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Is *Roe v. Wade* a “super, duper precedent”?

During the Senate Judiciary Committee’s hearings into the nomination of Judge John Roberts as Chief Justice, Senator Specter, the Committee Chairman, presented Judge Roberts with a large poster board on an easel listing the names (but not the citations) of thirty-eight Supreme Court decisions purportedly “upholding” *Roe v. Wade*, 410 U.S. 113 (1973). Senator Specter asked Judge Roberts whether, in light of the number of times *Roe* has been “upheld,” it was not accurate to describe *Roe* as a “super, duper precedent.” An examination of these decisions indicates that *Roe* has been “upheld” in only three of those decisions, one of which—*Planned Parenthood v. Casey*, 505 U.S. 833 (1992)—modified *Roe* in several significant respects. In the context in which Senator Specter used the word, “upholding” means “reaffirming” an earlier decision in the face of later challenges to that decision. It most assuredly does *not* mean “applying” that decision. To “apply” an earlier case to a later one simply means that the subsequent case was decided on the basis of the preceding case, without a discussion as to whether the older case should be revisited and reexamined. All of the cases are discussed below.

In the following eight cases, a lower court decision was summarily affirmed by the Supreme Court *without an opinion*, *i.e.*, the Court issued *no* opinion and affirmed on the basis of the briefs filed without oral argument. Although the Court’s decision in *Roe v. Wade* was the basis for affirming in each of these cases, no opinion was issued and there was no discussion as to whether *Roe* should be revisited:

Danforth v. Rodgers, 414 U.S. 1035 (1973)
Louisiana State Board of Medical Examiners v. Rosen,
419 U.S. 1098 (1975)
Gerstein v. Coe, 428 U.S. 901 (1976)
Sendak v. Arnold, 429 U.S. 968 (1976)
Guste v. Weeks, 429 U.S. 1056 (1977)
Bowen v. Gary-Northwest Indiana Women’s Services, 429 U.S. 1067 (1977)
Ashcroft v. Freiman, 440 U.S. 941 (1979)
Babbitt v. Planned Parenthood of Central and Northern Arizona,
479 U.S. 925 (1986)

In yet another case, the lower court's judgment was affirmed by an equally divided Court, again without an opinion:

Hartigan v. Zbaraz, 484 U.S. 171 (1987)

Three cases listed by Senator Specter involved abortion protestors. Each of these cases concerned the protestors' First Amendment rights, not abortion law. Whether *Roe* should be reexamined and overruled was not at issue:

Madsen v. Women's Health Center, 512 U.S. 753 (1994)

Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357 (1997)

Hill v. Colorado, 530 U.S. 703 (2000)

In yet another case, the issue was whether opposition to abortion represents class-based "animus" for purposes of 42 U.S.C. § 1985(3) (Section 2 of the Civil Rights Act of 1871). Once again, whether *Roe* should be revisited was not at issue:

Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993)

Eighteen cases listed by Senator Specter involved the interpretation and application of *Roe* (and its progeny) to various efforts to regulate the practice of abortion (*e.g.*, parental consent or notice, spousal consent, hospitalization requirements. *etc.*) and/or federal, state or local restrictions on the use of public funds and public facilities for abortion. Some regulations were upheld while others were struck down, but in none of these cases did the Court reexamine *Roe v. Wade*:

Doe v. Bolton, 410 U.S. 179 (1973) (the companion case to *Roe*)

Connecticut v. Menillo, 423 U.S. 9 (1975) (*per curiam* decision holding that States may prosecute non-physicians for performing abortions)

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976)
(evaluating various state regulatory statutes)

Beal v. Doe, 432 U.S. 438 (1977)
(upholding state abortion funding restrictions)

Maher v. Roe, 432 U.S. 464 (1977)
(upholding state abortion funding restrictions)

Poelker v. Doe, 432 U.S. 519 (1977)
(upholding local public access restrictions)

Colautti v. Franklin, 439 U.S. 379 (1979) (striking down state viability-determination requirement and standard-of-care provision)

Bellotti v. Baird, 428 U.S. 132 (1976) (ordering abstention in federal challenge to state parental consent statute)

Bellotti v. Baird, 443 U.S. 622 (1979) (striking down state parental consent statute)

Harris v. McRae, 448 U.S. 297 (1980) (upholding federal abortion funding restrictions embodied in the Hyde Amendment))
H.L. v. Matheson, 450 U.S. 398 (1981) (upholding state parental notice statute)
Simopoulos v. Virginia, 462 U.S. 506 (1983) (affirming conviction of physician for performing second trimester abortion outside of a licensed clinic)
Planned Parenthood Association of Kansas City, Missouri v. Ashcroft, 462 U.S. 476 (1983) (evaluating various state regulatory statutes)
Hodgson v. Minnesota, 497 U.S. 417 (1990) (striking down two-parent notice statute without judicial bypass, but upholding two-parent notice statute with judicial bypass)
Ohio v. Akron Center for Reproductive Health, 497 U.S. 502 (1990) (upholding one-parent notice statute)
Rust v. Sullivan, 500 U.S. 171 (1991) (upholding Title X regulations)
Mazurek v. Armstrong, 520 U.S. 968 (1997) (*per curiam*) (upholding parental notice statute)
Lambert v. Wicklund, 520 U.S. 292 (1997) (*per curiam*) (upholding physician only statute)

In one case, the Court considered the First Amendment aspects of commercial speech relating to abortion advertising. Whether *Roe* should be reconsidered was not at issue:

Bigelow v. Virginia, 421 U.S. 809 (1975)

In another case listed, the Court considered the standing of the plaintiffs-physicians—to challenge state abortion funding restrictions. The Court did not reach the merits of the case:

Singleton v. Wulff, 428 U.S. 106 (1976)

In one of the cases listed by Senator Specter, four justices would have modified and narrowed the holding in *Roe* (or overruled *Roe* outright), while a fifth justice (Justice O'Connor) said that such a holding was premature and not necessary to decide the issues presented. There was no majority to reaffirm *Roe*:

Webster v. Reproductive Health Services, 492 U.S. 490 (1989)

In only three cases has the Court expressly “reaffirmed” *Roe* in the course of addressing the issues presented. In the third case listed—*Planned Parenthood v. Casey*—the Court abandoned *Roe*’s “trimester” scheme, partially overruled the first and second cases listed below, refused to characterize the woman’s liberty interest in obtaining an abortion as “fundamental,” jettisoned the “strict scrutiny” standard of review and developed and applied the new “undue burden” standard to the challenged regulations:

City of Akron v. Akron Center for Reproductive Health, Inc.,
462 U.S. 416, 419, 426-32 (1983)

Thornburgh v. American College of Obstetricians & Gynecologists,
476 U.S. 747, 759 (1986)
Planned Parenthood of Southeastern Pennsylvania v. Casey,
505 U.S. 833, 844-79 (1992)

In the Court's decision on partial birth abortion, the majority declined to revisit the principles of *Roe*, as modified by *Casey*, but simply purported to "apply them to the circumstances of this case."

Stenberg v. Carhart, 530 U.S. 914, 921 (2000)

In summary, of the thirty-eight cases listed by Senator Specter, only three actually "upheld" *Roe*, in the sense of reaffirming the holdings of *Roe*, as opposed simply to applying *Roe* (and its progeny) to various regulatory measures—*Akron Center*, *Thornburgh* and *Casey*. Of those three, one, *Planned Parenthood v. Casey*, made major modifications to *Roe*. There is no basis, therefore, for describing *Roe* as a "super, duper precedent."

Since the confirmation hearings of Chief Justice Roberts and Associate Justice Alito, the Supreme Court has decided three more abortion cases. In none of those cases did the Court re-examine or re-affirm either *Roe v. Wade* or *Planned Parenthood v. Casey*. In *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006), decided after John Roberts became Chief Justice, but shortly before Samuel Alito replaced Justice O'Connor, the very first sentence of the Court's opinion stated: "We do not revisit our abortion precedents today, but rather address a question of remedy." 546 U.S. at 323. In *Gonzales v. Carhart*, 550 U.S. 124 (2007), in which the Court upheld the federal Partial-Birth Abortion Ban Act of 2003, the majority opinion by Justice Kennedy merely "assume[d]" that *Roe*, as modified by *Casey*, controlled the disposition of the case. 550 U.S. at 146. Finally, in striking down two Texas statutes regulating abortion last summer, the Supreme Court simply applied *Casey* without revisiting whether *Casey* (or *Roe*) should be reconsidered. *Whole Woman's Health v. Hellerstedt*, 579 U.S. ____ (2016). It remains the case that since *Roe* was decided more than forty-four years ago, it has been reaffirmed only three times, in *City of Akron* (1983), in *Thornburgh* (1986) and in *Casey* (1992).