

## WHEN JUDICIAL PRECEDENT SUBVERTS THE CONSTITUTION

BY Wanda Franz, Ph.D.

Respect for precedent means not only that the justices should follow the specific outcomes of prior cases but also that they must follow their logic. The logic of cases demands that judges second-guess legislative and executive decisions on the most sensitive moral and political issues and that judges decide for themselves on the appropriate means for achieving preferred policies. The simple fact is that constitutional law as set out in the cases now requires judges to legislate from the bench. Nominees to the [Supreme] Court can repeat endlessly that judges should interpret, not make, law. But unless they are willing, once on the Court, to rethink the logic of prior cases, they will have to make law.

This displacement of political decision-making has had deeply harmful consequences for our society....

So [Senator] Specter's questions [at Justice Alito's nomination hearing] about stare decisis [i.e. following precedent] were not tangential or technical.

—Robert F. Nagel, in *The Weekly Standard*, 4/17/ 2006

It is fair to say that Senator Specter is in favor of abortion "rights" and that he looks at the Constitution as a malleable "living thing" that "represents the values of a changing society." It is also fair to assume that when it comes to abortion, he—like pro-abortionists in general—expects "progressive" justices to make law and conservative justices to "respect precedent" and question neither the legitimacy nor logic of such judge-made law.

Judges below the level of the Supreme Court are, of course, obliged to follow the precedent of a Supreme Court decision. Some courts, such as the "progressive" 9th Circuit Court of Appeals, venture beyond Supreme Court precedent. This lack of judicial discipline has earned the 9th Circuit the highest reversal rate among appeal courts.

More typically, appeal courts bow (sometimes grudgingly) to the authority of the Supreme Court. Thus in a terse amendment to a previous decision the 4th Circuit Court of Appeals (that originally had gone against a group of abortionists), Judge J. Michael Luttig wrote (8/22/2000), "I understand the Supreme Court to have intended its decision in *Planned Parenthood v. Casey* (1992) 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. And I believe this understanding to have been not merely confirmed, but reinforced, by the Court's recent decision in *Stenberg v. Carhart* [2000]."

Some lower-court judges have recused themselves—on moral grounds—in cases where they would be forced to cooperate directly in the procurement of an abortion (for example, a minor seeking a court's approval to have an abortion without involving her parents). The *New York Times* (9/4/05) reported about such cases in Alabama, Pennsylvania, and Tennessee.

A judge's recusal in Tennessee "prompted 12 experts on judicial ethics to write to the Tennessee Supreme Court in late August. The experts called his action lawless." Reasonably, a judge's job is to "judge" and not mechanically act as a rubber stamp. But what if the judge, acting from "progressive" prejudice, frustrates the parents' legitimate interest in their daughter's welfare? Or what if, in his judgment, a minor lacks the maturity to have an abortion without the parents' knowledge? Unfortunately, a recusal by the judge precludes him from reaching that judgment.

It seems that the more the constitutional illegitimacy of *Roe v. Wade* and *Planned Parenthood of S.E. Pennsylvania v. Casey* is in doubt, the more the pro-abortionists insist on the inviolability of these decisions.

And nominees to the courts are pressed about “following precedent” or “adhering to stare decisis”—no matter how poorly reasoned these abortion decisions are.

Senator Specter’s claim that *Roe v. Wade* is a “super precedent” seems to rest primarily on the Court’s fevered attempts to make *Roe* respectable. If it were soundly based on the Constitution, there would be no desperate need to invoke judicial mysticism and give it the halo of a “super precedent.”

*Roe*’s fatal deficiencies were evident from the beginning: In his dissent, Justice Byron R. White noted its lack of constitutional grounding and condemned it as “an exercise of raw judicial power.” *Roe* did not improve with age. Nineteen years later in *Casey*, Justice Antonin Scalia stated the obvious: “(1) the Constitution says absolutely nothing about [abortion], and (2) the longstanding traditions of American society have permitted it to be legally proscribed.”

*Roe* is a collection of truly bad judicial sins: It lacks constitutional justification. It substitutes its own medical and psychological “judgments” for legal reasoning. It violates the principle of separation of powers by taking from the legislative branches the right to make law and public policy. It is guilty of bad history. It willfully ignored the biological facts. And it is so badly written that its author, Justice Harry A. Blackmun, and Chief Justice Warren Burger thought that *Roe* and *Doe* created a right to abortion only under limited circumstances. (Blackmun even wanted to issue a press release to that effect.)

Normally, a Court decision with such serious deficiencies would sink without much of a trace. Not *Roe*. *Roe* gave rise to an industry solely devoted to “legal” killing. Therefore proclaiming that abortion “should be safe, legal and rare” makes no sense. How “rare” are 45 million “legal” victims to date?

Instead of noting *Roe*’s lack of constitutionality, the majority in *Casey* pontificated about the “obligation to follow precedent”—even though the Court had overturned itself many times before. Worse, the plurality demanded respect for *Roe* because “a decision to overrule *Roe*’s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court’s legitimacy and to the Nation’s commitment to the rule of law” (emphasis added). In this astonishing view, the Court’s legitimacy arises not from adherence to the Constitution, but from refusing to admit and correct its miscarriages of justice.

Oh I forgot, the plurality in *Casey* wants us to stop complaining about the Court’s intransigence and, on abortion, accept its “mandate rooted in the Constitution.” Pray tell, where in the Constitution?