THE SUPREME COURT WILL NOT OVERRULE *ROE V. WADE*

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The recent confirmation of two purportedly conservative Justices to the Supreme Court has fueled media speculation that the Supreme Court may be "poised to overrule *Roe v. Wade*."[1] The speculation has been fanned by South Dakota's recent enactment of a law banning virtually all abortions for the stated purpose of getting the Supreme Court to reconsider *Roe*.[2] The pro-life forces also take encouragement from the fact that the Court has agreed to hear the government's appeal from lower court decisions holding unconstitutional Congress's ban on "partial birth" abortions.[3] Finally, based on the assumption by the pro-life forces that there are now four Justices on the Court willing to overrule *Roe* (Chief Justice Roberts, and Justices Scalia, Thomas and Alito), the possible retirement of Justice Stevens and his replacement by a Bush-appointed "pro-life" Justice would ensure the overruling of *Roe*, and with it a woman's constitutional right to make the choice to end an unwanted pregnancy by a safe and legal abortion.[4]

The problem with this scenario is that it is completely wrong. The Supreme Court will not overrule *Roe v. Wade*. This is so for two related reasons, one going to the operation of the Court itself, and the other going to the value acceptances of American society today.

The Court operates as an institution, and the new Justices, like the

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1. *See* Roe v. Wade, 410 U.S. 113 (1973).

2. *See* Monica Davey, *South Dakota Bans Abortion, Setting Up a Battle*, N.Y. TIMES, Mar. 7, 2006, at A1.

3. Carhart v. Gonzales, 413 F.3d 791 (8th Cir. 2005), *cert. granted*, 126 S. Ct. 1314 (Feb. 21, 2006).

4.

> Some, including those who led the efforts to pass the ban in South Dakota, said they considered this the ideal time to return the central question of Roe to the Supreme Court. State Representative Roger Hunt, who sponsored the bill in South Dakota, pointed to the appointments of Chief Justice John G. Roberts Jr. and Justice Samuel A. Alito Jr., both conservatives, and what he described as the "strong possibility" of the retirement of Justice John Paul Stevens in the near future and the naming of a conservative as his successor.

Davey, *supra* note 2.

other Justices on the Court, will operate within this institutional framework.[5] We can understand the workings of the Court as an institution by looking to what it has done over a number of years, and we can assume that what it has done in the past, it will continue to do in the future.

The most important component in Supreme Court decision-making is the constitutional doctrine and precedent that has emerged from the Court's decisions in the different areas of constitutional law over a period of time.[6] Most of the constitutional cases coming before the Court today, important as some of them may be in terms of public policy and societal impact, involve the application of this doctrine and precedent to particular constitutional questions, some very narrow, arising from new laws and new kinds of governmental action.[7] While media commentary (and sometimes academic commentary as well) might suggest that the Court, particularly as its composition changes, frequently reviews its major and most controversial decisions, experience indicates that this indeed is not the case. Although the Court has the power to overrule its prior decisions and sometimes does so, a longitudinal analysis indicates that over a period of time comparatively few decisions have been overruled.[8] Generally, the court will overrule a decision only when its premises have been weakened by subsequent decisions, so that there is a seeming inconsistency between the older and newer decisions, or when the Court concludes in retrospect that the decision could not be supported by the doctrine and precedents on which it was based.[9] The

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5. While the Justices' judicial philosophy and views on substantive constitutional law influence their decisions in particular cases, experience indicates that for the most part they generally will continue to operate within this institutional framework.

6. While a substantial amount of academic commentary today focuses on constitutional theory and downplays the significance of constitutional doctrine and precedent, in the real world of constitutional litigation, there appears to be little room for constitutional theory, and the cases are litigated within the framework of constitutional doctrine and precedent.

7. It is interesting to note that the result in the Court's recent and highly visible "affirmative action" cases, Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003), worked no change in the applicable constitutional doctrine and ended up reaffirming the result the Court had reached a quarter-century before in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). *See also* Robert A. Sedler, *Affirmative Action, Race, and the Constitution: From* Bakke *to* Grutter, 92 KY. L.J. 219 (2003-2004).

8. *See* THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS 194-206 tbl.2-17 (Lee Epstein et al. eds., 3d ed. 2003). This source lists Supreme Court decisions in all areas overruled by subsequent decisions from 1789-2002. According to this table, there were 171 instances in which a Supreme Court decision overruled a prior decision or decisions. Sixteen of these instances occurred from 1810-1894, and 155 occurred from 1914-2002. While some might find a few more or a few less overrulings than the authors, the study gives a pretty accurate picture of the Court's institutional reluctance to overrule prior decisions.

9. See the discussion in Robert A. Sedler, *The Settled Nature of American Constitutional Law*, 48 WAYNE L. REV. 173, 175-78 (2002). For example, when the Court in *Brown v. Board of*

Court has never overruled a decision, at least not explicitly, on the ground that the composition of the Court has changed, and a majority of the present Justices would have decided the case differently had they been on the Court at the time of the decision.

More importantly for present purposes, the Court has never overruled a decision recognizing a constitutional liberty interest or for that matter any other constitutionally-protected interest. The Court has never held that what is a protected constitutional right today would not be a protected constitutional right tomorrow. Where the Court has overruled cases involving constitutional rights, it has been to overrule a case rejecting a claimed constitutional right and to hold that the claimed right is indeed protected by the Constitution.[10]

Roe v. Wade was a landmark decision, holding that a woman has a protected liberty interest in making the choice to have a safe and legal abortion. That decision has been the law of the land for some thirty-three years. And in the 1992 case of *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[11] the Court expressly affirmed the central holding of *Roe v. Wade*, that a woman had a fundamental right to make the choice to have an abortion prior to the time that the fetus became viable while permitting only such regulation of the abortion procedure that it did not impose an "undue burden" on the woman's right to choose to have an abortion.

In *Casey*, the Court specifically rejected the argument of the pro-life forces, joined in by the first Bush administration, and supported by four dissenting Justices, that it should overrule *Roe v. Wade*. The Court noted that there were no grounds for overruling *Roe* in terms of its

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Education, 347 U.S. 483 (1954), effectively overruled the "separate but equal" doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896), by holding that there could be no racial segregation in the public schools, the premises of *Plessy* and of the "separate but equal" doctrine had been weakened by more recent decisions holding that racial segregation in law schools and graduate schools was "inherently unequal" and so unconstitutional. *See* Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents for Higher Educ., 339 U.S. 637 (1950). It may also be noted that *Brown*'s overruling of *Plessy* had the effect of overruling a case rejecting a claimed constitutional right to be free of state-imposed racial segregation and holding that the claimed right was indeed protected by the Constitution. *See infra* note 10.

10. As in *Lawrence v. Texas*, 539 U.S. 558, 575 (2003), where the Court held that the due process clause protects the right of consenting adults to engage in sex in private, overruling the contrary holding in *Bowers v. Hardwick*, 478 U.S. 186 (1986). In that case, the Court also emphasized that the holding in *Bowers v. Hardwick* had been eroded by the subsequent cases of *Romer v. Evans*, 517 U.S. 620 (1996), holding violative of equal protection a Colorado state constitutional amendment that prohibited the inclusion of sexual orientation in anti-discrimination law, and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), where the Court expressly affirmed a woman's constitutionally-protected right to make the choice to have a pre-viability abortion. *See Lawrence*, 539 U.S. at 576.

11. 505 U.S. 833 (1992).

premises having been weakened by subsequent decisions or its being unsupported by the doctrine and premises on which it was based.[12] Indeed, the only thing that had changed was the composition of the Court, and this had never been considered to be a proper ground for overruling a prior decision.[13]

More importantly, in *Casey* the Court explained why it had never overruled a precedent recognizing a constitutional liberty interest. As Justice Kennedy succinctly put it: "In *Casey* we noted that when a court is asked to overrule a precedent recognizing a constitutional liberty interest, individual or societal reliance on the existence of that liberty cautions with particular strength against reversing course."[14] As the Court stated in *Casey*:

> Abortion is customarily chosen as an unplanned response to the consequence of unplanned activity or to the failure of conventional birth control, and except on the assumption that no intercourse would have occurred but for *Roe*'s holding, such behavior may appear to justify no reliance claim. . . .
>
> To eliminate the issue of reliance that easily, however, one would need to limit cognizable reliance to specific instances of sexual activity. But to do this would be simply to refuse to face the fact that for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, *in reliance on the availability of abortion in the event that contraception should fail*. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain

12. *Id.* at 855-61.

13. In 1992, the only Justice who had been in the *Roe* majority who was still on the Court was Justice Blackmun. The two dissenters in *Roe*, now Chief Justice Rehnquist and Justice White, were still on the Court. Justice Stevens, who had been appointed by President Ford, was assumed to be supportive of *Roe*. The remaining five Justices on the Court, O'Connor, Scalia, Kennedy, Souter and Thomas, had been appointed by "pro-life" Presidents Reagan and Bush, and the pro-life forces assumed that at least three of them would vote to overrule *Roe*. While Justices Scalia and Thomas did vote to overrule *Roe*, Justices O'Connor, Kennedy and Souter, in a joint opinion, voted to uphold the central holding of *Roe* that a woman had the fundamental right to make the choice to have a pre-viability abortion, while changing *Roe*'s approach to the constitutionality of abortion regulation from a rigid trimester test to a more flexible "undue burden" approach. The latter change had long been advocated by Justice O'Connor, see her dissenting opinion in *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 453 (1983) (O'Connor, J., dissenting), and the joint opinion in *Casey* saw the change as not affecting *Roe*'s central holding. *Casey*, 505 U.S. at 872-76.

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

> cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed.[15]

Fourteen more years have elapsed since *Casey* was decided, and the reasons set forth by the Court in *Casey* that "caution with particular strength against reversing course" apply even more strongly today. The Supreme Court operates as an institution, and for the Court to overrule *Roe v. Wade* today would be completely inconsistent with the Court's institutional behavior over a long period of time.[16]

The second and related reason why the Court will not overrule *Roe v. Wade* today is that this would have a cataclysmic effect on American society. For large numbers of American women, abortion has become a fully acceptable way of ending an unwanted pregnancy. Approximately 1.3 million abortions are performed in the United States each year. Almost 90% of the abortions are performed during the first twelve weeks, with most being performed during the first nine weeks. Less than 1% of these abortions are performed after twenty-four weeks. In 2002, the last year for which figures are available, 60% of the women having abortions were already mothers, which shows that for these women at least, abortion was a "back-up" for contraception. And, emphasizing the importance of choice, the figures also show that 53% of the women having unwanted pregnancies chose to continue with their pregnancies rather than have an abortion.[17]

There is thus a disconnect between the media speculation that the Supreme Court may be "poised to overrule *Roe v. Wade*" and the real world in which American women live their lives. Women under fifty came of age at a time when women had the right to choose to end an

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15. *Casey*, 505 U.S. at 856 (emphasis added and citations omitted). As the Court concluded: "The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce." *Id*. at 871.

16. Judge Michael Luttig of the United States Court of Appeals for the Fourth Circuit has stated that he understands the Supreme Court to have intended that its decision in *Casey* to be a "decision of super-*stare decisis* with respect to a woman's fundamental right to choose whether or not to proceed with a pregnancy." Richmond Med. Ctr. for Women v. Gilmore, 219 F.3d 376 (4th Cir. 2000) (Luttig, J., concurring) (vacating the stay pending appeal).

17. *See* Alan Guttmacher Inst., *Facts in Brief: Induced Abortion in the United States*, May 18, 2005 [hereinafter *Induced Abortion*], http://www.guttmacher.org/pubs/fb_induced_abortion.html; *see also* LAWRENCE B. FINER & STANLEY K. HENSHAW, ALAN GUTTMACHER INST., ESTIMATES OF U.S. ABORTION INCIDENCE IN 2001 AND 2002 (May 18, 2005), http://www.guttmacher.org/pubs/2005/05/18/ab_incidence.pdf. The Report shows that there has been a decline of the number of abortions from the 1.6 million peak in 1990 to the 1.3 million range from 1997 to the present. Approximately one-quarter of the total pregnancies each year end in abortion. *Induced Abortion*, *supra*. See the summary of the Report in Nasseem Sowti, *With High Court Debate Brewing, New Report Shows Procedure's Numbers Down*, WASH. POST, July 19, 2005, at F01.

unwanted pregnancy by a safe and legal abortion. Every day in America some women faced with an unwanted pregnancy choose to have an abortion while a like number of women choose to continue their pregnancy. *A woman's right to choose is a part of the value acceptances of American society today*. I strongly suspect that a clear majority of Americans would support a woman's right to choose to have an abortion during the first nine to twelve weeks of pregnancy, which is when most abortions take place.[18] Less than 1% of abortions are performed after twenty-four weeks,[19] presumably to protect the life or health of the woman. I would assume that many of the abortions performed between ten and twenty-four weeks are because ultrasound or genetic testing has revealed that the woman is carrying a seriously defective fetus, and here too I strongly suspect that a clear majority of Americans would support the woman's right to choose in this very difficult situation. In other words, when it comes to the crucial issue of the woman's right to chose to have an abortion in the circumstances where in fact American woman do chose to have an abortion—as opposed to peripheral issues such as parental consent or notification or a ban on so-called "partial birth abortion"—I maintain that a clear majority of Americans would support a woman's right to choose to end a pregnancy by a safe and legal abortion. It is my submission then, that a woman's right to choose is a part of the value acceptances of American society today.[20]

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18. *See Induced Abortion*, *supra* note 17.

19. *See id.*

20. If I am correct in my submission that a woman's right to choose is a part of the value acceptances of American society today, then it may be queried how I explain the fact that abortion is the subject of great political controversy in that society. In my opinion, this is due to the fact that what may be called a "substantial minority" of Americans is strongly opposed to abortion, that this "substantial minority" is very-well organized into a number of "pro-life" groups, and that this "substantial minority" has pretty much co-opted the Republican Party on this issue. Specifically, the Republican Party on the national level and in all but a handful of very "blue" states such as New York and California, supports the "pro-life" agenda, and will strive to bring about the enactment of "anti-abortion" laws. *See* Michael Hill, *Why Overturning* Roe v. Wade *Could Cost Republicans Votes Close Up*, SEATTLE TIMES, July 27, 2005, at A3. Republican Presidents also support the "pro-life" agenda and take whatever actions they can to restrict abortion, such as to refuse to contribute funds to international family planning programs that are not "anti-abortion." *See* Julia L. Ernst et al., *The Global Pattern of U.S. Initiatives Curtailing Women's Reproductive Rights: A Perspective on the Increasingly Anti-Choice Mosaic*, 6 U. PA. J. CONST. L. 752, 774-77 (2004).

Also, in the political arena the issue of abortion does not arise in the context of a woman's right to obtain an abortion in the first trimester of pregnancy or to avoid giving birth to a seriously defective fetus. Rather the issue arises in the context of "anti-abortion" regulation that often enjoys broad public support, such as parental consent or notification or a ban on so-called "partial birth" abortion or a ban on Medicaid funding for abortions for indigent women. *See* Kathryn Kolbert, *Two Steps Forward and One Step Back*, 6 U. PA. J. CONST. L. 686, 686-89 (2004). Legislators who find it "politically easy" to vote for these "anti-abortion" laws might find it more difficult to vote for an "anti-abortion" law imposing severe restrictions on the circumstances in which a woman could

The Supreme Court is not going to take that choice away from American women, no matter who joins its ranks. The Supreme Court is not going to overrule *Roe v. Wade*.

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obtain a safe and legal abortion during the first trimester of pregnancy.

One of the other reasons why abortion continues to be the subject of great political controversy in American society today is that the "pro-life" and "pro-choice" lawyers litigate the peripheral questions of abortion regulation with the same intensity as the "pro-life" and "pro-choice" lawyers litigated the *Roe v. Wade* constellation of cases thirty plus years ago. Apparently, the "pro-life" lawyers believe that if they can prevail in the peripheral abortion regulation cases, this will somehow "chip away" at *Roe v. Wade*, so that the case will eventually "fall of its own weight." It appears that the "pro-choice" lawyers may share the same view about the "chipping away" effect of these cases and so litigate them with equal intensity. Or it may be that ideologically based lawyers, as the "pro-life" and the "pro-choice" lawyers, including the author, necessarily are, always have the need to litigate constitutional cases at a high level of intensity.