

## HOW TO REVERSE GOVERNMENT IMPOSITION OF IMMORALITY: A STRATEGY FOR ERODING *ROE V. WADE*

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The topic of this Symposium is the relationship between law and morality. The essays in this volume adeptly explore the theory of this relationship, track its historical path, and address pressing legal and moral issues of our time. The very basics of law and morality, at least, should be relatively clear. All law worthy of obedience is rooted in morality. A regime whose law is not based in morality, like the regimes of Nazi Germany or Soviet Russia, is not one where the positive law deserves to be obeyed. To our good fortune and to the credit of our forebears, the laws of the United States, for the most part, are rooted in moral presuppositions. Indeed, very few would claim that the American legal regime is fundamentally immoral and ought to be overthrown, and I would not make such a claim myself.

There is, however, one important respect in which our law is deeply immoral: its recognition of a *constitutional right* of women to have abortions. In the United States, we have not merely decriminalized or legalized abortion. We have made the legality of abortion a matter of individual constitutional right. In so doing, the American legal system has put its highest moral imprimatur on a loathsome procedure that ought to be at least discouraged by the law if not forbidden altogether. *Roe v. Wade*<sup>1</sup> was thus in my opinion not merely wrongly decided. It was also profoundly immoral.

This Essay lays out a plan for righting that wrong. It describes how pro-life groups can erode the precedential value of *Roe*, paving the way for its overruling, and legally discourage abortion once again. In the process, this Essay makes two suggestions which should be useful to those who wish to reverse

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1. 410 U.S. 113 (1973).

other legal trends they find unfortunate—for example, the extensive constitutional protection our legal system gives to pornography<sup>2</sup> or our unusual use of the death penalty as a form of punishment.<sup>3</sup>

First, those working against *Roe* must understand that public opinion matters. Just as there are limits on the government's ability to legislate morality (as the experiment of Prohibition taught us) without at least some degree of public support, so too is it the case that the Supreme Court will not overrule incorrect or immoral decisions when the public clearly opposes its doing so. For better or worse, each part of the struggle against abortion—the legislative *and* the constitutional—requires building up public support.

Second, Americans who oppose abortion must candidly discuss strategy. We must learn to litigate shrewdly and to shape public opinion. On both scores, we would be well-advised to adopt some of the legal tactics employed in past moral constitutional campaigns—for example, the campaigns against capital punishment and racial segregation. To prevail, supporters of the pro-life cause must adapt old means used in these prior campaigns to the new end of cutting back on *Roe*.

This Essay proceeds in two Parts. Part I discusses how the pro-life position can prevail in the Supreme Court—how *Roe* can be overruled. Part II suggests several ways to turn the tide of public opinion against abortion, not only insofar as necessary to achieve victory in the Supreme Court, but also so that abortion can once again be legally discouraged, with laws against at least some forms of abortion that are routinely enforced.

## I. WINNING IN COURT

Pro-life Americans must work to erode the precedents of *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>4</sup> with the same sense of determination and strategic genius that the NAACP Legal Defense Fund used in eroding the prece-

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2. See Phyllis Schlafly, *The Morality of First Amendment Jurisprudence*, 31 HARV. J.L. & PUB. POL'Y 95 (2008).

3. See Ronald J. Allen, *Moral Choices, Moral Truth, and the Eighth Amendment*, 31 HARV. J.L. & PUB. POL'Y 25 (2008).

4. 505 U.S. 833 (1992).

dent of *Plessy v. Ferguson*.<sup>5</sup> It is worth noting in this regard that the NAACP's campaign against *Plessy* was a protracted one, beginning in the 1930s, achieving a major victory twenty years later in *Brown v. Board of Education*,<sup>6</sup> and only realizing complete success with the 1967 decision *Loving v. Virginia*,<sup>7</sup> more than thirty years after the campaign against Jim Crow had begun. This final victory in *Loving*—which declared anti-miscegenation laws to be unconstitutional—came only after Congress had weighed in on the pro-civil rights side with the Civil Rights Act of 1964<sup>8</sup> and the Voting Rights Act of 1965.<sup>9</sup> I do not think Americans necessarily need to wait twenty or thirty years to overrule *Roe*. Indeed, we may well be closer to being able to attain that objective than we realize, even if we are much further away from having a political climate in which even the most extreme forms of abortion can again be made illegal.

I am cautiously hopeful about where the pro-life cause currently stands in the Supreme Court. I believe there are probably four Justices—Roberts, Scalia, Thomas, and Alito—who would like to vote to eviscerate *Roe* right now, although I do not think Chief Justice Roberts and Justice Alito are prepared to do that suddenly in one case. The crucial fifth vote in abortion cases belongs to Justice Kennedy. I will begin by stating my own personal impression of what Justice Kennedy is likely to do in future cases.

I believe that Justice Kennedy is in fact personally pro-life as a policy matter, as he privately suggested to some at the time he was nominated to the Supreme Court.<sup>10</sup> I am not aware of any indication that he has changed his mind on abortion or has “grown” on the issue during the twenty years he has been on the Court. Indeed, Justice Kennedy dissented in the first par-

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5. 163 U.S. 537 (1896).

6. 347 U.S. 483 (1954).

7. 388 U.S. 1 (1967).

8. 42 U.S.C. § 2000 *et seq.* (2000).

9. 42 U.S.C. § 1973 (2000).

10. Editorial, *Religion and the Court*, WALL. ST. J., Oct. 11, 2005, at A16 (“Conservative Senator Jesse Helms had doubts, however, so Judge Kennedy met him in a private room at the White House that November. According to columnist Cal Thomas, Mr. Helms said to Judge Kennedy, ‘I think you know where I stand on abortion.’ Judge Kennedy smiled and answered, ‘Indeed I do and I admire it. I am a practicing Catholic.’” (internal quotation marks omitted)).

tial-birth abortion decision, *Stenberg v. Carhart*,<sup>11</sup> with a passionate and obviously heartfelt opinion, and he was rumored to have been furious with Justices Souter and O'Connor for relying in *Carhart* on the plurality opinion the three of them wrote in *Casey*.<sup>12</sup> Justice Souter seems to have confirmed this by suggesting that he may have lost Justice Kennedy's vote in *Bush v. Gore* in part because Justice Kennedy was still angry with him over their split in *Carhart*.

I would be surprised if Justice Kennedy were ever again on the same side of an abortion case as Justice Souter, and since Justice O'Connor has retired from the Court, the three-Justice *Casey* plurality opinion now rests on the ash heap of history. Thus, the only "burdens" on abortion that the Court is likely to strike down as "undue"<sup>13</sup> are those that strike Justice Kennedy as undue. The very term "undue burden" is an O'Connor-invented test without roots in the case law; the only way to understand which burdens are undue, therefore, is to understand what Justice Kennedy thinks.

I believe Justice Kennedy starts from the premise that abortion ought to be legally discouraged, but I suspect he is deeply worried about the political backlash that the Court might trigger by precipitously overruling *Roe*. The *Casey* opinion upholding *Roe* was issued in June of 1992, only months before President George H.W. Bush lost his bid for reelection. It is therefore not beyond the realm of possibility that Justice Kennedy might have feared that overruling *Roe* at that time could have cost President Bush his reelection by driving away suburban Republicans. He could even have been worried that in the event Governor Bill Clinton were elected President, the overruling of *Roe* would itself be overruled soon thereafter when Justice Byron White was likely to retire.

In fact, if the Court had overruled *Roe* in 1992, Justice White's replacement, Ruth Bader Ginsburg, almost certainly would have voted to spring it back to life the very next year. Moreover, the Democratic Congress and President elected in 1992 would very probably have passed a federal statute codifying abortion rights. This would have been a huge setback for the

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11. 530 U.S. 914 (2000).

12. See, e.g., JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 135–36 (2007).

13. 505 U.S. 833, 874 (1992).

pro-life cause. If my supposition is correct, Justice Kennedy's reasons for not overruling *Roe* in *Casey* could well have been largely prudential.

I suspect that Justice Kennedy may understand the *Casey* plurality opinion to mean that most regulations of abortion commanding fifty percent support in national public opinion polls are constitutional. In the capital punishment area, Justice Kennedy has not hesitated to give constitutional weight to modern public opinion opposing the execution of the mentally infirm<sup>14</sup> or of juveniles,<sup>15</sup> and he might give similar weight to public opinion with respect to regulations of abortion. It is worth noting in this regard that the plurality opinion in *Casey* upheld the imposition of waiting periods and parental consent for abortions for minors, both of which were supported by majorities in national public opinion polls.<sup>16</sup> *Casey* did strike down the Pennsylvania spousal notification requirement,<sup>17</sup> which commanded more than fifty percent support in national public opinion polls. But it is possible that Justice Kennedy agreed to this largely as a sop to Justices O'Connor and Souter, allowing the three of them to collaborate together on the *Casey* plurality opinion. Regardless of his reason for acting the way he did at that time, I personally do not expect Justice Kennedy ever again to overturn a regulation of abortion with majority support in national opinion polls.

The key to eroding *Roe v. Wade*, then, is to pass a number of state or federal laws that restrict abortion rights in ways approved of by at least fifty percent of the public in national public opinion polls. Those cases can then be litigated up to the Supreme Court, and we can begin to build up a body of pro-life case law, like *Gonzales v. Carhart*.<sup>18</sup> Once we have won enough such cases, the Court will be in a position to overrule *Roe*. I think there may well be a substantial period of time where *Roe* is not technically "overruled" but during which it will be rendered meaningless. This is what happened to *Lochner v. New York*,<sup>19</sup> which became a dead letter in 1937,<sup>20</sup> but which was not

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14. See *Atkins v. Virginia*, 536 U.S. 304 (2002).

15. See *Roper v. Simmons*, 543 U.S. 551 (2005).

16. *Id.* at 885–87, 899–901.

17. *Id.* at 887–99.

18. 127 S. Ct. 1610 (2007).

19. 198 U.S. 45 (1905).

formally overturned until the Court's decision in *Ferguson v. Skrupa*<sup>21</sup> in 1963. Despite any temporary delay in its formal overruling, however, the days of *Roe* would be numbered.

I am not an expert on national public opinion polling on abortion, so I will defer to others to develop the precise content of the kind of abortion restrictions that might pass muster with Justice Kennedy. Offhand, I would recommend passing laws like the following: a ban on abortion for sex selection, a law preventing boyfriends or parents from intimidating young women into choosing to have an abortion, a ban on any form of abortion that might cause pain to the fetus (such as by sucking out his or her brain, or hacking his or her body into pieces), and a nationally-applicable mandatory waiting period before abortions can be performed. The pro-life movement should borrow a page here from the opponents of capital punishment, who challenge every mode of execution, from hanging to lethal injection, as imposing cruel and unusual punishment. Opponents of abortion should raise the same kinds of challenges, one by one, to each abortion procedure. This will force the public to focus on exactly what abortion entails, and that will put us on the national majority side of the issue. The end goal should be to have all abortion procedures banned nationally.

My strategy for eroding *Roe* thus advocates gradualism rather than immediate and outright challenges. If the recent South Dakota law banning abortion, for example, had survived its brush with the voters,<sup>22</sup> Justice Kennedy might have struck it down because national public opinion polls reveal a majority opposed to "overruling" *Roe*. I thus think that the pro-life cause is best advanced by slowly tightening the regulatory noose around abortion, and would suffer a setback were *Roe* challenged head on.

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20. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

21. 372 U.S. 726 (1963).

22. In 2006, the South Dakota Legislature passed, and the Governor signed, the "Women's Health and Human Life Protection Act," making abortion illegal on the grounds that "life begins at the time of conception, a conclusion confirmed by scientific advances since the 1973 decision of *Roe v. Wade*." S. HB 1215, 2006 Leg., 81st Sess. (S.D. 2006) (enacted). The measure failed to win the support of a majority of state voters when it was put to referendum on November 7, 2006. S.D. CODIFIED LAWS § 12-17-7 (2006).

## II. SHAPING PUBLIC OPINION

In order to overrule *Roe*, therefore, we must arrive at a situation where a majority of the public supports overruling *Roe*. We will need such a majority not only to get Justice Kennedy's vote, but also to confirm new originalist Justices, to pass new laws restricting abortion, and to make sure that prosecutors enforce those new laws. Here, I think opponents of abortion need a massive public education campaign that informs citizens about the facts of fetal development and that puts the moral authority of government on the side of discouraging resort to abortion.

We do not have too far to go. Former President Bill and Senator Hillary Rodham Clinton, for example, still claim they want abortion to be safe, legal, *and rare*.<sup>23</sup> The Clintons need to be called on their rhetoric. If they truly mean it when they say that they want abortion to be rare, they should have no objection to starting a massive, federally-funded educational campaign to discourage abortion and encourage adoption. This campaign could and should be modeled on the federal government's highly successful campaign over the last forty years to end smoking. The first step toward outlawing abortion is to persuade the American people that it is morally wrong, and the first step toward accomplishing that is a massive, federally-funded anti-abortion advertising campaign.

Some of the folks who now say they hate abortion will jump off the boat at this point, because they do not in fact really mean it when they say they want abortion to be rare. But it is vitally important that these people be unmasked and revealed as supporters of the morality of abortion and not just of its legality. Much of the public does not think abortion is moral, and I think many Americans will support efforts to advertise that fact.

Another aspect of the campaign against abortion should be for all pro-life groups constantly and publicly to compare abortion providers, like Planned Parenthood, to big tobacco companies. The comparison is fair; both are entities that exist to make money by encouraging vice. Similarly, pro-life state attorneys general should consider bringing at least some of the

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23. President William J. Clinton, Remarks Accepting the Presidential Nomination at the Democratic National Convention in Chicago (Aug. 26, 1996), <http://www.presidency.ucsb.edu/ws/index.php?pid=53253> (emphasis added).

same kinds of lawsuits against abortion providers that anti-smoking advocates have brought against big tobacco companies. They should seek substantial judgments from abortion providers, with the money from these judgments going to pro-life and pro-adoption advertising funds.

I predict that by following this course we would, eventually, change public opinion to the point where even Justice Kennedy will be prepared to overrule *Roe* if he is still on the Supreme Court. But more importantly, such a public campaign to advertise the immorality of abortion will create a climate in which pro-life Supreme Court nominees, laws, and decisions to prosecute abortionists will flourish. Since our goal is not merely to erode *Roe* but actually to protect unborn life, we need to bring Congress and public opinion over to our side of this issue. Overruling *Roe* without creating a climate in which at least some abortionists can be and are in fact prosecuted would be a meaningless victory.

The overruling of *Roe* is *the* biggest issue implicating law and morality that we face today. The question of what tactics are necessary to make abortion illegal deserves more thought and discussion. One thing is certain, however: we cannot achieve the overruling of *Roe* and the protection of the unborn without first changing social attitudes on abortion. You cannot reverse the government's imposition of immorality unless you first build up public support for doing so.