

Can McCain, Obama Turn High Court? Abortion.

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(Symposium with Neal Devins, Goodwin Liu, Douglas Laycock, et al.)

David Garrow, a professor at the University of Cambridge and author of “Significant Risks: Gonzales v. Carhart and the Future of Abortion Law,” in the Supreme Court Review:

Eighteen months have passed since the Supreme Court’s last abortion decision—its 5-4 upholding of the federal Partial-Birth Abortion Ban Act in April 2007—and no abortion case is presently on the Court’s docket or is swiftly approaching. Yet this lull in litigation has not stopped dozens of partisan commentators—plus a few journalists who should know better—from proclaiming that the fate of *Roe v. Wade* hinges on whether Obama or McCain wins the Nov. 4 presidential election. But they’re wrong. It doesn’t.

Let’s leave aside how the most likely outcome—an Obama victory coupled with significant Democratic congressional gains—will remove any prospect of a *Roe* opponent being nominated or confirmed as a successor to any of the three justices who might voluntarily leave the Court between 2009 and 2012. What’s more, the prospect that some 60 Democrats will be sitting in the Senate means that even if McCain pulls off an upset of 1948 proportions, the next potential Alito—never mind the next Scalia—will not win Senate confirmation.

But the “who leaves,” “who’s nominated” game is small beer in comparison to the far more weighty considerations of institutional reputation and legacy that concern real Supreme Court justices while being ignored by partisan true-believers. Judicial self-image and the Court’s own self-interest—not personal views about abortion or the constitutional analysis of *Roe* and *Casey*—are the biggest and indeed virtually insuperable obstacles that stand in the way of any readily visible reversal of *Roe*.

Future Courts may well, like in 2007, uphold limited or symbolic anti-abortion enactments, but federal constitutional protection for the core of a woman’s right to end an unwanted pregnancy will remain the law of the land for all time to come.