability of my framework to the modern day. Based on the results of my research, I theorize that, while some of these factors may still be present in the current day, they no longer operate on the type of justice that sits on the modern Court. I argue that the conservative coalition of the Roberts Court is a far cry from the factitious alliances that permeated the Rehnquist Court. To put it simply, where *Casey* was a perfect example of swing justices being influenced by a variety of external forces, the Roberts Court has seen the death of the swing justice--for now. As America moved into the 21st century, coalitions on the Court shifted to create an environment much less hostile to the attitudinal approach and much more hostile to the existence of compromise and collegiality. Above all, the case study of the abortion right's life and death provides a major insight into the intrinsic inextricability of law and politics that will continue to shape constitutional law for decades to come.

The Path of the Law

Before delving into the varying theories surrounding the outcome of the *Casey* decision, I would like to lay down a road map of the actual decisions that led up to *Casey* with the troika members. The first abortion decisions O'Connor voted in were three cases in 1983: *Akron*, *Ashcroft*, and *Simopoulos*. A 6-3 majority in *Akron v Akron Center for Reproductive Health* struck down a requirement for minor parental approval, a waiting period, a second trimester hospitalization requirement, and an informed consent requirement with O'Cnnor in dissent (Akron). *Planned Parenthood v Ashcroft* saw more of a split, with a 5-4 majority striking down a second trimester hospitalization requirement but allowing a parental consent requirement narrower than the one struck down in *Akron,* a requirement for pathology reports, and a second physician requirement. Finally, *Simopoulos v Virginia* was a case in which an 8-1 Court upheld a second trimester

hospitalization requirement because it more broadly included outpatient centers when defining hospitals (Simopoulos). In the last case before Kennedy joined the Court, a slim 5-4 majority in *Thornburgh v American College of Obstetricians and Gynecologists* (1986) held unconstitutional a number of Pennsylvania abortion regulations similar to those at issue in *Akron* (Thornburgh).

With the addition of Kennedy in *Webster v Reproductive Health Services* in 1989*, Roe* seemed to be on its last legs when O'Connor abandoned a 5-4 plurality to concur only in the judgment in upholding restrictions on counseling requirements, use of public funds for abortion, and viability testing regulations (Webster). Rehnquist's plurality opinion made evident that, had O'Connor joined the other four, the majority would have effectively overruled *Roe* in that case (Webster). A year later, in *Hodgson v Minnesota,* a 5-4 Court in the same coalitions as *Webster* besides O'Connor switching her bloc struck down a parental notification requirement (Hodgson). However, the apparent pro choice stint was short lived because in *Ohio v Akron Center for Reproductive* Health, decided on the same day, the Court upheld a one parent notification requirement with a parental bypass (Ohio). Finally, *Rust v Sullivan*, decided in 1991 by a 5-4 Court, judged that it was constitutionally permissible to condition federal funds for family planning clinics on their not supporting abortion as an acceptable method (Rust). *Planned Parenthood v Casey* in 1992 represented the peak of the abortion debate in the 20th century, where the troika reaffirmed the essential holding of *Roe*, cementing abortion as a constitutional right while replacing the trimester system and with the undue burden test promoted by O'Connor (Casey).

Schools of Thought: Literature Review

Three general schools of thought attempt to explain judicial decision making, each covering its own set of factors and explanations. The *legal model* offers a simple equation: facts plus rules equals decision. In this framework, justices simply apply the rules as written to whatever set of facts come before them, and thus operate under very few constraints or influences. This presumption leads to a new dilemma: how can justices come to different conclusions on the same set of facts? The

attitudinal model suggests that "justices of the Supreme Court decide cases based on their personal attitudes," which can include ideology, policy preferences, or personal worldviews (Friedman et al 2020). The strategic model challenges the attitudinal model by asserting that justices do not just blindly vote in favor of their preferences, but rather behave strategically based on collegial dynamics, external influences, and institutional constraints (Friedman et al 2020). These three schools of thought guide my assessment of the *Casey* decision, and set out a framework for evaluating the more specific decision making factors that follow.

Theories of Judicial Decision Making

This paper seeks to examine what factors were working on the troika leading up to and during the *Casey* decision, and how those factors may have acted differently on each of the three justices. Friedman et al and Epstein & Knight offer similar theoretical frameworks for assessing judicial decision making through a more general lens. Though their books present a detailed discussion of many different factors, here I will focus on three in particular: judicial identity, collegial courts, and public opinion. The ideas that their books discuss bolster the literature surrounding *Casey*.

The attitudinal model argues that justices are affected by their own belief systems and preferences and these internal factors shape how they view and interpret cases that come before them (Friedman et al 2020). Most models gauge judicial attitudes based on their ideologies, or "the cluster of a justice's preferences, which together define part of what that judge cares about in resolving cases" (Friendman et al 150). Social background factors like race and sex are statistically significant "at least in areas where judges have some discretion" (Friedman et al 179). This finding is particularly relevant to this particular topic, given that a large part of the speculation that surrounded Sandra Day O'Connor's abortion jurisprudence centered on the assertion that she would be more favorable to abortion as the only woman on the Court and the only Justice who had ever gone through a pregnancy (Murchison 2017).

The key obstacle to success for Justices on the Supreme Court is exactly that; the other justices. As Justice Brennan was often quoted saying, you can't do anything without five votes. Individual justices are presumed to have an "ideal point" on a spectrum of outcomes across a case that represents a resolution of the case that exactly reflects how they would decide the case (Friedman et al 598). On a court of nine justices, it is extremely unlikely that five justices would share the exact same ideal point, thus justices move from their ideal outcomes to a "j-point" at which the outcome is palatable to a majority of justices, if not preferable to each individual one (Friedman et al 603). In order to produce opinions that command a majority of the Court and hold the weight of precedent, justices must engage in this strategic behavior and be flexible in their voting behavior.

Friedman's research identifies the "modern phenomenon" that "Supreme Court decisions tend to converge with the considered judgment of the American people" (Friedman et al 2020). One study suggested that the link between public mood and judicial shifts toward liberalism to exist "through the mechanism of attitudinal change;" i.e. the justices shifting their views alongside or in response to public mood shifts (Friedman et al 2020). Public opinion may also hold justices captive by way of institutional legitimacy. The Supreme Court must "attend to those informal rules that reflect dominant societal beliefs about the rule of law in general…the norms of legitimacy" (Epstein & Knight 1998). Epstein and Knight argue that this reliance on the good faith of the American people allows public opinion to influence judicial decision making (1998).

Common Law Textual Interpretation

While interpretation can take a variety of paths, the most natural starting place is with the law itself. Some scholars argue that the troika's approach to constitutional interpretation was grounded in the common law/natural law tradition, and this perspective informed the way they wrote the *Casey* decision (Kelso et al 2002). Kelso et al. argue that justices weigh and prioritize six different factors in constitutional interpretation: (1) the text of the Constitution, (2) arguments derived from context, (3) intent of the framers, (4) legislative and executive practice, (5) judicial precedent, and (6) arguments

concerning the consequences of the judicial decision (Kelso et al 2002). The common law approach that the troika were disciples of considers all six of the factors relevant except for a subset of factor (6) that considers policy implications (Kelso et al 2002). In terms of the text itself, adherents of the natural law tradition consider both "literal text and the text's purpose and spirit" (Kelso et al 2002). Justice Souter personified this approach in his confirmation hearings, stating that "Principles don't change but our perceptions of the world around us and the need for those principles do" (Kelso et al 2011). The focus on "arguments of general intent" prominent in the natural law approach allowed the *Casey* writers to take a broader definition of liberty under the Due Process Clause (Kelso et al 2002).

Other literature characterized the troika's approach to textual interpretation on a rules/standards continuum. The standard approach includes balancing and line drawing in the role of the justice, relying on certain basic and bedrock concepts to ground the case by case analysis (Sullivan 1992). This view of interpretation is closely related to the common law approach, characterized by the troika's approach to interpretation, and dubbed by Sullivan as "the rule of law as the law of standards" (Sullivan 1992). The troika's adoption of the standard based approach led to "awfully fine distinctions" like the splicing of the Pennsylvania statutes in the *Casey* decision; the case of one-parent notification can be permitted, but the case of two-parent notification fails constitutional muster (Sullivan 1992). In following with this assessment, McDonald characterized the *Casey* decision as a compromise in which the troika could "good conscience vote to uphold a woman's right to obtain a previability abortion, while at the same time permitting significant regulation of both the abortion decision and the procedure itself" (McDonald 2017). In essence, this approach calls on the Court to make judgements in individual cases based on broad guarantees and principles, as the troika purported to do in *Casey* by examining abortion provisions on a case-by-case basis while guided by *Roe's* essential holding.

Common Law Approach to Precedent

Judicial approach to precedent features heavily in literature surrounding the *Casey* decision, and its importance to the members of the troika. Michael Gerhardt details two different conservative doctrinal lines on precedent; the classically conservative approach followed by the troika and the competing Rehnquist-Scalia-Thomas approach (Gerhardt 1993). According to the troika's approach, "adherence to prior constitutional values breeds stability, certainty and predictability in constitutional law" and allows for incremental changes in law as seen in their tailoring of the abortion right in *Casey* (Gerhardt 1993). In comparison, the Rehnquist-Scalia-Thomas approach argues that "overruling erroneously reasoned decisions will best preserve the legitimacy of the Court's decision making" and remain long lasting due to the strength of their reasoning and of the conservative court coalition to protect the new decisions (Gerhardt 1993). Between these two competing approaches, the troika's classical conservative approach affords significantly more deference to precedent.

The "law of standards" explicated in regards to textual interpretation can also be applied to interpretation of stare decisis. However, under the "law of standards," precedent is actually viewed *more* strictly than under the law of rules, for three primary reasons (Sullivan 1992). First, this approach relies on Burkeian organicism in regards to history, valuing judicial stability and continuity "as good in and of themselves, independent of the values and customs being preserved" (Sullivan 1992). Second, also relying on Burkeian thought and legal pragmatism, justices of standards take a more forward looking view of knowledge and ask what customs mean, not only where they came from (Sullivan 1992). Finally, the law of standards views judicial power as a collective exercise, given to "internal ideological equilibrium" (Sullivan 1992).

Foote theorizes that stare decisis operated differently on the troika because they were more centrist (Foote 2002). According to his dissertation, despite "a fundamental weakening of institutional cohesion, the norm of *stare decisis* continues to influence the decision making of moderate justices" (Foote 2002). He argues that O'Connor avoided the rigidity of the conservative bloc in order to take a fact specific approach to precedential application (Foote 2002). Kennedy's

decision making, likewise, "is based on a case-by-case approach" and "guided by deference to precedent and legislative intent" (Foote 2002). These values seem to be reflected in the progression of the abortion cases in the 1980s, when Kennedy expressed reservations about overruling *Roe* because "unlike Scalia, he thought the doctrine of stare decisis…would save it" (Simon 1995)

Political Factors & Ideology

Perhaps legalistic factors like interpretative style were motivated by political and ideological perspectives. Sullivan dives yet deeper into the nuance of common law interpretation by suggesting that the reason the troika favored the standard approach to interpretation was because they were politically moderate, and a constitutional "split-the-difference" was the best way to achieve political moderatism (Sullivan 1992). According to him, "The best example of the Court's convergence with politically moderate public opinion last Term was *Casey"* (Sullivan 1992). Collet approaches the political inclination argument from a different tack, criticizing the *Casey* decision as an imposition of "the Justices' political judgment" without any textual identification (Collett 2008). Some newspaper articles at the time even attributed Kennedy's flip in *Casey* to the work of legal and political scholars like Lawrence Tribe "pulling strings backstage" (Rowl 1992).

Ideology also plays into the *Casey* debate, with some literature suggesting that O'Connor's role at the time as the only woman on the Court made her more liberal in the area of abortion and thus unwilling to be the vote to overturn *Roe* for that reason (Smith 2005). Contrasting to the more common law style theories, some scholars propose that the *Casey* decision was an effort by the troika "to recast the right in *Roe* to accommodate the ideological structure of a more conservative Court," balancing purely ideological preferences (Howard 1993). Finally, other literature connects ideology and politics, arguing that the political leanings of justices may have impacted the way the troika handled *Casey*. In a 2002 law review article, William Ross points out that political arguments over the 1992 election, like the need to elect a Democrat to preserve *Roe* or curbing the increasing public belief that the Court was too political, could have influenced judicial behavior (Ross 2002).

Collegial Behavior

Some branches of scholarship identify collegial Court dynamics as the defining factor in the troika's erratic jurisprudential behavior. Compared to the troika, Scalia, Rehnquist, and Thomas maintained a near perfect record on major conservative issues like abortion when individually voting. However, these justices "arguably hampered the attainment of Reagan and Bush's overriding goals" (Smith & Beuger 1994). Smith and Beuger argue that Scalia's and Thomas's refusal to engage in coalition building, compromise, and persuasion ultimately caused the overall failure of the Republican Revolution on the Court (1994). The "confrontational and combative judicial behavior of Justices Scalia and Thomas" pushed the troika members away from their former allies, even when they'd expressed similar positions in the past (Smith & Beuger 1994).

Smith and Beuger point to Scalia's attack on O'Connor in his dissent in *Webster* as the "quintessential example of his failure to adhere to the Court's usual traditions of diplomatic opinions and strategic interactions" to gain a Court majority (1994). These authors suggest that O'Connor may have harbored concern that "she risked the appearance of being pounded into submission" if she then sided with Scalia in cases after *Webster* (Smith and Beuger 1994). Smith and Beuger also identify Justice Thomas's confirmation hearings and subsequent ascension to the Court as a potential explanation for Justice Kennedy's sudden shift away from the conservative bloc between the 1990 and 1991 terms (1994). Divisive events like Thomas's handling of his sexual assault charges and insisting on being sworn in the day after Chief Justice Rehnquist's wife's funeral cast a very flagrant tone to the start of his tenure on the Court (Smith and Beuger 1994). Because of the circumstances surrounding Thomas's entry to the Court, "Kennedy, as well as O'Connor and Souter, may have sought to disassociate themselves from a justice who, despite being a fellow Republican appointee of a conservative president," had not handled his ascension to the Court "effectively and gracefully" (Smith and Beuger 1994).

Smith assessed Scalia's behavior in *Webster* in the same light, suggesting that his vitriolic concurrence "put an end to speculation…that he would…build majorities for his firm ideological positions" as Brennan had had such success doing (Smith 2005). According to his book, that inclination towards ad hominem accusations turned O'Connor away from Scalia as she did not appreciate the "personal and mean spirited attack on her professional competence" (Smith 2005). Additionally, Smith characterizes *Casey* as "Rehnquist's failure to find five votes to overturn *Roe*," (2005). He asserts that Rehnquist had to walk a fine line in abortion cases like *Webster* not to criticize *Roe* too harshly and lose O'Connor or Kennedy, but also not be too soft on *Roe* and lose White or Scalia (Smith 2005). Ultimately, Rehnquist failed in this balancing act to find points of commonality to draw his coalition together (Smith 2005).

Public Opinion & Institutional Legitimacy

Finally, some scholars argue that the troika was driven to preserve the abortion right because they considered overturning *Roe* to be a threat to their conception of institutional legitimacy. Louis Bilionis proposes that Kennedy was an apostle of what he calls "grand centrism," or "a jurisprudence whose project is the self-conscious maintenance of public faith in a substantive constitutional center of clean, simple, shared American values" (Bilionis 2005). He contrasts this practice with O'Connor's "minimalist centrism," which "offer[s] a measure of assuagement to all sides and afford[s] the Court ample latitude to respond with similar inventiveness in future cases" (Bilionis 2005). According to this theory, the *Casey* opinion was, at its core, a preservation of the constitutional center as they balanced American values (Bilionis 2005). Others affirm the importance of public opinion to the troika justices. Foote notes that Kennedy's often surprising judicial behavior can be attributed to "emphasis in his opinions on preserving doctrinal stability and the Court's legitimacy in the eyes of the public" (Foote 2002). Centrist justices like the troika members focus in this way on institutional legitimacy "because they are mindful of the prestige of the Court, adherence to the rule of law, and the overall stability of the political system" (Foote 2002).

Primary Data Analysis

While the previous section broke the primary hypotheses offered by other scholars to explain the *Casey* decision, I would like to add two of my own before delving into the primary research. First, I propose that as the conservative coalition failed to aptly engage in coalition building, the liberal bloc of the Court simultaneously succeeded in strategically maneuvering. This hypothesis suggests that the liberal coalition was extremely flexible in adjusting their j-points to find points of commonality with the troika justices. After spending the years proving their willingness to work with the troika to find mutually palatable solutions, Blackmun and Stevens managed to pick the troika members away from the conservative coalition when it mattered: in *Casey*.

My second hypothesis asserts that because the troika were constrained presidential choices, they inherently conceived of their role differently than Scalia, Rehnquist, and their other conservative counterparts who were unconstrained. In this context, a constrained choice occurs when a president, because of political promises or political factors like failure to get Senate approval, cannot necessarily appoint his first choice to the Court. Hence, the choice is constrained because the selection pool is more limited. The troika were all results of this constraint in the nomination process: O'Connor because of Reagan's campaign promise to put the first woman on the Supreme Court, Kennedy because he was the third choice after Reagan failed to get two nominees through the Senate, and Souter because Bush wanted a politically uncontroversial pick after the drama of the Kennedy appointment process. I argue that constrained choices tend to adhere less strictly to their appointing president's agenda due to inherent jurisprudential differences stemming from that categorical discrepancy, and thus the constrained troika substantially differed from Rehnquist, Thomas, and Scalia (the unconstrained choices).

Research Methods

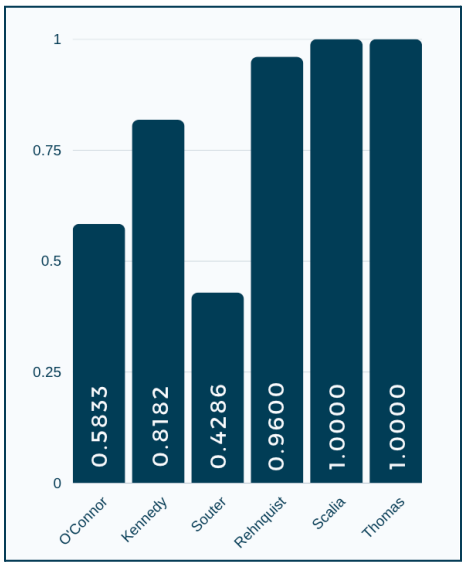
I used a combination of archival data from the Library of Congress, quantitative voting pattern data, and rhetorical analysis of final opinions to explore my hypotheses. For the voting statistics, I examined thirty abortion cases from 1972-2022 and assigned a quantitative value to each

vote: 0 for a vote that substantially deviated from the appointing president's constitutional agenda, and 1 for a vote that basically complied with that agenda. I then averaged each justice's voting scores to calculate an aggregate level of support for administration policies. A cumulative score closer to 1 indicates that the justice voted most frequently to restrict the abortion right, and a score closer to 0 indicates that the justices voted more often to preserve the abortion right. Because the Library of Congress archives only extend to 1994, this data collection method provides a holistic record of each justice's level of support for the abortion right across their full tenure. However, because the data is purely quantitative, it does not provide a nuanced picture of the causal mechanisms at work to trigger differentiations in support levels for *Roe*.

To combat this limitation, I searched through archival records in the justices' papers in the Library of Congress and analyzed final opinions to identify the causal mechanisms behind the aggregate trends demonstrated by my quantitative analysis. I examined the data through a dichotomous framework: individual factors and interpersonal factors. Individual factors are those completely internal to the justice and shaped by their own personal worldview, similar to the attitudinal model by Friedman. In this section, those factors include approach to precedent, approach to textual interpretation, and ideological shift. Interpersonal factors are those factors influenced or driven by actors external to individual justices, most similar to the strategic model. Here, those include collegial dynamics and public perception of the Court and its legitimacy.

Quantitative Voting Record Analysis

The troika demonstrated a statistically significant difference from the other Reagan and Bush appointees over their tenures in their support of administration abortion policies. **Fig. 1** plots the various support levels of the justices on a bar chart to demonstrate the highest and lowest net levels of support. Souter demonstrated the least overall support for administration policies, voting only 43% of the time over



his tenure to limit access to abortion. O'Connor similarly scored in a moderate range, with a 58% support rate. Of the constrained choice justices, Kennedy scored the highest with an 82% support rate. Though this number sounds fairly high, it proves remarkably low when compared to the lowest of the unconstrained justices (Rehnquist with a 96% support rate). As the chart demonstrates, Thomas and Scalia both boasted perfect voting records on abortion relative to Reagan and Bush's espoused preferences (Data set assembled by author).

The results of this study attest that the troika objectively supported the right to an abortion more than the unconstrained justices in their voting patterns. Furthermore, the wide discrepancy between Kennedy and Rehnquist, the highest and lowest scoring of the constrained and unconstrained justices, respectively, prove that the troika voted substantially and consistently differently. Because *Casey* was clearly not an aberration in the troika's jurisprudence, evidenced by their cumulative lower scores, we can presume that the factors evident in earlier cases can be taken as patterns of a larger jurisprudential or strategic environment. Additionally, the difference in scores between the troika validate the theory that each member of the troika was likely influenced by different factors at different strengths, and thus their convergence in *Casey* can coexist with their different voting in other cases. However, these numerical findings only provide the big picture, so next I explore what caused these lower numbers for the troika (Data set assembled by author).

Individual Factors

Approach to precedent

The archival data suggests that approach to precedent was the most prominent individual influence on the *Casey* outcome. O'Connor's common law tendencies toward stare decisis began to emerge more clearly in the later string of abortion cases leading up to *Casey*. Even from the first of the five drafts of her concurrence in *Webster*, one key sentence at the conclusion of her opinion remained unchanged: "the Court's suggestion today that *Akron* casts doubt on the validity of sec. 188.029, even as the Court has interpreted it, is without foundation and cannot provide a basis for

reevaluating *Roe*" (Blackmun Box 536). This phrase highlights O'Connor's common law inclination toward judicial restraint. Other draft changes similarly reflect this emphasis on respect for precedent; between her second and third drafts, she added a concluding sentence reinforcing that "[she] dissent[s] from the Court's willingness to decide the merits of a constitutional challenge to 188.205 as interpreted that is not actually before us" (Brennan Box I:816). These examples show a pattern of reliance on precedent in earlier cases.

These common law leanings on the issue of precedent appear to have been clear to the public as well. A *New York Times* article published shortly after the *Webster* decision came down asserted that "only the relative restraint of Sandra Day O'Connor slowed the assault on *Roe*," indicating their belief that O'Connor's heightened sense of judicial restraint had been the deciding factor in preserving the abortion right (Blackmun Box 536). The speculation even extended to Kennedy at this time, with a *Newsweek* article arguing that the doctrine of stare decisis was challenging for justices like Kennedy and Scalia, who believed in judicial stability and could therefore provide a fifth pro-*Roe* vote (Blackmun Box 536). Of course, the article clearly mischaracterized Scalia, whose sense of judicial restraint did not extend to preserving precedents he believed to be wrongly decided. However, these articles demonstrate that three years before *Casey* came down, the public suspected that O'Connor and Kennedy might share a devotion to judicial restraint that would eventually protect the abortion right.

O'Connor's emphasis on precedent emerged again in *Hodgson*, in both her pre decision memos and her writing. Her logical process suggested that if the parental notification with bypass was constitutional, as she believed that precedent supported, then the two parent notification with a judicial bypass would also be constitutional (Blackmun Box 545). Here, O'Connor's interpretation of precedent clearly influenced her interpretation of the statute. Similarly, Kennedy's opinion draft changes in *Ohio* the same term reveal an emphasis on stare decisis. He changed the structure of a paragraph assessing the clear and convincing evidence standard to begin with the phrase "our

precedents do not require" a lesser standard instead of beginning with an explanation of why a higher standard would not be a logical standard to appraise bypass procedures (Marshall Box 498). A plausible explanation for this shift is that he wanted the focus of his argument to be on the weight that precedent plays in determining standards of review. *Rust* provided the final opportunity to examine the troika's approaches to precedent before *Casey*. Like in *Webster*, O'Connor's opinion focused heavily on the necessity of judicial restraint (Marshall Box 530). In her dissent, she highlighted that the Court "acts at the limits of its power when it invalidates a law on constitutional grounds" and thus should not "reach constitutional questions in advance of the necessity of deciding them" (Rust).

In *Casey*, precedent played a massive role in the troika's strategy and influence. Originally, the question poised to the Court in *Casey* was quite simply, has the Court overruled *Roe*? (Blackmun Box 601). In a January 1992 memo from Souter to the conference, he suggested rephrasing the question to read, "1. Is the undue burden standard the appropriate standard of review and 2. If so, did the appellate court correctly apply that standard?" (Blackmun Box 601). He also recommended adding "what weight is due to stare decisis in evaluating abortion cases?" to answer a more general question about precedent (Blackmun Box 601). We also see a focus on precedent in the oral argument (Supreme Court). During oral arguments, Kennedy commented that he did not think "our decision on parental notice in the *Akron* case is necessarily inconsistent with a fundamental right" and that the Court's sustaining the Pennsylvania provisions "does not necessarily undercut all of the holding of *Roe v. Wade*" (Supreme Court). These comments express that even during oral argument, Kennedy was likely leaning towards preserving *Roe* in some form while ruling more leniently on the abortion statutes at hand.

The troika's writing in *Casey* further demonstrates the prevalence of their conception of stare decisis. From the first to second draft, they edited the phrase "such a holding would be inconsistent with the holdings of many of the Court's cases and with what we deem the be the promise of the

Constitution" to "such a holding would be inconsistent with *our law*" [emphasis added] when discussing the extent of personal liberty protections (Blackmun Box 602). This change could indicate that to the troika, the "holdings of many of the Court's cases" and "the promise of the Constitution" constituted the law itself, taking a sweeping view of the role of stare decisis consistent with the common law tradition. Similarly, from the fourth to fifth draft they tacked on a reference to stare decisis in the last pages, writing "we accept our responsibility not to retreat from interpreting the full meaning of the covenant *in light of all our precedents*" [emphasis added] (Blackmun Box 602). Finally, the section comparing the troika's treatment of *Roe* to *Plessy* and *Lochner* was also a later addition to the opinion, inserted between the second and third draft (Blackmun Box 602). These edits demonstrate that the trio was increasing their reliance and emphasis on the value precedent as they developed their opinion. Blackmun's clerks even acknowledged the strength of their precedential argument in the first draft circulation, writing in a memo that one upside of the troika's decision was its "principled stare decisis approach that may be the most they can hope for if Bush gets another nomination" (Blackmun Box 602).

Approach to textual interpretation

Evidence of a common law approach to textual interpretation emerge more prevalently in the later cases archived in the Library of Congress. Unbeknownst until the release of the papers surrounding the 1990 term, the first opinion circulated in *Hodgson* was a per curiam written by Kennedy that judged only on whether or not two provisions of the Minnesota abortion law were constitutional but left all reasoning on the decision up to individual concurrences and dissents (Blackmun Box 545). One way to understand Kennedy's push for a per curiam rather than typical majority opinion is through the common law interpretational tradition: to judge individual cases on very specific facts guided by general principles rather than prescribing specific standards for different areas of law (Sullivan 30). This approach appears again in *Ohio*, where Kennedy added the phrase "on this facial challenge" when discussing the court's affirmance of the physician notification

requirement (Marshall Box 498). In keeping with common law practice, this change may have been added in an effort to emphasize the specificity of the Court's decision on the facts of that case.

Oral arguments and text in *Casey* offer the strongest evidence for the textual interpretation hypothesis. During questioning, Kennedy asked Planned Parenthood's lawyer to address the specific provisions of the Pennsylvania statutes because "one way of our understanding this fundamental rights [sic] and their parameters, their dimensions is to decide on a case-by-case basis" (Supreme Court). In this example, we see him redirecting the argument to a common law style of adjudicating provisions in their own unique context, rather than prescribing straight line rules for general topic areas. Souter also honed in on the rules/standards dichotomy in his oral argument questioning, noting during the solicitor general's application of the rational basis standard that he was "asking the Court to adopt a standard and I think we ought to know where the standard would take us" (Supreme Court). This interjection shows Souter searching for fine lines within the broader standard that would hold significance to him under a common law textual interpretation style.

Finally, the textual balance that the troika struck in the final *Casey* opinion is indicative of a common law balancing style to textual interpretation. In asserting that "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed" while acknowledging the compelling state interest of preserving maternal and fetal life, the troika turned the *Roe* precedent into an overarching standard against which to judge cases on an individual, contextual basis (Casey). This final opinion holds the hallmarks of common law style described by Sullivan, with the core holding of *Roe* serving as their bedrock concept and the undue burden standard operating as their vehicle to adjudicate each claim in its own context and balance (Casey). The observations and analysis in *Hodgson, Ohio,* and *Casey* lend considerable support to the theory that the troika was substantially influenced by a common law textual jurisprudence.

Ideology

The assertion that the troika's ideology simply changed to become more liberal over time is both the most difficult to test and the one that finds the least evidence in primary sources. One potential support for the ideological shift theory lies in the change in confidence that her conservative counterparts like Rehnquist and White showed in her throughout her tenure leading up to *Casey*. In the 1983 trio of abortion cases, the two other anti-*Roe* justices at the time expressed confidence through their memos that she would write opinions that they would be willing to join (Marshall Box 315). After Powell circulated the first draft of his majority opinion, the first correspondence from any of the dissenters came from O'Connor evincing her intent to circulate her own opinion (Marshall Box 315). Rather than circulate his own opinion, Rehnquist indicated in a memo a day later that he planned to wait for O'Connor's writing (Marshall Box 315). On the same dates, Rehnquist also agreed to wait for O'Connor's draft for the *Simopoulos* and *Ashcroft* cases (Marshall Box 312; Stevens Box 245). However, by the *Thornburgh* case Rehnquist and White began to write their own dissents without waiting for O'Connor's lead (Marshall Box 382)

Letters from the public and newspaper articles published as these decisions came down denoting that a substantial portion of Court adherents shared the belief that ideology strongly influenced justices in the abortion cases. The Northwoods Unitarian Society, a religious sect, wrote in a letter to the justices in 1988 that "approaching the problem of abortion in this way forces the Justices of this court to rely consciously or unconsciously on their own religious biases" (Blackmun Box 536). Similarly, a *Newsweek* article in early 1989 suggested that "all eyes will be on Sandra Day O'Connor" during the *Webster* oral arguments as "the first and only woman on the Supreme Court and quite possibly the swing vote" (Blackmun Box 536). Compliant with the attitudinal model, that author positted that O'Connor's gender would influence the way she voted and, in turn, the way the case would be decided.

However, the Library of Congress archives also offer contradictory evidence to this theory. Memos revealed that the Court held a special conference to vote on sub issues within the three

abortion cases decided in 1983, such as pathology tissue samples in *Ashcroft* or the informed consent provision in *Akron* (Brennan Box I:599). Of the 13 sub issues that the justices voted on, O'Connor voted with White and Rehnquist on 11 of the issues (Brennan Box I:599). She split from their coalition on the fetal disposition and the informed consent provisions at issue in *Akron* (Brennan Box I:599). On both of those provisions, she voted with the liberal bloc in conference to affirm the appellate court's decision that the provisions were unconstitutional, leaving Rehnquist and White as the lone two justices to argue that the provisions should be upheld (Brennan Box I:599). This difference in votes may demonstrate that O'Connor was never fully against the abortion right, but in her first few cases, the nuances of her position were too subtle to notice from final opinions alone.

One last piece of evidence supporting the ideological position emerges from a memo in *Casey*, where Blackmun's clerk insinuated that the troika had let ideological positioning slip into their rhetoric, if not the entire opinion (Blackmun Box 602). In June 1992, clerk Steff recommended that Blackmun distance himself from the "personal reluctance" referenced by troika in section IIIA4 of the plurality opinion draft because "the Justices' personal or moral views are irrelevant to the constitutional issue" (Blackmun Box 602). At the very least, Blackmun's clerk and potentially other justices noticed these small nods to personal ideology and preferences. However, the section of the troika's opinion she quoted reads that "Within 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, not for overruling it" (Casey). The full context of that phrasing actually works against the idea that the troika was influenced by personal ideology because here they acknowledge that their ideologies conflicted with the ruling but felt duty bound by stare decisis to lay down the law objectively.

Interpersonal Factors

<u>Collegial Dynamics: Liberal Bloc's Successes</u>

The information in the Library of Congress archives substantially supports the idea that the pro-*Roe* bloc of the Court was engaging in strategic coalition building for several years leading up to *Casey*. Even as early as *Akron* (1983), memos and draft opinions demonstrate that the liberal bloc, led by Blackmun and later Stevens, were walking a fine line to try and draw who they viewed to be the middle justices (typically O'Connor) away from the conservative group. In a memo in the *Akron* case, Blackmun counseled Powell, the majority opinion writer, that he believed the best response to O'Connor's dissent would be no response (Blackmun Box 369); potentially in an attempt to keep O'Connor amiable to their coalition.

Six years later, in *Webster*, the liberal bloc's efforts at coalition building were even more transparent. In a 1989 memo dated on May 30, Blackmun's clerk wrote that he hoped Stevens' initial draft would shake up Rehnquist and "set SOC to thinking" (Blackmun Box 536). Blackmun then offered to join part I of her opinion if she considered dropping from part IIC of the plurality opinion (Brennan Box I:816). Here, Blackmun directly employed strategic behavior to change the way O'Connor's vote fit with the conservative majority. Following that memo exchange, O'Connor recirculated an opinion in which she dropped from part IIC of the plurality opinion, likely a direct effect of Blackmun's willingness to abdicate his ideal point in this opinion to move to a j-point palatable to O'Connor (Blackmun Box 536). In this case, Stevens also strategically maneuvered to align himself with O'Connor. After her first draft concurring in part and dissenting in part, Stevens responded with a memo stating that her opinion had convinced him that the challenge to section 188.205 was moot and that her construction of section 188.029 had persuaded him that it was unnecessary in this case to address any challenges to *Roe v Wade* (Brennan Box I:816). Shortly after, she circulated an official first concurring opinion which Marshall, Blackmun, and Brennan also jumped to join in part (Brennan Box I:816). By honing in on the mootness and the refusal to reconsider *Roe* that he knew the other liberal justices could agree to, Stevens maneuvered the other liberal justices to find a j-point at which they could agree with O'Connor.

The *Hodgson* case in 1990 marked another major milestone for the liberal bloc's push to pick off O'Connor from the conservative coalition. Memos between the liberal justices offered clear evidence that the liberal bloc believed Stevens played the biggest strategic role in O'Connor's voting behavior. On December 4th, 1989, Blackmun's clerk reported to him that Stevens was meeting with O'Connor but still agreed with Blackmun on striking down both statutes, writing that "perhaps JPS has a 'method to his madness' in his conversations with SOC" (Blackmun Box 545). Brennan's clerk also knew about Stevens honing in on O'Connor, writing to Brennan that "JPS is clearly writing for SOC" and didn't expect the rest of the liberal bloc to jump on board immediately (Brennan Box I:846). Three months later, the strategic behavior continued; Blackmun's clerk disclosed again that not only was Stevens "walking a fine line" to draw O'Connor away from the conservatives, but that "JPS [was] probably the only one who could succeed in reaching SOC" (Blackmun Box 545). Similarly, Brennan acknowledged Stevens's efforts in a memo between the liberal justices, writing "I realize you are walking a tightrope in this one" trying to write an opinion palatable to O'Connor and the rest of the liberal coalition (Blackmun Box 545). As the justices made changes, they continually demonstrated their commitment to keeping O'Connor's vote by checking with her clerk to ensure that any potential changes would not scare her off (Blackmun Box 545).

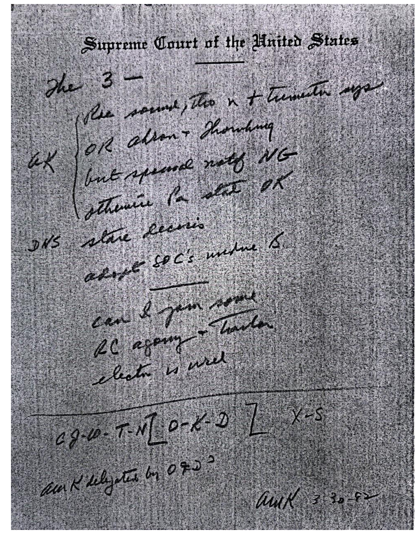
However, O'Connor was not the only justice that Stevens targeted in his strategic maneuvering. These 1990 cases also marked the first demonstrable instances of the liberal bloc trying to pull Kennedy away. In *Hodgson*, Blackmun's clerk reported that Kennedy had called his own clerk at home to say that he "did not like the two parent requirement" (Blackmun Box 545). This insider information may have prompted Stevens to join Kennedy's opinion in Ohio despite his reservations about portions of the statute, and his intent to still write separately (Blackmun Box 544). Additionally, in *Ohio* Stevens joined the exact same sections of the majority opinion as O'Connor, further establishing partnership between them (Blackmun Box 544). With both O'Connor and

Kennedy, Stevens created examples over years of opinions leading up to *Casey* demonstrating his willingness to work with them instead of against them.

Strategy abounded even between the liberal justices in the *Hodgson* case, demonstrating the true intricacy of the methods that the coalition employed. In March of 1990, Blackmun's clerk Anne advised him against taking "too combative" of a strategy with Stevens (Blackmun Box 545). She repeated the refrain a day after Marshall's first draft circulated, writing that she was "disappointed" because she saw "no need to castigate [Stevens] if he can get SOC to strike down any statute" containing the word abortion (Blackmun Box 545). Brennan echoed that message three months later, reminding Marshall in a memo of the importance of supporting Stevens since O'Connor had joined them in striking down an abortion statute for the first time (Marshall Box 499). These memos offer fairly clear and convincing evidence that the liberal coalition devoted substantial effort in *Hodgson* to convince O'Connor to meet them at an agreeable j-point. Not only did Stevens actively engage in strategic coalition building in private with O'Connor to convince her to adopt his position, the other liberal justices also strategized between one another to support Stevens in his efforts.

The liberal bloc experienced only one opportunity to strategize with all three members of the troika before *Casey*; *Rust v Sullivan* in 1991. Memos in this case hinted at Stevens's inkling that *Casey* might not prove to be a pre-ordained death for *Roe*. In a February 1991 memo to Blackmun, Stevens wrote, "I think it may be poor strategy to assume that either Sandra or David—and certainly not both—are prepared to overrule *Roe v Wade*. Your last paragraph implies that one who joins the majority opinion has that objective ultimately in mind" (Blackmun Box 568). Here, Stevens attempted to convince Blackmun to take a more collegial tone in order not to estrange O'Connor or Souter, both of whom he clearly believed could be convinced to take a pro-*Roe* stance. Blackmun's clerk recognized the significance of maintaining O'Connor's support, writing in a January memo that because O'Connor would join the dissenters on the issue of the Secretary's statutory authority, "that section is somewhat more substantial than it would otherwise have been" (Blackmun Box 568).

Ultimately, the liberal coalition's strategizing paid off in *Casey*. The Library of Congress archives demonstrated that initially, the decision was 5-4 to basically overturn *Roe* with Rehnquist writing the majority opinion. However, on May 29, 1992, Kennedy sent Blackmun a private memo informing him that he wanted to chat for a few moments about "some developments in *PP v Casey*," and that "at least part of what I say should come as welcome news" (Blackmun Box 601). On that memo, Blackmun scrawled a few notes about "the 3" (shown right), writing that Kennedy would keep *Roe* sound, and that Souter focused on stare decisis and preferred using O'Connor's undue burden test (Blackmun Box 601). These notes demonstrate that Blackmun was identifying the points that the troika members would feel most strongly about (their i-points), possibly in an effort to identify the best way to shift his opinion to keep the troika in their coalition. Similarly, Blackmun's clerk recommended that he use his opinion to put the best possible spin on the troika's plurality and "attack undue burden and overruling of *Akron 1* and *Thornburgh* in a way that doesn't make the undue burden test look toothless" (Blackmun Box 602).



The memos also demonstrate that Stevens continued to work closely with the troika in this case, helping them restructure their opinion to give the strongest possible coalitional showing. After congratulating them on an "impressive" opinion, Stevens recommended that the troika move their criticism of the trimester approach to a later section so that he and Blackmun could join parts I, II, and III in full, thus producing an opinion that begins with a majority of the Court and continues that way for 25 pages (Blackmun Box 601). Stevens even went as far as striking down provisions he had previously upheld in order to ally with the troika because they held such power as swing votes (Blackmun Box 602). These exchanges provide an example of Stevens strategically maneuvering the opinion writing to create the strongest image of solidarity between the remaining members of the liberal bloc and the troika. Stevens' final opinion reflects the spirit behind those recommendations,

leading with “The portions of the Court's opinion that I have joined are more important than those with which I disagree” to emphasize the aspects of coalitional similarity (Casey).

Collegial Dynamics: Conservative Bloc’s Failures

One major driving factor in the outcome of *Casey* was the conservative bloc’s failure to conscientiously and consistently engage in strategic decision making. Even from the earliest cases O’Connor voted in, conference votes indicate that her position was more nuanced than the conservative bloc considered (see ideology section). As demonstrated above, O’Connor voted differently than White and Rehnquist on the fetal disposition provision and the informed consent provision at issue in *Akron* (Brennan Box I:599). From these records we can infer that the conservative bloc assumed that her overall vote with them symbolized coherence in goals, without paying attention to the refinement of her position. The conservative coalition may have disregarded differing preferences on opinion writing as well in their dealings with the troika. In an *Akron* draft, Powell added a footnote to the majority opinion responding to O’Connor’s dissent. After that draft circulated, Blackmun’s clerk reported that O’Connor had removed the word “unprincipled” from her critique of the *Roe* framework and privately told her clerk that the change was made because she was anxious to avoid anything “that even indirectly appeared to be an ad hominem attack” (Blackmun Box 369). Even from her first set of abortion cases on the Court, O’Connor held a philosophy toward her opinion writing that clearly differed from Scalia’s propensity for personal attacks.

Further, the conservative bloc consistently failed to demonstrate the same sort of internal cohesion that the liberal bloc did in abortion cases. In the *Thornburgh* case in 1986, O’Connor circulated a memo saying that even though she agreed with much of White’s dissent draft, she had decided to write her own opinion (Marshall Box 382). Here, O’Connor broke from the conservative coalition’s cohesive thinking for the first observable time--six years before *Casey* came down. Though Rehnquist joined both White and O’Connor’s dissents, he was not able to pull the coalition together and neither O’Connor nor White joined the other’s opinion (Thornburgh). O’Connor’s

memo indicated that while she agreed with "much of" White's opinion, she did not agree with all of it, and her reservations were enough to prevent her from joining the opinion. Even six years before *Casey* came down, the conservative bloc appeared to be weakening in their cohesive logic.

The division deepened in *Webster*, where O'Connor first publicly broke from the conservative coalition. The files on *Webster* reveal that the conservative bloc of the Court may have failed to attract O'Connor by engaging with her in a combative way rather than a collegial tone. For example, in a memo to O'Connor Stevens jokingly wrote that "having been convinced that the question is moot," he would not reach the merits and therefore she "can no longer say the Court is evenly divided on the merits" and would have to make revisions or delete that section entirely (Brennan Box I:816). This jovial, friendly tone contrasts starkly with Scalia's derisive rhetoric, calling O'Connor's argument pure "irrationality" (Webster). Based on the opinions and memos in the Library of Congress, it is reasonable to assert that O'Connor preferred to avoid stringent personal attacks in her work and instead emphasized civility. Notably, between her first and final drafts of her *Webster* concurrence, O'Connor removed a reference attacking the plurality specifically for attempting to overturn *Roe* and rephrased her language to simply assert that reconsidering *Roe* was generally unnecessary (Brennan, Box I:816).

As aforementioned, the *Hodgson* decision a year after *Webster* marked the first instance in which O'Connor struck down an abortion statute. While Stevens was working hard to pull her from the conservative bloc, memos from the Library of Congress indicate that that coalition was not doing themselves any favors. Shortly after oral arguments in November of 1989, O'Connor sent a memo to Rehnquist expressing that she was "presently in the unhappy position of adopting a disposition which is shared by no other justice" (Blackmun, Box 545). As a result, she felt most closely aligned with Stevens's position and changed her vote to reverse in 88-125 and affirm in 88-1139. As I demonstrated in the previous section, Stevens maneuvered his position significantly to align with O'Connor's vote not only in this case, but in cases preceding. The above memo indicates that

O'Connor felt "unhappy" promoting a view that separated her from the other justices, which may have compelled her to feel more aligned with the justices that put in the most effort to move their j-point to match her view.

The lack of memos from the conservative justices creates a slight bias in determining how much work went into matching O'Connor's view from their coalition's side. One newspaper article saved by Blackmun interpreted the partial dissent written by Kennedy and joined by Rehnquist and White as a halfhearted attempt to take a more moderate position and perhaps affirm some aspects of *Roe* (Blackmun Box 545). However, the conference votes from that case reflect that even from the beginning, all four of the other conservative justices starkly opposed the positions of both O'Connor and Stevens (Blackmun 545). All four of those justices also joined Kennedy's opinion concurring in the judgment in part and dissenting in part which argued for the same positions they voted for in conference (Hodgson). One plausible conclusion from these examples is that the conservative coalition put in less effort than the liberal coalition to adjusting their j-points to meet O'Connor's.

One possible reason the conservative coalition may not have engaged in as much strategic coalition building is that they simply believed that they shared enough viewpoints with the troika that they did not have to. On the heels of O'Connor's flip in *Hodgson*, she wrote to Rehnquist about the *Ohio* case to point out that, again, she was in the unhappy position of having a viewpoint that none of the other justices shared (Blackmun Box 544). However, this time, that realization led her to decide to uphold the statute in its entirety, changing her vote to reverse the lower court (Blackmun Box 544). One can read her siding with the conservative coalition upon deciding to join one camp or the other as her "default" position, like an indication that when she differed from both camps, she would be most likely to return to the conservative coalition. This reversal in course immediately following *Hodgson* could plausibly be interpreted that her siding with the liberal bloc in *Hodgson* was an aberration rather than a portender of future coalitional choices to come.

In *Ohio v Akron*, Court memos demonstrated that the harsh rhetoric O'Connor seemed averse to may also have impacted Kennedy's affiliation with the conservative bloc. The evidence is less clear in this case, but in a memo between Kennedy and Blackmun during the Ohio case, Kennedy wrote that he "harbor[ed] deep resentment" at Blackmun's accusation in his dissent that the conservative bloc was stoking flames amongst the public (Blackmun Box 544). The implications of this note on Kennedy's understanding of legitimacy will be explored later in the paper, but for this section, what I find most noteworthy is Kennedy's "resentment" over Blackmun's accusations. Like O'Connor's proclivity to avoid ad hominem attacks seen in the 1983 cases, one interpretation of this memo is that Kennedy, too, felt turned off by personal attacks in opinions of the Court.

The conservative coalition also seemed to lack the meticulousness of positioning that the liberal bloc, and particularly Stevens, demonstrated in cases leading up to *Casey*. In *Rust*, Souter joined with Rehnquist's coalition and made several suggested changes to the majority opinion draft that Blackmun's clerk characterized as "clearly inconsistent with the rest of the opinion," suggesting that "this inconsistency may speak louder than any comments [Blackmun] might make in dissent" (Blackmun Box 568). This comment hints that even in their understandings of their own opinions, the conservative coalition was fractured in stark contrast to the liberal bloc's constant discussion to ensure everyone was clear on what their different opinions meant. To Rehnquist's credit, however, the archives did reveal that in April of 1991 he corresponded with Souter to make some requested changes to the majority opinion to accommodate Souter's First Amendment concerns between doctors and patients (Marshall Box 530).

Ultimately, the treatment of the plurality opinion in *Casey* provides a summary example of the general failures of the conservative coalition in the area of abortion. Like the conservative coalition, Blackmun disagreed with much of what the troika had done, but was counseled to strategically write his separate opinion in the "consoling tone of an older, wiser uncle" to avoid harsh rhetoric (Blackmun Box 602). In contrast, the memos indicate that the conservative coalition leaders

like Scalia felt no inclination to restrain their rhetoric. Blackmun's clerk asserted that the "main battle is going to be between the troika and AS" and expressed hope that Scalia's attacks on the undue burden standard could eventually drive the troika to adopt strict scrutiny (Blackmun Box 602). Because evidence from earlier cases insinuate that the troika shared a distaste for personal attacks in the opinion writing of themselves and others, the lack of tone control from Scalia well could have pushed the troika away from adopting his position.

Public Perception

Even as early as 1983, the justices' memos showed that O'Connor might have had a stronger inclination to behave based on her idea of Court legitimacy than other justices like Blackmun. For example, in the *Ashcroft* case files, Blackmun's clerk wrote that he was "not bothered by the fact that SOC has advocated abstention in *Akron*," and that "the fact that the Court may look result-oriented is not our responsibility" (Blackmun Box 374). In this first set of cases O'Connor voted in on the Court, Blackmun and his clerks acknowledged that she placed more value on whether the public viewed the Court as "results oriented" than he did. This memo supports the theory that O'Connor's voting behavior in later cases may have been motivated by her effort to prevent the Court from appearing "result-oriented" or other legitimacy based concerns.

Newspaper clippings saved by Blackmun around the time of each case further demonstrate the relevance of legitimacy to the national conversation surrounding abortion. A June 16th, 1986 article in the *Washington Post* shortly after *Thornburgh* was decided reported that, although the Court occasionally reverses precedent, "such steps are not taken lightly: they erode confidence in the stability of the law and the value of high court precedent" (Blackmun Box 436). Though these accusations are difficult to definitively prove, gossip between the clerks provides at least one example of newspaper topics directly impacting decision making. O'Connor indicated to her clerks after *Hodgson* oral arguments that she felt "troubled" after reading an article about her "murky

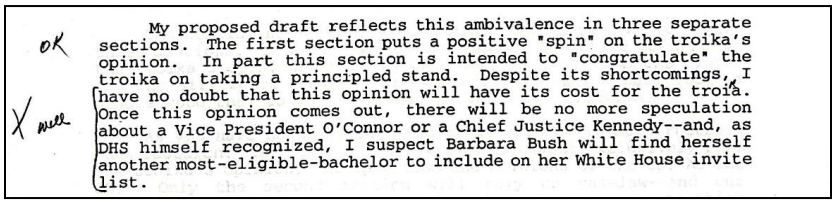
abortion jurisprudence" in the *Washington Post* and that she feared striking down the Minnesota law would only make it murkier (Blackmun Box 545).

Closer to *Casey*, public perception of the Court and the troika's conception of legitimacy began to play more heavily into their writing and interpersonal interactions. In the note between Kennedy and Blackmun mentioned earlier from *Ohio*, Kennedy wrote that he harbored "deep resentment" at Blackmun for insinuating that Kennedy's majority opinion intended to "incite an inflamed public" because "to write with that purpose would be a violation of [his] judicial duty" (Blackmun Box 544). This memo proves that Kennedy's conception of his "judicial duty" played heavily at the forefront of his mind in regards to the abortion debate. Other justices were aware of the prevalence of public opinion as well; in a memo after *Casey* was filed, Blackmun's clerk warned him that "the Court's authority is in the long run limited by the popular will" (Blackmun Box 602). From these examples, it is plausible to deduce that the topic of public opinion and the potential loss of legitimacy that the Court would suffer from overturning *Roe* played heavily on the troika's minds.

The text of *Casey* and draft changes provide convincing evidence that public perception of the Court remained on the forefront of the troika's mind while writing the decision. From their second to third draft, the troika rephrased "any error in *Roe* is unlikely to lead to replication" to read "any error in *Roe* is unlikely to have serious ramifications in future cases" (Blackmun Box 602). The changing in phrasal demonstrates that the troika wanted to highlight the prevalence of societal effects to their judicial reasoning. In the same draft, they added an entire paragraph devoted to explaining that while there would have been a terrible price for not overruling *Adkins* or *Plessy*, there would be a terrible price for overruling *Roe* (Blackmun Box 602). Again, these changes demonstrate that while the troika worked through various iterations of their plurality opinion, they shared a focus on the societal impact their decision would have. One key line in *Casey* underscores this prevalence of public opinion: that overruling *Roe* 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" (Casey).

Describing the potential erasure of *Roe* as "profound and unnecessary damage" to their conception of legitimacy highlights how highly the troika prioritized public perception of the Court.

Memos between Blackmun and his clerks during the *Casey* deliberations add another perspective on public involvement; political influences. In January of 1992, a series of memos illustrated Souter's desire for more time to have the summer to think over the question because "unlike SOC or WHR, he is not concerned about the election" (Blackmun Box 602). After the plurality's opinions had begun circulating, Blackmun's clerk specifically mentioned the political costs of this opinion for the troika (shown right). However, these pieces of evidence offer little support to the political factor theory because of exactly what the memo says; the troika recognized the same ramifications that Blackmun and his clerks discussed in the memo and decided to preserve *Roe* anyways. Were political ramifications a high priority to any member of the troika, either in the form of effect on the 1992 election or on their future judicial careers, it appears unlikely from the above evidence that the troika would have chosen the path they ultimately elected.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My proposed draft reflects this ambivalence in three separate sections. The first section puts a positive "spin" on the troika's opinion. In part this section is intended to "congratulate" the troika on taking a principled stand. Despite its shortcomings, I have no doubt that this opinion will have its cost for the troika. Once this opinion comes out, there will be no more speculation about a Vice President O'Connor or a Chief Justice Kennedy--and, as DHS himself recognized, I suspect Barbara Bush will find herself another most-eligible-bachelor to include on her White House invite list.

Discussion and Conclusion

Of the hypotheses I developed prior to laying out my research, the primary data make some conclusions clear, while some remain only strong inferences. The troika evidently shared at the very least a common conception of their judicial role, connected by a "cautiously conservative jurisprudence" that served "as a brake on more ambitious forays to the right by Chief Justice William Rehnquist and Justices Scalia and Clarence Thomas" (Barrett 1993). Before diving into the implications for each individual justice, I would like to discuss the most likely and unlikely general hypotheses from the primary data analysis. Based on my findings, the most unlikely explanations are the ideology theory from the individual factors and the political factors theory, discussed with public perception. As depicted above, both of these have shallow support from the primary data but lack

consistent connection in the texts and the library archives. Some letters from the public after *Casey* came down accused the troika of caving to the politicization of abortion (Blackmun Box 602). However, were the troika members focused on taking the route most politically beneficial, they certainly would have been better off overturning *Roe*, as the memos demonstrate effectively.

Regarding the hypothesis that the troika changed their ideological position, I find the argument unconvincing as applied to O'Connor because, as I have demonstrated earlier in the paper, a nuanced assessment of her actual positions in earlier cases proves that she was never fully against abortion. Even in *Akron* and the early cases that critics point to to prove she changed her position, she never spoke out against the core holding of *Roe*, only the trimester framework that could not "be supported as a legitimate or useful framework for accommodating the woman's right and the State's interests" (Akron). However, that opinion tracks with *Casey* almost a decade later, where the troika scrapped the trimester framework but replaced it with the undue burden standard O'Connor had been promoting since *Akron* (Akron). As applied to Kennedy, the ideology theory is likewise unconvincing because it does not explain his pattern of behavior over his full tenure. As the quantitative analysis demonstrated, Kennedy only had an 82% support rate of abortion restrictions over his tenure, substantially deviating in *Casey* in 1992 and *Whole Woman's Health v Hellerstedt* in 2016 (Data set assembled by author). If his voting behavior were motivated by an ideological shift, then his votes would not be expected to alternate back and forth between pro-abortion and anti-abortion positions.

Regarding the remainder of the factors discussed, I find that the interpersonal factors best explain why the troika wrote the *Casey* decision, and the individual factors best explain why they wrote it the way they did. The assertion that the liberal coalition actively engaged in strategic coalition building is near irrefutable from the Library of Congress evidence. The memos reveal very obviously that Stevens engaged in a several years long campaign to align himself with O'Connor, Kennedy, and Souter in order to pull them over when *Casey* rolled around. His faith and ability to persuade not only the troika to meet him at his j-point but also the other members of the liberal

coalition to find points of commonality with the troika clearly influenced the way that *Casey* played out. Without Stevens's, and Blackmun's to some extent, constant efforts to find acceptable j-points, it seems very unlikely that O'Connor would have changed her vote in *Hodgson* or that Kennedy would have been willing to leave his coalition in *Casey*.

Simultaneously, the conservative coalition demonstrably failed to demonstrate the same capacity to move their own j-points, remaining firmly stuck in positions that the troika were not willing to meet. As Gerhardt highlight, "Some scholars argue that the troika's willingness to distance themselves from their appointing presidents' agendas helped them reach 'more of a semblance of neutrality than the Chief Justice and Justices Scalia and Thomas achieved'" -- and those scholars appear to be correct (Gerhardt 1993). Perhaps if Rehnquist and Scalia had been willing to agree to smaller chops at the *Roe* tree rather than fixating on overturning the precedent sub silentio or explicitly (in their respective cases), they could have spent the next 13 years of the Rehnquist Court slowly chipping away at the abortion right until there was none at all. From the memos and the evident differences in writing styles between the troika and conservative bloc, their failure to act strategically contributed significantly to their losing the troika's vote in *Casey*.

Finally, public opinion appeared to stand fairly certainly near the front of the troika's mind when deciding *Casey*. From memos like the exchange between Kennedy and Blackmun in the *Ohio* case, or O'Connor's comments to her clerk as early as *Akron*, the troika members clearly shared a conception of legitimacy that centered on stability and public trust. One important distinction to make at this point is exactly what the troika meant by public trust. Their sense of legitimacy, I argue, was institutional, not personal. As Sullivan points out, the troika themselves did not necessarily fare well in public opinion after the decision came down, as "the authors of the joint opinion took a beating in the post-*Casey* press conferences by both pro-choice and antiabortion advocates alike" (Sullivan 35-36). However, their efforts prevented the Court itself from taking a significant hit in public opinion ratings (Sinozich 2017).

The evidence from the Library of Congress paints a convincing light on the references to legitimacy in the final *Casey* opinion. The troika argued in *Casey* that "the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation," a clear reference to their desire to produce decisions that accounted for the way the public would react (Casey). Additionally, the final opinion asserted that overruling *Roe* in its entirety would impair not only the Court's reputation but its judicial function itself, writing that such an action "would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law" (Casey). When we combine the text of *Casey* with the evidence of strategic maneuvering by the liberal coalition, stubbornness of the conservative coalition, and clear weight the troika afforded to public opinion, the interpersonal factors quite clearly explain why the troika sided against their fellow conservatives to actually preserve *Roe*.

However, the individual factor assessment takes the analysis a step further by explaining why *Casey* was written the way it was written. Having disproved ideology as a factor, I turn back to the common law theories of textual interpretation and precedent. The primary data from the cases leading up to *Casey* and *Casey* itself support the theories explicated in the literature review regarding common law interpretation. Sullivan clarifies that "Ideological poles tend to attract rules," while "Standards tend to dive for the middle and split the difference between ideological poles" (Sullivan 1992). The troika mirrored this language in their final opinion when they wrote that "because we set forth a standard of general application to which we intend to adhere, it is important to clarify what is meant by an undue burden" (Casey). This quote indicates that the troika themselves viewed their opinion in *Casey* as setting a general standard by which facts scenarios could be evaluated on an individualized basis. Later in the opinion, the troika remarks that the criticism directed at *Roe* tended to emerge "when the Court draws a specific rule from what in the Constitution is but a general standard," obviously favoring a standard style interpretation over rules (Casey). Their demonstrated

inclination for common law style of textual interpretation presents the most likely reason why they decided to employ the undue burden standard as the new basis of review for abortion access.

Finally, the troika's common law interpretation to precedent most strongly influenced the way they decided to preserve the abortion right. O'Connor's restraint in *Webster*, *Hodgson*, and *Casey* all point to a very strong respect for precedent. Souter's suggested change to the question before the Court in *Casey* represented his own intense focus on the role of stare decisis in lawmaking. Throughout the *Casey* decision, the troika cited a whopping 72 precedent cases to support their reasoning (Casey). The opinion includes numerous nods to the importance of precedent in the troika's jurisprudential framework, writing that "the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable" (Casey). Based on the general respect for precedent that all three justices showed in the *Casey* opinion and the memos, as well as their voting patterns, I posit that none of the three were willing to provide the crucial vote that would substantially damage the most controlling precedent in this area. Three key 5-4 votes exemplify this idea: O'Connor stepping back in *Webster*, Kennedy switching his vote in *Casey*, and Kennedy siding with the liberal bloc in *Hellerstedt* for the first time since 1992. These examples testify that, while the troika members might have been willing to take more extreme conservative stances when someone else was there to provide a fifth vote to protect the precedent, all of them stepped away from the precedent when the burden fell on them to provide the fifth vote. This aversion towards the idea of being responsible for such a large break in precedent can explain some of the perceived inconsistencies in their opinion writing (Murchison 2017).

In sum, I find that the following line from the *Casey* opinion aptly encapsulates the findings and conclusions I have drawn: "After considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, and the rule of *stare decisis*, we are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed" (Casey). "Principles of institutional integrity" translates to troika conceptions of legitimacy and normative

assumptions of how the Court should behave in order to retain public confidence. The "rule of stare decisis" represents the common law preference for strict adherence to precedent, reflected in the *Casey* analysis of the four factors necessary to overturn a precedent and why those factors did not apply to *Roe*. Having examined the Library findings, opinions, and voting data, I suggest that the above quotation could be rephrased as follows: After considering the history of the abortion right, the interpersonal factors that influence decisions on abortion, and our shared individual common law tradition that influences how justices rule on precedent and text, we conclude that the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.

Individual Applications

Though the primary analysis section largely highlighted each troika justice individually, I would like to briefly touch on the factors that may have influenced each justice the most, and why those factors could then explain their divergence in later cases. O'Connor appears to have been equally touched by Stevens's coalition building efforts and by the common law textual interpretation style. Because she was on the Court so much longer than the other members of the troika leading up to *Casey*, the liberal bloc had much more time to strategically influence her and pull her to their side. Additionally, the undue burden standard she championed for the decade leading up to *Casey*, and which was eventually implemented as the controlling test for abortion cases, was the acme of her penchant for "balancing tests that were highly fact-specific" (Murchison 2017).

Kennedy, I argue, was more strongly impacted by his conception of legitimacy than the other two. Numerous examples abounded in the primary data of Kennedy proving his awareness of how his opinions were perceived by the public; take his memos with Blackmun, for example. The next majority opinion he authored in an abortion case came in 2007, when he wrote that "The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake" (Gonzales). Here, again, that language of an independent judiciary crops up, reaffirming his commitment to maintaining what he believed to be judicial neutrality. He made a similar reference in *Hellerstedt*, arguing that "The

statement that legislatures, and not courts, must resolve questions of medical uncertainty is also inconsistent with this Court's case law" (Hellerstedt). These examples demonstrate that Kennedy felt strongly about judiciary independence and the ability of the Court to say what the law is in the modern conception of constitutional rights, possibly more so than the other members of the troika.

Finally, Souter was undoubtedly influenced most heavily by his conception of precedent. As the *Casey* memos and opinions depict, Souter "seeks to restrain his judicial role by respecting case precedents, including liberal precedents" (Smith & Beuger 1994). Blackmun's papers proved that Souter wrote the part of *Casey* about stare decisis, so that entire section stems from Souter's own reliance on the stability of precedent (Blackmun Box 602). He also appears to have been the least influenced one or another by the failure of the conservative bloc to build coalitions, potentially signaling that he was inevitably the first that would leave Rehnnquist and Scalia's coalition. Smith and Beuger attest that "unlike Justices Kennedy and O'Connor, Souter appears unaffected by the confrontational styles of Justices Scalia and Thomas," and thus was likely minimally affected by the interpersonal dynamics and much more strongly influenced by the individual factors (1994). These different weights of the decision making factor help explain the troika's divergence in other cases that boasted different fact scenarios.

Possibilities for Future Research

My paper has established a relatively comprehensive framework for understanding why the *Casey* decision came down the way it did, but new opportunities could provide even more clarity on this question as time goes on. The primary limitation of my research was the resource bias in the Library; because Rehnquist, Scalia, Thomas, O'Connor, Kennedy, and Souter have not released their papers and White's papers were extremely scant, I lacked a deep dive into the conservative point of view from behind the scenes. Particularly in my coalitional dynamics theory, it is quite possible that the reason the evidence points to copious strategic behavior by the liberal bloc and lazy strategizing by the conservative bloc can be explained by the lack of access to private memos and other resources that would have supported the opposite theory. Along with that point, the other major limitation was the lack of access to any of the troika's papers. From Blackmun, Brennan, Marshall, and Stevens's papers, I was able to draw very strong

inferences, but the most convincing evidence would of course be from the troika justices themselves. However, Stevens's papers through 2005 will be released in May, and as years pass some of those restricted justices' files could open up to provide new insights to more completely answer this question.

Legal Rules, Strategy, and Attitudes

I began my literature review by reviewing different frameworks for evaluating judicial behavior: the legal model, the attitudinal model, and the strategic model. The research question in itself demonstrates that more factors were at play here than in just the legal model; if the process were as simply as applying rules to facts, the *Casey* opinion wouldn't have produced three very different sub opinions. The attitudinal model, which corresponds to my individual factor distinction, certainly has some relevance to *Casey*. As the literature review introduced and the evidence demonstrated, the troika viewed precedent and textual interpretation very differently than Scalia, for example (Sullivan 1992). While Scalia preferred hard line rules and felt that bad precedent was more of a suggestion, the troika leaned more towards general standards applied to specific fact situations, and precedent as irrefutable law (Sullivan 1992). These attitudinal factors certainly explain how different justices picked their i-points. But if we stop at the attitudinal model, how does Stevens come to strike down statutes he had previously upheld, and Kennedy go from joining an opinion that nearly eviscerated *Roe* in *Webster* to unequivocally affirming the abortion right in *Casey*? My research shows that not only do justices retain attitudinal preferences, but they also move strategically within that attitudinal space. Explaining the *Casey* question proves perhaps one of the most ideal judicial examples to outline how justices and the public influence each other to advance the development of constitutional law. Although the troika "share the decision-making philosophy represented in *Casey,* nuances in how the theory is understood and applied in different circumstances have led to different results" (Kelso et al 2002).

Implications for Law and Politics

This paper began by addressing the elephant in the room: if *Dobbs* killed *Roe*, why does it matter that *Casey* didn't? Having explained what factors were operating on the troika when they decided to save the abortion right in *Casey*, it is clear that some or all of those factors are missing from the current Court

that wrote *Dobbs*. The current Court includes no constrained choices, and thus lacks one of the primary elements that influenced the troika to behave differently than their counterparts. Without constrained choices, the Roberts Court today lacks the moderating presence of swing justices, whose approaches to law and precedent influence them to stray from ideological poles (Sullivan 1992). The development of abortion cases since *Casey* exemplifies how the swing vote swung further and further right until it disappeared altogether. In *Stenberg v Carhart*, a 5-4 decision in 2000, O'Connor and Souter provided the necessary swing votes to prevent an extremely constricted reading of the undue burden text, while Kennedy split to return to the conservative coalition (Stenberg). In 2007, when O'Connor had left the Court, Kennedy became the new swing vote. Though he preserved the abortion right in the 5-4 *Hellerstedt* in 2016, he also wrote the *Gonzales* opinion almost entirely contradicting the reading of the undue burden test from *Stenberg* (Hellerstedt; Gonzales). After Kennedy left the Court in 2018, Roberts became the new swing vote, narrowly preserving the *Hellerstedt* precedent in a tight 5-4 vote solely on precedential grounds (June Medical). Finally, with the replacement of Ginsburg by Barrett, even Roberts' moderating presence faded to obsolescence.

Even though *Roe* and *Casey* are now dead and buried along with the abortion right, other substantive liberties still hang in the balance. In his concurrence to the *Dobbs* decision, Thomas stated his intent to "reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell"* (Dobbs). For now, this position is only shared by Thomas himself. However, the *Dobbs* example itself shows that without the presence of the strategic, attitudinal, and contextual factors that influenced the outcome of *Casey*, precedent can disappear rapidly and violently. The absence of these interpersonal and individual factors may be a side effect of that specific era of the Court dwindling to a close, to be replaced with the quick shifts that have become characteristic of the new Roberts Court. However, Court observers and Americans everywhere should be wary of the rise of this new type of Court jurisprudence absent constrained choices, respect for precedent, and effective collegial dynamics. Sullivan encapsulates the dilemma by writing, "The Court is the least dangerous branch. It cannot tax, and it has no tanks. So why should people obey it? Because it has 'legitimacy, a product of substance and perception.'

People 'perceive' the Court as making 'principled' decisions, not political 'compromises'" (Sullivan 1992). Without legitimacy based on stability and "principled decisions," the Court risks losing the one tool that commands respect for its decisions and rule of law itself.

In 2022, after the release of the *Dobbs* decision, the Court hit a milestone in its public opinion ratings: for the first time in the last quarter century, the percentage of Americans who disapproved of the Court was higher than the number of Americans who approved of the Court by over 15 points (Gallup). Additionally, for the first time in the last 25 years, the percentage of Americans who reported that they had "no faith at all" in the judicial system headed by the Supreme Court climbed over 20% (Gallup). Gerhardt predicted in 1993, just one year after *Casey*, that if a majority of the Court were to ever follow Rehnquist and Scalia's flip approach to constitutional stare decisis, "it risks irreparable damage to the Court's prestige and to constitutional law" (Gerhardt 1993). The *Casey* plurality echoed the same warning, that "there is a limit to the amount of error that can plausibly be imputed to prior Courts," and if exceeded, "the legitimacy of the Court would fade with the frequency of its vacillation" (Casey). That these warnings, pushed off in *Dobbs* by a troika focused on preserving institutional legitimacy, have now come to pass portends a chill wind in the future of the Court, to quote Blackmun. Comprehending the evident differences between the *Casey* Court and the current Court tells us how we should expect to see the Court's role changing. And right now, the Court's role is shifting away from an institution grounded in precedential stability and balancing acts to a Court that has veered sharply in one constitutional and political direction, and does not seem to care what foundations must be overturned to get there.

My work also provides new implications for the greater relationship between law and politics. Over the course of four years of study of political science, I've found that almost every debate over judicial topics boils down to the same inherent dilemma: is the Court a political institution? I argue that *Casey's* formation and demise proves that the Court is inherently political. In 1992, O'Connor, Kennedy, and Souter were influenced by numerous factors, both internal to their own perspectives and externally by other actors. In 2022, political circumstances had brought about the end (for now) of centrist swing justices and those factors that had played such a large role in *Casey* no longer operated on the justices, or

no longer operated on them in the same way. The demonstrable attitudinal and strategic forces that operated on justices and shaped the outcome of *Casey* prove that law is not just law; it's how the justice conceives of interpretation, how the justice conceives of precedent, how the justice conceives of their own role personally and institutionally, and how the justice operates among eight other justices with their own unique conception of all of the previous factors. It would be impossible not to consider justices political beings when they exist in such a heavily political context, like the one at example in *Casey*, and what is the Court if not an amalgamation of the nine justices that comprise its bench? As the Roberts Court trucks along, the lessons learned from *Casey* allow us to conclude that the Court is a political institution seeking institutional legitimacy in an increasingly politicized context, and the shift that we are seeing in the type of judge on the Court will determine what that definition of institutional legitimacy will be in the coming years.

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