

To Follow or to Overrule *Roe v. Wade*? The Debate on the Principle of *Stare Decisis* in U.S. Constitutional Practices

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Abstract

Since *Roe v. Wade* was decided in 1973, the question whether the U.S. Supreme Court is bound by its own constitutional precedents has caused great disagreements both for practitioners and theorists. Opponents of the *Roe* decision seek to undermine the substantive grounds of the case; at the same time, they argue that the Supreme Court is not bound by its own previous constitutional decisions and thus shall/can overrule substantively mistaken decisions like *Roe*. However, even after President Trump successfully sent three conservative justices into the Supreme Court, thus forming the conservative majority, *Roe* continued to be followed in the *Russo* case in 2020. While *Roe* continues to be followed, the content of its holding has changed dramatically since 1973. This paper highlights the judicial techniques adopted by the Court from 1973 to 2020 to transform the content of the precedential norm, and shows the duality of following and overruling that is not uncommon in case-based reasoning. In the second part, the paper explores the theoretical aspect of this controversy. For both supporters and opponents of the principle of *stare decisis* in constitutional cases, there is a strong normative tendency which enshrines the act of following or overruling precedential rules into constitutional obligations. The norm-building approach finds the sources of restraints in constitutional texts or constitutional precedents. The paper argues that this approach is premised upon the presumptive dichotomy of rule following and rule overruling, and that it falls short of a method to theorize the common phenomenon of the following/overruling duality. Instead, a different analytical approach, as developed by Maltz and Fallon, can better describe the

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institutional hurdles faced by practitioners and the policy considerations as they experience as part of the institution. This approach has the strength to describe the judicial reality and can better serve as a methodological guidance for practitioners.

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