

When the Supreme Court “Respects Precedent”

In the last weeks of February 2006 the state legislature of South Dakota passed a law, signed by the governor in early March, effectively banning almost all abortions in the state (the exception being to save the life of the mother). Both sides of the issue prepared for the expected court battle that many pro-life advocates hope would eventually go before the Supreme Court of the United States in a direct challenge to the *Roe vs. Wade* decision of 1973. As the press covered this impending conflict focus inevitably turned to the two newest members of the Supreme Court, Chief Justice John Roberts and Justice Samuel Alito, speculating on how they would affect the decision should the court agree to hear the case.

During the Senate Judiciary



Committee hearings for both Roberts and Alito, the politicians who were concerned with the future of a woman’s right to abortion repeatedly asked the potential justices if they, as members of the Supreme Court, would “respect established precedent” (or words to that effect) when cases come before them that might test decisions already made by the court. In short, would they respect *Roe vs. Wade* as established law?

Without getting into the obvious error that the judiciary does not pass laws (that is for the legislative branch of government – thank you high school civics!) such a question raises interesting historical issues, which are no less relevant today as we now see a future challenge begin to unfold. What has been the Supreme Court’s record in “respecting precedent” when important issues of justice have come before them? What would our country be like today if the Supreme Court had “respected precedent” across the board whenever they were presented a challenge to past laws and decisions? Looking at a few of the courts most historical decisions might yield some

When the Supreme Court “Respects Precedent”

interesting answers.

On March 6, 1857 the Supreme Court handed down its decision in the case of *Scott vs. Sanford*, also known as the *Dred Scott Decision*. In this decision the Supreme Court overturned a “settled law of the land”, the Missouri Compromise of 1820, which limited the spread of slavery in the territories. It also “established precedent” for our nation, declaring that even free Negroes did not have any rights that white Americans were bound to respect. Dred Scott did not even have the right to sue for his freedom in federal court because “a man whose ancestors were imported into this country, and sold as slaves” did not enjoy the same privileges reserved for citizens under the Constitution. This precedent was later overturned by the United States Congress and effectively laid to rest by the 13th, 14th and 15th Amendments to the Constitution. In this case the people of the nation through their representatives declared the Supreme Court to be wrong, and its decision defunct.

In another landmark decision that defined American society for over fifty-five years the Supreme Court handed down another “established precedent” on May 18, 1896. In *Plessy vs. Ferguson* the Supreme Court declared that having separate facilities for blacks and whites was not a violation of the Constitution. As a result, the social doctrine of “Separate but Equal” became the

policy that maintained segregation in the United States well into the twentieth century.

This precedent was later challenged and overturned on May 17, 1954 when *Brown vs. Board of Education* effectively overturned the “Separate but Equal” doctrine the day before the fifty-eighth anniversary of *Plessy vs. Ferguson*.

Given these important cases from our history, how would our country be today had the Supreme Court respected “established precedent”, as the two most recent nominees to the court were pressed to guarantee during the hearings of the

Judiciary Committee? Had the *Dred Scott Decision* respected the precedent set by the Missouri Compromise the Civil War may not have been averted, but slavery would not have spread as rapidly to the territories. In addition, affirming the rights of at least freed slaves would have planted an important social seed. Instead, all blacks were denied Constitutional protections and our nation was pushed more rapidly towards a war with itself. Had the *Dred Scott Decision* itself been respected as “established precedent” the deplorable denial of the rights of Black Americans would have been perpetuated.

Had the decision of *Brown vs. Board of Education* respected the precedent set by *Plessy vs. Ferguson*, we would perhaps still be living in a segregated society; and the

downward spiral of inequality would have been further perpetuated by the court’s affirmation of the “Separate but Equal” policy. Instead the long



When the Supreme Court “Respects Precedent”

and often tumultuous journey toward desegregation received the boost it needed that eventually led to the civil rights movement of the sixties, the great leaders it brought forth and the results it yielded.

Today we face another “established precedent” in *Roe vs. Wade*, a precedent that pro-abortion advocates are so desperate to see respected by our judges that they will conveniently ignore the monumental laws and decisions, both good and bad, in which the Supreme Court and lawmakers of the United States blatantly defied precedent. *Dred Scott* and *Plessy vs. Ferguson* were precedents that needed overturning and demonstrate that our courts are not bound by past decisions that either immediately or over time are recognized as being disgracefully unjust.

It was in that spirit that Governor Robert Casey of Pennsylvania (1987-1994) said of *Roe vs. Wade*: “Those who say we must learn to live with it still don't get it. Ultimately, *Roe* cannot survive alongside our enduring, unshakable sense of justice. It is no more permanent than any other act of human arrogance. It is no more unchangeable than the laws which sent *Dred Scott* back to his master.” The *Chicago Tribune* on March 7, 1857 reacted to the *Dred Scott Decision* in words that could easily apply to *Roe vs. Wade*: “We must confess we are shocked at the violence and servility of the Judicial Revolution caused by the decision of the Supreme Court of the United States. We scarcely know how to



express our detestation of its inhuman dicta or fathom the wicked consequences which may flow from it...To say or suppose, that a Free People can respect or will obey a decision so fraught with disastrous consequences to the People and their Liberties, is to dream of impossibilities.”

It was in that vein that South Dakota stood with *Brown vs. Board of Education* as it directly challenged an “established precedent”. We pray our Supreme Court will not respect the “established precedent” of *Roe vs. Wade*, but rather will set a new precedent for our nation which affirms the right to life from the moment of conception. We pray this new precedent will deny all people, men and women, the so-called “right” to kill the unborn, and confine *Roe vs. Wade* to the historical abyss where it will join *Plessy vs. Ferguson* and the *Dred Scott Decision* as one of the most shameful errors of our highest court.

Fr. William Nicholas
revised from a commentary published in the
Catholic San Francisco
March 17, 2006