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Will *Roe v. Wade* ever be overturned and, if so, how?

Roe v. Wade is a ruling ungrounded in the Constitution and one with serious consequences for mothers and unborn children alike.

Even those supporting abortion find it hard to justify how the court came to its conclusion. In fact, soon after *Roe* was decided, liberal constitutional scholar Laurence Tribe wrote "[o]ne of the most curious things about *Roe* is that, behind its own verbal smokescreen, the substantive judgment on which it rests is nowhere to be found."[1] Similarly, legal scholar John Ely noted that "[w]ere I a legislator I would vote for a statute very much like the one the Court ends up drafting," but he admits that *Roe* is frightening in that "this super-protected right [abortion] is not inferable from the language of the Constitution."[2] Both writers were "pro-choice" and favored legalizing abortion,[3] yet they recognized that *Roe* was a radical decision in which the Supreme Court deviated from its role of interpreting the law and the Constitution as they stand.

Tribe and Ely also recognize that the Supreme Court essentially wrote legislation, which is the job of Congress, not the Supreme Court. One of the law clerks of Justice Blackmun, the justice who authored the *Roe v. Wade* decision, also criticized *Roe*, stating: "The problem, I believe, is that it has little connection to the constitutional right it purportedly interpreted. A constitutional right to privacy broad enough to include abortion has no meaningful foundation in constitutional

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[1] Laurence H. Tribe, *The Supreme Court, 1972 Term – Forward: Toward a Model of Roles in the Due Process of Life and Law*, 87 Harv L Rev 1, 7 (1973).
[2] John Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J 920, 935–937.
[3] Michael W. McConnell, *How Not to Promote Serious Deliberation About Abortion*, 58 U. CHI. L. REV. 1181, 1184 (1991), *available at* http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=4743&context=uclrev.

text, history, or precedent – at least, it does not if those sources are fairly described and reasonably faithfully followed."[4]

It is difficult to overturn a Supreme Court case. In theory, it is only necessary that a majority of the Supreme Court justices (usually five, when there is a full bench of nine sitting justices) (1) agree the decision should be overturned, and (2) have a case come before the Court that raises the issue. In practice, it is difficult to reach that agreement because the court typically extends deference to its prior decisions. This is a legal concept known as *stare decisis*. The degree of deference due to prior cases is, therefore, understandably a matter of controversy.

The closest *Roe* has come to being overturned was in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Several justices wanted to overturn *Roe* and several others expressed discomfort with *Roe*'s shaky reasoning. However, a majority of justices agreed to keep *Roe*'s central holding, protecting the "right" to an abortion at all stages of pregnancy, though it amended the test for weighing appropriate state regulation of abortion. Despite the minority of justices standing ready and willing to overturn, the majority cited the need to respect precedent, since citizens and government officials had come to rely on *Roe* in the nineteen years since it was decided.

The Supreme Court does not always give such deference to precedent. Some decisions fade with age and become discredited despite not being officially overruled. One example is *United States v. Korematsu*, which ruled the Constitution allowed the government to force Japanese-Americans on the Pacific coast into internment camps during World War II. Other decisions remain relevant until it becomes apparent to the Court that the case was wrongly decided. The Court overruled one such case, *Plessy v. Ferguson* (1896), which allowed racial segregation under the mantra of "separate but equal."

The Supreme Court can sometimes be overruled by a legislative act or an amendment to the Constitution. The Constitution does not allow the Supreme Court to write legislation. It can only interpret the law and Constitution. If the Supreme Court wrongly interprets an Act of Congress, Congress can make a new statute to more clearly articulate what it originally intended and this law takes precedence over a Supreme Court decision on the old statute. *Roe* is more challenging because the Court based its decision upon a faulty interpretation of the Constitution which essentially added a Court-created amendment protecting a "right" to an abortion. Even when Congress is right and the Supreme Court is wrong, a mere statute cannot fix a Court's misunderstanding of the Constitution, the "supreme law of the land." Other than the Court voluntarily overruling itself, the only way to correct such an error is to amend the Constitution.

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[4] Edward Lazarus, *The Lingering Problems with Roe v. Wade, and why the Recent Senate Hearings on Michael McConnell's Nomination Only Underlined Them*, FINDLAW (Oct. 03, 2002), http://supreme.findlaw.com/legal-commentary/the-lingering-problems-with-roe-v-wade-and-why-the-recent-senate-hearings-on-michael-mcconnells-nomination-only-underlined-them.html.

Amending the Constitution usually requires a three-fourths majority vote of both houses of Congress and approval by three-fourths of the States.

The predicament in *Roe* is similar to that of one of the most infamous Supreme Court cases: *Dred Scott v. Sandford* (1857) where the Court ruled that descendants of African-American slaves, even if taken to free states, were not citizens, but property. The Supreme Court refused to protect African-Americans as persons, just as the Supreme Court refused to protect unborn children as persons in *Roe*. After the outrageous *Dred Scott* decision and the subsequent Civil War, Congress and the States remedied the Supreme Court's constitutional misunderstanding by ratifying the Thirteenth, Fourteenth, and Fifteenth Amendments which made it clear that under the Constitution, African-Americans were not property, but free and equal citizens with constitutional rights.

It is impossible to say what the Court will do in coming years, especially as the composition of the Court changes over time. *Roe* has been frequently questioned by the Court and a number of justices have articulated a desire to overturn it. It is a difficult road, but it remains possible that *Roe*'s error could be overturned if a majority of justices come to recognize this error. The justices who are appointed to the Court over the next few years could well determine whether *Roe*'s status will be cemented for another generation or finally be brought to an end. If the Supreme Court will not correct their error, the only way to take the decision out of its control is to pass a constitutional amendment. Until that time comes, the right to life will remain the most critical civil rights issue of our time.