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THE CONSEQUENCES OF ROE V. WADE AND DOE V. BOLTON

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND PROPERTY RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

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CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

Page

Brownback, Hon. Sam, a U.S. Senator from the State of Kansas 1
opening statement 46
DeWine, Hon. Mike, a U.S. Senator from the State of Ohio, prepared statement 75
Feingold, Hon. Russell D., a U.S. Senator from the State of Wisconsin 4
prepared statement 88

WITNESSES

Cano, Sandra, Atlanta, Georgia 6
Charo, R. Alta, Professor of Law and Bioethics, and Associate Dean for Research and Faculty Development, University of Wisconsin Law School, Madison, Wisconsin 26
Collett, Teresa Stanton, Professor of Law, University of St. Thomas School of Law, Minneapolis, Minnesota 22
Edelin, Kenneth, M.D., Associate Dean Boston University School of Medicine, Boston, Massachusetts 9
McCorvey, Norma, Dallas, Texas 7
O'Connor, Karen, Professor of Government, American Unniversity, Washington, D.C. 28
Whelan, M. Edward, III, President, Ethics and Public Policy Center, Washington, D.C. 24

QUESTIONS AND ANSWERS

Responses of Karen O'Connor to questions submitted by Senator Feingold 41
Responses of R. Alta Charo to questions submitted by Senator Feingold 45

SUBMISSIONS FOR THE RECORD

Cano, Sandra, Atlanta, Georgia, statement 57
Charo, R. Alta, Professor of Law and Bioethics, and Associate Dean for Research and Faculty Development, University of Wisconsin Law School, Madison, Wisconsin, statement 60
Collett, Teresa Stanton, Professor of Law, University of St. Thomas School of Law, Minneapolis, Minnesota, statement 65
Edelin, Kenneth, M.D., Associate Dean Boston University School of Medicine, Boston, Massachusetts, statement 78
Keenan, Nancy, President NARAL Pro-Choice America, Washington, D.C., statement and attachment 90
McCorvey, Norma, Dallas, Texas, statement 121
National Abortion Federation, Vicki A. Sporta, President and CEO, Washington, D.C., letter 129
O'Connor, Karen, Professor of Government, American Unniversity, Washington, D.C., statement 131
Saporta, Vicki, President and CEO, National Abortion Federation, Washington, D.C., statement 143
Tamis, Robert, M.D., Member, Physicians for Reproductive Choice and Health, Phoenix, Arizona, statement 147
Whelan, M. Edward, III, President, Ethics and Public Policy Center, Washington, D.C., statement 151

VerDate Nov 24 2008 13:05 Feb 18, 2009 Jkt 047069 PO 00000 Frm 00003 Fmt 5904 Sfmt 5904 S:\GPO\HEARINGS\47069.TXT SJUD1 PsN: CMORC

THE CONSEQUENCES OF ROE V. WADE AND DOE V. BOLTON

THURSDAY, JUNE 23, 2005

UNITED STATES SENATE,
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND PROPERTY RIGHTS, OF THE COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:03 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Sam Brownback, Chairman of the Subcommittee, presiding.

Present: Senators Brownback, DeWine, Sessions, and Feingold.

OPENING STATEMENT OF HON. SAM BROWNBACK, A U.S. SENATOR FROM THE STATE OF KANSAS

Chairman BROWNBACK. The hearing will come to order. Thank you all for being with us today. I am pleased to call to order this Constitution Subcommittee hearing on the consequences of *Roe* v. *Wade* and *Doe* v. *Bolton*. I want to thank the ranking member, Senator Feingold, the witnesses and those in attendance for their participation.

America was founded upon the self-evident truth that all humans are endowed with the unalienable right to life. Yet, the wisdom that flowed in 1776 from Jefferson's pen was rejected almost two centuries later, when a divided Supreme Court found a constitutional right to abortion.

In *Roe* v. *Wade*, the Court shaped this right around the three trimesters of pregnancy, even prohibiting the States from regulating post-viability abortions if the health of the mother was involved. In *Doe* v. *Bolton*, the Court expounded on the meaning of "health," describing the term so broadly that several scholars believe this exception to State authority to regulate abortion actually is the rule.

In the years since *Roe* v. *Wade* and *Doe* v. *Bolton* were decided, it is estimated that around 40 million abortions have taken place in the United States. The legally-sanctioned ending of these millions of innocent lives is a gross injustice in itself.

Not long after the Supreme Court handed down *Roe* and *Doe*, former Justice Harry Blackmun, the author of these opinions, himself cast doubt on the wisdom of the Supreme Court's sudden and decisive role in the abortion debate. For instance, in 1978, as the Supreme Court was considering yet another abortion-related case from a lower court, Justice Blackmun noted in private correspondence, "More a[bortion]. I grow weary of these * * *[I] wish we had not taken the case."

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Justice Blackmun's surprisingly candid private sentiments match the unsurprising and overwhelming public criticism that the Supreme Court's abortion jurisprudence has inspired. The contentious debate since 1973 over the culture of life has proven that the American people, the democratic process, and ultimately even the Federal judiciary have been ill-served by the Supreme Court's breathtaking into and circumvention of the public debate about abortion.

What is striking about the criticism of these decisions is that it has come from across the political spectrum. Indeed, the Supreme Court decisions have been widely condemned by both the right and the left. Liberal legal scholars, in particular, have attacked the abortion decisions' utter lack of pedigree in either constitutional text or American tradition, and let me cite a couple of examples.

John Hart Ely, one of the leading constitutional scholars of his generation, stated that *Roe* v. *Wade*, quote, "is bad because it is bad constitutional law, or rather because it is not constitutional law and gives almost no sense of an obligation to try to be."

One of the most thorough explanations of the constitutional quicksand upon which the right to an abortion rested after *Roe* comes from Edward Lazarus, himself a former clerk to Justice Blackmun. Lazarus has stated as follows, quote, "As a matter of constitutional interpretation and judicial method, *Roe* borders on the indefensible. I say this as someone utterly committed to the right to choose, as someone who believes such a right has grounding elsewhere in the Constitution instead of where *Roe* placed it, and as someone who loved *Roe's* author like a grandfather* * *"

He goes on: "What, exactly, is the problem with *Roe*? 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 text, history or precedent* * *The proof of *Roe's* failings comes not from the writings of those unsympathetic to women's rights, but from the decision itself and the friends who have tried to sustain it. Justice Blackmun's opinion provides essentially no reasoning in support of its holding. And in the almost 30 years since *Roe's* announcement, no one has produced a convincing defense of *Roe* on its own terms." That is the end of that quote.

But the left's strong criticism of *Roe* and *Doe* does not stop with the fact that the decisions smacked of political judgment more than constitutional principle. Rather, it also extends to the fact that the Supreme Court unilaterally ended the democratic process by which the people and the States were making their own judgments about the appropriate governmental role in protecting unborn life.

For example, none other than Justice Ginsburg has said that at the time of the decisions, quote, "The law was changing * * *Women were lobbying around that issue* * *The Supreme Court stopped all that by deeming every law—even the most liberal—as unconstitutional. That seemed to me not [to be] the way courts generally work," end of quote by Justice Ginsburg.

Similarly, Jeffrey Rosen, a liberal law professor and noted privacy expert at George Washington University Law School, recently stated that, quote, "*Roe* v. *Wade* was bad for liberals* * *Roe has cast a shadow over our judicial politics for the past thirty

years * * * Roe is an important cautionary tale about how the judiciary, when it attempts to thwart the determined wishes of a national majority * * * may be responsible for a self-inflicted wound," end of quote.

These powerful objections to *Roe* and *Doe* from the left beg the question of what would happen were those objections to be sustained and the cases to be overturned. The answer is not, as some have claimed, the nationwide prohibition of abortion. Rather, as the Constitution contemplates, the decision of whether and how to regulate abortion would return once again to the States.

This is far more preferable to the status quo, as Justice Scalia explained in his dissent in *Planned Parenthood* v. *Casey*, where he stated, quote, "[By] foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair and honest fight * * * the [Supreme] Court merely prolongs and intensifies the anguish."

Justice Blackmun won applause from some for stating in the 1994 case of *Callins* v. *Collins* that he would vote against the death penalty in all future cases, and would, quote, "no longer * * * tinker with the machinery of death," end of quote.

Yet, Blackmun's firm position in the *Callins* case stands in stark contrast with the opinions he had authored in *Roe* and Doe, which allowed the premature ending of 40 million lives. Indeed, in his memoranda to other Justices before the cases were decided, Justice Blackmun observed that, quote, "I have concluded that the end of the first trimester [of pregnancy] is critical," end of quote, and then explicitly concedes, quote, "this is arbitrary," end of quote.

Geoffrey Stone, a law clerk to Justice Brennan when *Roe* was decided, has confirmed this, stating that, quote, "Everyone in the Supreme Court, all the justices, all the law clerks knew it was 'legislative' or 'arbitrary,'" end of quote.

To put it simply, *Roe* was a mistake, a very, very costly one. The admittedly arbitrary decisions in *Roe* v. *Wade* and *Doe* v. *Bolton* have had deliberate and severe real-life consequences for women, for unborn children and the body politic.

Here to discuss those consequences in more detail are two distinguished panels of witnesses. On the first panel, we will hear personal perspectives from Norma McCorvey, who was the plaintiff Jane Roe in *Roe* v. *Wade*, and Sandra Cano, the plaintiff in *Doe* v. *Bolton*. These witnesses will describe their journey from being litigants in the most controversial cases of our time to becoming dedicated advocates for a culture of life. We also will hear from Dr. Ken Edelin, Associate Dean at the Boston University School of Medicine.

The second panel of witnesses will discuss the legal and institutional aspects of the abortion decisions. In particular, they will both examine the constitutional foundation for the right to abortion and explore the effects of the Supreme Court's permanent short-circuiting of the democratic process with respect to this important issue.

The witnesses on this panel will include Teresa Collett, Professor of Law at the University of St. Thomas Law School; M. Edward Whelan, President of the Ethics and Public Policy Center and a

former clerk on the Supreme Court; Alta Charo, Professor of Law and Bioethics, and Associate Dean for Research and Faculty Development at the University of Wisconsin Law School; and Karen O'Connor, Professor of Government at American University.

I want to thank all of the witnesses for attending and, with unanimous consent, we will enter of your written statements into the record. We are in a series of potential votes this afternoon on the energy bill. We may have to have recesses to vote. We will try to keep the hearing going as smoothly as we can along the way. This is an important issue. It is a very important case, important before our country, and I look forward to a thorough vetting and discussion of that.

I am delighted to be joined by the ranking member, Senator Feingold. I will yield to him for his opening statement.

STATEMENT OF HON. RUSSELL FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator Feingold. Thank you, Mr. Chairman, and let me welcome our witnesses, particularly my friend, Professor Alta Charo from the University of Wisconsin Law School.

Mr. Chairman, you have entitled this hearing "The Consequences of *Roe* v. *Wade* and *Doe* v. *Bolton*." I suspect and can tell from your remarks that you believe those consequences have not been good for this country, and I respect your views, but I disagree. I know that this is an extremely difficult issue and one on which good and sincere people often disagree.

Mr. Chairman, my view is that these most private decisions should not be dictated by the government, but should be left to individual women and their families based on their own unique circumstances, in consultation with their doctors, and guided by their own consciences and moral or religious codes.

The Supreme Court's decision in *Roe* v. *Wade* was indeed consequential. It has brought about steady and far-reaching improvements to the health and welfare of women in this country. In addition, as the Supreme Court observed in *Planned Parenthood* v. *Casey*, *Roe* has played a significant role in allowing women to participate fully and equally in the economic and social life of this Nation.

Although abortion was legally permitted up until the mid-1800s, from the turn of the century through the 1960s States enacted legislation outlawing abortion in most circumstances. But far from putting a stop to abortions, these laws simply drove reproductive health services underground. Consequences for women were disastrous.

According to the Alan Guttmacher Institute, nearly one-fifth of the material deaths in 1930 were the result of botched abortions, many performed in unsafe conditions by untrained people. While the availability of antibiotics made abortions somewhat safer during the next several decades, some estimate that more than 5,000 per year died as a result of complications from abortions in the years leading up to *Roe*. It is estimated that during the 1950s and '60s, between 200,000 and 1.2 million women per year obtained illegal abortions. Just 40 years ago, in 1965, illegal abortions accounted for 17 percent of all pregnancy-related deaths.

We cannot have a discussion about the consequences of *Roe* without acknowledging the realities women faced before it. We must never forget the period in our history when many women, forced to choose between continuing an unwanted pregnancy or risking their lives, chose the latter. This is not a choice we should force women to make again.

What has been the impact of the Court's decision in *Roe* v. *Wade*? To start, the years following the Court's decision have been marked by great advances in the quality of reproductive health care information and medical services available to women. Abortion-related deaths have become extremely rare, and less than 1 percent of abortion patients experience major complications.

According to the Centers for Disease Control, in 1973 only 36 percent of abortions were performed at or before eight weeks of pregnancy. Today, 88 percent of all legal abortions are performed within the first 12 weeks of pregnancy, and 59 percent take place within the first 8 weeks of pregnancy. Only 1.4 percent occur after 20 weeks. This is another reason that abortions are safer today than they were in the pre-*Roe* era, when women often had to wait for weeks or even months to find a provider.

We must not turn back the clock. The Supreme Court has consistently upheld *Roe* and the American people support a woman's right to choose. Instead of constantly seeking ways to undermine that right, Congress should work to help women avoid unwanted and unintended pregnancies. If we do that, abortions will become more rare, as well as staying safe and legal.

For these reasons, I intend to continue my work in the Senate to ensure that all women have access to the best information and reproductive health services available. But I do look forward to the testimony of the witnesses and I thank you, Mr. Chairman.

Chairman BROWNBACK. Thank you, Senator Feingold.

We have one other member who is here who I think wants to submit a brief statement.

Senator DeWine.

Senator DeWine. Mr. Chairman, I do have a brief statement I would like to submit for the record. I appreciate that very much. I just want to congratulate you for holding this hearing and I want to thank our witnesses. I have had the opportunity to read their testimony and I just appreciate their courage and appreciate their good work and I look forward to their testimony.

I do have a longer statement which I will submit for the record.

Chairman BROWNBACK. It will be included in the record.

[The prepared statement of Senator DeWine appears as a submission for the record.]

Chairman BROWNBACK. Thank you all very much as panelists, and we will start with Sandra Cano, who is also known as *Doe* in *Doe* v. *Bolton*.

I believe this is the first time you have ever testified regarding this issue and it is significant. It is tough for you. I want to say thank you very much for your willingness to come forward. Most people would rather go get a root canal or two than testify in front of a Senate Committee. So I can imagine that this is very difficult, but thank you for being here and we will receive your testimony now.

If you could pull that microphone as close to you as possible, it would be helpful.

STATEMENT OF SANDRA CANO, ATLANTA, GEORGIA

Ms. CANO. The *Doe* v. *Bolton* Supreme Court decision bears my name. I am Sandra Cano, the former *Doe* of *Doe* v. *Bolton*. *Doe* v. *Bolton* is the companion case to *Roe* v. *Wade*. Using my name and life, *Doe* v. *Bolton* falsely created the health exception that led to abortion on demand and partial birth abortion. How it goes there is still pretty much a mystery to me.

I only sought legal assistance to get a divorce from my husband and to get my children from foster care. I was very vulnerable, poor and pregnant with my fourth child, but abortion never crossed my mind, although it apparently was utmost in the mind of the attorney from whom I sought help. At one point during the legal proceedings, it was necessary for me to flee to Oklahoma to avoid the pressure being applied to have the abortion scheduled for me by this same attorney.

Please understand, even though I have lived what many would consider an unstable life and overcome many devastating circumstances, at no time did I ever have an abortion. I did not seek an abortion, nor do I believe in abortion. Yet, my name and life are now forever linked with the slaughter of 40 to 50 million babies.

I have tried to understand how it all happened. How did my divorce and child custody case become the basis for bloody murders done on infants thriving in the wombs of their mothers? How can cunning, wicked lawyers use an uneducated, defenseless pregnant woman to twist the American court system in such a fraudulent way?

Doe has been a nightmare. Over the last 32 years, I have become a prisoner of this case. It took me until 1988 to get my records unsealed in order for me to try and find the answers to those questions and to join in the movement to stop abortion in America. When pro-abortion advocates found out about my efforts, my car was vandalized on one occasion, and at another time someone shot at me when I was on my front porch holding my grandbaby.

I am angry. I feel like my name, life and identity have been stolen and put on this case without my knowledge and against my wishes. How dare they use my name and my life this way. One of the Justices of the Supreme Court said during oral arguments in my case, what does it matter if she is real or not? Well, I am real and it does matter.

I was in court under a false name and lies. I was never cross-examined in court. *Doe* v. *Bolton* is based on lies and deceit. It needs to be retried or overturned. *Doe* v. *Bolton* is against my wishes. Abortion is wrong. I love children. I would never harm a child, and yet because of this case I feel like I bear the guilt of over 46 million innocent children being killed. The Supreme Court is also guilty.

The bottom line is I want abortion stopped in my name. I want the case which was supposedly to benefit me to be either overturned or retried. If it is retried, at least I will have the opportunity to speak for myself in court—something that never happened before.

My lawyers at the Texas Justice Foundation have collected affidavits from over 1,000 women hurt by abortion. We have filed those affidavits in a motion to reverse *Doe* which is now on its way to the Supreme Court through the Eleventh Circuit Court of Appeals in Atlanta. I am giving you a copy of my affidavit in the case. Millions of babies have been killed. Millions of women have been hurt horribly. It is time to get my name and my life out of this case and it is time to stop the killing. This Committee can propose a constitutional amendment to end *Doe* v. *Bolton* and *Roe* and return the issue to the States. Please do so. I need your help.

I would like to add one thing. *Doe* v. *Bolton* was a law broken against me. My constitutional rights were violated. I never applied for this abortion, I never applied for that case. It was done without my knowledge, so I have been a victim here.

Thank you.

[The prepared statement of Ms. Cano appears as a submission for the record.]

Chairman BROWNBACK. Thank you, Ms. Cano.

There will be no comments from the audience, please.

Ms. Norma McCorvey is the *Roe* of *Roe* v. *Wade*, and we are pleased to have you here to testify today. Again, if you could pull that microphone as close as possible, I would appreciate that.

Ms. McCorvey.

STATEMENT OF NORMA MCCORVEY, DALLAS, TEXAS

Ms. MCCORVEY. I am the woman once known as Jane *Roe* of *Roe* v. *Wade*, but I dislike the name Jane *Roe* and all that it stands for. I am a real person named Norma McCorvey, and I want you to know the horrible and evil things that *Roe* v. *Wade* did to me and others. I never got the opportunity to speak for myself in my own court case.

I am not a trained spokesperson, nor a judge, but I am a real person, a living human being who was supposed to be helped by lawyers and the court in *Roe* v. *Wade*. But, instead, I believe I was used and abused by the court system in America. Instead of helping women in *Roe* v. *Wade*, I brought destruction to myself and millions of women throughout the Nation.

In 1970, I was pregnant for the third time. I was not married and I truly did not know what to do with the pregnancy. I had already put one child up for adoption and it was difficult to place a child for adoption because of the natural bond that occurs between a woman and her child. After all, a woman becomes a mother as soon as she is pregnant, not when the child is born.

Women are now speaking out about their harmful experiences from legal abortion. I was seeking an abortion for myself, but my lawyers wanted to eliminate the right of society to protect women and children from abortionists. My lawyers were looking for a young white woman to be a guinea pig for a new social experiment.

I wanted an abortion at the time, but my lawyers did not tell me that I would be killing a human being. I was living on the streets. I was confused and conflicted about the case for many years, and while I was once an advocate for abortion, I would later come to deeply regret that I was partially responsible for the killing of between 40 and 50 million human beings.

Do you have any idea how much emotional grief I have experienced? It was like a living hell knowing that you have had a part to play, though in some sense I was just a pawn of the legal system. But I have had to accept my role in the death of millions of babies and the destruction of many women's lives.

How did I come to this position where I am today? Abortion is a shameful and secret thing. I wanted to justify my desire for an abortion in my own mind, just as almost every woman who participates in killing her own child must justify her actions. I made the story up that I had been raped to help justify my desire for an abortion.

Why would I make up a lie to justify my conduct? Abortion is based on lies. My lawyers did not tell me that abortion would be used for sex selection. But later, when I was a pro-choice advocate and worked in abortion clinics, I found women who were using abortion as a means of gender selection and birth control. My lawyers didn't tell me that future children would be getting abortions and losing their innocence. Yet, I saw young girls getting abortions who were never the same afterwards.

In 1973, when I learned about the *Roe* v. *Wade* decision from the newspapers, not from my lawyers, I won no victory. The lawyers did. After all, the decision didn't help me at all. I never had an abortion. I gave my baby up for adoption, since the baby was born before the legal case was over. Today, I am glad that that child is alive and that I did not kill her.

I was actually sullen about my role in abortion for many years and did not speak out at all. Then in the 1980s, in order to justify my own conduct, with many conflicting emotions, I did come forward publicly to support *Roe* v. *Wade*. Keep in mind that I have never had an abortion and did not know much about it at the time.

Then around 1991, I began to work in abortion clinics. Like most Americans, including many of you Senators, I had no actual experience with abortion until that point. When I began to work in the abortion clinics, I became even more emotionally confused and conflicted between what my conscience knew to be evil and what the judges, my mind and my need for money were telling me what was okay.

I saw women crying in the recovery rooms. If abortion is so right, why were women crying? Actually, it is a tragic choice for every child that is killed and every woman and man who participates in the killing of their own child, whether they know it or not at the time. I saw the baby parts, which was a horrible sight to see, but I urge everyone who supports abortion to look at the bodies, to face the truth of what they support. I saw filthy conditions in abortion clinics. I saw the low regard for women from abortion doctors. My conscience was bothering me more and more, causing me to drink more.

Finally, in 1995, a pro-life organization moved its offices right next door to the abortion clinic where I was working. I acted hatefully toward these people, but these people acted lovingly to me most of the time. The answer to the abortion problem is forgiveness, repentance and love. The Web is filled with post-abortion recovery and grief sites. According to an amicus brief filed in my case, 100,000 women a year enter abortion recovery counseling pro-

grams. Abortion is not a simple medical procedure that is safer than childbirth. It is the killing of a human being. It produces severe psychological and emotional consequences.

We can ask the children to forgive us, but the children are dead. They say alone I was born, alone I shall die. We must also ask Almighty God to forgive us for what we have done. We must repent for our actions as a Nation in allowing this holocaust. We have to turn from our wicked ways.

Senators, I urge you to examine your own consciences before Almighty God. God is willing and able to forgive you. He sent his only son, Jesus Christ, to die on the cross for my sins as *Roe* of *Roe* v. *Wade*, and for our sins in failing to act to end abortion and to truly help women in crisis pregnancies.

In 1995, I became a Christian and immediately dedicated my life to saving children's and women's lives. In the year 2000, I met with lawyers from the Texas Justice Foundation, Allan Parker and Clayton Trotter, who are here behind me. I asked them to help me reverse *Roe* v. *Wade* legally. We began collecting evidence from women about the devastating consequences of abortions in their lives. Women are very reluctant to speak about this horrible act. Women who have had an abortion can't even tell their husbands, parents, family, friends, or even their physicians or clergy.

Eventually, we collected almost 1,500 affidavits and filed a motion to reverse *Roe* v. *Wade*. As a part of my statement to you today, I am enclosing summaries of those women's affidavits, along with pictures of some of the women, so you can see what abortion does to real women. I am also going to file copies of all the affidavits collected. Also behind me today are some of those witnesses whose affidavits were before the Supreme Court and I would like to ask them to stand at this time.

[Three women from the audience stood.]

[The prepared statement of Ms. McCorvey appears as a submission for the record.]

Chairman BROWNBACK. Thank you very much, Ms. McCorvey. I appreciate your willingness and your—this is a very difficult thing to do and I appreciate very much your willingness to come forward and to testify and to answer questions.

Next, we will hear from Dr. Ken Edelin, Associate Dean, Boston University School of Medicine.

STATEMENT OF KENNETH EDELIN, M.D., ASSOCIATE DEAN, BOSTON UNIVERSITY SCHOOL OF MEDICINE, BOSTON, MASSACHUSETTS

Dr. EDELIN. Chairman Brownback, Senator Feingold, other distinguished members of this Subcommittee, thank you very much for this invitation to appear before you this afternoon. My name is Dr. Kenneth Edelin—

Chairman BROWNBACK. Excuse me. I apologize.

Dr. EDELIN.—and I am Professor of Obstetrics and Gynecology and Associate Dean for Student and Minority Affairs at Boston University School of Medicine.

I would like to take you back for a moment to 1966, when I was a third-year medical student attending Meharry Medical College in Nashville, Tennessee. Meharry and its hospital, Hubbard, were lo-

cated in the poorest sections of segregated Nashville. As a third-year student, I worked on the ob/gyn service providing reproductive health care for women who came to our clinic and who came to our hospital. The birth control pill was only 6 years old, but women from all parts of Nashville came seeking contraceptive help. The fear of pregnancy nearly disappeared for many women, nearly, but not completely.

I was on call, sleeping in the hospital, when I was summoned downstairs to the emergency room by the ob/gyn resident to help with a patient. She was a 17-year-old black high school student whose reddish-black mahogany-colored skin contrasted with the starkness of the white of the sheets which covered the stretcher that she was lying on. Her body was swollen, and her fingers, toes and the tip of her nose were a dusky, bluish-purple color. She was semi-conscious. She responded to pain when I attempted to start an IV. Otherwise, she could not be aroused. Her blood pressure was low, her heart was racing and her skin was hot to the touch.

The resident called the attending physician who was on duty that night. He arrived. He was one of the busiest and best obstetrician/gynecologists in the city of Nashville. He examined the young woman and knew immediately what the problem was. She had fallen prey to a poorly-performed illegal abortion.

When the women of Nashville, rich and poor, black and white, found themselves pregnant and did not want to be, they sought out one of the physician abortionists who practiced in the city. But if they could not afford the hundreds or thousands of dollars that it would cost, they would turn to the poorly-trained and sometimes untrained abortionists. Sometimes, the abortionists were nurses or nurses' aides who had access to surgical equipment. Sometimes, there was no medical equipment at all. Sometimes, the abortionists were scam artists who took advantage of and money from desperate women who were pregnant and did not want to be.

Women who survived tell stories of humiliation and exploitation. They tell stories of being raped as part of the price they had to pay for the abortion they were going to have. These women tell stories of being directed to stand on isolated street corners at midnight waiting for a car and being blindfolded as they drove off to go to a place where the abortion would take place. They described empty apartments in abandoned buildings with a single, bare light bulb hanging down from the ceiling dimly lighting a newspaper-covered kitchen table, with no anesthesia, no antisepsis. Instruments or rubber catheters were inserted into the vagina and blindly guided into the cervix, the opening which leads to the womb.

If a woman, in her desperation, could not find anyone to perform the abortion, she would attempt to do it herself. Sticks were used, knitting needles were used, crochet hooks were used, straightened coat hangers were used. Sometimes, they injected strong douches made up of Lysol and water, green soap and water, or alcohol and water into their wombs by pressing the nozzle of the douche up against the cervix. When nothing worked, sometimes they committed suicide.

On this night, this desperate young woman's life was slipping away and the attending physician knew that the only chance that he had of saving her life would be by removing the nidus of her

infection—her pregnant, infected uterus. He had a resident prepare the patient for surgery and I scrubbed with him. As the incision was made in this girl's abdomen, fluid oozed from the tissues. Once he opened the abdominal cavity, pus and the foulest of odors escaped into the room.

He held her uterus gently in his hands and it, like her fingers and toes, had a bluish discoloration and was like mush. On the back side of her uterus was a gaping hole, and floating free in her abdomen was a red rubber catheter, one of the favored instruments of the illegal abortionist. The catheter had been threaded through her cervix and into her womb, and her vagina had been packed with gauze to keep the catheter in place.

The catheter had punctured her uterus, and bacteria with it caused infection throughout her body. It seeped from her abdomen into the rest of her body and infected her entire system. With great care and skill, he was able to finish the surgery and remove her infected uterus, along with a dead fetus and the placenta that it contained.

The image that has been burned into my brain and into my mind as a young third-year medical student was of this young woman lying in the recovery room with drains and tubes protruding from every orifice. And the only thing the attending physician could do was to sit at her side and hold her hand as her life slipped away from her body. She died.

Women have been trying to control their fertility for almost as long as women have been on this earth. The first recorded successful abortion occurred 4,000 years ago. Some women abort and others give birth. When women are determined to end an unwanted pregnancy, only their imagination, their desperation and money limit the means that they will use to end a pregnancy.

Gentlemen of this Senate Subcommittee, we cannot turn back the clock. We cannot turn back the clock to 1966 to force women to seek illegal abortions. Women have been trying to control their fertility for almost as long as women have been on this earth. I ask you not to send women back to the States with a patchwork of laws that will be unfair to more than 50 percent of the population of the United States of America.

Thank you very much.

[The prepared statement of Dr. Edelin appears as a submission for the record.]

Chairman BROWNBACK. Thank you very much, Dr. Edelin, and I apologize for mispronouncing your name.

I think we will run the time clock at seven minutes, if that is okay with my colleague, Senator Feingold, and go through perhaps two rounds of questions. These are very difficult issues and ones that have stirred a lot of emotion, and yet I am firmly convinced that they are ones that we need to delve into and discuss as a society.

Ms. McCorvey, the daughter of yours that was the subject of *Roe* v. *Wade* is alive today. Is that correct?

Ms. MCCORVEY. Yes, Senator, she is.

Chairman BROWNBACK. And you had put her up for adoption. Is that correct?

Ms. MCCORVEY. Yes, sir.

Chairman BROWNBACK. I just wanted to make sure that the record was clear about what had happened since that period of time.

You have attempted to have your case reopened. Is that correct?

Ms. MCCORVEY. Yes, sir, we filed—

Chairman BROWNBACK. Please pull that microphone up closer, if you would, so we can hear. Thank you.

Ms. MCCORVEY. Yes, sir. We started about 5 years ago collecting the affidavits, and it went to the district court where it was thrown out within 48 hours. Then we went to the Federal court down in New Orleans and they had it for about 6 months and then they threw it out. And then eventually we made it up here to D.C. to the Supreme Court.

Chairman BROWNBACK. And it has not been heard yet here in front of the Supreme Court, or has it been denied?

Ms. MCCORVEY. It has been denied.

Chairman BROWNBACK. But you would like to see this case reopened and litigated and the factual setting actually heard. Is that correct?

Ms. MCCORVEY. Yes, sir, I would.

Chairman BROWNBACK. Ms. Cano, you have attempted, as well, to bring your case and to open it back up. Is that correct?

Ms. CANO. Yes, sir.

Chairman BROWNBACK. And your case, as you said, is currently pending in front of the circuit court. Do I understand that?

Ms. CANO. Yes.

Chairman BROWNBACK. And do you have any idea whether or not or when they are going to rule on that particular case?

Ms. CANO. Well, no. It has been filed. We have no idea.

Chairman BROWNBACK. Ms. Cano, why is it that you want your case to be heard at this point in time?

Ms. CANO. Well, for the simple reason this case used my name. I didn't go to any lawyer, I didn't go to any court and say I believe in abortion, I want an abortion, put me in this case. I am just a regular mother, grandmother, that had circumstances. I went to Atlanta Legal Aid and that is how I became involved. Attorneys, because I guess I didn't have the mentality to know what was happening, used me against my wishes and wants, and I didn't know until later on.

And then once I did find out that I am involved, I didn't know any of the information. When I was trying to search, people thought I was just trying to get out here and get publicity or something. I didn't know anything. Then I had to get my records unsealed. That is when I found out the devastating things, the fraud that the lawyers used. I didn't go to this attorney and say, hey, I want an abortion. I am against abortion.

Chairman BROWNBACK. But you must have signed some documents saying that you wanted an abortion for them to even file the case. Did they put affidavits in front of you for you to sign?

Ms. CANO. I never signed anything stating I want an abortion. There is an affidavit that I am 99-percent sure is not my signature, and in that affidavit it states that I was poor, my husband was in jail; that if I had another baby, it would destroy me. Granted, I was pregnant, my life was unstable. The last thing I needed was an-

other child, but under no circumstances would I sign an affidavit stating I wanted to take my baby's life. That is wrong. I do no believe in abortion, no kind of any circumstances. I don't care what it is.

I have been in the most devastating circumstances, any walk of life you can go through. I have been there, done that, but never one time have I thought to take my baby's life, or never would. There is no reason.

Chairman BROWNBACK. Did you ever have a deposition taken of you in the *Doe* case?

Ms. CANO. To be honest with you, I knew nothing about any part of this case until the records were unsealed. I never knew I was involved in *Doe* v. *Bolton* until almost to the end, and then I didn't know all the circumstances. When I went to search, people didn't believe me because I didn't know it was Mary Doe. I am thinking Jane Doe. It is incredible.

People do not believe this, but I am just a regular woman that was put in a lawyer's case that had an agenda to do. She used me because I was naive and vulnerable, uneducated, did not question her motives or what she was doing. And, wham, I am on the Supreme Court case *Doe* v. *Bolton* against my wishes, and I want it stopped.

Chairman BROWNBACK. Dr. Edelin, you present very strong testimony, obviously, and very clear testimony. I read the testimony ahead of time. In the years since *Roe* v. *Wade*, what has been the level of maternal deaths due to abortion? Do you know the numbers of what has taken place since that period of time?

Dr. EDELIN. Yes, I can give you relative numbers, but I would like to respond to my colleagues here sitting to my right, Ms. Cano and Ms. McCorvey.

Chairman BROWNBACK. Well, then I am going to need some more time afterwards because I am at one-and-a-half minutes here.

Dr. EDELIN. Okay, I apologize.

Chairman BROWNBACK. Maybe we can do that a little bit later.

Dr. EDELIN. But I can do that in a sentence by saying no woman should ever be tricked or forced to have an abortion. That is what the freedom of choice really does mean.

What happened prior to *Roe*—

Chairman BROWNBACK. No, after *Roe*, the number of maternal deaths by abortion, is what I would like to know. Do you know the level of maternal deaths after *Roe*?

Dr. EDELIN. The number of deaths after *Roe* is something less than 1 percent of all abortions done in this country.

Chairman BROWNBACK. The numbers I have here are after legalization, which you were talking about, the system was cleaned up and people came out from underneath. Since 1997, CDC reports 400 women have died from induced abortions from 1973 to 2000. Does that sound right to you?

Dr. EDELIN. That is about right.

Chairman BROWNBACK. Do you know what that number was prior to *Roe*?

Dr. EDELIN. I don't think anybody can know for sure, but there is indirect evidence that that number was much larger than that. After *Roe*, the number of women admitted to the hospital with sep-

tic abortions and the number of women who died dramatically decreased. And the number of women, interestingly enough, who were admitted to the hospital with, quote, unquote, "spontaneous abortions" or miscarriages also went down. So the numbers dramatically dropped and women—

Chairman BROWNBACK. Do you know what it was prior to *Roe*?

Dr. EDELIN. Nobody knows, because specific—

Chairman BROWNBACK. The CDC has a number.

Dr. EDELIN. Christopher Setsi estimated that there were probably still about a million, a million-and-a-half abortions done prior to *Roe* illegally.

Chairman BROWNBACK. I am asking you about deaths related to abortion prior to *Roe*.

Dr. EDELIN. There is no way to know that number.

Chairman BROWNBACK. Well, the Centers for Disease Control says that the number was 61 abortion-related maternal deaths in 1972; 21 from legal abortion and 40 from illegal abortions was the CDC number. Do you agree or disagree with that number?

Dr. EDELIN. I absolutely disagree with those numbers.

Chairman BROWNBACK. Do you disagree with the number that they have put forward after 1973?

Dr. EDELIN. I think those numbers are about right.

Chairman BROWNBACK. You agree with them after 1973, but not prior to 1973?

Dr. EDELIN. Absolutely, absolutely.

Chairman BROWNBACK. My time is up. I would like to pursue this a little further, if I could.

I do want to note that Senator Feingold and I have different positions on this, but I want to recognize his longstanding commitment to particular issues of the heart, particularly death penalty issues, that he and I have had different conversations about. While we have different points of view on this one, I do recognize and certainly respect the heart-felt position you have taken on that for a number of years.

Senator Feingold.

Senator FEINGOLD. Let me commend the Chairman for his sincerity and for his willingness to candidly talk about these issues both publicly and privately. I think it is a good part of what the Senate should be and I thank you for that.

Dr. Edelin, could you first clarify a bit the exchange you just had? Why the difference in your attitude about the figures?

Dr. EDELIN. Because so many women were admitted to the hospital for conditions of bleeding with a different diagnosis. Women were not admitted to the hospital with a diagnosis of induced abortion back in 1973 or before 1973 because it was illegal. They could go to jail, physicians could go to jail. So the numbers were very difficult to come by, and that is why the numbers that I just heard from the CDC I feel to be in error and inaccurate. There is no way to go.

Senator FEINGOLD. Thank you. Doctor, obviously your statement provides a powerful illustration of how restrictions before *Roe* didn't end the practice of abortion. They ended the practice of safe abortions. Would you say a bit more about, on the whole, how big of an impact *Roe* has had on women's health? What kinds of health

risks would women face if *Roe* were overturned and women were denied access to legal abortions?

Dr. EDELIN. Well, I think the answers to those questions are slightly different now than they would have been in 1973 or 1974. We certainly have come a long way, but women would then be put back into the position of trying to find physicians who would provide them with pregnancy termination services, abortion services. And depending on the laws in each State, that might be different from State to State.

We would end up with a country that would have a patchwork of laws that would be inequitably distributed across the country and put women at great hardship. Women would still seek to terminate some of their pregnancies. There is no question about that. They have been doing that for almost as long as they have been on this earth. We would hope that we would not fall back to the time when we suffered the tragedies we saw prior to 1973.

Senator FEINGOLD. Thank you, Doctor. I was also struck by the emphasis in your testimony on the dangers and difficulties faced by minority women in the pre-*Roe* era. I would like you to elaborate on that. Why did laws prohibiting abortion have such a great impact on women of color and why did *Roe* make such a difference for minorities?

Dr. EDELIN. Well, you know, we have heard a lot these days about health disparities. Health disparities have been around for a very long time. Maternal mortality, for example, has a disparate impact on women of color, black and Hispanic women, in this country. The same is true for women prior to *Roe* v. *Wade* who wanted to terminate their pregnancies because poverty was so prevalent amongst minority women, in particular, black and African-American women, that they were forced to seek out the poorly-trained, illegal abortionist who used the crudest means and methods to help them terminate their pregnancies.

It is they who suffered the most. It was poor women, it was black women, and in particular it was also very young women, teenage women, who died in extraordinarily desparate numbers when one compares it to the majority population.

Senator FEINGOLD. Doctor, I understand you were able to review the testimony of the witnesses who will be on the second panel. As a doctor, do you have any response to the arguments raised by Professor Collett about the health risks of abortion, particularly the risk of cancer for women who have not borne children?

Dr. EDELIN. Almost all of the studies that you can find and read about the risk and the health consequences of abortion are flawed for one main reason. We don't know what the denominator is. We don't know the total number of women who have had abortions in this country. Therefore, they cannot be included in the survey, so that the information and the data are skewed.

Abortion has saved many more women's lives than it did prior to *Roe*. Maternal mortality dropped drastically after 1973. Women did not die the way they died prior to 1973. All of those studies, all of them, are seriously flawed in their data collection.

Senator FEINGOLD. Mr. Chairman, I would ask that the testimony and report by the Center for Reproductive Rights and the

statement by Nancy Keenan, President of NARAL Pro-Choice America, be included in the record.

Chairman BROWNBACK. Without objection.

Senator FEINGOLD. Mr. Chairman, thank you.

Chairman BROWNBACK. Thank you.

Senator Sessions.

Senator SESSIONS. Thank you, Mr. Chairman. We have heard through the media that *Roe* and *Doe* may have been unhappy with the way this legal case was handled, but when you see the two people right before us, both of whom were involved in the seminal cases involving abortion, both renouncing abortion, neither one having had an abortion, and really condemning the entire process, I think it is something we need to think about.

Let me ask this, Ms. Cano. I think you have explained your view of being steadfastly opposed to abortion consistently.

Ms. McCorvey, you worked in an abortion clinic.

Ms. MCCORVEY. Yes, sir, I did.

Senator SESSIONS. And through that experience, you came to reject abortion?

Ms. MCCORVEY. Well, it was pretty obvious to me that when the women were being run through the line, which is what we used to call it, they were given early appointments, such as eight or nine o'clock in the morning, and the abortionist wouldn't show up until, say, after lunch, say one-ish, which I thought was cruel because it doesn't take very long to do an abortion procedure, especially in the first trimester. So I thought that was mental cruelty to the woman to make her come in at a very early hour and then not have her abortion late that afternoon.

And then the counseling that was supposed to have been done, sir, went something like what is it that you want? Well, I would like to have an abortion, they would say, doctor. And he would say, okay, I sign here, I give abortion. That was it.

Senator SESSIONS. Do you feel, based on that experience, that there is something fundamentally wrong with having an abortion? Did you reach that conclusion?

Ms. MCCORVEY. Yes, sir, it is.

Senator SESSIONS. How would you explain that in your words?

Ms. MCCORVEY. My own words, sir, it is the taking of a human life and life is a gift from God. If God had not wanted that woman to be pregnant, then she wouldn't have been pregnant.

Senator SESSIONS. Mr. Chairman, I am committed to something else I will have to go to in a few minutes. I just want to salute you for having this hearing. It takes a bit of courage to talk about an issue that a lot of people just don't want to talk about.

What has struck me as I have heard this testimony from these two ladies is that you are not supposed to have a lawsuit unless you have legitimate parties to the lawsuit. If we didn't have legitimate, knowing parties to this lawsuit, then we should not be in a position of having a rendering of an opinion in it. It is really an abuse and fraud on the court for a lawyer to proceed with a case without the knowing participation of the client they are supposed to be representing.

It also strikes me, sadly, that in many ways that fraud on the court in creating the lawsuit and the ultimate judgment that was

rendered is sadly consistent with an opinion that is unprincipled. It is also not sound. I am just looking at some of the comments of well-known liberal lawyers and professors and judges in commenting on the basis, the legal reasoning of *Roe* v. *Wade*.

Ruth Bader Ginsburg, now on the Supreme Court and an ACLU lawyer, called it a breathtaking decision whose heavy-handed judicial intervention is difficult to justify. Lawrence Tribe once described the *Roe* opinion as a verbal smokescreen and noted that the substantive judgment on which it rests is nowhere to be found.

Edward Lazarus, a liberal legal commentator and former law clerk to a Supreme Court Justice who authored *Roe* has stated, quote, "As a matter of constitutional interpretation and judicial method, *Roe* borders on the indefensible," close quote, and then he added, quote, "at its worst, disingenuous and results-oriented."

Jeffrey Rosen, a liberal commentator for the New Republic, said that the rule announced in *Roe* is hard to locate in the text or history of the Constitution, and he said it is based on, quote, "an unprincipled and unconvincing constitutional methodology." And it goes on. Alan Derschowitz has described *Roe* as a case of, quote, "judicial activism," close quote, in an area, quote, "more appropriately left to political processes."

"So I think the matter is not going away. It is not going away and it deserves serious thought. How we get out of where we are today, I don't know. I am not that smart. Justice Ginsburg in a 1985 law review article said that *Roe* ventured too far in the change it ordered, and presented an incomplete justification for its action." Justice Scalia said *Roe* v. *Wade*, quote, "destroyed the compromises of the past and rendered compromise impossible in the future. To portray *Roe* as a statesman-like settlement of a divisive issue is nothing less than Orwellian," close quote, Justice Scalia said.

So I don't know, Mr. Chairman, what the answers are to this problem. We know that statistics continue to show a national unease and a growing unease among the American people about this procedure. I think it is probably the sonograms that people are seeing now. I just salute you for having a hearing and discussing it.

Thank you. I think it is a good idea and I am glad that we have had these witnesses who are willing to come forward and testify.

Chairman BROWNBACK. Thank you, Senator Sessions.

Ms. McCorvey, you have worked in abortion clinics and you mentioned in your testimony that you would counsel women, I believe, beforehand and afterwards. What did you hear them say, or what were some of the comments that they would say to you as you would counsel them afterwards?

Ms. MCCORVEY. Afterwards?

Chairman BROWNBACK. Yes.

Ms. MCCORVEY. Whenever they would come out of the procedure room, one woman asked me—we were taking her into recovery—she asked me if she could call her mother, and it was a rather strange request. I had had many, but that was the strangest. And so I accommodated her by dialing the number and she said, I am so glad you gave me life; I just killed my own child.

Chairman BROWNBACK. Have you talked with women since that period of time, since the last several years, that have had abortions?

Ms. MCCORVEY. Yes.

Chairman BROWNBACK. What have been some of the comments they have said to you, women who have had abortions that you have talked with in the past several years?

Ms. MCCORVEY. Well, a lot of them have told me, in essence, Senator, that, Ms. Norma, if I would have known then what I know today about abortion, I wouldn't have gone through with it; I have had nightmares, I have gone from relationship to relationship, I have started taking drugs, I have started drinking; I have done this and I know that it is from killing my child.

Chairman BROWNBACK. Did they say, though, that—at the time, why did they do the abortion if it has had this effect on them at a later date?

Ms. MCCORVEY. A lot of the women did say—when I was standing in the lab testing their blood, something that I was not qualified to do, one woman said that her mother and her father said that she couldn't come back home if she did not have the abortion. Another woman said that her husband refused to take on another child and that if she didn't have the abortion, he would divorce her.

I don't know. The stories—some of them were very heart-wrenching, some of them were very personal. But what I would tell them in counseling when I had the opportunity was that if they had been forced to come into this particular abortion facility or they had been coerced into this abortion that they were under no obligation to me, the abortionist or the abortion clinic to have the abortion, and for them to return to the payment window and get a refund for their abortion, except for $100 for their sonogram.

Chairman BROWNBACK. Ms. Cano, you must have talked to a number of women who have had abortions during the past several years. Is there any consistent theme that you hear from them?

Ms. CANO. Yes, I have, and these women—when you see these women, they look like just regular, everyday women going about their lives. But inside of them, if you saw these women, their hearts are broken. You can do anything that looks like a quick, easy fix. That easy fix destroys your life, because you may not realize it right then. These women have cried.

There are women today, people that I know, and close people, that their lives are never the same. There are women my age who are grandmothers. They have never forgotten that day that they took their baby's life. It never goes away. I mean, you can put it in a place in your heart that you don't just cry and scream everyday. It never goes away. It is destroying their souls piece by piece. It is something you can't ever undo.

Dr. EDELIN. Mr. Chairman, may I talk to you about the women that I have also talked to who have had abortions?

Chairman BROWNBACK. Yes, but may I ask you a question first and then if we need to, we will come back to you on that, because again my time is limited. You said in your testimony you also believe that physicians should not be forced to perform abortions. Is that correct?

Dr. EDELIN. That is correct.

Chairman BROWNBACK. So do I take that that is support for a conscience clause type of provision for physicians that if they don't think they should provide it, they shouldn't forced to perform the abortions?

Dr. EDELIN. That is correct.

Chairman BROWNBACK. You also noted in here, and I took particular note of this—you said, "Those of us who perform abortions recognize, as do our patients, that we are not only terminating the pregnancy, but the life of the embryo or fetus which is part of the pregnancy." That is a correct quote from you?

Dr. EDELIN. Yes, sir.

Chairman BROWNBACK. I take it, then, that you believe that you are taking life when you perform an abortion. Is that accurate?

Dr. EDELIN. There is no question that what is contained inside of the uterus is alive. The egg that created and the spermatozoa which created it were also alive. The semantics come in in the words that you use and that you have read between what is alive and what is life. The decision to terminate a pregnancy by a woman is not always, and most often is not an easy decision.

We demean women when we say that they take these decisions lightly and cavalierly. Most women that I know whom I have talked to who have come to the decision to terminate a pregnancy fully understand what they are doing and have considered it. So to put in laws that require waiting periods is an insult to women from my perspective because it says that they have not thought about this before.

The same is true for physicians. We have come down on the side of helping women because we know that women will seek out poorly-trained physicians or non-physicians to terminate their pregnancies when they are so desperate, and they have.

Chairman BROWNBACK. When do you believe that life then begins?

Dr. EDELIN. I think life never ends. I mean, it is a continuum, it is continuum.

Chairman BROWNBACK. I understand, but when did it begin?

Dr. EDELIN. It began with the union of the sperm and the egg. It is living, but Aristotle couldn't answer that question.

Chairman BROWNBACK. But it isn't a live thing?

Dr. EDELIN. It is living, it is living. It has a different genetic make-up. It is living, and if you would rather, sir, pass laws that would protect that over the lives and experiences and health and bodies of women, then that is what you will do in this body, in all your wisdom.

Chairman BROWNBACK. Well, what we are trying to do is get it back to the States, if possible. This is a very serious question. I think you rightly state that it is alive, but you will not state when it is a life, and that, of course, is the issue for us to resolve and that is what we need your thoughtful comment about. It is a life at this point, or even personalize it yourself and ask when did your life begin?

Dr. EDELIN. I know that every woman I have as a patient is alive and is a life. I know that.

Chairman BROWNBACK. When did her life begin?

Dr. EDELIN. We will disagree as to when, quote, unquote, "life begins," and that is the crux of our disagreement.

Chairman BROWNBACK. And I want to know when you believe life begins.

Dr. EDELIN. I believe that the union of the egg and the sperm is alive. When life begins is a question that philosophers and scientists have struggled with much longer than you and I have, and there is no answer to that question and that is the essence of choice. It is not you imposing or anybody imposing your definition of life on somebody else. That is the essence of a democracy.

Chairman BROWNBACK. So even after that child is born, we could define it as not being life?

Dr. EDELIN. Absolutely not, absolutely not.

Chairman BROWNBACK. So at least you have a line there.

Dr. EDELIN. Absolutely not.

Chairman BROWNBACK. So we do have at least a line there.

Senator Feingold.

Senator FEINGOLD. Mr. Chairman, I am hoping we can get on to the next panel. I just have a couple of brief comments to make sure we have a chance to hear from them, or a couple of questions.

Dr. Edelin, I want to just quickly follow up on something Ms. McCorvey said. She was upset about women having to wait before receiving an abortion at the clinic she worked at. Do you have a view about mandatory waiting periods of a day or more that some legislatures have passed?

Dr. EDELIN. Absolutely. I think it is an insult and demeaning to women. I think it implies that women take this decision to terminate a pregnancy without thought, without forethought, that they take it cavalierly, and that is the furthest thing from the truth.

Most women that I know, the hundreds and thousands of women that I have talked to who have come requesting pregnancy terminations or abortions have thought about it, have weighed the circumstances of their lives, have weighed all of the issues and have come to a conclusion, maybe a difficult conclusion, maybe in the eyes of some a tragic conclusion, but have come to a conclusion that they would like to terminate their pregnancy.

But there are lots of other tragedies that we have to deal with. There is nothing more tragic than the woman that I described in my testimony who died simply because she was pregnant and did not want to be. There is nothing more tragic than a child who is born unloved and unwanted and who ends up in the toilet by the prom queen on prom night. There is nothing more tragic than the baby who ends up in the dumpster because it was unloved and unwanted when it was born. That is the tragedy that we have to deal with. It is a full spectrum of tragedies and we can't just isolate on one specific part of the tragedies of reproduction.

Senator FEINGOLD. Finally, I want to give you my time to talk a bit about what you wanted to talk about, which was the women that you have talked to who have had abortions.

Dr. EDELIN. Thank you. The women I have talked to have agonized over the decision. No woman should ever be forced to have an abortion. No woman should ever be denied the right to terminate a pregnancy or have an abortion. Women who decide to continue with their pregnancy—we ought to provide them with the

best prenatal care we can as a country. That would help to reduce infant mortality. That would help to reduce the morbidity of women.

But if a woman decides, for whatever reason she decides, that she wants to terminate her pregnancy, then it is our responsibility as a country and my responsibility as a physician to make sure that those women can make those decisions and have it carried out safely, legally and with dignity.

Senator FEINGOLD. Thank you, Doctor, and thank you, Mr. Chairman.

Chairman BROWNBACK. Thank you.

Senator DeWine.

Senator DEWINE. Thank you, Mr. Chairman.

Ms. McCorvey, you said that abortion is a secret thing. By this do you mean that women are not provided with complete information about it before they choose to have an abortion?

Ms. MCCORVEY. I am sorry, sir. I didn't understand your question.

Senator DEWINE. You said that abortion is a secret thing. Do you mean that women are not provided with enough information about it, and if so, what maybe aren't they told about it?

Ms. MCCORVEY. Well, the four abortions where I worked, it was just like cattle city, is what I would call cattle city. They would just bring them in, sonogram them. Sometimes, the doctors would ask us to go and tell the women in question that they were further along and that they needed more money for their termination. One doctor on one occasion said that a woman had to pay double because she was going through her abortion and she was going to have twins, so it was going to cost her double. But I do think that there should be more pamphlets or education for women besides a 24- or maybe even a 48-hour waiting period.

Senator DEWINE. Do you think if women were shown an ultrasound of their baby, told about its body parts, perhaps maybe even its ability to feel pain, that that might be helpful?

Ms. MCCORVEY. I have often taken instruments when I was counseling women, sir, even leaving a smidgeon of blood on the instruments for a dramatic effect because I really felt in my heart of hearts at the time that they did not want to go through with their abortions, and that is how I would convince them not to go through with their procedure.

Senator DEWINE. Can you describe some of your experience in the abortion clinics, some of the adverse consequences that abortion has had on the women that you have observed?

Ms. MCCORVEY. I don't know. I have seen so much. I have seen young women walk in with teddy bears, clinging to their teddy bears, and we would have to ask them to take the teddy bears outside, put them in their cars, for the simple reason that we were killing children and that the teddy bears were not allowed in the procedure room.

I have seen them come in very happy, very together; "jubilant," I guess, is a good word to say. And then after their procedure they were like plastic dolls, they were like paper dolls. They were just like torn in half. They were regretting it while they were digging their claws into my hands and I was sitting there trying to per-

suade them not to move so their uterus wouldn't be punctured or ruptured. I would ask them to think of the nicest thing that they had ever done or the most fun part of their life. And they would always say, stop, stop. And the abortionist, you know, would just say, oh, tell her to shut up.

Senator DEWINE. Thank you very much.

Ms. MCCORVEY. Yes, sir.

Senator DEWINE. Thank you, Mr. Chairman.

Chairman BROWNBACK. Thank you, Senator DeWine.

I want to thank the panel, as well, for being here. This is a difficult topic. It has embraced our country for some period of time and it has embraced the world. I really want to particularly thank you ladies for coming forward and your testimony. This has got to be a very difficult thing for you to do.

Dr. Edelin, thank you for being here and your passions that you put forward, as well, and the clarity of caring for women, which I think is a very, very important thing to put forward. This country does guarantee from our very founding documents the right to life, and when does that life begin is the central issue of our day.

Thank you all very much for joining us.

We will now call up our second panel: Teresa Collett, Professor of Law, University of St. Thomas Law School; M. Edward Whelan, President of the Ethics and Public Policy Center; R. Alta Charo, Professor of Law and Ethics, University of Wisconsin Law School, in Madison; and Karen O'Connor, Professor of Government at American University.

Thank you all very much for joining us. You have heard a very interesting first panel in front of you. I don't expect you to top that. That would be difficult to do.

Professor Collett, we will start with you and your testimony. We will run a time clock to give you some idea. We will include in the record all of your testimony as if presented. If you choose to summarize, that would be fine. I would like for you to do as much as possible to stay within a five- to seven-minute time frame, if we can do that.

Professor Collett.

STATEMENT OF TERESA STANTON COLLETT, PROFESSOR OF LAW, UNIVERSITY OF ST. THOMAS SCHOOL OF LAW, MINNEAPOLIS, MINNESOTA

Ms. COLLETT. Thank you, Mr. Chairman. My name is Teresa Collett. I am a professor of law at the University of St. Thomas School of Law. I am honored to have been invited to testify this afternoon about the consequences of *Roe* v. *Wade* and *Doe* v. *Bolton*.

My testimony represents my professional knowledge both as a law professor and as a practicing lawyer. I currently serve as the special attorney general for the State of Oklahoma in defense of that State's abortion liability law, as well as their parental notification law, in the Tenth Circuit. I also represent a group of New Hampshire legislators in the United States Supreme Court in a case that is pending before it, *Ayotte* v. *Planned Parenthood*. I also advise groups of State legislators as they try to craft laws that regulate abortion in light of the current confusion that has resulted

from the *Roe* v. *Wade* opinion. I also work with various citizens groups as they try to express their political opinions regarding abortion and the ability to enhance women's and children's lives in the aftermath of *Roe* v. *Wade*.

My opinion that I am expressing today does not represent the university that I am employed by, nor any other organization or person.

Mr. Chairman, Senator Feingold, members of the Subcommittee and other guests, contrary to, I believe, the sincere intentions of the authors and proponents of *Roe* v. *Wade* and *Doe* v. *Bolton*, I believe that those opinions have undermined the well-being of women and children in America, as well as the political fiber of this country.

Throughout this country's history, women have struggled to gain political, social and economic equality. That is perhaps best expressed by the letter of Abigail Adams to John Adams, known as the "remember the ladies letter," in which the wife of John Adams wrote to her husband that he should remember the ladies, lest they foment a rebellion in drafting this country's laws and not hold themselves bound by any laws in which we have no voice or representation.

You might recall it took a great deal of time before the amendment was passed until we were allowed to vote in this country. That doesn't mean we didn't exercise some political influence, however, prior to that. Nonetheless, by 1972, the year before *Roe* v. *Wade* was decided, the simple fact is that women were advancing tremendously.

In fact, according to the United States Census Bureau, women who had completed 4 years or more of college were as likely as men with the same education to be holding professional, technical, administrative or managerial positions. In 1964, Margaret Chase Smith became the first woman in our Nation's history to be nominated for President by a national political party. In 1967, Muriel Seibert became the first woman to own a seat on the New York Stock Exchange, and five short years later Juanita Kreps became the first woman director of that eminent institution.

Women were making great progress in our society and it was not by means of denying our capacity to bear children. Rather than furthering these achievements, while accommodating our unique maternal capacity, our unique gifts as women, *Roe* and *Doe* adopted the sterile male model of society where achievement now demands that women become childless in order to break the glass ceiling. I think it was a huge setback for women.

It is no accident that the early feminists, Susan B. Anthony and Elizabeth Cady Stanton, opposed abortion. Let me just quote Elizabeth Cady Stanton when she said, "When we consider that women are treated as property, it is degrading to women that we should treat our own children as property to be disposed of as we see fit."

So strongly did these women reject abortion that they put the solvency of their own publication, "The Revolution," at risk rather than accept advertisements from abortionists. By their rejection of abortion, these women demanded something far more meaningful and far more radical than what the majority—I might note the all-male majorities—of the *Roe* and *Doe* courts ordered. They de-

manded equality as full women, not as chemically or surgically-altered surrogates of men. The early feminists understood that abortion on demand, not motherhood, posed the real threat to women's rights. The early feminists recognized that abortion was the product not of choice, but of pressure, particularly from men in women's lives all too often.

The current regime of *Roe* v. *Wade* has not changed this sad fact. A 1998 study published by Guttmacher Institute, which we have heard liberally quoted today, a research affiliate of Planned Parenthood, the most common provider of abortion in this country, indicates that relationship problems contribute to the decision to seek abortion by 51 percent of American women.

I quote, "Underlying the general reason are such specific ones as the partner threatens to abandon the woman if she gives birth; the partner or the woman herself refuses to marry to legitimate the birth; that a breakup is imminent for reasons other than the pregnancy; that the pregnancy resulted from an extra-marital relationship; that the husband or partner mistreated the woman because of her pregnancy; or that the husband or partner simply doesn't want the child."

The simple fact is, as in the 19th century, for many women abortion is the man's solution for what he perceives as the woman's problem. So since *Roe*, we have had numerous cases in various State supreme courts in which men have asserted a right to claims of contraceptive fraud or right of equal protection where a woman has gotten pregnant and he says that if equal protection allows the woman to terminate her parental obligation through abortion, surely he has a right to terminate his right to paternal obligation, and she is stuck with the baby alone.

Chairman BROWNBACK. Professor Collett, we have a big panel. If you could, wrap up the testimony as much as possible.

Ms. COLLETT. Certainly.

Fortunately, no court has accepted that to date, but as one of the liberal law professors in the new book *What Roe* Should Have Said notes, why is it that men are left to either celibacy or being stuck with the consequences of pregnancy? *Roe* was wrong. It is not good for women and it is not good for children.

Thank you, Mr. Chairman.

[The prepared statement of Ms. Collett appears as a submission for the record.]

Chairman BROWNBACK. Thank you very much, Professor.

Mr. Whelan.

STATEMENT OF M. EDWARD WHELAN, III, PRESIDENT, ETHICS AND PUBLIC POLICY CENTER, WASHINGTON, D.C.

Mr. WHELAN. Good afternoon, Chairman Brownback, Senator Feingold and Senator DeWine. Thank you very much for inviting me to testify before you and your Subcommittee on this important subject. I am Ed Whelan, the President of the Ethics and Public Policy Center.

Reasonable people of goodwill may come to a variety of conclusions on what abortion policy ought to be in the many diverse States of this great Nation, and there are undoubtedly weighty arguments that can be advanced for a variety of positions. But it is

well past time for all Americans, no matter what their views on abortion, to recognize that the abortion regime imposed by the Supreme Court in *Roe* v. *Wade* should be dismantled and that the issue of abortion should be returned to its rightful place in the democratic political process.

Roe v. *Wade* is a frightening and lousy opinion. It borders on the indefensible. It is a verbal smokescreen. It provides essentially no reasoning in support of its holding. These are not my words. As we have heard, these are the words of numerous liberal scholars and thinkers who strongly support abortion.

But even these criticisms do not adequately explain why we are here today addressing a case that the Supreme Court decided 32 years ago, that it ratified 13 years ago, and that America's cultural elites embrace and celebrate. The broader explanation, I would submit, is two-fold.

First, *Roe* marks the second time in American history that the Supreme Court has blatantly distorted the Constitution to deny American citizens the authority to protect the basic rights of an entire class of human beings. The first time, of course, was the Court's infamous 1857 decision in *Dred Scott*. There, the Court held that the Missouri Compromise, which prohibited slavery in the northern portion of the Louisiana territories, could not constitutionally be applied to persons who brought their slaves into free territory. By its ruling, the Court cast aside the efforts of the people through their representatives to resolve politically and peacefully the greatest moral issue of their age, and it made all the more inevitable the civil war that erupted 4 years later.

Roe is the *Dred Scott* of our age. Like few other Supreme Court cases in our Nation's history, *Roe* is not merely patently wrong, but also fundamentally hostile to core precepts of American government and citizenship. *Roe* is, simply put, a lawless power grab by the Supreme Court, an unconstitutional act of aggression by the Court against the legislative powers of the American people.

Roe prevents all Americans from working together through an ongoing process of peaceful and vigorous persuasion to establish and revise the policies on abortion in our 50 States. *Roe* imposes on all Americans a radical regime of unrestricted abortion for any reason, all the way up to viability, and under the predominant reading of *Roe's* companion case, *Doe* v. *Bolton*, essentially unrestricted even in the period from viability until birth.

Roe fuels endless litigation in which pro-abortion extremists challenge modest abortion-related measures that State legislatures have enacted and are overwhelmingly favored by the public, provisions, for example, seeking to ensure informed consent and parental involvement for minors and barring atrocities like partial birth abortion.

Roe disenfranchises the millions and millions of patriotic American citizens who believe the self-evident truth proclaimed in the Declaration of Independence that all men are created equal and are endowed by their creator with an unalienable right to life warrants significant governmental protection of the lives of unborn human beings. So long as Americans remain Americans—so long, that is, as they remain faithful to the foundational principles of this country—I believe that the American body politic will never accept *Roe*.

The second reason to examine *Roe* is the ongoing confusion that somehow surrounds the decision. Leading political and media figures, deliberately or otherwise, routinely misrepresent and understate the radical nature of the abortion regime that the Court imposed in *Roe*. Conversely, they distort and exaggerate the consequences of reversing *Roe* and of restoring to the American people the power to determine abortion policy in their own States. The more Americans understand *Roe*, the more they recognize that it is illegitimate.

Despite the fact that the abortion issue was being worked out State by State, the Supreme Court in 1973 purported to resolve the abortion issue once and for all and on a nationwide basis in *Roe*. Instead, as Justice Scalia has observed, the Court fanned into life an issue that has inflamed our National politics ever since.

In 1992, the five-Justice majority in *Casey* called on the contending sides on abortion to end their national division by accepting what it implausibly claimed was a common mandate rooted in the Constitution. Thirteen years later, the abortion issues remains as contentious and divisive as ever.

As Justice Scalia suggested in his dissent in *Casey*, Chief Justice Taney surely believed that his *Dred Scott* opinion would resolve once and for all the slavery question. But, Scalia continued, it is no more realistic for us in this case than it was for him in that to think that an issue of the sort they both involved, an issue involving life and death, freedom and subjugation, can be speedily and finally settled by the Supreme Court. Quite to the contrary, by foreclosing all democratic outlet for the deep passions this issues arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs an intensifies the anguish.

As increasing numbers of observers across the political spectrum are coming to recognize, Justice Scalia's observation in *Casey* remains sound. If the American people are going to be permitted to exercise their constitutional authority as citizens, then all Americans, whatever their views on abortion, should recognize that the Supreme Court's unconstitutional power grab on this issue must end, and that the political issue of whether and how to regulate abortions should be returned where the Constitution leaves it, with the people and with the political processes in the States.

Thank you.

[The prepared statement of Mr. Whelan appears as a submission for the record.]

Chairman BROWNBACK. Thank you very much, Mr. Whelan.

Professor Charo.

STATEMENT OF R. ALTA CHARO, PROFESSOR OF LAW AND BIOETHICS, AND ASSOCIATE DEAN FOR RESEARCH AND FACULTY DEVELOPMENT, UNIVERSITY OF WISCONSIN LAW SCHOOL, MADISON, WISCONSIN

Ms. CHARO. Thank you, Chairman Brownback, Senator Feingold, Senator DeWine, for this opportunity to address the Subcommittee. My name is Alta Charo. I am Professor of Law and Bioethics at the

University of Wisconsin, and I am also a member of the board for the Alan Guttmacher Institute. I am very proud to see that its research is being cited by all sides in this debate, which is certainly a testament to the accuracy and comprehensiveness of its work.

Roe v. *Wade*'s broad vision of the right to privacy, in my opinion, is our constitutional bulwark against legislation that could mandate a Chinese-style one-child policy, against governmental eugenics policies that penalize parents who choose to have a child with disabilities, against a state prohibition on home-schooling our children, against a state rule that would forcibly intubate competent but terminally ill patients. It is also our constitutional bulwark against things like state-approved lists of permissible forms of sexual intercourse between husband and wife.

If we reject the core holding of *Roe* v. *Wade* and its predecessor cases and its successor cases—that is, that some activities are too intimate and some family matters too personal to be the subject of governmental intrusion—we also reject any significant limit on the power of the government to dictate not only our personal morality, but also the way we choose to live, to marry and to raise our children.

Roe v. *Wade* has become a case that is absolutely at the core of American jurisprudence. It represents multiple strands of reasoning concerning marital privacy, medical privacy, bodily autonomy, psychological liberty and gender equality, each of which is connected to myriad other cases concerning the rights of parents to rear their children, the right to marry, the right to use contraception, the right to have children, and the right to refuse unwanted medical treatment. Overturning *Roe* would unravel far more than the right to have an abortion.

Many Americans who have never felt they had a personal stake in the abortion debate would suddenly find their own interests at stake and threatened, whether it is the elderly seeking to control their medical treatment, the infertile seeking to use IVF to have a child, the woman seeking to make a decision about genetic testing, the couple heeding public health messages to use a condom to reduce the risk of contracting AIDS, or the unmarried man who, with his partner, is trying to avoid becoming father before he is ready to support a family.

As a legal matter, the right of the government to regulate or even to prohibit reproductive choices depends upon whether we recognize them as the exercise of specially protected personal liberties and whether we recognize that their absence has a sufficiently disparate impact on women's lives that it amounts to a denial of equal protection of the law.

This is why in the 19th century, when abortion was terribly dangerous without the presence of antibiotics, feminists decried abortion, called for its criminalization, because it was unsafe and put medical burdens on women. But with the advent of antibiotics, mainstream feminists as individuals and as organizations all came to advocate abortion rights now that it was safe as a core element of the ability to maintain control over one's life equal to that of men, and also as a core element of the freedom to choose the kind of womanhood one wants to live out in one's life.

Indeed, this issue of equality is at the core of the *Dred Scott* decision, but I believe that the comparison to the *Dred Scott* decision is inapposite here. The *Dred Scott* decision was about stopping efforts to recognize that individuals should not be controlled by masters, should not be raped and used sexually, should not be denied the power to control their lives. I would submit overturning *Roe* v. *Wade* would invite States to treat women just as slaves were treated during the pre-Civil War period.

The earliest reproductive rights cases, such as those concerning forced sterilization, were grounded in a traditional common law concern about bodily integrity. But later cases very specifically came to incorporate concerns about marital privacy and psychological autonomy, a notion of reproductive liberty that embraces a variety of activities that have no physical implications, but are at the core of the right to self-determination, such as the right to marry.

If *Roe* v. *Wade* is overturned, if the right to privacy is narrowed to something as limited as the notion of bodily integrity, many of those privileges that we now take for granted to control the schooling of our children, to control whether we use contraception, to control whether or not we have choice over the timing of our children or the ability to use medical care to ensure their health will all be taken away as constitutional rights and will be sent to the States as a matter of political choice, subject to the vagaries of political opinion.

If the Court reverses *Roe* v. *Wade* and limits its holding on right to privacy to intimate marital relations, many of the rights that we take for granted—the right of the unmarried to use contraception and protection themselves from sexually-transmitted diseases, the right of couples to have access to artificial insemination and IVF that often uses third-party assistance—also would be threatened.

In sum, *Roe* v. *Wade*'s overturning would necessarily reject what has become the culmination of these myriad threads of legal reasoning; that is, a notion of personal privacy and personal liberty that falls not only from substantive due process, but also from the penumbra of other more specifically identified constitutional rights, a realm that is too intimate, too personal, too subject to individual and diverse religious beliefs and moral views to be comfortably subject to the political whims of the electorate without the protection of individual rights to control their futures and without the protections of individual women to assure that they have equal access to the goods of society and that they are the mistresses of their own fate.

Thank you.

[The prepared statement of Ms. Charo appears as a submission for the record.]

Chairman BROWNBACK. Thank you, Professor Charo.

Professor O'Connor.

STATEMENT OF KAREN O'CONNOR, PROFESSOR OF GOVERNMENT, AMERICAN UNIVERSITY, WASHINGTON, D.C.

Ms. O'CONNOR. Thank you. Good afternoon, Mr. Chairman, Senator Feingold, members of the Subcommittee and distinguished guests. My name is Karen O'Connor and I am a Professor of Gov-

ernment at American University and the founder and director of its non-partisan Women in Politics Institute. I am also the author of "No Neutral Ground: Abortion Politics in an Age of Absolute" and over 50 articles and book chapters on how the law affects women and women's rights. The testimony I give today, however, reflects my personal views and not those of my university or any other group. I am honored to be testifying regarding the significant implications of *Roe* v. *Wade* and *Doe* v. *Bolton* for American women and their families.

Abortion regulations were not rooted in any ancient theory or common law. Despite the commonality of abortion, no government attempted to regulate it until 1821, when Connecticut became the first State to criminalize abortion after "quickening." But by 1910, every State in the Union except Kentucky had made abortion a felony.

In the late 1950s, organized interests began to question these statutes. In 1959, for example, the American Law Institute suggested changes in its model penal code to decriminalize abortion in limited circumstances, in the interest of the mother's health, where there was a likelihood of fetal abnormality, or when the pregnancy resulted from rape or incest.

By the early 1970s, 14 States had adopted abortion laws that met those standards. Four States decriminalized abortion for any reason during the early stages of pregnancy. One was New York, which passed its liberalized abortion law in 1970 when I was a high school senior. As such, I got to observe firsthand its impact on my high school class, which was the first one in memory not have a student drop out to marry or to have a baby, to return later, marked figuratively, if not literally, with a scarlet "A" like Hester Prynne.

The fact that abortion was illegal in most States before *Roe* did not mean that women did not obtain them. Instead, the general unavailability of legal abortions meant that only a limited number of women, generally the most affluent women, were able to obtain safe abortions. And the vast majority of women who wanted to terminate a pregnancy were left with but one option: illegal procedures commonly known as back-alley abortions. These illegal abortions, sometimes performed by lay people who do not have the proper training, equipment, methods of anesthesia or sanitation, were extremely dangerous and put women at high risk of incomplete abortion, infection and death.

All of this changed in the early 1970s when the Supreme Court decided *Roe* v. *Wade* and *Doe* v. *Bolton*. In these companion landmark decisions firmly grounded in constitutional law, the Supreme Court invalidated the statutes challenged in both cases, holding that the right of privacy is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. This judicial doctrine has recently been affirmed by the Court. In *Lawrence* v. *Texas*, the Court stated *Roe* recognized the right of a woman to make certain fundamental decisions affecting her destiny, and confirmed once more the protection of liberty under the Due Process Clause has substantive dimension of fundamental significance in defining the rights of a person.

Roe's implications for women were profound and wide-reaching. The most immediate result, of course, was to rescue women from dangerous back-alley abortions and to provide access to safe, legal abortion for women who chose it. *Roe* also marked a new beginning in women's ability to control their own fertility. This led to increased freedom for women in other areas, including education, employment and family life.

However, these basic, fundamental rights of *Roe* have been under attack since the ink was dry on both cases. Within 6 months of *Roe*, 188 anti-abortion bills were introduced in State legislatures. Restrictions such as waiting periods, spousal and parental requirements, and informed consent requirements slowly chipped away at *Roe's* protections, especially those for low-income women.

Battles over abortion continue today and they are waged in the States. In 2004 alone, 714 anti-choice measures were considered and 29 such measures were enacted. Despite the severe restrictions placed on a woman's right to decide whether or not to have an abortion and the ongoing campaign to attack and undermine the *Roe* decision, the central core of *Roe* still remains. American women have a fundamental right to choose to terminate a pregnancy.

What then would happen if *Roe* was overturned? Contrary to assertions that bans on abortion would occur only in a few States and take considerable time to enact, it is probable that many States would enact immediate abortion bans. Ultimately, abortion would likely become legal in a small number of States, but even in such States women's access could be severely restricted. Thus, a woman's right to obtain an abortion would be entirely dependent on the State in which she lived or her ability to travel to another State or another country.

Overruling *Roe* would also signal a rollback of women's status in the United States. *Roe* not only protects her bodily integrity, but also just importantly it protects a woman's right to be responsible for the choices she makes and the options that she chooses. A woman's ability to decide when and if she will have children will ultimately make her a better mother, and if she chooses to become one, it helps ensure that children are brought into families willing and able to care for them.

A woman's ability to control her reproduction ensures she can make medical decisions central to her physical and emotional well-being. This autonomy allows women the ability to make choices we now take for granted—whether and when to marry, whether and when to have children, and whether to pursue educational opportunities or professional careers.

I am 53 years old. I started law school in 1973, the year that the Court decided *Roe* v. *Wade*. Later, I had the honor to work with Margie Pitts Hames, who argued *Doe* v. *Bolton* before the United States Supreme Court, in what proved to be an ultimately unsuccessful challenge to the Hyde amendment.

During those proceedings, 7 months pregnant, in Federal district court in Atlanta, Georgia, I was called a killer of unborn fetuses by the guardian ad litem that had been appointed by the court. To deny women the rights that we have fought so hard for for so many years would put us back to an era where I would not want my

daughter or any other people in the generations that came after me to have to endure.

Thank you very much for your attention and the opportunity to speak to you today.

[The prepared statement of Ms. O'Connor appears as a submission for the record.]

Chairman BROWNBACK. Thank you all very much. We do have a vote on right now. If the panelists can remain, we would appreciate the chance to put the Subcommittee in recess for a period of time and then come for questions. If you can't, I am sure I understand, but we would probably need about ten minutes, I am guessing, for a recess to go over and vote and be back. So if you can hold, we would certainly appreciate that.

The Subcommittee will be in recess for approximately—it will probably be 15 minutes back and forth.

[The Subcommittee stood in recess from 3:44 p.m. to 4:01 p.m.]

Chairman BROWNBACK. We will call the hearing back to order. My apologies to all for the vote, but we will proceed now back with the hearing. I understand Senator Feingold will be coming back shortly and what I will do is proceed with a round of questions and then as members come in, we will add them into the queue on the questioning. I thank all the witnesses for their presentations.

Mr. Whelan, I want to particularly start out with you because there has been a lot of back-and-forth of what happens if *Roe* is overturned. We have heard testimony that it unravels a whole series of issues. There are others that would contend another way. I would particularly appreciate your thoughts of what happens if *Roe* v. *Wade* is overturned.

Mr. WHELAN. Thank you, Senator. Well, first, I think the contention that the overturning of *Roe* would have either any necessary or foreseeable effect on anything beyond abortion is far-fetched. As I suggest in my testimony, *Roe* could readily be overturned on the basis that, like *Dred Scott*, it and *Dred Scott* are unique as cases in which the Supreme Court has distorted the Constitution to deny American citizens the authority to protect the basic rights of an entire class of human beings. A reversal on that basis, recognizing that issues like this belong in the democratic political process, would have zero impact on any of the parade of horribles that have been trotted out.

I do want to address, as well, briefly the parades of horribles that Professor Charo developed because I think they are not only unfounded, but it is really bizarre.

First, the notion that *Roe* is essential to protect against legislation mandating a Chinese-style one-child policy. A culture of life is the best defense against a Chinese-style one-child policy, and it is, I think, particularly telling that abortion groups have been complicit in working with the Chinese government and seem not particularly to care or to be promoting that one-child policy.

So I don't think that those who devalue the lives of unborn human beings can plausibly maintain that *Roe* is needed in order to prevent further devaluation of those lives. If anything, the pretense that the unborn human being is some sort of lump or some living or live thing that is not human would provide exactly the

basis for coercive abortion. After all, if it is just a lump, why not destroy it?

So, likewise, with the second example by Professor Charo about governmental eugenics policies that penalize parents who choose to have a child with disabilities, what the *Roe* regime has led to is the devaluation of the lives of the disabled, very often a search-and-destroy mission that goes on in utero, the increasingly widespread view that somehow the lives of the disabled don't have the same dignity as the lives of the rest of us. So, again, it is precisely the maintenance of *Roe* that is going to encourage the further devaluation of the lives of the disabled.

I could go on, but the basic point is that one can readily distinguish *Roe* from any of the other examples that have been trotted out and there is no reason to be concerned that overturning *Roe* and restoring this issue to democratic process is going to have the consequences that have been outlined. I think—

Chairman BROWNBACK. I want to be able to get in some other questions here.

Professor Collett, as we look overall at this situation and what has taken place to date, you heard a statement from myself and a statement from Senator Sessions of the number of legal scholars on the left who think that *Roe* was poorly-decided law.

Is there a coming together just on the issue of the constitutional basis of *Roe* that this was poorly decided as a constitutional case?

Ms. Collett. I think there is a broad consensus among legal scholars that the legal analysis employed by the *Roe* court is not a paradigm of legal analysis. In fact, that is the basis of a new book that is coming out, *What Roe* Should Have Said. It is widely accepted that *Roe* is not defensible. That was the premise of the Justices in *Planned Parenthood* v. *Casey*. They themselves accept that the legal reasoning is not defensible. They simply say that stare decisis and the fact that people have ordered their lives around its holding is such that they are going to maintain it, regardless of whether they themselves would have voted for its outcome or not at that time.

Chairman BROWNBACK. So even if it is poorly decided on a constitutional basis, regardless of your opinion on the right of choice or right to life, maintain it because people have now ordered their lives around it and that is the way it should be. Is that—

Ms. COLLETT. That was the holding of the three Justices. It is interesting to note that *Planned Parenthood* v. *Casey*, of course, could not command a majority of Justices to explain to the United States why they should continue to make abortion a constitutional right and therefore deprive people of what I would say is our most important individual right, at least collectively, which is the right of political self-governance.

Chairman BROWNBACK. Professor O'Connor, if I could ask you on this issue, you have heard the quotes, and I am sure you are very familiar with them, from Justice Ginsburg, several that I quoted of scholars from the left, generally viewed as being more liberal in their orientation on constitutional law, that *Roe* was poorly decided.

I understand your viewpoint of what this does to women in the future and your perspective of what you put forward in your testi-

mony, and I appreciate your putting it forward that way. But as a matter of constitutional law and its decision basis on that, doesn't it strike you that there is now more coming together that this is poorly decided as a constitutional basis, because these are opinions generally expressed by people that would be considering themselves pro-choice?

Ms. O'CONNOR. First, Senator Brownback, with all due respect, I don't know if I—in fact, I actually do not agree with you that there is a legal consensus that *Roe* v. *Wade* was decided and is bad law. I would like to call to your attention that all of the liberal scholars that you noted, with the exception of Justice Ginsburg, are male scholars, number one, and we are talking about a procedure that affects 51 percent of our population.

Justice Ginsburg also, in the excerpt that you mentioned from her Madison lecture, was talking about perhaps that there might have been another way to bring this case. At the time, Justice Ginsburg, I believe, was reflecting on the fact that she herself, as head of the Women's Rights Project at the American Civil Liberties Union, was also bringing a series of test cases trying to get pregnancy covered under the Equal Protection Clause.

So to her, it was a situation that it was something that discriminated against women and was something basically—whatever your legal rationale was, it was something that had to be remedied on the national level because we had such a patchwork of State laws.

I would also like to sort of mention that when we talk about going back to the States and problems that we have with the way cases are decided, many people for years have been concerned with *Brown* v. *Board of Education's* reliance in footnote 11 on statistical information to ground a constitutional decision. Yet, I doubt anyone in this room or in this building would say that *Brown* v. *Board of Education* should not be good law.

So I do respectfully disagree with you, and I think that there are legal scholars on both sides of the issue who either approve of how *Roe* v. *Wade* was decided or disapprove it, and oftentimes it is based on how they believe the outcome of the case should be.

Chairman BROWNBACK. But you wouldn't suggest that because these are male scholars that that would shade their view of the Constitution, would you?

Ms. O'CONNOR. I think we bring to our interpretations of everything some of our personal biases, and I think that this issue is one that is oftentimes much more difficult for women to grapple with than it is for men. And I think that women scholars have those same kinds of situations when they are looking at these cases because they have oftentimes been in the position of having to make that decision whether or not to have an abortion, and looking to our Constitution as a source to protect those vital rights.

Chairman BROWNBACK. So you do believe it would shade your view of the Constitution whether you are a male or a female scholar?

Ms. O'CONNOR. At times, I think it does, just like our socio-economic status and our race can affect how we interpret the Constitution. I don't think we would have the detailed kind of hearings that this Committee has on potential Justices and what they bring

to cases if we were to ignore that how we approach and interpret the Constitution is based on a variety of different sources.

Chairman BROWNBACK. It seems to me strange that you would view the Constitution one way or the other, but I will let that go.

My colleague has returned. I do want to ask on a second round each of you—and I would just like you to think of this ahead of time—whether or not the Constitution guarantees a right to life, and if so, when does that attach. I would like to ask each of you that on another round.

Senator Feingold.

Senator FEINGOLD. Thank you, Mr. Chairman.

Professor Charo, I understand that Mr. Whelan was critical of your testimony concerning what could happen if *Roe* was overturned. Would you like to respond?

Ms. CHARO. Thank you very much, Senator Feingold. Yes, I would because I think actually this is a very important conversation about the scale of activities that are implicated by the doctrines in *Roe* and its successor cases.

Mr. Whelan suggested that the real dilemma here is that, as he puts it, just like in the *Dred Scott* case *Roe* essentially took away the political power to protect an entire class of persons, I think was the phrase. But to give back the power to protect that class of persons is, in fact, to say that we must recognize the embryo as a 14th Amendment person, which was specifically rejected in *Pennsylvania* v. *Casey*.

Roe v. *Wade*, remember, did not say that the State cannot have an interest in developing life. It very clearly said, however, as did *Pennsylvania* v. *Casey*, that that interest cannot rise to the level of declaring the embryo a 14th Amendment person, which would function to give it rights that are equal to those of live-born women. Such a phenomenon would trigger things like a duty to care and rescue for embryos akin to what we have for our children, which would mean, for example, IVF really would no longer be acceptable because of the way it is performed with the certain knowledge it will produce more embryos than can ever be used, medically speaking.

It would result in a natural conclusion that virtually all hormonal forms of contraception and even the rhythm method might be unacceptable because they function sometimes to prevent conception, but at other times to prevent a fertilized egg from properly implanting in the uterine wall. In other words, to recognize embryos as 14th Amendment persons, which would be to protect that class of persons, would create an untenable situation.

Last, and very briefly, when listing my absurd parade of horribles, which were used as examples not of what the body politic would do today, but what it could in theory do at other times, mention was made that it is abortion itself that is most discriminatory toward the disabled. But I would note that that is historical because, of course, abortion was criminalized virtually in the entire United States in the 1920s and 1930s, which, of course, was the absolute height of the excesses of the American eugenics movement. We are capable of cruelty and barbarism whether abortion is legal or not.

Senator FEINGOLD. Thank you, Professor.

Professor Collett, your testimony—

Mr. WHELAN. Senator, I have been misquoted. May I respond?

Senator FEINGOLD. Excuse me. I am going to have to use my time and I am hoping to give you that opportunity. I am sure Senator Brownback will, but I want to make sure I get these questions out.

Professor Collett, your testimony indicated that you were concerned about an alleged causal effect between not carrying a pregnancy to term and breast cancer. I am far from an expert on this, but I note that both the most comprehensive and most recent studies conducted to date on this issue which were published in the New England Journal of Medicine and Epidemiology, respectively, found no causal link between not carrying a pregnancy to term and breast cancer. On the other hand, we know that before *Roe*, thousands of women in this country died or suffered terrible injuries each year as a result of botched, illegal abortions.

Given the fact that so many women were willing to risk their lives to seek abortions before *Roe*, don't you think it is likely that women would continue to seek abortion services even if they were outlawed? You indicate, of course, that you are concerned about women's health. So are you at all troubled by the grave health risks women would likely face if illegal and potentially unsafe methods were their only option if they choose to terminate a pregnancy?

Ms. COLLETT. Actually, Senator Feingold, I believe there is a new European study on the connection between breast cancer and abortion that postdates the New England and JAMA study that finds—it is a meta study that finds, again, that there is a connection. And the majority of studies that have looked at the connection do find that there is a connection between the two, as well as the largest study, which is the World Health Organization study that I cite and quote in my testimony that looked at over 250,000 women that found a connection.

So while there is a dispute, it is also true that many of the American organizations failed to find a connection between smoking and lung cancer because of the great contribution that the tobacco industry made to some of those organizations initially. So I would suggest that there may be a problem with the connection between the abortion industry and some of those who are doing these studies in the American journals. That has been noted by some of the European scientists.

Senator FEINGOLD. I accept the fact that there are other studies. I have indicated studies, but on to my question. Are you at all concerned about the effects on women's health if abortion is made illegal?

Ms. COLLETT. I am concerned that, of course, there will be some people that will break the law. But anytime we make something illegal, there will be people that break the law. The question is—

Senator FEINGOLD. So it is sort of a tough luck situation for them if they feel that—

Ms. COLLETT. No, Senator. May I finish my sentence?

Senator FEINGOLD. Sure.

Ms. COLLETT. Thank you, Senator. The question is whether or not States will make abortion illegal. I am not confident that, in

fact, all abortions will be illegal, based on the surveys that we look at. In fact, a majority of voters will be women in this country and if, as in your opening statement, a majority of voters are in favor of abortion, if you return it to the States, then we can anticipate it won't be outlawed.

Senator FEINGOLD. Well, I have a feeling that some States will outlaw it. I am asking you in those States whether you are at all concerned about the grave health risks for women who choose to have an abortion even if it is illegal.

Ms. COLLETT. I am persuaded there are health risks that are attendant to abortion, also, Senator.

Senator FEINGOLD. I am going to take that as a complete nonanswer because I asked you specifically whether you are concerned about the health risks to those who choose to take the illegal act of having an abortion.

Professor O'Connor, I regret that I missed your testimony because of a vote. Would you like to respond to this discussion about the health risks for women should abortion be made illegal?

Ms. O'CONNOR. Senator, I am very concerned about health risks and all other kinds of risks to American women if we go back to an age before 1973. As I said earlier, I am one of the youngest people to grow up in an era where abortion was still something that you could not get, and I know young women who had to go away, have babies under sort of the cover of night, if you will. Many of them returned, had what were called the back-alley, botched abortions and were never able to have children.

If one of our concerns here at this Subcommittee is the life and prosperity of children, we are taking away from some women by making abortion illegal and forcing them into back-alley situations—they might indeed have such horrible medical consequences; as Dr. Edelin even pointed out earlier today, death, but also having to have hysterectomies and things such that.

So just the physical nature of having to secure an illegal abortion, let alone the mental anguish—we have talked here a lot about mental anguish, but the mental anguish of a woman who seeks to terminate a pregnancy, who must do so under stealth, under unsafe conditions, is something that I find absolutely abhorrent.

Senator FEINGOLD. Professor Collett actually started us on this road because she was speculating a bit about what would happen if States would outlaw abortion. I am wondering if you would elaborate on what you think would happen on a State-by-State basis. Do you have a sense of how many States there are where abortion services would probably be outlawed and sort of a thought about the geographic distribution of those States? What would be the situation a year after *Roe* is overturned, let's say, if it is overturned in terms of the availability of abortion services in the country?

Ms. O'CONNOR. Well, if we take *Casey* as any indication, right after the Justices sort of invited the States to enact legislation, we did have several State legislatures come together to convene in order to pass various kinds of abortion restrictions. So I would expect those States, of course, to take the lead.

But we also have four States right now—Alabama, Delaware, Massachusetts and Wisconsin—that actually have bans on abortion

in their State law, but they have never been declared to be unconstitutional. So no offense, but right away we are starting with you all.

Senator FEINGOLD. No offense taken.

Ms. O'CONNOR. Exactly. So you have four States right now where women will not be able to travel. We also have the additional problem even now that in approximately 90 percent of the counties in the United States, there are no abortion providers right now.

So if you couple the fact that even in States where abortion is legal, it is oftentimes very difficult to procure one, if you happen to live geographically in an area where it is going to take you hours to drive or to fly to try to get someplace that has abortions, and then we don't know if States are going to allow people to have abortions who are non-residents, I do not have a crystal ball, but I am not at all optimistic of the ability of many people in many sections of this country to be able to get access to a reasonable-cost abortion within, let's say, a day's drive.

Senator FEINGOLD. Mr. Chairman, thank you for letting me go over my time.

Chairman BROWNBACK. I am happy to have you do that.

Let me pose the question I asked you at the end of my questions. Does the Constitution, because that is really what I would like to get from you—we have had a fair amount of opinion on impact, but I do want to know from the Constitution and your perspective as lawyers, does the Constitution guarantee a right to life and when does that right to life attach.

Professor Collett?

Ms. COLLETT. It has been, I believe, accepted historically that the most fundamental function of government is to protect the individual against unwarranted aggression of others. If government cannot serve that function, I fail to see what other function it need serve that is superior to that.

It is nice that we have a post office, it is nice that we have other services, but if you cannot protect the lives of the innocent, it strikes me that there is no other function that is more foundational. And I think the founding documents of our country anticipated that being the fundamental function of government.

Chairman BROWNBACK. When does that right attach?

Ms. COLLETT. I believe the duty of government attaches when personhood attaches.

Chairman BROWNBACK. And when does that occur?

Ms. COLLETT. That is a more complex constitutional question. At the time the 14th Amendment was enacted, a vast majority of States that were in existence at that time outlawed abortion. And so there is an argument that constitutional personhood exists then, which is what Professor Charo's argument is premised upon. If that is so, then *Roe* v. *Wade* would say that you have to constitutionally protect these people and therefore abortion would constitutionally be outlawed. I believe that it is left to the political judgment of the individuals, and therefore that is why each State can make its individual judgment at this point in time.

Chairman BROWNBACK. Mr. Whelan.

Mr. WHELAN. Does the Constitution protect a right to life? The answer to that is yes in at least two respects. First, both the 5th

and the 14th Amendments provide that government—in one case the Federal Government, in the other case the States—shall not deprive a person of life without due process of law. The second way that the Constitution protects human life is to enable the people, through the democratic processes, to provide whatever additional protections they see fit.

Is an unborn human being a person within the meaning of the 14th Amendment? No. I believe that that is clear. Professor Charo, in attempting to refute my argument, misquoted exactly what I had said and built her entire new parade of horribles on her misquotation. I do not believe that an unborn human being is a person for purposes of the 14th Amendment.

I would add that the evolving, living Constitution argument for personhood for the unborn human being is far, far stronger than the arguments that the Court made in *Roe*. That said, I believe both arguments fail.

Chairman BROWNBACK. Professor Charo.

Ms. CHARO. I think this is related to your earlier dialogue with Dr. Edelin about the meaning of life because there is—

Chairman BROWNBACK. I am just asking as a lawyer; just tell me as a lawyer, if you would, on this.

Ms. CHARO. I am going to tell you as a lawyer, but I think it is connected to how one arrives at the question of personhood and its meaning in the Constitution, because there is a difference between purely biological life and life that is morally and legally significant in a way that requires protection, including a so-called right to life. That is why asking when life begins doesn't necessarily answer the question of when the Constitution grants a right to life to that entity. The two questions are, in fact, distinct.

In my view, as in the view of the two others who have already spoken, it is quite clear that the Constitution grants a right to life to persons; that "persons" was understood at the time that that provision was written and has been understood since then to refer to live-born human beings, interestingly also to corporations, although the "right to life" phrase does not apply to them particularly and in no way was ever understood to apply to forms of human life prior to birth.

In the abortion decisions, the Supreme Court has hinted that the state's interests might rise almost to the level of personhood after viability, even though inside the womb there is at least the theoretical possibility of separate existence of a separate citizen. But they have never completely worked through some of the dilemmas in that particular form of reasoning.

In this sense, I think that it is appropriate, as the Court has stated, to conclude that the States are free to say that they have an interest in developing forms of life. They can say that they would like to promote the choice to continue pregnancies, but they cannot give rights to developing forms of life that will trump the rights of those who are undisputedly protected by the 14th Amendment; that is, those who have already been born.

Chairman BROWNBACK. Professor O'Connor.

Ms. O'CONNOR. I don't think that I can add very much to Professor Charo's eloquent statement just a second ago, but I would say that this is a decision when we get beyond actual birth—and

I would say, just like our other speakers did, that rights attach at birth and not before that. To go into anything else, I think, requires all of us to have such moral, religious and ethical considerations and I think that our Framers tried to make certain that religion was not involved in making of many of our pieces of legislation.

This particular decision has become one that is so fraught with religious and moral overtones that I think it is very difficult for any of us in this room to agree on any exact definition of your question. I think that the American public has been shown to be all over the place on this particular question, but one that in terms of the constitutional protections of life, I would say they begin when a person is born.

Chairman BROWNBACK. Mr. Whelan.

Mr. WHELAN. Senator, I have again been misquoted. I certainly did not say that rights generally attach only after birth. I was addressing the question of merely whether an unborn human being is a person for purposes of 14th Amendment and 5th Amendment protections and those attached rights.

It is indisputable as a matter of biology that the unborn human being is a living, developing member of the species Homo sapiens. Our Judeo-Christian moral tradition has long recognized rights that inhere in that status, exactly as our foundational documents recognize that. And it is not only proper, but I think incumbent upon us as citizens to recognize the right to life of the unborn.

Chairman BROWNBACK. Senator Feingold, do you have any further questions?

Senator FEINGOLD. No, thank you, Mr. Chairman.

Chairman BROWNBACK. I want to thank you all for being here. To me, this last round of questions is right at the heart of it because we have so many issues that are now in front of us about just when is—there is no question, I guess, about when it is alive, I take it anyway from the number of hearings that I have had. The question is when is it a life, and that goes to any number of different issues that we are debating in this country today.

Biologically, I think the answer is very clear. The legal definition is not, as a number of people have testified at different times. Yet, it goes into our debates on embryonic stem cells, on cloning, on partial birth abortion, on whether it is one victim or two when a woman who is pregnant is killed. It is something I think we have to resolve and we have to work on aggressively as a country because it is so central to our thought of the day, our dealing with what it is to be humanity.

I held some hearings last year on Downs syndrome children. It was just astounding to me that we abort nearly 80 to 90 percent. We put in a little, simple bill that Senator Kennedy has joined me on to try to get that number down. But people looking at life as being, yes, okay, it is alive, but we can kind of do what we want to here at this point in time, and then you have 80 to 90 percent that are aborted, to me is just a tragic level of what is taking place.

I think in the political debate we are at a point now of people saying, well, we do have too many abortions in America. I know if Senator Feingold would agree with that, but a number of people

agree we have got too many—40 million. Some may say that figure is too high or it is inaccurate, but it is a lot and it is way too many.

We are getting in a period of time where we can genetically figure out what this child is like and put a lot of selection in the process. Is that what we want to do? It is, in essence, what we have done on Downs syndrome children, where we have had that test and then a number of people say, well, let's terminate this child that is not perfect in somebody's determination. And then it comes to the very issue of do you have subjective standards for life or is human life sacred, per se. I think that is what we are all wrestling with.

I agree with Dr. Edelin in his comments about the tragedy of a child in a dumpster after it is born. I guess I would extend it to before the child is born, and if he is aborted and ends up in a dumpster, that is a tragedy, too, of an equal nature.

So thank you very much for helping us to try to look through that issue. We have a set of legal constraints that are developed. We have a heart and moral sense within each of us that continues to yearn to do everything we can for the least and the downtrodden within this society. I also want to respect and highly regard those who stand four-square and boldly and aggressively for a woman's right to choose and that position. I know it is heartfelt, I know it is honestly felt. I respect that as well. I hope you will help us continue to figure out in the debate just how we do address it and move forward.

Senator FEINGOLD. Senator Feingold, do you have a closing statement?

Senator FEINGOLD. No, Mr. Chairman.

Chairman BROWNBACK. Thank you all. The record will be left open for the requisite number of days, 7 days, for Senators to submit materials or questions to the witnesses. I do want to thank you all for your attendance and I want to thank the audience for its quietness and being here on a touchy subject.

The hearing is adjourned.

[Whereupon, at 4:33 p.m., the Subcommittee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Written Questions Submitted by
U.S. Senator Russell D. Feingold

Senate Judiciary Subcommittee
on the Constitution, Civil Rights & Property Rights
Hearing on "The Consequences of *Roe v. Wade* and *Doe v. Bolton*"
Thursday, June 23, 2005

Questions for Professor O'Connor:

1. Ms. Cano testified that she was "used" by her lawyer in the *Doe v. Bolton* case. As someone who worked with Margie Pitts Hames, did you ever discuss the *Doe* case with her? What is your understanding of the process by which Ms. Cano became a plaintiff in *Doe v. Bolton*?

2. The CDC estimates there were 40 deaths from illegal abortion in 1972. Do you think this is an accurate number?

3. Ms. McCorvey testified that clinics operate like "cattle city," and that women are coerced into having abortions. Based on your experience working with an abortion provider, what is your understanding of how abortion providers and clinics treat patients?

4. Professor Collett testified that the *Roe* and *Doe* decisions were a "huge setback for women." Do you agree?

5. Mr. Whelan stated, "*Roe* is the *Dred Scott* of our age." Do you agree with this statement?

6. Professor Collett stated, "if you return [the abortion decision] to the States, then we can anticipate [abortion] won't be outlawed." Do you agree with this statement? What steps are states likely to take if *Roe* were overturned?

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Responses to Senator Russell D. Feingold
Senate Judiciary Subcommittee on the Constitution and Civil Rights & Property Rights
Hearing on the Consequences of *Roe* v. *Wade* and *Doe* v. *Bolton*
June 23, 2005

From Professor Karen O'Connor, J.D/PhD, American University

1. As a young attorney in Georgia, and a professor at Emory University, I had the honor to work with Margie Pitts Hames, the lawyer who argued *Doe* v. *Bolton.* Not only did I interview her extensively for my dissertation, which was subsequently published as *Women's Organizations' Use of the Courts* (1980), about her participation in *Doe*, as we were preparing to test the constitutionality of the Hyde Amendment in federal district court in 1978-1979, she offered many reminiscences about her participation in *Doe*. Since Ms. Hames met a tragic death in an automobile accident several years ago, I feel that I must set the record straight about this dedicated lawyer.

   It is my understanding that Ms. Cano came to her after she had contacted Legal Aid lawyers about a divorce and her concern over what to do as she was pregnant and did not want another child. Most of my conversations with Ms. Hames about the case centered around the legal arguments made in the case as well as the diverse groups of plaintiffs that she had assembled to challenge the law, including a married couple who feared a pregnancy because their physician had counseled them that one might threaten the woman's life, and the doctors and nurses who also were parties to the challenge. I vividly recall (and this was confirmed when I contacted a nurse/plaintiff in *Doe*) that Sandra Cano, who Ms. Hames never spoke of as other than Mary Doe, was quite poor, and in order to have her presentable in Court and available if the judge should want to question her, Ms. Hames even took her to Macy's to buy her a dress out of her own funds. Ms. Cano, thus, was in the courthouse when *Doe* was first argued and there is no question in my mind that she was fully informed of the subject and import of the case.

   In working with Ms. Hames on the Hyde Amendment challenge we followed stringent rules of ethics as we sought clients to allow us to challenge that law. All were counseled, informed that their participation might not lead to a state funded abortion, and of our efforts to maintain their confidentiality. In Ms. Cano's case, Ms. Hames took her real identity to her grave.

2. The CDC estimate about illegal abortions in 1972 appears very low to me. Although abortions were legal in some states at that time, women in most states faced nearly impossible laws and regulations banning or limiting abortion. Moreover, many women who died of abortion at that time were not necessarily listed as dying from abortion by physicians sensitive to the potential embarrassment of the women's families.

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3. Ms. McCorvey's description of clinics that operated like "cattle city" is a surprising one. First, if this was her belief, one wonders why she continued to work so long at a clinic. If you notice, during Ms. McCorvey's testimony, she noted that she was always in the room when the physician was performing the abortion. It was my experience that every client had a trained advocate, "a hand holder" if you will, to help and comfort her during the procedure. I have never observed the kind of treatment Ms. McCorvey complained of. In fact, at the clinic I was associated with, it would have been her duty to report any physician impatience or rudeness immediately. Our clinic's first interest was the safety and comfortability of the patient, as it should be. I know of no other clinics that did not share this philosophy.

   As to Ms. McCorvey's complaint that some women were required to wait long hours in the clinic, physicians, as we all know, regularly run late, often because they are on rounds that take more time than anticipated, or they are spending extra time with patients with problems. While I know of no clinic that made "lateness" a "practice," I know of no physician in any area of specialty, who has not, on occasions, run late.

   I must also note the irony in Ms. McCorvey's complaint that patients had to wait up to three hours. Under laws favored by the Justice Foundation, which is now, it appears representing Ms. McCorvey, it and other anti-choice groups favor 24 or even 48 hour waiting requirements for women to procure an abortion. Thus, a three hours wait, which should never be the norm, certainly is preferable to a compulsory 24 or 48 hour waiting period now common in some states --with the costs and mental anguish, which Ms. McCorvey seems to deplore – a regular occurrence. Thus, her concerns seem quite disingenuous.

4. I have absolutely no idea how Professor Collett came to the conclusion that *Roe* and *Doe* were a "huge setback for women." *Roe* and *Doe* allowed women who found themselves faced with unintended pregnancies the freedom to control their reproduction allowing them to finish their educations, pursue their careers, have happier and more stable marriages, and better provide for children they felt they could adequately care for in a loving home.

   I also must comment on Professor Collett's references to Elizabeth Cady Stanton and Susan B. Anthony's professed dislike of abortion. At the time they made those statements, abortion produced tremendous risks for women since any surgical procedures had high rates of infection and death. Thus, it is not surprising that when these suffragists weighed the options available to women, they came down on the side of women's health, something that pro-choice activists have been advocating since the 1960s when it became clear that abortions were safer for women than carrying pregnancies to term.

5. I strongly disagree with Mr. Whelan's statement that "*Roe* is the Dred Scott of our age." In fact, I worry that the next U.S. Supreme Court case may produce a Dred

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Scott-like case denying women across America their basic constitutional rights to privacy and bodily integrity. Dred Scott classified an entire race of people as undeserving of basic constitutional rights. A case overruling *Roe* and *Doe* would do the same to women in most states in America. And, a constitutional amendment barring abortion would not only make women second class citizens, it could also threaten their access to contraception further relegating them to second class "citizenship," an argument that I thought had largely been settled in favor of equality for women in most spheres.

5. Professor Collett's statement, "If you return [the abortion decision] to the states, then we can anticipate [abortion] won't be outlawed," is false. Currently several states have laws outlawing abortion already on their statute books that would become immediately enforceable. Others, especially ones that already have attempted to limit abortion in a variety of ways, are likely to follow suit quite quickly leaving, at first, a complex continuum of laws from states out rightly banning abortion to a few states that might allow abortions in some circumstances. I fully expect that Republican controlled state houses would rush to outlaw or drastically limit women's access to safe and legal abortions. Thus, abortions might be available for women wealthy enough to travel to the few states where abortion might still be legal. And even for those women, it would be at tremendous financial, personal and emotional risk.

   One need only look to the rush that several states took after the U.S. Supreme Court seemed to invite the states to limit abortions in the *Webster* case. This was only an invitation or indication that further abortion restrictions might be upheld by the Court. A decision from the U.S. Supreme Court sending the decision back to the states would result in political turmoil, jeopardize gains made by women in the last 30 years, and result in jeopardy to the physical and mental health of women in America.

Thank you for the opportunity to extend my remarks.

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Professor Charo
Senate Judiciary Committee
Subcommittee on the Constitution, Civil Rights and Property Rights
on
"The Consequences of Roe v. Wade and Doe v. Bolton"

1. Is the debate about abortion rights entirely a debate about the moral and legal status of embryos and fetuses?

Response:

No it is not. It is also, and perhaps primarily, a debate about our moral evaluation of women and women's behavior.

Most opponents of abortion rights nonetheless support an exception where pregnancy ensues following rape. Supporting such an exception represents an implicit argument that the relevant variable is not the developmental status of the embryo or fetus, but rather whether or not the pregnant woman "innocently" became pregnant, that is, that she whether or not she is "at fault" for becoming pregnant. In other words, when women become pregant following consensual sex (whether or not they used contraception to try to avoid pregnancy) they are charged with being at fault for having caused the pregnancy, as well as with being somewhat unnatural women for not wishing to carry the pregnancy to term and fullfil what another witness, Professor Collette, characterized as their natural role
as women.

We should recognize, therefor e, that widespread support for a rape exception in abortion bans also signals that much of the underlying support for the general abortion ban lies in the general disapproval of women who have sex and who reject their "natural" destiny as mothers.

For this reason, the abortion debate is best viewed through a lens of gender equality and the right of American women to choose which kind of womanhood they prefer, rather than solely as a question of embyo and fetal rights.

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SUBMISSIONS FOR THE RECORD

OPENING STATEMENT OF SENATOR SAM BROWNBACK CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND PROPERTY RIGHTS

SUBCOMMITTEE HEARING: "THE CONSEQUENCES OF ROE V. WADE AND DOE V. BOLTON"

JUNE 23, 2005

I am pleased to call to order this Constitution Subcommittee hearing on the consequences of Roe v. Wade and Doe v. Bolton, and thank Ranking Member Feingold, the witnesses, and those in attendance for their participation.

America was founded upon the "self-evident truth" that all humans are endowed with the unalienable right to life.

Yet the wisdom that flowed in 1776 from Jefferson's pen was rejected almost two centuries later, when a divided Supreme Court found a constitutional right to abortion. In Roe v. Wade, the Court shaped this right around the three trimesters of pregnancy, even

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prohibiting the states from regulating post-viability abortions if the "health" of the mother was involved. In Doe v. Bolton, the Court expounded on the meaning of "health," describing the term so broadly that several scholars believe this exception to state authority to regulate abortion actually is the rule.

In the years since Roe v. Wade and Doe v. Bolton were decided, it is estimated that around 40 million abortions have taken place in the United States. The legally-sanctioned extinguishing of these millions of innocent lives is a gross injustice in itself.

Not long after the Supreme Court handed down Roe and Doe, former Supreme Court Justice Harry Blackmun, the author of the those opinions, himself cast in doubt the wisdom of the Supreme Court's sudden and decisive role in the abortion debate.

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For instance, in 1978, as the Supreme Court was considering yet another abortion-related case from a lower court, Justice Blackmun noted in private correspondence, "More a[bortion]. I grow weary of these. . . . [I] wish we had not taken the case."[1]

Justice Blackmun's surprisingly candid private sentiments match the unsurprising and overwhelming public criticism that the Supreme Court's abortion jurisprudence has inspired. The contentious debate since 1973 over the culture of life has proven that the American people, the democratic process, and ultimately even the federal judiciary have been ill-served by the Supreme Court's breathtaking intervention into, and circumvention of, the public debate about abortion.

What is striking about the criticism of these decisions is that it has come from across the political spectrum. Indeed, the

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[1] Quoted in David J. Garrow, "The Brains Behind Blackmun," *Legal Affairs* (May-June 2005), available at http://www.legalaffairs.org/issues/May-June-2005/feature_garrow_mayjun05.msp.

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Supreme Court decisions have been widely condemned by both the right and the left.

Liberal legal scholars in particular have attacked the abortion decisions' utter lack of pedigree in either constitutional text or American tradition. For instance:

- John Hart Ely, one of the leading constitutional scholars of his generation, stated that Roe v. Wade "is bad because it is bad constitutional law, or rather because it is not constitutional law and gives almost no sense of an obligation to try to be."

- One of the most thorough explanations of the constitutional quicksand upon which the right to an abortion rested after Roe comes from Edward Lazarus, himself a former clerk to Justice Blackmun. Lazarus has stated as follows:

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"As a matter of constitutional interpretation and judicial method, Roe borders on the indefensible. I say this as someone utterly committed to the right to choose, as someone who believes such a right has grounding elsewhere in the Constitution instead of where Roe placed it, and as someone who loved Roe's author like a grandfather. . . .

What, exactly, is the problem with Roe? 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 text, history, or precedent. . . .

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> The proof of Roe's failings comes not from the writings of those unsympathetic to women's rights, but from the decision itself and the friends who have tried to sustain it. Justice Blackmun's opinion provides essentially no reasoning in support of its holding. And in the almost 30 years since Roe's announcement, no one has produced a convincing defense of Roe on its own terms." [2]

But the left's strong criticism of Roe and Doe does not stop with the fact that the decisions smacked of political judgment more than constitutional principle. Rather, it also extends to the fact that the Supreme Court unilaterally ended the democratic process by which the People and the states were making their own judgments about the appropriate governmental role in protecting unborn life.

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[2] "The Lingering Problems of Roe v. Wade" (Oct. 3, 2002), available at http://writ.findlaw.com/lazarus/2002/1003.html.

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- For example, none other than Justice Ginsburg has said that at the time of the decisions, "The law was changing. . . . Women were lobbying around that issue. . . . The Supreme Court stopped all that by deeming every law – even the most liberal – as unconstitutional. That seemed to me not [to be] the way courts generally work."[3]

- Similarly, Jeffrey Rosen, a liberal law professor and noted privacy expert at George Washington University Law School, recently stated that "Roe v. Wade was bad for liberals. . . . Roe has cast a shadow over our judicial politics for the past thirty years. . . . Roe is an important cautionary tale about how the judiciary, when it attempts to thwart the determined wishes of a national

[3] See http:// www.nrlc.org/News_and_Views/March05/nv031405.html.

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> majority . . . may be responsible for a self-inflicted wound."[4]

These powerful objections to Roe and Doe from the left beg the question of what would happen were those objections to be sustained, and the cases to be overturned. The answer is not, as some have claimed, the nationwide prohibition of abortion. Rather, as the Constitution contemplates, the decision of whether and how to regulate abortion would return once again to the states. This is far preferable to the status quo, as Justice Scalia explained in his dissent in Planned Parenthood v. Casey:

> "[B]y foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair and honest fight, . . . the [Supreme] Court merely prolongs and intensifies the anguish."

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[4] See http://www.washingtonpost.com/wp-dyn/articles/A1349-2005Mar25.html.

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Justice Blackmun won applause from some for stating in the 1994 case of Callins v. Collins that he would vote against the death penalty in all future cases, and would "no longer . . . tinker with the machinery of death."

Yet Blackmun's firm position in the Callins case stands in stark contrast with the opinions he authored in Roe and Doe, which allowed the premature ending of 40 million lives. Indeed, in his memoranda to other Justices before the cases were decided, Justice Blackmun observed that "I have concluded that the end of the first trimester [of pregnancy] is critical," and then explicitly conceded, "this is arbitrary." Geoffrey Stone, a law clerk to Justice Brennan when Roe was decided, has confirmed this, stating that "Everyone in the Supreme Court, all the justices, all the law clerks knew it was 'legislative' or 'arbitrary.'"

To put it simply, Roe was a mistake. A very, very costly one.

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The admittedly arbitrary decisions in Roe v. Wade and Doe v. Bolton have had deliberate and severe real-life consequences for women, unborn children, and the body politic. Here to discuss those consequences in more detail are two distinguished panels of witnesses. On the first panel, we will hear personal perspectives from Norma McCorvey, who was the plaintiff Jane Roe in Roe v. Wade, and Sandra Cano, the plaintiff in Doe v. Bolton. These witnesses will describe their journey from being litigants in the most controversial cases of our time to becoming dedicated advocates for a culture of life. We also will hear from Dr. Ken Edelin, Associate Dean at the Boston University School of Medicine.

The second panel of witnesses will discuss the legal and institutional aspects of the abortion decisions. In particular, they will both examine the constitutional foundation for the right to abortion, and explore the effects of the Supreme Court's permanent short-circuiting of the democratic process with respect to this

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important issue. The witnesses on this panel will include Teresa Collett, Professor of Law at the University of St. Thomas Law School; M. Edward Whelan, President of the Ethics and Public Policy Center and a former clerk on the Supreme Court; Alta Charo, Professor of Law and Bioethics, and Associate Dean for Research and Faculty Development at the University of Wisconsin Law School; and Karen O'Connor, Professor of Government at American University. I thank all of the witnesses for attending, and with unanimous consent will enter each of your written statements into the record.

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TESTIMONY OF SANDRA CANO
The Former *Doe* of *Doe v. Bolton*, before the Subcommittee on the Constitution of the Senate Judiciary Committee
June 23, 2005

The *Doe v. Bolton* Supreme Court decision bears my name. I am Sandra Cano, the former "*Doe*" of *Doe v. Bolton*. *Doe v. Bolton* is the companion case to *Roe v. Wade*. Using my name and life, *Doe v. Bolton* falsely created the health exception that led to abortion on demand and partial birth abortion. How it got there is still pretty much a mystery to me. I only sought legal assistance to get a divorce from my husband and to get my children from foster care. I was very vulnerable: poor and pregnant with my fourth child, but abortion never crossed my mind. Although it apparently was utmost in the mind of the attorney from whom I sought help. At one point during the legal proceedings, it was necessary for me to flee to Oklahoma to avoid the pressure being applied to have the abortion scheduled for me by this same attorney. Please understand even though I have lived what many would consider an unstable life and overcome many devastating circumstances, at NO TIME did I ever have an abortion. I did not seek an abortion nor do I

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believe in abortion. Yet my name and life is now forever linked with the slaughter of 40-50 million babies.

I have tried to understand how it all happened. How did my divorce and child custody case become the basis by which bloody murder is done on infants thriving in the wombs of their mothers? How can cunning, wicked lawyers use an uneducated, defenseless pregnant woman to twist the American court system in such a fraudulent way?

Doe has been a nightmare. Over the last 32 years, I have become a prisoner of the case. It took me until 1988 to get my records unsealed in order for me to try and find the answer to those questions and to join in the movement to stop abortion in America. When pro abortion advocates found out about my efforts; my car was vandalized on one occasion and at another time, someone shot at me while I was on my front porch holding my grandbaby.

I am angry. I feel like my name, life, and identity have been stolen and put on this case without my knowledge and against my wishes. How dare they use my name and my life this way! One of the Justices of the Supreme Court said during oral argument in my case "What does

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it matter if she is real or not." Well I am real and it does matter. I was in court under a false name and lies. I was never cross-examined in court. *Doe v. Bolton* is based on a lie and deceit. It needs to be retried or overturned. *Doe v. Bolton* is against my wishes. Abortion is wrong. I love children. I would never harm a child and yet because of this case I feel like I bear the guilt of over 46 million innocent children being killed. The Supreme Court is also guilty.

The bottom line is I want abortion stopped in my name. I want the case which was supposedly to benefit me, be either overturned or retried. If it is retried, at least I will have an opportunity to speak for myself in court, something that never happened before. My lawyers at The Justice Foundation have collected affidavits from over one thousand women hurt by abortion. We have filed those affidavits and a Rule 60 Motion to reverse *Doe* which is now on its way to the Supreme Court through the 11th Circuit Court of Appeals in Atlanta. I am also giving you a copy of my affidavit in the case. Millions of babies have been killed. Millions of women have been hurt horribly. It is time to get my name and life out of this case and its time to stop the killing.

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Testimony of
R. Alta Charo, J.D.
Elisabeth S. Wilson Professor of Law and Bioethics,
University of Wisconsin Law and Medical Schools
Associate Dean for Research and Faculty Development, University of Wisconsin Law School
Madison, Wisconsin
on
"The Consequences of Roe v. Wade and Doe v. Bolton"
before the
U.S. Senate
Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Property Rights
2 p.m.
226 Dirksen

June 23, 2005

Senator Brownback, Senator Feingold and members of the committee,

Thank you for this opportunity to address the committee on the past, present and future significance of the 1973 Supreme Court decisions in Roe v. Wade and Doe v. Bolton. My name is Alta Charo, and I am associate dean of the University of Wisconsin Law School and the Elizabeth S. Wilson Professor of Law and Bioethics with appointments to the faculty at both the Law and Medical Schools of the University of Wisconsin at Madison.

Roe v. Wade's broad vision of the right to privacy is our constitutional bulwark against legislation mandating a Chinese-style one-child policy; governmental eugenics policies that penalize parents who choose to have a child with disabilities; state prohibitions on home-schooling our children; forcible intubation of competent but terminally ill patients; and the issuance of a state-approved list of permissible forms of sexual intercourse between husband and wife. If we reject the core holding of Roe v. Wade that some activities are too intimate and some family matters too personal to be the subject of governmental intrusion, the we also reject any significant limit on the power of the government to dictate not only our personal morality but also the way we choose to live, to marry, and to raise our children.

Roe v. Wade is at the core of American jurisprudence, and its multiple strands of reasoning concerning marital privacy, medical privacy, bodily autonomy, psychological liberty and gender equality are all connected to myriad other cases concerning the rights of parents to rear their children, the right to marry, the right use contraception, the right to have children, and the right to refuse unwanted medical treatment. Overturning Roe would unravel far more than the right to terminate a pregnancy, and many Americans who have never felt they had a personal stake in the

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abortion debate would suddenly find their own interests threatened, whether it was the elderly seeking to control their medical treatment, the infertile seeking to use IVF to have a child, the woman seeking to make a decision about genetic testing, the couple heeding public health messages to use a condom to reduce the risk of contracting AIDS or other sexually transmitted diseases, or the unmarried man who, with his partner, is trying to avoid becoming a father before he is ready to support a family.

As a legal matter, the right of the government to regulate, or even prohibit, reproductive choices depends both on whether they are considered an exercise of especially protected personal liberties and whether their absence has a sufficiently disparate impact on women's lives that it amounts to a denial of equal protection of the law.

Various aspects of reproductive privacy rights have been articulated in a number of landmark cases in the US Supreme Court. The earliest case limited the right of the government to order involuntary sterilization. In the 1960s and 1970s, the Court issued other landmark rulings that protected access to contraceptives and abortion services, declaring that the 'decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices' and that 'if the right of privacy means anything, it is the right of the individual... to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child'.

The earliest cases, such as those concerning forced sterilization, were grounded in a traditional, common-law concern about bodily integrity, but the later cases incorporated concerns about marital privacy and psychological autonomy. For example, a right to contraception for men — for whom conception is a psychological and potentially economic burden, but not a physical one — implicitly endorsed a theory of reproductive liberty that went beyond mere bodily integrity and included a more general right to set the course of one's future. This is a notion of reproductive liberty that embraces a variety of activities that have no physical implications but are at the core of the right to self-determination, for example the right to marry, the right to rear one's children in the manner of one's choosing, or the right to use medical services to predict one's risk of having offspring with devastating diseases.

Subsequent abortion decisions have recognized the scope and implications of this expansive notion of personal liberty. Where psychological autonomy was raised, as in Justice Sandra Day O'Connor's statement that 'at the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life', it was ravaged by some of her colleagues, as when Justice Scalia wrote that this 'collection of adjectives... can be applied to many forms of conduct that this Court has held are not entitled to constitutional protection... (for example) homosexual sodomy, polygamy, adult incest and suicide, all of which are equally 'intimate' and 'deeply personal' decisions involving 'personal autonomy and bodily integrity', and all of which can constitutionally be proscribed because it is our unquestionable constitutional tradition that they are proscribable'. Left unsaid in Justice Scalia's dissent, however, is an equally strong historical tradition of banning contraception and interracial marriage, which would once again be an option for individual states should personal and psychological liberty no longer be constitutionally protected.

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These comments by Scalia did presage a series of doctrinal struggles within the Supreme Court, and subsequent abortion cases have emphasized instead gender equality or bodily autonomy. Similarly, cases concerning control over the manner of one's death backed away from expanding upon Roe v. Wade's vision of personal liberty. But by the same token, the Court has steadfastly upheld the right to refuse unwanted medical treatment as consistent with the right to privacy and bodily autonomy enunciated in Roe. Overturn Roe and one risks losing the constitutional grounds with which to challenge a state law that forces hospitals to inflict painful and even futile medical interventions on competent, protesting patients.

Thus, the implications of overturning Roe v. Wade are difficult to predict but certainly go beyond the narrow question of abortion. Much depends upon how the court would choose to identify the key justifications for the right to privacy deployed in Roe and which they would now propose to overturn.

If the court reverses Roe v. Wade and limits the right to privacy to intimate marital relations, then technologies such as artificial insemination and in vitro fertilization that often use a third party may not be protected, because they represent a departure from the purest form of marital privacy. Perhaps even more alarmingly, the longstanding right of unmarried persons to obtain contraceptives would be undermined, as would the right of unmarried persons to be free of coercive state efforts to prevent them from bearing children, for example, through forced sterilization or exorbitant tax penalties for having children outside marriage.

If it reverses Roe v. Wade and limits the right to privacy to preventing the government from casually interfering with the physical bodies and reproductive capabilities of its citizens, although there might still be protection from involuntary sterilization, there would be only a far weaker claim of any right to access medical services such as IVF that depend on extra-uterine maintenance or diagnosis of embryos. And again, perhaps more alarmingly, an interpretation narrowly focused on bodily autonomy would no longer support the more expansive notions of privacy and liberty that support parental discretion to choose the language of instruction for their children or to make other fundamental decisions about how to rear their children.

But however it chooses to reverse Roe v. Wade, it would be necessary to reject existing case law, which singles out human reproduction for the profound way in which it reflects individual choices, aspirations and self-identity. This is because neither marital intimacy nor bodily autonomy rights could explain the right of men to use a simple condom to avoid unintended pregnancy or the right of parents to freely choose whether or not to use genetic testing, that is, to freely choose whether to avoid or embrace the possibility of having a child with genetic disabilities. Rejecting the notion that our liberty rights encompass a right to control the path our lives would clear the way for a broad range of government intrusions into both reproductive decisions and other matters of personal life.

Of course, it is possible that the Court might overturn Roe v Wade not by backing away from its principle of a fundamental right to privacy but rather by a claim that the fertilized egg and developing embryo have competing rights that outweigh even a fundamental right to privacy.

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One hears this point of view in the claim that the founding fathers listed "life, liberty, and the pursuit of happiness" in that order. But to accept this argument, however, the court would be forced to redefine the egg or embryo as a "person" for the purposes of the 14th amendment; without that status, the interests imputed to the embryo could not outweigh the undisputed interests of an adult woman.

If the courts conclude that embryos are protected as persons by the 14th amendment, it is not only the abortions that follow unprotected sex that could be outlawed. It is not only the abortions following failed contraceptive efforts that could be outlawed. It is also abortions following cases of rape and incest that could be outlawed, because the effect of ruling that embryos have the same rights as children is to rule that nothing short of a threat to a woman's life could justify their destruction.

And re-defining the egg or embryo as a 14th amendment person, entitled to equal protection under the law, has implications that go far beyond the legality of abortion. Now viewed as legally equivalent to a live-born child, a parent would be required to provide nurture, to avoid undue risk, and to effect a rescue when the conceptus was in danger, just as a parent must do for a child.

In practical terms, providing nurture and avoiding undue risk might well mean that women would lose the right to choose midwives over physicians, or to use herbal remedies and nutritional supplements rather than prescribed drugs during pregnancy. Indeed, they might even lose the right to treat their own illnesses, such as epilepsy or slow-growing cancer, if such treatments might destroy the embryo but foregoing the treatments would merely interfere with the health, but not the life, of the woman herself.

Even contraceptive techniques such as breast feeding and the rhythm method might be banned, as they not only reduce the odds of fertilization, but when fertilization nonetheless occurs, they reduce the chances that the fertilized egg will successfully implant in the uterine wall. This is precisely the reasoning by which many abortion opponents advocate a ban on birth control pills, IUDs and all other forms of hormonal contraception. Indeed, given that in most months a sexually active woman will lose a fertilized egg during her menstrual cycle, abandoning Roe v. Wade would mean, at least theoretically, that the government could prescribe the precise time of the month when sexual activity is permitted, in order to reduce the chances that a fertilized egg will fail to implant in the uterine wall. More realistically, a duty to rescue an embryo in danger could mean that women would be forced to have every IVF embryo they create put back in their bodies, even if additional embryos posed a threat to fetal and maternal health, and even if pregnancy attempts were likely futile.

Practical consequences such as these demonstrate not only the moral, ethical, and logistical challenges that await us if Roe v Wade is overturned, but also the tremendous implications this would have for women's equality interests. A blanket principle that accords equal rights as between embryos and adults functions, in fact, to place virtually all responsibility and burden upon women. It is women who will be vulnerable to state mandated medical interventions. It is women whose educations will be interrupted, with potentially lifelong consequences. It is women whose

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jobs and careers will be at risk, with all the economic losses that entails.

That men and women are biologically different is a physiological fact. For some, this suggests that it is women's lot to bear the cost of intimate relations. For others, however, and for the Supreme Court in many of its decisions that go far beyond Roe v Wade, it means that it is the duty of the government to avoid adopting policies or announcing principles that forever place women at the service of the state rather than as the mistresses of their own lives.

Overall, Roe v. Wade represents the culmination of decades of constitutional law on the need to restrain over-zealous governmental intrusions on personal decisions concerning our families, our bodies, and our lives. In turn, it has formed the basis for yet more decades of constitutional law on the importance of maintaining a zone of personal liberty and privacy, in which individuals may flourish. In a century that will bring ever greater temptations and technological capabilities for governmental surveillance and control of its citizens, maintaining the integrity of this zone of personal liberty and privacy is more important than ever.

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UNITED STATES SENATE COMMITTEE ON THE JUDICIARY

HEARING BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND PROPERTY RIGHTS:

"The Consequences of *Roe v. Wade* and *Doe v. Bolton*"

June 23, 2005

Prepared Testimony of
Professor Teresa Stanton Collett*

Good afternoon Chairman Brownback, Senator Feingold, Members of the Subcommittee, and other distinguished guests. My name is Teresa Stanton Collett and I am a Professor of Law at the University of St. Thomas School of Law in Minneapolis, Minnesota.

I am honored to have been invited to testify on the consequences of *Roe v. Wade*[1] and *Doe v. Bolton*.[2] My testimony represents my professional knowledge and opinion as a law professor who writes on the topic of family law, and specifically on the topic of abortion. It also represents my experience in assisting legislators and citizen groups across the country evaluate proposed abortion laws during the legislative process and defending such laws in the courts. I am currently serving as special attorney general for the State of Oklahoma assisting in the defense of two abortion related laws of that state,[3] and I have served as a member of the Texas Supreme Court Subadvisory Committee

* Professor of Law, University of St. Thomas School of Law, MSL 400, 1000 LaSalle Avenue, Minneapolis, MN 55403-2015, telephone 651-962-4973, fax (651) 962-4996, email tscollett@stthomas.edu.

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

[2] 410 U.S. 173 (1973).

[3] *Nova Health Systems v. Gandy,* 388 F.3d 744 (10th Cir. 2004) (abortion provider did not have standing to sue state offices asserting facial challenge to abortion liability law which contained only civil damages) (motion for rehearing pending); and *Nova Health Systems v. Edmondson,* No. 05-5085 (10th Cir.) (abortion provider has challenged procedural aspects of the judicial bypass contained in the newly enacted parental

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charged with proposing court rules implementing the parental notification in that state. I also currently represent a group of New Hampshire legislators before the United States Supreme Court in defense of that state's parental notification law.[4] My testimony today is not intended to represent the views of my employer, the University of St. Thomas, or any other organization or person.

Contrary to the intention of their authors and proponents, *Roe v. Wade* and *Doe v. Bolton* have significantly undermined the well being of women and children in the United States, as well as seriously damaged the political fabric of American civil society. Due to the time constraints of the committee, my testimony today will just address the first issue.

Throughout this country's history women have struggled to gain political, social, and economic equality.[5] By 1972 however, the year before *Roe* and *Doe* were decided, women were making considerable strides towards achieving these goals. According to a 1972 report by the United States Census Bureau, "Women who had completed 4 (sic) years or more of college were as likely as men with the same education to be professional, technical, administrative, or managerial workers."[6] In 1964 Margaret Chase Smith became the first woman in our nation's history to be nominated for the presidency of the United States by a national political party.[7] In 1967 Muriel Seibert became the first woman to own a seat on the New York Stock Exchange, and five short years later Juanita Kreps became the first woman director of that eminent institution. Women were

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notification law).

[4] *Planned Parenthood of Northern New England v. Heed,* 390 F.3d 53 (1st Cir. 2004) *sub nom Ayotte v. Planned Parenthood of Northern New England, cert. granted,* No. 04-1144.

[5] *See e.g.* Letter of Abigail Adams to John Adams, dated March 31, 1776 suggesting in the drafting of the laws for the new country that he "remember the ladies", lest they "foment a rebellion" and not hold themselves "bound by any laws in which we have no voice or representation."

[6] U.S. Bureau of the Census, Current Population Reports, Series P-20, No. 242, "Educations Attainment: March 1972," at 2 U.S. Government Printing Office, Washington, D.C., 1972.

[7] It was at the Republican National Convention.

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making great progress in our society, and it is not by means of denying their capacity to conceive and bear children. Rather than furthering these achievements while accommodating the unique maternal capacity of women, *Roe* and *Doe* adopted the sterile "male model" of society effectively forcing women to conform to ideal of childlessness in order to gain equality.[8]

It was no accident that the early feminists, such as Elizabeth Cady Stanton and Susan B. Anthony, opposed abortion. They saw it as a tool of oppression, manifesting men's domination and mistreatment. Elizabeth Cady Stanton wrote, "When we consider that women are treated as property, it is degrading to women that we should treat our children as property to be disposed of as we see fit."[9] Susan B. Anthony was of the same opinion. "Guilty? Yes. No matter what the motive, love of ease, or a desire to save from suffering the unborn innocent, the woman is awfully guilty who commits the deed. It will burden her conscience in life, it will burden her soul in death; But oh, thrice guilty is he who drove her to the desperation which impelled her to the crime!"[10] In their newspaper devoted to women's equality, *The Revolution*, Matilda Joslyn Gage wrote "[This] subject lies deeper down in woman's wrongs than any other...I hesitate not to assert that most of [the responsibility for] this crime lies at the door of the male sex."[11] So strongly did these women reject abortion that they put the solvency of their publication, *The Revolution*, at risk rather than accept advertisements from abortionists.

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[8] "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992).
[9] *Letter to Julia Ward Howe, October 16, 1873, recorded in Howe's diary at Harvard University Library.*
[10] Susan B. Anthony, *The Revolution, 4(1):4 July 8, 1869.*
[11] Matilda Joslyn Gage, *The Revolution, 1(14):215-6 April 9, 1868.*

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By their rejection of abortion, these women demanded something more meaningful (and more radical) than what the majorities of the *Roe* and *Doe* Courts ordered – they demanded equality as full women, not as chemically or surgically altered surrogates of men. The early feminists understood that abortion on demand, not motherhood, posed the real threat to women's rights. The early feminists recognized that abortion was the product, not of choice, but of pressure, particularly from the men in women's lives. The current regime of abortion which *Roe* instigated has not changed this sad fact. A 1998 study published by the Guttmacher Institute, a research affiliate of Planned Parenthood, indicates that relationship problems contributed to the decision to seek abortions by 51% of American women.

> Underlying this general reason are such specific ones as that the partner threatened to abandon the woman if she gives birth, that the partner or the woman herself refuses to marry to legitimate the birth, that a break-up is imminent for reasons other than the pregnancy, that the pregnancy resulted from an extramarital relationship, that the husband or partner mistreated the woman because of her pregnancy, or that the husband or partner simply does not want the child. Sometimes women combined these reasons with not being able to afford a baby, suggesting the importance of having a partner who can offer both emotional and financial support.[12]

The simple fact is that today, as in the 19th century, for many women abortion is the man's solution for what he views as the "woman's problem."[13]

Roe's harmful effects on women have not been confined to the social realm. Medical science has shown that abortion damages women's physical and mental health as

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[12] Akinrinola Bankole, Susheela Singh and Taylor Haas, *Reasons Why Women Have Induced Abortions: Evidence from 27 Countries*, 24 International Family Planning Perspectives 117 (1998) citing statistics from Aida Torres and Jacqueline Darroch Forrest, *Why Do Women Have Abortions?*, 20 Family Planning Perspectives 169 (July/August 1988).

[13] To date, when women have resisted the pressure to obtain an abortion, the courts have rejected claims by their sexual partners that men should be able to avoid paternal obligations since they did not choose to become fathers. See e.g. Wallis v. Smith, 22 P.3d 682 (N.M. 2001) (rejecting man's claim for contraceptive fraud).

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well.[14] By aborting their pregnancies, women lose the health benefits that childbirth and its accompanying lactation bring, including reduced risk of breast, ovarian, and endometrial cancer.[15]

One-third of all women in the U.S. will suffer from cancer in their lifetime.[16] Cancer is the second leading cause of death in the United States. [17]

Breast cancer is the most common cancer diagnosed in women, and the second leading cause of cancer death in women.[18] It is estimated that about 211,240 women in the United States will be diagnosed with invasive breast cancer in 2005, and about 40,410 women will die from the disease.[19] One of the recognized risk factors for breast cancer is having no children or delaying childbearing until after the age of thirty.[20]

In 1970 the World Health Organization published the results of an international study of breast cancer and reproductive experience involving 250,000 women from seven areas. The study established that women having their first child under age 18 have only about one-third the breast cancer risk of those whose first birth is delayed until age 35 or older. The researchers also noted that "data suggests an increased risk [of breast cancer] associated with abortion contrary to the reduction in risk associated with full-term births."[21]

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[14] *See* ELIZABETH RING-CASSIDY & IAN GENTLES, WOMEN'S HEALTH AFTER ABORTION (2d. 2003).
[15] *See* John M. Thorp et al., *Long-term Physical and Psychological Health Consequences of Induced Abortion: Review of the Evidence,* 58 Obstetrical & Gynecological Survey 67 (2003);V. Beral et al, *Does Pregnancy Protect Against Ovarian Cancer?*, THE LANCET (May 20, 1978) at 1083 ("pregnancy - or some component of the childbearing process – protects directly against ovarian cancer"); and G. Albrektsen et al., *Is the Risk of Cancer of the Corpus Uteri Reduced by a Recent Pregnancy? A Prospective Study of 765, 756 Norwegian Women*, 61 INT'L. J. CANCER 485 (1995).
[16] American Cancer Society, *Cancer Facts and Figures: 2005* at 2, available *at* <www.cancer.org>.
[17] *Id.*at 1.
[18] *Id.* at 9
[19] *Id.*
[20] *Id.*
[21] B. MacMahon, *Age at First Birth and Breast Cancer Risk*, 43 BULLETIN OF THE WORLD HEALTH ORGANIZATION, 209 (1970). See also P.M. Layde et al, *The Independent Associations of Pariety, Age at*

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Childbirth also has a protective effect against ovarian cancer.[22] Ovarian cancer is the seventh most common cancer, but ranks fourth as the cause of cancer death in women.[23] It causes more deaths than any other cancer of the female reproductive system.[24] The American Cancer Society estimates that there will be about 22,220 new cases of ovarian cancer in this country in 2005. About 16,210 women will die of the disease. While less common than breast cancer, it is more likely to be fatal. Childbirth reduces this risk.[25]

Endometrial cancer is a cancer that develops from the inner lining of the uterus. In 2005, 40,880 new cases of endometrial cancer are expected to be diagnosed, and 7,310 women are expected to die from this cancer.[26] Researchers have found that the process of childbirth results in the shedding of malignant or pre-malignant cells which lead to endometrial cancer.[27] This protective effect increases with each birth.[28]

In contrast, abortions render women thirty percent more likely to develop breast cancer[29] and also increase the likelihood of developing cervical[30] and ovarian cancer.[31]

First Full Term Pregnancy, and Duration of Breastfeeding with the Risk of Breast Cancer, 42 J. CLINICAL EPIDEMIOLOGY 963 (1989).

[22] V. Beral et al, *Does Pregnancy Protect Against Ovarian Cancer?*, THE LANCET (May 20, 1978) at 1083 ("pregnancy - or some component of the childbearing process – protects directly against ovarian cancer"); and D. Purdie et al, *Reproductive and Other Factors and Risk of Epithelial Ovarian Cancer: An Australian Case-Control Study*, 62 INT'L J. OF CANCER 678 (1995) (finding a reduced risk of ovarian cancer with increasing number of children).

[23] American Cancer Society, *Cancer Facts and Figures: 2005* at 10, available *at* <www.cancer.org>.

[24] *Id.* at 16.

[25] See n. 22 *supra*.

[26] American Cancer Society, *Cancer Facts and Figures: 2005* at 20, available *at* <www.cancer.org>.

[27] G. Albrektsen et al., *Is the Risk of Cancer of the Corpus Uteri Reduced by a Recent Pregnancy? A Prospective Study of 765, 756 Norwegian Women*, 61 INT'L. J. CANCER 485 (1995).

[28] L.A. Brinton et al, *Reproductive, Menstrual, and Medical Risk Factors for Endometrial Cancer: Results from a Case-Control Study*, 167 AMERICAN J. OBSTETRICS & GYNECOLOGY 1317 (1992).

[29] RING-CASSIDY, *supra* note 14, at 17. "Since 1957, evidence liking induced abortion to the later development of breast cancer has been observed in 23 of 37 studies worldwide, including 10 of 15 U.S. studies." *Id. See also* Joel Brind, et al. *Induced Abortion as an Independent Risk Factor for Breast Cancer: A Comprehensive Review and Analysis*, 50 J. EPIDEMILOGY & COMMUNITY HEALTH 481; and Nancy Kreiger, *Exposure, Susceptibility, and Breast Cancer Risk: A Hypothesis Regarding Exogenous Carcinogens, Breast Tissue Development, and Social Gradients, Including Black/White Differences in*

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Abortion also creates numerous health hazards for subsequent pregnancies, including increasing the likelihood of death during childbirth.[32] Furthermore, women who have had abortions experience varying degrees of emotional distress[33] and are more likely to exhibit self-destructive behaviors, including suicide.[34]

While it is often said that abortion is significantly safer than completing the pregnancy, the fact is we simply don't have the statistical information to know. Abortion providers have concede this fact in the published literature.[35] Yet any attempts to remedy

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Breast Cancer Incidence, 13 BREAST CANCER RESEARCH AND TREATMENT 205 (1989). *See generally* John Kindley, *The Fit Between the Elements for an Informed Consent Cause of Action and the Scientific Evidence Linking Induced Abortion with Increased Breast Cancer Risk*, 1998 WIS. L. REV. 1595 (1998).

[30] David A. Grimes, *Sequelae of Abortion*, *in* MODERN METHODS OF INDUCING ABORTION 95, 105 (David T. Baird et al. eds., 1995).

[31] RING-CASSIDY, *supra* note 14, at 35. "[C]hildbirth provides women with protection from cancers of the reproductive system." *Id.*

[32] *See* RING-CASSIDY, *supra* note 14, at 41. "These complications include: cervical damage leading to future problems in carrying a pregnancy to term; uterine damage resulting in *placenta previa* which increases the morbidity and mortality risks for both mother and infant; and ectopic pregnancy. Data indicate that in the past twenty years the incidence of these complications has risen sharply. Studies reveal that induced abortion can put a woman at a seven-fold increased risk of placenta previa and a 30 to 510 per cent increased risk of delivering a premature infant. Children born prematurely are at an enormously increased risk of developing cerebral palsy. Ectopic pregnancies are reaching epidemic proportions, the rates having doubles or triples in many parts of the world in direct proportion to the increase in induced abortions." *Id.* Abortion also increases the risk of infertility, pelvic inflammatory disease, and Chlamydia trachomatis. *Id.* at 64-69. For a thorough discussion of abortion's contribution to maternal mortality see *id.* at 85-98.

[33] RING-CASSIDY, *supra* note 14, at 131. *See also* Anna Glasier, *Counseling for Abortion*, *in* MODERN METHODS OF INDUCING ABORTION 112, 117 (David T. Baird et al. eds., 1995); Jo Ann Rosenfeld, *Emotional Responses to Therapeutic Abortion*, 45 AM. FAM. PHYSICIAN 137, 138 (1992) ("Teenagers who do not tell their parents about their abortion have an increased incidence of emotional problems and feelings of guilt.") Additional sources are collected and discussed in Thomas R. Eller, *Informed Consent Civil Actions for Post-Abortion Psychological Trauma*, 71 NOTRE DAME L. REV. 639 (1996). For cases involving claims of psychological injury *see* Edison v. Reproductive Health Servs., 863 S.W.2d 621 (Mo. Ct. App. 1993), and Showery v. State, 678 S.W.2d 103 (Tex. App.—El Paso 1984, writ ref'd).

[34] RING-CASSIDY, *supra* note 14, at 189. "Post abortion behaviors tend to be self-destructive and include suicide, both actual and attempted; deliberate self-harm such as mutilation and other punishments; unconscious self-harm in the form of substance abuse, smoking, and various eating disorders; and unstable, often abusive and battering, relationships. . . . [T]he suicide rate following abortion is six times greater than that following childbirth, and three times the general suicide rate." *Id. See also* Mika Gissler, *Suicides After Pregnancy in Finland 1987-1994: Register to Linkage Study*, 313 BRIT. MED. J. 1431, 1433 (1996); and H. David et al., *Postpartum and Postabortion Psychotic Reactions*, 13 FAMILY PLANNING PERSPECTIVES 889 (1981).

[35] "The primary limitation of many U.S. studies is that they use data on average characteristics of abortion patients, rather than directly matching records, and they rely on complicated algorithms and corrections that introduce opportunities for measurement error." J. Richard Udry, *A Medical Report Linkage Analysis of Abortion Underreporting*, 28 FAMILY PLANNING PERSPECTIVES, 228 (1996) *available at* <www.agi-

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this critical lack of public health information are furiously fought by abortion-rights advocates.[36]

Yet women are not the only ones harmed by the mentality reflected in the *Roe* and *Doe* holdings. It is often said that these Courts did not understand the physical development of the unborn at the time the cases were heard. Yet I recently had occasion to go back and read the briefs presented to the *Roe* Court and was amazed by the amount of detail concerning the development of the unborn child, even in 1973. While there were no pictures as compelling as tiny Samuel Armas' hand apparently grasping the finger of the perinatal surgeon who was repairing his spine while Samuel was still in his mother's womb[37] or those currently available from a 4-D ultrasound system, our common humanity was made clear by the Attorney General of Texas from the medical materials available, even at that time. The failure of the Court to engage this material in its opinion deeply troubles me.

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usa.org/pubs/journals/2822896.html>. See also Stanley K. Henshaw, *Unintended Pregnancy and Abortion: A Public Health Perspective in* A CLINICIAN'S GUIDE TO MEDICAL AND SURGICAL ABORTIONS at 20 (Maureen Paul et al., eds. 1999) ("The abortion reporting systems of some countries and states in the United States include entries about complications, but these systems are generally considered to underreport infections and other problems that appear some time after the procedure was performed."); Haishan Fu et al., *Measuring the Extent of Abortion Underreporting In the 1995 National Survey of Family Growth*, 30 FAMILY PLANNING PERSPECTIVES 128 (1998) *available at* <www.agi-usa.org/pubs/journals/3012898.html>; Alan Guttmacher Institute, *Issues in Brief: The Limitations of U.S. Statistics on Abortion* (1997) *available at* <www.agi-usa.org/pubs/ib14.html>; and Audrey F. Saftlas et all, *Pregnancy-Related Morbidity* in CDC's Public Health Surveillance for Women, Infants, and Children, *From Data to Action: CDC's Maternal & Child Health Monograph 1994* at 137, *available at* <www.cdc.gov/nccdphp/drh/datoact/pdf/rhow10.pdf> ("no nationally representative data about legal abortion-related morbidity have been available or collected since the 1970's"); and David Reardon, *The Cover-Up: Why U.S. Abortion Mortality Statistics Are Meaningless* available at www.afterabortion.org/PAR/V8/n2/abortiondeaths.html.

[36] *See e.g. Planned Parenthood v. Casey*, 505 U.S. 833 (1992)(contesting statistical reporting requirement of Pennsylvania law).

[37] The photo and story can be found at *Doctors Give Little One a Hand,* The Tennessean (Sept. 7, 1999) available at http://www.tennessean.com/sii/99/09/07/fetus07.shtml.

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Courts have traditionally recognized some rights in unborn children,[38] and medical science continues to demonstrate with increasing veracity that even at the earliest stages of development, an unborn child is a human being.[39] Even *Roe* recognized that the States have a compelling interest in protecting this human life.[40] Nevertheless, this decision authorized expectant mothers to choose abortion over life, and since 1973, over thirty-nine million legal abortions have been performed in the United States.[41] In this country alone, roughly 700 pregnancies per year continue after an initial abortion attempt, and children born after these failed attempts are likely to suffer from developmental abnormalities.[42] Also, as previously noted, children conceived after an abortion and carried to term run a higher risk of prenatal complications.[43]

Perhaps even more troubling is the mounting evidence that abortion has contributed to the reemergence of the idea of children as possessions. In 1972, one year before the *Roe v. Wade* decision, there were 2.05 reported abuse cases per 1,000 children, according to the U.S. Bureau of the Census. In April, 2004 the U.S. Department of Health and Human Services reported 12.3 out of every 1,000 children were victims of abuse or neglect. In the six short years from 1986 to 1993 the total number of children

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[38] *See* Jack Balkin, ed., WHAT ROE SHOULD HAVE SAID (NYU Press 2005), at 191 (Collett). "[S]tates have recognized a child's right to sue for prenatal injuries. Family law courts have recognized the right of the unborn child to sue for the financial support of his parents. Unborn children have long been included as heirs and testamentary beneficiaries of decedents." *Id.*

[39] *See* BALKIN, *supra* note 38, at 207 (Paulsen) ("A conceived human embryo is, biologically, human life. . . . There is simply no room for disagreement with the scientific and medical evidence concerning the biological beginning of human life."); *id.* at 191 (Collett) ("At five and a half weeks the fetal heartbeat is similar to that aof an adult, and at forty-three days of gestation brain waves can be noted. 'By the end of the first trimester (12th week) the fetus is a sentient moving being.'" (quoting ARNOLD GESELL, THE EMBRYOLOGY OF BEHAVIOR 65 (1945))).

[40] *See Roe v. Wade*, 410 U.S. 153, 164-65 (1973).

[41] BALKIN, *supra* note 38, at 5.

[42] RING-CASSIDY, *supra* note 14, at 124-25. In one highly documented case in Canada, a child born after a botched abortion was left without oxygen for forty minutes until she was taken to intensive care. The child consequently developed cerebral palsy. *Id.* at 125.

[43] *See supra* note 32 (discussing the increased risk of premature birth and ectopic pregnancy after an

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endangered quadrupled.[44] While many factors may have contributed to this increase, the attitude that we are free to dispose of human life that is "unwanted" certainly must be among them.

With the advent of in vitro fertilization, technology that only became available five years after *Roe v. Wade*, some would-be parents now dream of "custom-order" children resulting in today's debate regarding the morality of selecting the sex and other characteristics of a child. The parameters of this debate have expanded so far as to include those who defend the right of two deaf lesbians to intentionally create a deaf child.[45]

All of these facts lead me to agree with a recent opinion of Judge Edith Jones of the United States Court of Appeals for the Fifth Circuit:

> Hard and social science will of course progress even though the Supreme Court averts its eyes. It takes no expert prognosticator to know that research on women's mental and physical health following abortion will yield an eventual medical consensus, and neonatal science will push the frontiers of fetal "viability' ever closer to the date of conception. One may fervently hope that the Court will someday acknowledge such developments and re-evaluate *Roe* and *Casey* accordingly.[46]

Some of us think that day needs to be now.

Thank you, Mister Chairman, for allowing me the time to appear before the committee and to extend my remarks in the form of this written testimony.

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abortion).

[44] Andrea J. Sedlak and Diane D. Broadhurst, THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (1996).

[45] Liza Mundy, A World of Their Own. *The Washington Post*, 31/3/2002, p.W22.

[46] *McCorvey v. Hill*, 585 F. 3d 846, 852-53 (5th Cir. 2004) (Jones, J. concurring).

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HEARING STATEMENT
JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS AND PROPERTY RIGHTS
CONSEQUENCES OF ROE v. WADE AND DOE v. BOLTON
U.S. SENATOR MIKE DEWINE
JUNE 23, 2005

Mr. Chairman, thank you for taking the time to schedule this hearing on such a very important issue and for allowing me to join the Subcommittee this afternoon.

Thank you, as well, to the witnesses who have taken the time to speak from the heart and offer us their perspectives on the issue of abortion. Your testimony confirms that abortion has many victims, not just the unborn.

I especially want to thank the two remarkable women on today's first panel: Norma McCorvey and Sandra Cano. Thank you for sharing your personal stories. Thank you for your courage to stand up for what you believe is right. And, thank you for your fight to protect the rights of the unborn.

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I have reviewed your written testimony, and it has touched me deeply. We do not share the same personal experiences. But, we share the same values. We share a commitment to ensuring that all persons -- all lives -- are respected and protected under our laws.

This hearing today is about the consequences of Roe v. Wade and Doe v. Bolton. Obviously, those cases have had a dramatic effect on our laws, our nation, and our culture. What strikes me most, however, is that those cases seem to have victimized the very people that they were intended to benefit.

During this hearing, we will hear about the effect that these cases have had on Norma McCorvey and Sandra Cano and about the severe psychological and emotional consequences that abortion has on the women who have them. We will learn that 100,000 women a year enter abortion recovery counseling programs.

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On our second panel, we will hear from Professor Teresa Collett about the adverse social and medical impact that abortion has on women.

These are serious consequences. They are not legal consequences. They are not theoretical ones. They are not even political ones. They are real consequences. And, it is our job in the U.S. Senate to do something about them.

We need to provide women facing unwanted pregnancies with information about their baby. We need to point these women toward alternatives to abortion. And, for women who want to keep their children, but feel unable to do so, we need to tell them that counseling and services are available to give them a helping hand during their time of need.

Ultimately, we need to provide these women with the information, assistance, and resources they need to make the right choice. Whatever the consequences of Roe and Doe, we have a duty to ensure that abortion is *not* one of them.

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Abortions in America Before and After *Roe v. Wade*

It was 1966 and I was a third year medical student attending Meharry Medical College in Nashville, Tennessee. Meharry and its hospital, Hubbard, were located in the poorest section of segregated Nashville. Some of the patients who came to the hospital lived in the surrounding neighborhood, often one room wooden shacks, with no indoor plumbing and with sewage running in ditches outside of the houses. There were few sidewalks, and most of these patients came to the hospital on foot. But Hubbard Hospital didn't just take care of poor Black Nashville. Hubbard Hospital was for all Black Nashvillians, because Black patients were not allowed to go to the white hospitals. Rich and poor alike came to Hubbard Hospital. What they had in common was that they were sick and they were Black. It was their hospital.

As a third year student I worked in the Ob/Gyn clinic taking care of women and their reproductive health care needs. The birth control pill had been on the market for six years and women came to the clinic seeking it. The issue of birth control, especially in a southern city like Nashville, was still controversial, but at Hubbard and Meharry the patients got what they wanted and needed. The Pill was a liberating chapter in our history. The fear of pregnancy nearly disappeared for some women who took the pill - nearly, but not completely.

I was on call, sleeping in the hospital when I was summoned downstairs to the emergency room by the Ob/Gyn resident to help with a patient. She was a seventeen year old Black high school student whose reddish-black mahogany colored skin contrasted with the starkness of the white of the sheets which covered the stretcher that she was lying on. Her body was swollen, and her fingers, toes and the tip of her nose were a

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dusky bluish-purple color. She was semi-conscious. She responded to pain as I attempted to start an I.V. Otherwise she could not be aroused. Her blood pressure was low, her heart was racing and her skin was hot to the touch. The resident called Dr. Carr Treherne, the attending physician on duty that night.

Dr. Treherne was one of the busiest and best Ob/Gyns in Nashville. He examined the young woman and knew immediately what the problem was. She had fallen prey to a poorly performed abortion. When the Black women of Nashville –rich or poor - found themselves pregnant and did not want to be they sought out one of the physician abortionists who practiced in the city. But if they could not afford the hundreds of dollars that it would cost, they turned to the poorly trained and sometimes untrained abortionists. Sometimes the abortionists were nurses or nurses' aids who had access to surgical equipment. Sometimes there was no medical equipment. Sometimes the abortionists were scam artists who took advantage of and money from the desperate women who were pregnant and did not want to be. Women who survived tell stories of humiliation and exploitation. They tell stories of being raped as part of the price of the abortion they were going to have. These women tell stories of being directed to stand on isolated street corners at midnight waiting for a car, and being blindfolded as they drove off to go to the place where the abortion was to take place. They describe empty apartments in abandoned buildings, with a single bare light bulb hanging down from the ceiling, dimly lighting a newspaper covered kitchen table. With no anesthesia and no antisepsis, instruments or rubber catheters were inserted into the vagina and blindly guided into the cervix, the opening which leads to the womb. If a woman, in her desperation, could not find anyone to perform the abortion she would attempt to do it herself. Sticks were used.

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Knitting needles were used. Crochet hooks were used. Straightened coat hangers were used. Sometimes strong douches made up of Lysol and water, Green soap and water or alcohol and water, were injected into their wombs by pressing the nozzle of the douche up against their cervix. When nothing worked, sometimes they committed suicide.

On this night this desperate young girl's life was slipping away and Dr. Treherne knew that the only chance that he could save her would be by removing the nidus of infection – her pregnant, infected uterus. He had the resident prepare the patient for surgery and I scrubbed with them.

As the incision was made in the girl's abdomen, fluid oozed from her tissues. Once he opened the abdominal cavity pus and the foulest of odors escaped into the room. He held her uterus gently in his hands, and it, like her fingers and toes, had a bluish discoloration and was like mush. On the back side of her uterus was a gapping hole and floating free in her abdomen was a red rubber catheter, one of the favorite instruments of abortionists. The catheter had been threaded through her cervix and into her womb and her vagina had been packed with gauze to keep the catheter in place. The catheter had punctured her uterus and the bacteria carried with it caused an overwhelming infection. The infection seeped into her abdomen and from there spread throughout her body. She was septic – her body, blood stream and all of her organs were infected. She was near death. The decision to perform a hysterectomy was the only decision Dr. Treherne could make because it was the source of the infection that pervaded and invaded her body. Because the tissues of her uterus were so infected they were extremely fragile, and putting in the stitches needed to tie off the blood vessels was like putting stitches into wet tissue paper. With great care and skill he was able to finish the surgery and remove her

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infected uterus along with the dead fetus and placenta it contained. The image that is seared into my mind is that young girl lying in a bed in the recovery room with tubes and drains emerging from every orifice. Dr. Treherne sat at her bedside holding her hand. It was the only thing left for him to do. Her life slipped away and she died.

Women have been trying to control their fertility for almost as long as they have been on this earth. The first recorded successful abortion occurred 4000 years ago. Some women abort and others give birth. When women are determined to end an unwanted pregnancy only their imaginations, desperation and money limit the means that they will use to end that pregnancy.

Women, having had their bodies and lives partially liberated by *The Pill* in 1960, relearned the tactics and methods used by their foremothers to legalize birth control and employed by the civil rights and anti-war movements. Women took to the streets for better reproductive health care. Betty Friedan called on all American women to celebrate the 50th anniversary of women's suffrage by striking for free child care and abortion upon request. Abortion! That dark secret of America was lobbed into the public arena and the reverberations spread out across the country. Hawaii felt the tremors and was first in the country to enact a liberal abortion law. Women marched and other states followed. The American Medical Association came out in favor of legal abortion by stating that it was a decision between a woman and her doctor while the Vatican and its American Bishops said that it was always homicide even when the woman's life was threatened. In the United States Senate Bob Packwood rose to introduce a national abortion rights bill, and the U.S. Supreme Court finally agreed to hear two abortion cases which would eventually change the entire country.

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I graduated from medical school in 1967 and served as a general medical officer in the United States Air Force assigned to a Base in England. Upon completing my tour of duty I entered the residency training program in Obstetrics and Gynecology at Boston City Hospital.

As a first year resident in training at City Hospital I was permitted and often encouraged to perform abortions. When I first arrived at City Hospital in 1971 women could have abortions if it could be documented that continuation of the pregnancy would be detrimental to their physical or mental health. If that was the case and if The Abortion and Sterilization Committee – *The Committee* - approved their request then the abortion could be carried out. For our patients it was humiliating to have to justify the reasons for wanting an abortion and to have that reason be judged by a committee. It was also time consuming. Sometimes the approval process would take so long that what started out being a first trimester abortion would progress into the second trimester.

We figured out a way to speed up the approval process. We got several psychiatry residents to agree to see our patients on an emergency basis when they came in requesting abortions. The residents would quickly write out a consultation that would state that "continuation of the pregnancy would be detrimental to the woman's mental health." This allowed us to get her case before *The Committee* sooner, which meant that more of the terminations could occur in the first trimester, when the procedure was easier for us and safer for our patients.

Before R*oe* many women from Boston went to New York, which had liberalized their abortion laws several years before. Unfortunately, Black women could not scrape together the money to travel to New York and pay for their abortions. A few did, but if

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they had complications when they returned to Boston, they would come to City Hospital and we would have to "clean up somebody else's mess." Most Boston poor and Black women did not have the option to go to New York. They came to City Hospital for their terminations. During those early years there were just a few of us who were willing to perform abortions. I felt strongly that this was a procedure that we should provide to the women who relied on City Hospital for their health care. I understood the fear and desperation that they felt.

No one made performing the abortions easy. There were a couple of nurses, a scrub tech, and an anesthesiologist who would volunteer to help us, but all the other department staff – doctors and nurses – did not want to be involved in providing abortions for the women who came to City Hospital. For the resident staff there was little training value in providing abortions. Therefore abortions had to be scheduled after the regular operating room cases were completed. The few of us who did perform them often did so in the afternoons and on Saturday mornings, with a reduced operating crew of volunteers. I wrote to the hospital administration and asked them to establish an ambulatory abortion unit for first - trimester abortions so that the service we were providing could be carried out under better conditions for the patients. They refused my request.

Half way through my second year of residency, on January 22, 1973, the Supreme Court of the United States declared that American women had a legal right to abortions. Their ruling in *Roe v. Wade* stated simply that women had a right to privacy and during the first 12 weeks of a pregnancy she could terminate a pregnancy and the state could not prevent her from doing so. During the second trimester the state could intervene only to

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say where the abortion could take place so as to protect the health and safety of women. During the last third of pregnancy, which is the time at which the fetus becomes increasingly viable and able to live outside of the womb of the woman, even with the help of respirators and other machines, the state might have an interest in the potential for life of the fetus, and may regulate the performance of the abortion. However, women still had the right to terminate the pregnancy, even in the third trimester.

The *Roe* decision hit like a bombshell. It threw out all restrictive laws against abortion in every state in the country. There were now no laws against abortion in Massachusetts. Women were now free to make the decision about terminating a pregnancy in private and in safety. With *Roe* illegal abortionists were driven out of business, and clinics opened up to provide women with the choice to terminate their unwanted pregnancies. The clinics were staffed by sympathetic and well trained physicians and nurses who were good at what they did. Doctors stopped going to jail and women stopped dying. But doctors began dying. Those opposed to abortion began to target doctors, first with intimidation and then with death.

Shortly after *Roe* was handed down I was invited to speak about the impact of the decision at a medical student conference which was being held in Boston. The Student National Medical Association, which I had help found while a medical student at Meharry in 1966, was holding a meeting in Boston and wanted to have a debate about abortion. The other person they invited was opposed to abortion and was a founding member of every right-to-life organization in Massachusetts.

In preparing for the debate I knew that my presentation would have to be based upon facts that particularly addressed how this Supreme Court decision would impact the

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lives of women, especially poor and Black women, their health and their options in life. My search of the medical literature confirmed my own experiences. It confirmed that women had been seeking to terminate unwanted pregnancies for almost as long as women have been on this earth. It confirmed what I knew, that women would put their health and lives on the line to terminate an unwanted pregnancy. It confirmed what I suspected, that the women who suffered most when abortion was illegal were poor and Black women. They were the ones who hemorrhaged, who became infected, and who had hysterectomies as a last resort life saving measure, and it was Black women who died in disproportionate numbers from poorly performed, illegal abortions. My own personal feelings and experiences were legitimized hundreds of times over by the cases cited in the medical and scientific literature.

During the debate my argument was about women's lives. It was about women making choices about their lives. My goal was to describe the human tragedy of the women who were hurt by illegal abortions.

It was an argument in images and words. Neither of us would yield. I focused on the rights of women, the horrors of illegal abortions, especially as they injured poor and Black women and the determination of women throughout the ages to terminate those pregnancies that they did not want, even if it meant putting their own lives and health at risk. After that debate, I vowed that I would never again debate "right-to lifers". Their position was too absolute and too rigid. They cared little for the lives of women, which as a gynecologist, was what I cared about most. For them things were black and white. For me, there were always shades of gray or café au lait.

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At City Hospital we began the struggle to make our abortion service a part of the other services provided by the Ob/Gyn department, but we met resistance at every turn. With the help of the nursing administration, however, we were able to open a second trimester abortion unit, and were able to perform two saline infusions per week. There were nurses who volunteered to work in the unit, who stayed with the women during the entire procedure, comforting them, supporting them and teaching them. They taught them about their bodies, about relationships with men and about contraception. It was their goal to keep women from having to come back to the unit again. It was their goal to empower women to take control of their lives.

Performing abortions has never been easy for any doctor I know. Those of us who decided to perform abortions, whether legal or illegal, did so because we felt that the choice should be up to the woman who was pregnant. During the days of illegal abortions, women died and doctors were imprisoned. Some doctors became wealthy performing abortions. So did some non-doctors. During those days, however, many women, especially poor women were humiliated, abused, maimed and were killed by their procedures, either done by someone else or self-induced.

Those of us who provided abortions understood through our life's experiences that life is not just, yes or no, black or white, up or down, right or wrong, life or not life, death or not death. In these difficult dilemmas I believe that the decision to have or not have an abortion should be left up to the individual woman, and to let her arrive at that decision by any way she chooses.

I also believe that physicians should not be forced to perform abortions. Those of us who perform abortions recognize, as do our patients, that we are not only terminating

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the pregnancy but the life of the embryo or fetus which is a part of the pregnancy. We respect, however, and give great weight to the intelligence and decision making abilities of our patients whereas those who oppose abortion do not.

Who are we to judge and put a value on the decision that a woman makes because she may have severe diabetes, severe kidney diseases, cancer, poverty or too many other children at home?

There have been many attempts to overturn Roe v. Wade and none of them have been successful. Our congress and state legislatures have successfully restricted a woman's right to choose in many instances, but they have not been able to overturn *Roe*. That, however, might happen. *Roe* survives because of a one-vote majority on the Supreme Court. If that majority is changed with the appointment of new Supreme Court justices, then women and physicians will be forced back to the days of illegal abortions. The potential for injury and death is too difficult to contemplate. But the potential for injury and death is too real for us not to contemplate it. We must not let that happen. We must not go back!

Kenneth C. Edelin, M.D.

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Contact: **Trevor Miller**
(202) 224-8657

Statement of U.S. Senator Russ Feingold
On the Consequences of Roe v. Wade
At the Judiciary Subcommittee Hearing on the Constitution

June 23, 2005

Thank you Mr. Chairman. And let me welcome our witnesses, particularly my friend Professor Alta Charo from the University of Wisconsin Law School.

Mr. Chairman, you have entitled this hearing, "The Consequences of *Roe v. Wade* and *Doe v. Bolton*." I suspect that you believe those consequences have not been good for this country and I respect your views. But I disagree.

I know that this is an extremely difficult issue, and one on which good and sincere people often disagree. Mr. Chairman, my view is these most private decisions should not be dictated by the government, but should be left to individual women and their families based on their own unique circumstances, in consultation with their doctors, and guided by their own consciences and moral or religious codes.

The Supreme Court's decision in *Roe v. Wade* was indeed consequential. It has brought about steady and far reaching improvements to the health and welfare of women in this country. In addition, as the Supreme Court observed in *Planned Parenthood v. Casey*, *Roe* has played a significant role in allowing women to participate fully and equally in the economic and social life of this nation.

Although abortion was legally permitted up until the mid-1800s, from the turn of the century through the 1960s, states enacted legislation outlawing abortion in most circumstances. Far from putting a stop to abortions, these laws simply drove reproductive health services underground.

The consequences for women were disastrous: According to the Alan Guttmacher Institute, nearly one-fifth of maternal deaths in 1930 were the result of botched abortions, many performed in unsafe conditions by untrained people. While the availability of antibiotics made abortions somewhat safer during the next several decades, some

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estimate that more than 5,000 women per year died as a result of complications from abortions in the years leading up to Roe. It is estimated that during the 1950s and 60s, between 200,000 to 1.2 million women per year obtained illegal abortions. Just 40 years ago, in 1965, illegal abortions accounted for 17% of all pregnancy-related deaths.

We cannot have a discussion about the consequences of *Roe* without acknowledging the realities women faced before it. We must never forget the period in our history when many women, forced to choose between continuing an unwanted pregnancy or risking their lives, chose the latter. This is not a choice we should force women to make again.

What has been the impact of the Court's decision in *Roe v. Wade*? To start, the years following the Court's decision have been marked by great advances in the quality of reproductive health care information and medical services available to women. Abortion-related deaths have become extremely rare, and less than 1% of abortion patients experience major complications.

According to the Centers for Disease Control, in 1973, only 36 percent of abortions were performed at or before eight weeks of pregnancy. Today, 88 percent of all legal abortions are performed within the first 12 weeks of pregnancy, and 59 percent take place within the first eight weeks of pregnancy. Only 1.4 percent occur after 20 weeks. This is another reason that abortions are safer today than they were in the pre-*Roe* era, when women often had to wait for weeks or even months to find a provider.

We must not turn back the clock. The Supreme Court has consistently upheld *Roe*, and the American people support a woman's right to choose. Instead of constantly seeking ways to undermine that right, Congress should work to help women avoid unwanted and unintended pregnancies. If we do that, abortions will become more rare, as well as staying safe and legal. For these reasons, I intend to continue my work in the Senate to ensure that all women have access to the best information and reproductive health services available.

I look forward to the testimony of the witnesses. Thank you Mr. Chairman.

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"The Consequences of *Roe v. Wade* and *Doe v. Bolton*"

Testimony Presented by

Nancy Keenan
President
NARAL Pro-Choice America

U.S. Senate
Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Property Rights

June 23, 2005

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Senator Brownback and members of the subcommittee: I thank you for the opportunity to submit this testimony for the record.

More than 30 years after it was decided, *Roe v. Wade* remains a pillar of constitutional law in the United States, one that supports the health and well-being of women and their families, and upon which numerous other critical rights depend. The Supreme Court's acknowledgement of a zone of privacy that began well before its decision in *Roe* recognizes a fundamental American principle: Certain decisions are so personal and so life-altering that they must be made by individuals and their families, not by politicians.

Contrary to the claims of its detractors, *Roe v. Wade* was not created out of whole cloth, nor was it a radical expansion of constitutional rights. During the half century leading up to *Roe*, the Supreme Court decided a series of significant cases in which it recognized a constitutional right to privacy that protects important and deeply personal decisions concerning bodily integrity, identity, and destiny from undue government interference.[1] Citing this concern for autonomy and privacy, the Court struck down laws severely curtailing the role of parents in education, mandating sterilization, and prohibiting marriages between individuals of different races.[1]

Important aspects of the right to privacy were established in *Griswold v. Connecticut*,[1] in 1965, and in *Eisenstadt v. Baird*, in 1972.[1] In these cases, the Supreme Court held that state laws that criminalized or hindered the use of contraception violated the right to privacy. These cases recognized the right of the individual to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[1] Following these cases, the Court held in *Roe* that the right to privacy encompasses the right to choose whether to end a pregnancy.[1]

The Court has reaffirmed *Roe's* central holding on multiple occasions throughout the past 32 years,[1] noting in 1992 that "[t]he soundness of this . . . analysis is apparent from a consideration of the alternative."[1] Without a privacy right that encompasses the right to choose, the Constitution would permit the state to override not only a woman's decision to terminate her pregnancy but also her choice to carry the pregnancy to term.[1]

Yet despite its solid constitutional footing and the fact that numerous courts – including those dominated by judges appointed by anti-choice presidents – have upheld *Roe*'s core principles, the right to obtain a safe and legal abortion remains under political, legal, and literal attack at every turn. Instead of focusing on how the two sides in this polarizing debate can find common ground and work to prevent unintended pregnancies by ensuring young people receive medically accurate sex education and that everyone has access to contraception, anti-choice forces stridently work to ensure abortion is as difficult and costly to obtain as possible. Far from concentrating on women's health, they focus instead on vilifying abortion and abortion providers, championing risky, unproven, and medically inaccurate "abstinence only" programs, and opposing efforts

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to expand access to family planning. Among the most disingenuous of their efforts are those to paint legal abortion as having been detrimental to women's health.

As part of their strategy to make abortion illegal and unavailable, anti-choice forces make unsubstantiated claims that *legal* abortion is harmful to women's health. The fact is that the decriminalization of abortion in the United States in 1973 has led to tremendous gains in protecting women's health. The Institute of Medicine of the National Academy of Sciences declared in its first major study of abortion in 1975 that "legislation and practices that permit women to obtain abortions in proper medical surroundings will lead to fewer deaths and a lower rate of medical complications than [will] restrictive legislation and practices."[1] And in fact, the legalization of abortion in the United States led to the near elimination of deaths from the procedure.[2] Between 1973 and 1997, the mortality rate associated with legal abortion procedures declined from 4.1 to 0.6.[3] The American Medical Association's Council on Scientific Affairs credits the shift from illegal to legal abortions as an important factor in the decline of the abortion-related death rate after *Roe v. Wade*.[4] Today, legal abortion entails half the risk of death involved in a tonsillectomy and one-hundredth the risk of death involved in an appendectomy.[5] The risk of death from abortion is lower than that from a shot of penicillin.[6]

In the years since *Roe* was decided, tens if not hundreds of thousands of American women's lives have been saved by access to legal abortion. Nonetheless, *Roe v. Wade* and the availability of legal abortion, as well as the progress women have achieved based on reproductive freedom, are under attack.

Mandatory waiting periods, biased counseling requirements, restrictions on young women's access, costly and medically unnecessary regulations on providers, and limited funding for low-income women have had a cumulative impact, making it increasingly difficult for women to obtain safe abortions. Aggravating the problem, the number of abortion providers is steadily decreasing;[7] anti-choice forces have created an atmosphere of intense intimidation and violence that deters physicians from entering the field and has caused others to stop providing abortion services.[8] Ironically, many of those now raising alarms about the supposed dangers of abortion are the very persons whose public policy suggestions would make exercising reproductive rights more hazardous. In pushing for bans on safe and medically appropriate abortions as early as 12 weeks in pregnancy, anti-choice forces reject exceptions to protect a woman's health. They aim to restrict access to mifepristone (RU 486), a safe early option for nonsurgical abortion. They deny funding for a low-income woman's abortion services even when continuing the pregnancy would endanger a woman's health. With these restrictions in place, women's reproductive health is seriously threatened.

You have convened this hearing to discuss the personal and legal implications of *Roe v. Wade* and *Doe v. Bolton*. It is impossible to capture, even in pages of testimony, how

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monumental a positive impact *Roe* has had on women's personal lives and the legal doctrine of the right to privacy. *Roe v. Wade* has saved the lives of tens if not thousands of thousands of women, and has improved the quality of life for countless others. In addition to its other positive effects, *Roe* empowered women to take responsibility for their reproductive health and overall well-being; in other words, it supports fundamentally American concepts of freedom and personal responsibility.

Legally, *Roe* is the cornerstone of the structure that includes virtually all the personal privacy rights that Americans hold dear. Perhaps time would be better spent considering the personal and legal implications of a United States without *Roe v. Wade* – since it seems that such a country is the one that President Bush and anti-choice leaders here in Congress are trying to create. In fact, we do not need to speculate. We know what havoc was wreaked on women before *Roe*, and we know that we can never go back. We know that if the fundamental principles underlying *Roe* are abolished, not only is a woman's right to choose eviscerated, but so are so many other freedoms, including the right to use birth control, and to be free from government intrusion into the most personal of private activity.

We can and should agree to disagree about the morality of abortion, recognizing that everyone has abiding and legitimate beliefs about pregnancy and the decisions surrounding whether and when to become a parent. But we should also agree, as the majority of Americans do, that decisions of this most personal nature are best made by women and their loved ones, not politicians. *Roe v. Wade* protects women and their families from allowing politicians to force personal decisions upon them – a protection whose political and legal implications are immeasurable.

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[1] Rachel Benson Gold, ABORTION AND WOMEN'S HEALTH: A TURNING POINT FOR AMERICA? 9 (1991).

[2] Phillip G. Stubblefield & David A. Grimes, *Septic Abortion*, NEW ENG. J. MED. 310 (1994).

[3] Laurie D. Elam-Evans et al., Centers for Disease Control & Prevention, *Abortion Surveillance* –

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United States, 1999, 51 MORBIDITY AND MORTALITY WEEKLY REPORT SS-09, 28, tbl. 19 (2002).

[4] American Medical Association, *Induced Termination of Pregnancy Before and After Roe v Wade: Trends in the Mortality and Morbidity of Women*, 268 JAMA 3232 (1992).

[5] Warren M. Hern, ABORTION PRACTICE 23-24 (1984), *citing* JE Wennberg et al., *The Need for Assessing the Outcome of Common Medical Practices*, 1 ANN. REV. PUB. HEALTH 291 (1980).

[6] Nancy Felipe Russo, *Unwanted Childbearing, Abortion, and Women's Mental Health: Research Findings, Policy Implications*, ROCKY MOUNTAIN PSYCH. 9 (1992).

[3] Lawrence B. Finer & Stanley K. Henshaw, *Abortion Incidence and Services in the United States in 2000*, 35 PERSP. ON SEXUAL & REPROD. HEALTH 6, 11 (2003).

[8] For example, in October 1999, abortion provider Stephen M. Dixon closed down his District of Columbia ob/gyn practice, indicating that threats and harassment by anti-abortion activists had taken their toll. These activists mailed threats to Dixon's home, placed his photograph on a "wanted poster," and listed him on a "Baby Butchers" web site, along with 32 other D.C. physicians and hundreds more across the country. (In February 1999, a federal jury ordered the creators of the poster and web site to pay over $107 million to Planned Parenthood of Columbia/Willamette, the Portland Feminist Women's Health Center, and certain physicians because of the threats contained in these and other materials.) Dixon said he had already stopped performing abortions due to the stress caused by anti-abortion terrorism. In a letter to his patients, Dixon wrote, "Sadly, the ongoing threat to my life and my concern for the safety of my loved ones has exacted a heavy toll on me, making it necessary that I discontinue practicing OB-GYN." Avram Goldstein, *Doctor Quits, Cites Antiabortion Threats*, WASH. POST, Nov. 4, 1999, at B1; *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 41 F. Supp. 2d 1130 (D. Or. 1999), *aff'd. in part, vacated and remanded in part*, 290 F.3d 1058 (9th Cir. 2002), *petition for cert. denied*, 123 S. Ct. 2637 (June 27, 2003).

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STATEMENT OF CENTER FOR REPRODUCTIVE RIGHTS TO THE SENATE JUDICIARY COMMITTEE, SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND PROPERTY RIGHTS ON "THE CONSEQUENCES OF *ROE v. WADE* AND *DOE v. BOLTON*" JUNE 23, 2005

The Center for Reproductive Rights respectfully submits this testimony on behalf of the almost 35 million women of childbearing age in more than half of the country who could lose their right to choose abortion within a year's time—some just in a matter of weeks—if the U.S. Supreme Court were to overturn *Roe v. Wade*[1] today. Our testimony includes an overview of Supreme Court decisions on abortion and the right to privacy and the results of our study, *What if Roe Fell? The State-by-State Consequences of Roe v. Wade.*

The Center for Reproductive Rights uses the law to advance reproductive freedom as a fundamental right that all governments are legally obligated to protect, respect and fulfill. The Center is the only public interest law firm dedicated exclusively to the protection of reproductive rights both at home and abroad.

Center attorneys are the preeminent abortion rights litigators in the United States and have represented women and health care providers in challenges to numerous restrictive laws at every level of the state and federal court systems. Center lawyers are counsel of record in one of the challenges to the federal abortion ban,and were the attorneys of record in the most recent abortion cases decided by the United States Supreme Court, *Stenberg v. Carhart* (2000) and *Ferguson v. City of Charleston* (2001).

Using international human rights law to advance the reproductive freedom of women, the Center has strengthened reproductive health laws and policies across the globe by working with more than 100 organizations in 45 nations including countries in Africa, Asia, East Central Europe, and Latin America and the Caribbean.

***Roe v. Wade*: Then and Now**

On January 22, 1973, the United States Supreme Court struck down the State of Texas's criminal abortion laws, finding that the right to decide whether to have a child is a fundamental right guaranteed by the U.S. Constitution. The 7-2 decision in *Roe v. Wade* would have an immediate and profound effect on the lives of American women.

Before *Roe*, it is estimated that "between 200,000 and 1.2 million illegally induced abortions occur[red] annually in the United States."[2] As many as 5,000 to 10,000 women

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

[2] Willard Cates, Jr., and Robert W. Rochat, Illegal Abortions in the United States: 1972-74, 8 Fam. Plan. Persp. 86, 92 (1976) (footnote omitted).

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died per year following illegal abortions and many others suffered severe physical and psychological injury.[3]

To prevent women from dying or injuring themselves from unsafe, illegal or self-induced abortions, women's advocates spearheaded campaigns to reverse century-old criminal abortion laws in the decades preceding *Roe*. During the 1960s and 1970s, a movement of medical, public health, legal, religious and women's organizations successfully urged one-third of state legislatures to update their abortion statutes.

Roe v. Wade is a landmark decision that recognized that the right to make childbearing choices is central to women's lives and their ability to participate fully and equally in society. Yet, the Supreme Court's decision in *Roe* was far from radical—it was the logical extension of High Court decisions on the right to privacy dating back to the turn of the century. The decision is grounded in the same reasoning that guarantees our right to refuse medical treatment and the freedom to resist government search and seizure. In finding that the constitutional right to privacy encompasses a woman's right to choose whether or not to continue a pregnancy, the Court continued a long line of decisions recognizing a right of privacy that protects intimate and personal decisions—including those affecting child-rearing, marriage, procreation and the use of contraception—from governmental interference.

The Decision

In its 1973 decision in *Roe*, the Supreme Court recognized that a woman's right to decide whether to continue her pregnancy was protected under the constitutional provisions of individual autonomy and privacy. For the first time, *Roe* placed women's reproductive choice alongside other fundamental rights, such as freedom of speech and freedom of religion, by conferring the highest degree of constitutional protection—"strict scrutiny"—to choice.

Finding a need to balance a woman's right to privacy with the state's interest in protecting potential life, the Supreme Court established a trimester framework for evaluating restrictions on abortion. The Court required the state to justify any interference with the abortion decision by showing that it had a "compelling interest" in doing so. Restrictions on abortions performed before fetal viability—that is, the period before a fetus can live outside of a woman's body—were limited to those that narrowly and precisely promoted real maternal health concerns. After the point of viability, the state was free to ban abortion or take other steps to promote its interest in protecting fetal life. Even after that point, however, the state's interest in the viable fetus must yield to the woman's right to have an abortion to protect her health and life.

Immediately following the *Roe* decision, those who did not want to see women participate equally in society were galvanized. The far right initiated a political onslaught

[3] See Lawrence Lader, Abortion 3 (1966); Cates & Rochat, supra, at 86-92; see also Nancy Binkin, Julian Gold and Willard Cates, Jr., Illegal Abortion Deaths in the United States: Why Are They Still Occuring? 14 Fam. Plan. Persp. 163, 166 (1982) (*Roe* resulted in a dramatic decline in deaths due to illegal abortion).

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that has resulted in numerous state and federal abortion restrictions and contributed to a changed Supreme Court, ideologically bent on eviscerating *Roe*. The right to choose became the target of not only the religious right, but also right-wing politicians and judges who used the *Roe* decision to attack the "judicial activism" of the Supreme Court and its purported failure to adhere to the text of the Constitution and the "original intent" of its framers. Beginning in 1983, the U.S. solicitor general routinely urged the Supreme Court, on behalf of the federal government, to overturn *Roe*. During this 12-year period, five justices—O'Connor, Scalia, Kennedy, Souter, and Thomas—were appointed. Not one of these five, who still constitute a majority on the Court today, supported the "strict scrutiny" standard of review established by *Roe*. As a result, that standard has been undermined in Court decisions since their appointments.

The Four Pillars of *Roe*

The *Roe* opinion was grounded on four constitutional pillars: (1) the decision to have an abortion was accorded the highest level of constitutional protection like any other fundamental constitutional right; (2) the government had to stay neutral: legislatures could not enact laws that pushed women to make one decision or another; (3) in the period before the fetus is viable, the government could restrict abortion only to protect a woman's health; (4) after viability, the government could prohibit abortion, but laws had to make exceptions permitting abortion when necessary to protect a woman's health or life.

The Dismantling of *Roe*

Shortly after the *Roe* decision, state legislatures began passing laws in hopes of creating exceptions to it or opening up areas of law that *Roe* did not directly address. No other right has been frontally attacked and so successfully undermined, and all in the course of two decades— the same two decades that sustained advances in other areas of women's rights, including education and employment.

Teenagers were the first successful target. In 1979, the Court endorsed state laws that required parental consent, as long as they were accompanied by a complicated system whereby minors could assert their privacy rights by requesting a hearing before a state judge on whether they were "mature" or an abortion was in their best interests (*Bellotti v. Baird*).

The next assault on *Roe* was directed at low-income women. In 1980 the Hyde Amendment, which prohibited Medicaid from covering most abortions, was upheld by the Supreme Court by a 5-4 margin (*Harris v. McRae*). The Court abandoned the neutrality required in *Roe*, finding that, for poor women, government could promote childbearing over abortion, so long as it did so by manipulating women through public funding schemes and not criminal laws.

Dissenting in *City of Akron v. Akron Center for Reproductive Health (1983)*, Justice O'Connor called for a radical erosion of *Roe* and proposed that a lesser standard of

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constitutional protection for choice be established, called the "undue burden" standard, in place of the "strict scrutiny" test. By 1989, after the arrival of Justices Kennedy and Scalia and the elevation of William Rehnquist to chief justice, there were no longer five votes to preserve reproductive choice as a fundamental constitutional right. The Court's ruling in *Webster v. Reproductive Health Services (1989)* demonstrated this new reality when five justices expressed hostility toward *Roe* in differing degrees and essentially called for states to pass legislation banning abortion in order to test the law.

Three years later, in *Casey*, the strict judicial scrutiny established in *Roe* was finally abandoned in a plurality opinion of Justices O'Connor, Kennedy and Souter. Although the Court said it was not overturning *Roe*'s central premise that abortion is a fundamental right, the *Casey* decision replaced the original "strict scrutiny" standard governing other fundamental rights for the weak and confusing "undue burden" standard. This opened the door to a host of state and federal criminal restrictions designed to make abortion more difficult for women to obtain. Over 300 criminal abortion restrictions have been enacted by legislatures in the past six years alone, none of which would have been constitutional under the original *Roe* decision.

Only two of the four *Roe* pillars remain today as a result of the Supreme Court's 1992 decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*. This decision is the culmination of a steady decline in constitutional protection for the right to privacy. A woman's right to choose is still constitutionally protected; however, the "strict scrutiny" standard was jettisoned in favor of a lesser standard of protection for reproductive choice called "undue burden." Under *Casey*, state and local laws that favor fetal rights and burden a woman's choice to have abortion are permitted, so long as the burden is not "undue." No longer does the state have to be neutral in the choice of abortion or childbearing. Now the government is free to pass laws restricting abortion based on "morality," a code word for religious anti-abortion views. States are now permitted to disfavor abortion and punish women seeking abortions, even those who are young and sick, with harassing laws.

Roe in the 21st Century

In 2000, eight years after the *Casey* decision, the Court agreed to hear another case that opened up *Roe* for reexamination. During that period, President Clinton had appointed two justices, Ginsburg and Breyer. The first challenge to *Roe* in the 21st Century came in the form of a Nebraska ban on so-called "partial-birth abortion" brought by the Center for Reproductive Rights. The language of the Nebraska ban—and the cookie-cutter versions that passed in 30 states—was sweeping and broad, and could have included virtually all abortion procedures, even those used in the early weeks of pregnancy. Publicly, however, supporters of these bans camouflaged this fact by using a term made up by the National Right-to-Life Committee—"partial-birth abortion"—and pretending that the bans were designed to prevent doctors from using one particular procedure.

In a 5-4 vote in the case *Stenberg v. Carhart (2000)*, the Court struck down the ban, finding it an unconstitutional violation of *Roe* and *Casey* by failing to include an

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exception to preserve the health of the woman and by imposing an undue burden on a woman's ability to choose an abortion.

In addition, the Court determined that the effect of the ban went well beyond prohibitions against so-called "late-term" abortion, finding the ban to be so broad and vague that constitutionally protected abortion procedures performed before viability could be prohibited. The majority decision was joined by four justices, with four separate dissenting opinions filed by Chief Justice Rehnquist and Justices Scalia, Thomas and Kennedy. Kennedy previously had supported the right to choose abortion in the *Casey* decision.

The 5-4 vote in *Stenberg* is an ominous sign for *Roe's* future. The nine Justices of the Supreme Court are clearly divided on this issue. Three—Chief Justice William Rehnquist and Justices Antonin Scalia and Clarence Thomas—are on record favoring a reversal of *Roe*.[4] Five other Justices—Justices John Paul Stevens, Sandra Day O'Connor, David Souter, Ruth Bader Ginsburg, and Stephen Breyer—believe that the U.S. Constitution protects the right of women to obtain abortions prior to viability and even after viability to protect their lives or health.[5] This leaves one Justice, Justice Anthony Kennedy, whose support for *Roe* is mixed.[6]

Because the Court is so closely divided, if one or two new Justices sharing the ideology of Justices Scalia, Thomas, and Rehnquist were appointed, the Court would likely overrule *Roe*, causing the first wholesale elimination of a constitutional right in U.S. history. As former Justice Blackmun noted, "[t]o overturn a constitutional decision that

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[4] *Stenberg v. Carhart*, 530 U.S. at 980 (Thomas, J., dissenting) ("although a State *may* permit abortion, nothing in the Constitution dictates that a State *must* do so.").

[5] While all of these Justices support *Roe's* core holding, they disagree about the degree of protection offered by the U.S. Constitution. For example, Justice Stevens criticized the Court's abandonment of the *Roe* standard in the Court's 1992 decision in *Planned Parenthood v. Casey*, and argued that the Court should have applied the principles established in cases from *Roe* through *Akron* to strike down Pennsylvania's requirement that physicians provide women with state-created biased materials designed to convince them not to obtain an abortion, as well as the 24-hour mandated delay period. 505 U.S. at 920-21. He also argued that these requirements were unconstitutional under the *Casey* "undue burden" standard because of the severity of burden they imposed and because the provisions did not serve legitimate state interests. *Id.* On the other hand, Justice O'Connor was the architect of the undue burden standard announced in the *Casey* decision in an opinion in which Justices Souter and Kennedy joined. *See* Appendix, Overview of Supreme Court Decision on Abortion and the Right to Privacy.

[6] *See Webster v. Reproductive Rights Health Services*, 492 U.S. 490 (1989) (arguing state's interest in protecting potential human life is compelling as of the moment of conception); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (reaffirming *Roe*'s standard for evaluating restrictions on abortions after viability but eliminating *Roe*'s trimester framework by explicitly extending the state's interest in protecting potential life and maternal health throughout pregnancy); *Stenberg v. Carhart*, 530 U.S. 914 (2000) (Kennedy, J., dissenting) (; *Lawrence v. Texas*, 539 U.S. 558 (2003) (citing *Casey* with approval numerous times for the proposition that the right to decide whether to obtain an abortion was similarly protected by the right to liberty under the Due Process Clause).

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secured a fundamental personal liberty to millions of persons would be unprecedented in our 200 years of constitutional history."[7]

What If *Roe* Fell?

Given the continued assault on *Roe*, and the success of anti-abortion advocates in whittling away *Roe's* protection, surprisingly few understand the legal ramifications of a reversal of *Roe*. For example, many assume that if the Supreme Court reversed *Roe* and sent the issue back to the states,[8] individual states would have to pass *new* legislation to ban abortions. Moreover, some commentators, while conceding that bans on abortions starting as early as 12-14 weeks of pregnancy (before amniocentesis is performed) are likely, dismiss as remote and inconsequential the possibility that bans on first-trimester abortion will be enacted in more than a "handful" of states.[9]

The sober truth, though, is that *old* laws are on the books that could ban abortion right away in many states. In states where the old laws have never been blocked by a court, state officials could begin enforcing these laws immediately; in states where the old laws have been blocked but never repealed, state officials could move to vacate court orders preventing enforcement and then enforce the bans. And states are likely to enact *new* laws banning abortion. State legislatures across the country from Arkansas to Kentucky to Illinois have been busy enacting laws establishing a state public policy of protecting the "unborn;" and, in six states, even promising that bans on abortion will be reinstated if *Roe* is overturned. Two states, Louisiana and Utah, went even further and in 1991 enacted new abortion bans, even while federal protection under *Roe* still existed. A ban on abortion came within inches of passing in 2004 in South Dakota and was vetoed by the anti-choice governor only because he was concerned that if the new law were challenged and blocked, the state might be left without *any* restrictions on abortion. And in Michigan, also in 2004, anti-abortion activists succeeded in enacting legislation that would ban all abortions; that law is now being challenged in court.

Recently, the Center for Reproductive Rights released a report on the state-by-state legal consequences if *Roe* is reversed. The report, *What If Roe Fell?,* looks at state constitutional and statutory protections, abortion bans currently on the books, and other anti-choice laws in the state. The report found that in 30 states women are at risk of losing their right to abortion if *Roe* is reversed, and 21 states are at the highest risk. As

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[7] *Webster*, 492 U.S. at 598 (Blackmun, J., concurring in part and dissenting in part).

[8] This is the manner of reversal promoted repeatedly by Chief Justice William Rehnquist, and Justices Antonin Scalia and Clarence Thomas. *See, e.g., Stenberg v. Carhart*, 530 U.S. 914, 980 (2000) (Thomas, J., dissenting) (expressing view that "[a]lthough a State *may* permit abortion, nothing in the Constitution dictates that a State *must* do so.").

[9] *See* Jeffrey Rosen, *Worst Choice*, New Republic, Feb. 24, 2003 (arguing that "pro-life legislators . . . would themselves think long and hard before pulling the trigger to overturn *Roe*" and that "even if a handful of state legislatures did pass restrictions on first-term abortions," the political consequences would be beneficial for the pro-choice movement).

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detailed in the report, many states already have pre-*Roe* abortion bans on the books that could be enforced after a *Roe* reversal. For example, Michigan's ban was blocked by the courts shortly after the *Roe* decision. But the day after *Roe* falls, Michigan officials could rush to court to lift the injunction, and in just a matter of days, begin enforcing the law. Doctors who performed abortions would be felons.

Alabama also has a pre-*Roe* abortion ban on the books, but unlike Michigan, it has never been enjoined by the courts. As a result, officials could begin enforcing the old law without going through the courts at all, immediately making abortion illegal in the state.

Also according to the report, the day after a *Roe* reversal, women seeking an abortion in states like Ohio may not have much time to obtain one. There's no pre-*Roe* ban on the books in the state, but there aren't any state constitutional or statutory protections of abortion rights either. The state has already passed numerous laws regulating abortion. And both the legislature and the governor are anti-choice. There's likely to be a rush to bring legislation banning abortion to the governor's desk and it will likely pass.

In 21 states women would be at high risk: Alabama, Arkansas, Colorado, Delaware, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, and Wisconsin.

In 9 states women would be at middle risk: Arizona, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, New Hampshire, and Pennsylvania.

In only 20 states are women likely to be protected: Alaska, California, Connecticut, Florida, Hawaii, Maine, Maryland, Massachusetts, Minnesota, Montana, Nevada, New Jersey, New Mexico, New York, Oregon, Tennessee, Vermont, Washington, West Virginia, and Wyoming.

Conclusion

If *Roe* were overturned today, within a year's time, almost 35 million women in their childbearing years would likely lose their right to choose. State governments would be given free rein to interfere in a woman's personal medical decisions. Left with no better options, women and teenagers would desperately turn to unsafe methods to terminate their pregnancies. In sum, without *Roe,* life for American women would be thrown more than 30 years in reverse and the nation will have turned the clock back on women's human rights.

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What If *Roe* Fell?

The State-by-State Consequences of Overturning *Roe v. Wade*

SEPTEMBER 2004

CENTER FOR REPRODUCTIVE RIGHTS
120 WALL STREET
NEW YORK, NY 10005
WWW.REPRODUCTIVERIGHTS.ORG

The Center for Reproductive Rights

The Center for Reproductive Rights is the leading legal advocacy organization dedicated to promoting and defending women's reproductive rights worldwide. Founded in 1992 (as the Center for Reproductive Law and Policy), the Center has defined the course of reproductive rights law in the United States with significant victories in courts across the country, including two landmark cases in the U.S. Supreme Court: *Stenberg v. Carhart* (2000), and *Ferguson v. City of Charleston* (2001). Using international human rights law to advance the reproductive freedom of women, the Center has strengthened reproductive health laws and policies across the globe by working with more than one hundred organizations in 45 countries.

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The Center's state legislative program works with state legislators, governors, partner organizations, lobbyists, and coalitions to prevent the passage of laws that would harm women's reproductive health and to promote the passage of positive laws. The program monitors and analyzes pending legislation, providing an "early warning system" on bills that may require legal challenges. It also offers model legislation, legal tools, and strategic advice to over 650 state contacts.

STATE PROGRAM
CENTER FOR REPRODUCTIVE RIGHTS
120 WALL ST., 14TH FLOOR
NEW YORK, NY 10005
(917) 637-3600
WWW.REPRODUCTIVERIGHTS.ORG

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EXECUTIVE SUMMARY

There is perhaps no political issue more volatile in the United States than abortion, no Supreme Court ruling subject to such a well-organized and well-funded attack as *Roe v. Wade*. Since it was decided in 1973, *Roe* has been under constant attack. Since 1995 alone, state legislatures have enacted 380 measures restricting abortion, and in November 2003, Congress passed the first-ever federal ban on abortion procedures. Anti-choice forces are counting on new appointments to the Supreme Court in the next few years to totally overturn *Roe*.

What would happen if *Roe* were to fall? This study by the Center for Reproductive Rights provides a detailed state-by-state analysis of the impact of a reversal of *Roe*.

A Supreme Court decision overturning *Roe* would not by itself make abortion illegal in the United States. Instead, a reversal of *Roe* would remove federal constitutional protection for a woman's right to choose and give the states the power to set abortion policy. Of course, all 50 states run the risk of their state legislatures enacting new abortion bans if *Roe* is overruled. But this study of current state laws, state constitutions, and the composition of state legislatures identifies five different categories that determine different levels of risk to the right to choose in each state.

Those categories are: states with abortion bans on the books that have never been blocked by courts; states with abortion bans on the books that have been blocked by courts; states that are highly vulnerable to enactment of new bans by their legislatures; states with constitutional protections for abortion and states with strong statutory protection for the right to choose, including legislatures disinclined to enact a new ban.

Where it gets complicated is that most states fall into more than one category, and a state's level of risk is determined by that combination of factors. For example, one might conclude that Massachusetts is at high risk because it has an abortion ban on the books that has never been blocked by the court. But the state constitution of Massachusetts specifically protects the right to choose abortion even more strongly than the U.S. Constitution. So it follows that women in Massachusetts are at low risk for losing their right to choose.

That said, we have found that women in more than half the country would be vulnerable to efforts by anti-choice forces to ban abortion.

In 30 states, women are at risk of losing their right to choose abortion after a reversal of *Roe*; 21 of these states warrant the highest level of concern.

In only 20 states does women's right to choose abortion appear secure.

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TABLE OF CONTENTS

INTRODUCTION page 1

A PATCHWORK OF RIGHTS:
UNDERSTANDING THE IMPACT OF A REVERSAL OF *ROE* page 7

WHAT CAN BE DONE NOW TO PROTECT THE RIGHT TO CHOOSE ABORTION? page 15

STATE-BY-STATE LEGAL ANALYSIS page 17

ALABAMA	page 19	NEBRASKA	page 58
ALASKA	21	NEVADA	59
ARIZONA	22	NEW HAMPSHIRE	61
ARKANSAS	24	NEW JERSEY	62
CALIFORNIA	26	NEW MEXICO	63
COLORADO	27	NEW YORK	64
CONNECTICUT	29	NORTH CAROLINA	65
DELAWARE	30	NORTH DAKOTA	67
DISTRICT OF COLUMBIA	32	OHIO	68
FLORIDA	33	OKLAHOMA	69
GEORGIA	35	OREGON	71
HAWAII	36	PENNSYLVANIA	72
IDAHO	38	RHODE ISLAND	73
ILLINOIS	39	SOUTH CAROLINA	75
INDIANA	41	SOUTH DAKOTA	76
IOWA	42	TENNESSEE	77
KANSAS	43	TEXAS	78
KENTUCKY	44	UTAH	79
LOUISIANA	45	VERMONT	81
MAINE	47	VIRGINIA	83
MARYLAND	48	WASHINGTON	84
MASSACHUSETTS	49	WEST VIRGINIA	85
MICHIGAN	51	WISCONSIN	87
MINNESOTA	53	WYOMING	88
MISSISSIPPI	54	COMMONWEALTH OF PUERTO RICO	91
MISSOURI	55	TERRITORY OF GUAM	93
MONTANA	57		

APPENDIX page 95

Model Legislation: Reproductive Privacy Act 97

Overview of Supreme Court Decisions on Abortion and the Right to Privacy 99

Timeline of Selected Supreme Court Decisions on Abortion and the Right to Privacy 103

State Abortion Bans 113

State Reproductive Privacy Acts 128

INTRODUCTION

Why consider "If *Roe* Fell"?

There is perhaps no political issue more volatile in the United States than abortion, no Supreme Court ruling subject to such a well-organized and well-funded attack as *Roe v. Wade* ("*Roe*").[1] Given the continued assault on *Roe*, and the success of anti-abortion advocates in whittling away *Roe's* protections,[2] it is shocking how few of us understand the legal ramifications of a reversal of *Roe*. For example, many assume that if the Supreme Court reversed *Roe* and sent the issue back to the states,[3] individual states would have to pass *new* legislation to ban abortions. Moreover, some commentators, while conceding that bans on abortions starting as early as 12-14 weeks of pregnancy (before amniocentesis is performed) are likely, dismiss as remote and inconsequential the possibility that bans on first-trimester abortion will be enacted in more than a "handful" of states.[4]

The sober truth, though, is that *old* laws are on the books that could ban abortion right away in many states. In states where the old laws have never been blocked by a court, state officials could begin enforcing these laws immediately; in states where the old laws have been blocked but never repealed, state officials could move to vacate court orders preventing enforcement and then enforce the bans. And anyone who claims that states are unlikely to enact *new* laws banning abortion simply hasn't been paying attention. State legislatures across the country from Arkansas to Kentucky to Illinois have been busy enacting laws establishing a state public policy of protecting the "unborn," and, in six states, even promising that bans on abortion will be reinstated if *Roe* is overturned. Two states, Louisiana and Utah, went even further and in 1991 enacted new abortion bans, even while federal protection under *Roe* still existed. A ban on abortion came within inches of passing in 2004 in South Dakota and was vetoed by the anti-choice governor only because he was concerned that if the new law were challenged and blocked, the state might be left without *any* restrictions on abortion. And in Michigan also in 2004, anti-abortion activists succeeded in enacting legislation that would ban all abortions; that law will be subject to a legal challenge and should be blocked before it takes effect, assuming *Roe* stands. Imagine the rush to bring legislation to governors' desks if *Roe* is gone.

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[1] 410 U S 113 (1973)

[2] See Appendix for an overview of United States Supreme Court decisions on abortion and the right to privacy

[3] This is the manner of reversal promoted repeatedly by Chief Justice William Rehnquist, and Justices Antonin Scalia and Clarence Thomas *See, e g., Stenberg v. C arhart*, 530 U S 914, 980 (2000) (Thomas, J , dissenting) (expressing view that "[a]lthough a State *may* permit abortion, nothing in the Constitution dictates that a State *must* do so ")

[4] *See* Jeffrey Rosen, *Worst Choice*, New Republic, Feb 24, 2003 (arguing that "pro-life legislators would themselves think long and hard before pulling the trigger to overturn *Roe*" and that "even if a handful of state legislatures did pass restrictions on first-term abortions," the political consequences would be beneficial for the pro-choice movement)

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This report provides a state-by-state guide to the impact of a *Roe* reversal. For example, on the day after *Roe* is reversed:

> Imagine that your sister is living in Alabama and has an appointment to obtain a first trimester abortion. Would she be able to get it? No. State officials could begin immediately to enforce Alabama's pre-*Roe* abortion ban that remains on the books and has never been enjoined by a court. Doctors prosecuted under the law risk jail. Pro-choice lawyers could argue that the law had been "repealed by implication," meaning that newer abortion restrictions enacted after *Roe* have, in effect, repealed the pre-*Roe* total ban. However, the success of such an argument is far from certain under Alabama law.
>
> Imagine that you live in a state such as Mississippi, Michigan, or Rhode Island, where pre-*Roe* abortion bans have been blocked since shortly after the *Roe* decision. State officials rush to court to lift the injunctions and begin enforcing the laws. Will they succeed? Most likely, yes. Mississippi courts are unlikely to find that the statute was "repealed by implication"; the argument would be difficult to win in Michigan and Rhode Island as well. Doctors who perform abortions in violation of the pre-*Roe* ban—even in the first trimester—would be felons.
>
> Imagine that your daughter lives in Nebraska; it's mid-January and the legislature is in session. She needs an abortion. She'd better hurry. Nebraska has no ban on the books, but the legislature has never met an abortion restriction it didn't like. It has already enacted a statute "expressly deplor[ing] the destruction of the unborn human lives which has and will occur in Nebraska" as a result of *Roe*, and is poised to enact a new ban on abortion if *Roe* is overturned.

The United States Supreme Court: the vote count

But all this begs the question: is *Roe* at risk? And if so, given how much of *Roe* has already been eviscerated, what of *Roe* remains to be jettisoned and how, if at all, is the Court likely to do that? The bottom line is that a slight change in the composition of the Court could tip the balance toward an anti-abortion majority and doom the core holding of *Roe*.

The nine Justices of the Supreme Court are clearly divided on this issue. The three most conservative members of the Court—Chief Justice William Rehnquist and Justices Antonin Scalia and Clarence Thomas—are on record favoring a reversal of *Roe*.[5] The consequence of their view is that states would be allowed—but would not be

[5] *Stenberg v. Carhart*, 530 U S at 980 (Thomas, J , dissenting) ("although a State *may* permit abortion, nothing in the Constitution dictates that a State *must* do so ")

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required—to ban abortions.[6] It is doubtful that the Court would overrule *Roe* by holding that a fetus, embryo, or zygote is a "person" within the meaning of the Fourteenth Amendment to the U.S. Constitution, thus establishing a right to life from the moment of conception and outlawing abortion nationwide.[7] However, in Court opinions, these Justices have expressed the view that states should be able to protect fetal life from the moment of conception, and that a state's interest in protecting fetal life outweighs any "liberty" interest a woman might have in controlling whether or not to give birth.[8]

Five other Justices—Justices John Paul Stevens, Sandra Day O'Connor, David Souter, Ruth Bader Ginsburg, and Stephen Breyer—believe that the U.S. Constitution protects the right of women to obtain abortions prior to viability and even after viability to protect their lives or health.[9] These five Justices fully support one of the fundamental tenets of *Roe*, a principle repeatedly reaffirmed by the Court,[10] that restrictions on abortion may not compromise the woman's health. Most recently, in 2000 in *Stenberg v. Carhart*, these five Justices formed the majority to hold that a statute banning methods of abortion that lacks an exception to protect the health of the woman is unconstitutional absent evidence that a health exception would "never [be] necessary to preserve the health of women."[11] According to these five Justices, the government may not prohibit physicians from providing, and their patients from obtaining, the safest abortions possible.[12]

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[6] *Stenberg v. Carhart*, 530 U S at 980 (Thomas, J , dissenting), *Planned Parenthood v. Casey*, 505 U S 833, 944 (1992) (Rehnquist, C J , dissenting, joined by Justices White, Scalia and Thomas) (arguing that *Roe* should be overruled and stating "[w]e would adopt the approach of the plurality in *Webster*"), *Webster v. Reprod. Health Servs.*, 492 U S 490, 519 (arguing that state's interest in protecting potential human life is compelling as of the moment of conception) (Rehnquist, C J), *Id.* at 55556 (Blackmun, J , concurring in part, and dissenting in part) (noting that under plurality's view "every hindrance to a woman's ability to obtain an abortion must be 'permissible '")

[7] As Justice Stevens noted in his opinion concurring and dissenting in *Casey*, 505 U S at 913, "no Member of the Court has ever questioned th[e] fundamental proposition" that "an abortion is not 'the termination of life entitled to Fourteenth Amendment protection ' "

[8] *Webster*, 492 U S at 519, *Casey*, 505 U S at 594 As former Justice Blackmun, the author of the Court's opinion in *Roe*, lamented

> The [anti-*Roe* Justices'] balance matches a lead weight (the State's allegedly compelling interest in fetal life as of the moment of conception) against a feather (a "liberty interest" of the pregnant woman that the plurality barely mentions, much less describes) The plurality's balance – no balance at all – places nothing, or virtually nothing, beyond the reach of the democratic process

Webster, 492 U S at 556 n 11 (Blackmun, J , dissenting)

[9] While all of these Justices support *Roe's* core holding, they disagree about the degree of protection offered by the U S Constitution For example, Justice Stevens criticized the Court's abandonment of the *Roe* standard in the Court's 1992 decision in *Planned Parenthood v. Casey*, and argued that the Court should have applied the principles established in cases from *Roe* through *Akron* to strike down Pennsylvania's requirement that physicians provide women with state-created biased materials designed to convince them not to obtain an abortion, as well as the 24-hour mandated delay period 505 U S at 920-21 He also argued that these requirements were unconstitutional under the *Casey* "undue burden" standard because of the severity of burden they imposed and because the provisions did not serve legitimate state interests *Id.* On the other hand, Justice O'Connor was the architect of the undue burden standard announced in the *Casey* decision in an opinion in which Justices Souter and Kennedy joined See Appendix, Overview of Supreme Court Decision on Abortion and the Right to Privacy

[10] *See, e g , Casey*, 530 U S at 879, *Thornburgh v Am. Coll of Obstetricians & Gynecologists*, 476 U S 770, 768-69 (1986) (women's health must remain the physician's "paramount consideration ").

[11] *Carhart*, 530 U S at 937-38, *see also Planned Parenthood v. Owens*, 287 F 3d 910, 919 (10th Cir 2002) (discussing *Carhart* analysis) As the Court explained, "this Court has made clear that a State may promote but not endanger a woman's health when it regulates the methods of abortion " *Id* at 931 (citations omitted) Rejecting the argument that the health exception applies only to situations where the pregnancy itself creates a threat to health, the Court emphasized that the "State cannot subject women's health to significant risks" in that context *or* "where state regulations force women to

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This leaves one Justice, Justice Anthony Kennedy, whose support for *Roe* is mixed. Shortly after his appointment to the Court, Justice Kennedy joined Justice Rehnquist and then-Justice White in 1989 in urging reconsideration of *Roe* in *Webster v. Reproductive Health Services.*[13] These Justices, including Justice Kennedy, indicated that were the question properly before them, they would overrule *Roe* by holding that the state had a compelling interest in fetal life from the moment of conception. However, just three years later, Justice Kennedy joined the Court's 1992 decision in *Casey* that reaffirmed the central principles of *Roe*, even while lowering the level of constitutional protection for abortion and allowing states to enact many onerous regulations. Then in 2000, Justice Kennedy dissented from the Court's opinion in *Carhart,* raising eyebrows and concern among pro-choice advocates that his support for the right to choose was eroding once again. The concerns were twofold.

First, in his dissent Justice Kennedy backed further away from *Roe*, dissenting from the majority's reaffirmation of the principle—central to abortion jurisprudence from *Roe* through *Casey*—that restrictions on abortion must include provisions that protect women's health.[14] Instead, Justice Kennedy saw Nebraska's prohibition of a method[15] of abortion as a valid exercise of "Nebraska's *right to declare* that critical moral differences exist" between the banned procedure and another procedure.[16] Justice Kennedy's willingness to allow states to ban methods of abortion that the American College of Obstetricians and Gynecologists (ACOG), the organization that represents 95% of all obstetricians and gynecologists in the country, believes would reduce risks of uterine perforation, cervical lacerations, infections, and thus infertility—as well as his apparent belief that these risks are "insignificant"[17]—has spurred many to count Justice Kennedy as a vote against *Roe*. Indeed, under Justice Kennedy's reasoning, a state would be able to legislate the way in which physicians perform abortions based on the state's moral view of the particular procedure, even if the legislation subjected the woman to additional risks to her health. Under this theory, there is nothing to prevent the state from banning

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use riskier methods of abortion." *Id.* (noting that "[o]ur cases have repeatedly invalidated statutes that in the process of regulating the *methods* of abortion, imposed significant health risks ")

[12] *Id.* The Court was clear that "[b]y no means must a State grant physicians 'unfettered discretion' in their selection of abortion methods," but instead held there must be "substantial medical authority support[ing] the proposition that banning a particular procedure could endanger women's lives " *Id.* at 938

[13] 492 U S 490, 498 (1989)

[14] *Id.* at 964

[15] Although the Court held that the Nebraska statute was so broadly written that it banned the safest and most common method of abortion used in the second trimester, Justice Kennedy interpreted the statute more narrowly to ban only the D&X method of abortion. *Compare Carhart*, 530 U S at 938-39 (construing statute to ban D&Es, the most common second trimester method) *with id.* at 972-79 (Kennedy, J , dissenting) ("law applies only to the D&X")

[16] *Carhart*, 530 U S at 964 (emphasis added) Apparently relying on *Casey's* recognition that states could require women to be told that the state disapproved of the woman's choice, even presumably that the state itself condemned the woman's choice, Justice Kennedy argued that banning some abortions – including those that are the safest – was simply Nebraska's method of "instruct[ing] all participants in the abortion process, including the mother, of its moral judgment that all life, including the life of the unborn, is to be respected " In this way, he reasoned, the ban served the state's interest in insuring that the woman's choice to have an abortion was "more informed " *Id.* Of course Nebraska's statute, even if interpreted to apply only to one method of abortion, went far beyond a *declaration* of Nebraska's moral judgment concerning one procedure, such a declaration may indeed have been constitutional under *Casey.* Instead, the statute imposed a *ban* on that procedure and would have forced women to *undergo* riskier methods of abortion.

[17] *Carhart*, 530 U S at 967 (Kennedy, J, dissenting) (distinguishing Casey's requirement that regulation must impose a "significant" threat before it was seen as undue burden from case at hand).

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any new and potentially safer method of abortion by declaring its moral repugnance. Even if Justice Kennedy supports some basic right to choose abortion,[18] there is little left of the right if states can force women to endure risks to their health that their physicians would never countenance.

Second, many saw Justice Kennedy's *Carhart* dissent as uncharacteristically hostile. For example, he used the term "abortionist"—which is used exclusively in a derogatory manner by anti-abortion advocates—to refer to physicians who provide abortions.[19] He also seemed to ignore ACOG's position that the ban would increase risks to women of serious complications.[20]

Thus, the Court is closely divided. Moreover, the Court is well overdue for change. It has been ten years since Justice Breyer, the most junior member of the Court, was appointed in 1994, the longest period without a new appointment since the early 1800s.[21] If one or two new Justices sharing the ideology of Justices Scalia, Thomas, and Rehnquist were appointed, the Court would likely overrule *Roe*, causing the first wholesale elimination of a constitutional right in U.S. history. As former Justice Blackmun noted, "[t]o overturn a constitutional decision that secured a fundamental personal liberty to millions of persons would be unprecedented in our 200 years of constitutional history."[22]

Conclusion

Anti-choice forces are counting on a changing Supreme Court and have been working tirelessly to pass anti-choice legislation in hopes that such legislation will be challenged in court, eventually forcing the Court to reexamine, and overturn, *Roe*. Given their near misses in the past in the *Webster*, *Casey*, and *Carhart* decisions, these anti-choice forces are especially determined to be successful this time at overturning *Roe*. Therefore, it is imperative that pro-choice forces prepare now, before changes in the Court occur, to educate themselves about the status of *Roe* in each state and to lay the legislative groundwork necessary to protect the right to choose abortion in the event that *Roe* is overruled. We hope this report will serve to educate the public and will give activists the tools they need to protect *Roe* on both national and state levels.

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[18] In his recent opinion in *Lawrence v. Texas*, striking down Texas's anti-sodomy statute, Justice Kennedy appeared to signal his continued support for the basic notion that women have a liberty interest protected by the Due Process Clause that protects their right to obtain an abortion *Lawrence v Texas*, 539 U S 558 (2003)

[19] *Carhart*, 530 U S at 958 (Kennedy, J , dissenting).

[20] *Compare id.* at 967 (Kennedy, J , dissenting) *with id.* at 935-36

[21] ALMANAC OF THE FEDERAL JUDICIARY, Vol 2 (Christine Housen, ed 2004)

[22] *Webster*, 492 U S at 598 (Blackmun, J , concurring in part and dissenting in part)

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A PATCHWORK OF RIGHTS: UNDERSTANDING THE IMPACT OF A REVERSAL OF *ROE*

A Supreme Court decision overturning *Roe* most likely would not by itself make abortion illegal in the United States.[23] Rather, such a decision would remove federal constitutional protection for the right to choose and give each state the authority to set its own abortion policy, including banning abortions outright. The only states in which the right to choose would be protected from changes in the political winds are those whose state constitutions provide strong protection independent of the U.S. Constitution—currently a mere ten states. Given the variations in law and political climates in the 50 states, the overturning of *Roe* would result in a patchwork of rights in which women seeking abortions would be strongly protected in some states and completely denied the right in others, with different levels of protection in between. Legislatures, law enforcement officials, and state courts would all have a role in shaping the scope of these rights. It is also possible that Congress could act to ban abortions if *Roe* is overturned. Such a ban, if upheld, would preempt state regulation of abortion, nullifying any protections granted under state statutes or constitutions.

Understanding the patchwork that would be left if *Roe* is reversed requires careful legal analysis of each state's laws, constitutions, and court decisions, as well as legislative and political considerations. The following state-by-state review analyzes the likely short-term impact on legal abortion in each state should the Supreme Court overrule *Roe*. In other words, we examine what would be the likely effect of a reversal within one year of the decision. In some states, the impact could be immediate; in other states, change would take longer.

Five categories emerged from our review that determine the level of risk to the right to choose in each state. Most states fall into more than one of these categories: (1) those with abortion bans on the books that have never been blocked by the courts; (2) those with abortion bans that are on the books but have been blocked by courts; (3) those that are most vulnerable to the enactment of new bans; (4) those with state constitutional protection that is independent of the U.S. Constitution and should survive the demise of *Roe*; and (5) those with strong statutory protection for the right to choose abortions or legislatures that will be hesitant to ban abortions.

These overlapping factors establish that women in 21 states are at the highest risk of losing their right to choose abortion. This is because of these states' vulnerability to enactment of new bans or the revival of old ones, coupled with a lack of state

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[23] *See supra* Introduction, "The United States Supreme Court the vote count" at 2-3 This report presumes that a decision to overrule *Roe* will leave regulation of abortion to the discretion of the states (and Congress, possibly), rather than command a prohibition on abortion by finding that the fetus or embryo is a "person" under the Fourteenth Amendment and therefore entitled to protection from the state

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constitutional protections. These states are: Alabama, Arkansas, Colorado, Delaware, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, and Wisconsin. The Territory of Guam is also at high risk.

In only 20 states, women's right to choose abortion appears secure because of established strong state constitutional or statutory protections or a friendly legislative environment. These states are: Alaska, California, Connecticut, Florida, Hawaii, Maine, Maryland, Massachusetts, Minnesota, Montana, Nevada, New Jersey, New Mexico, New York, Oregon, Tennessee, Vermont, Washington, West Virginia, and Wyoming.

In the remaining 9 states, the Commonwealth of Puerto Rico and the District of Columbia, protection is uncertain. In some of these states, legislative factors are uncertain but warrant concern. In others, there is some indication that the right to choose abortion could be protected under the state constitution, but the right is by no means secure. These states are: Arizona, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, New Hampshire, and Pennsylvania.

What follows is a breakdown of the states as they fall into the five categories. Keep in mind that there will be overlap among the categories.

Four states with bans on the books that have never been blocked by the courts

In Alabama, Delaware, and Massachusetts, laws banning abortion that were enacted before the decision in *Roe v. Wade* remain on the books and have never been declared unconstitutional or blocked by a court. In addition, a pre-*Roe* ban in Wisconsin has been declared unconstitutional only as applied to abortions performed prior to "quickening,"[24] thus leaving intact a ban on some pre-viability abortions. After *Roe* was decided, these laws became unenforceable, but no court has officially issued an order blocking their enforcement. Although the Delaware attorney general has issued an opinion stating that the Delaware law was unconstitutional and could not be enforced, the opinion is not binding and does not carry the same force as a judicial opinion. In these four states, therefore, state officials could take immediate steps to enforce the bans if *Roe* is overruled—for example, by prosecuting abortion providers. In each state, the position of the attorney general may be the decisive factor in determining whether immediate enforcement will begin; or these decisions may be left to the discretion of local law enforcement agencies.

The main argument against revival of pre-*Roe* bans is that the laws have been *repealed by implication* by laws regulating abortion enacted after *Roe*. (See box, "Implied Repeal"). In order to prevent arrests and prosecutions of abortion providers, providers would themselves have to file a lawsuit to make this argument affirmatively and to ask the court to prevent enforcement of the pre-*Roe* abortion ban. The argument could also be made

[24] *Babbitz v. McCann*, 310 F Supp 293 (E D Wis 1970), *appeal dismissed*, 400 U S 1 (1970), *supplemental opinion*, 320 F Supp 219 (E D Wis 1970), *vacated and remanded*, 402 U S 903 (1971) The court noted that "quickening" is the point in pregnancy when it is possible to detect fetal movement, usually at around 16 to 18 weeks *Id* at 299

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after the fact, as a defense during a criminal prosecution of a provider brought under the ban statute.

IMPLIED REPEAL

When a law is *expressly* repealed, the legislature passes a new law that explicitly states that the old law is repealed.[25] Under the doctrine of *implied repeal*, if a new statute is enacted that conflicts with an older statute, the older statute is said to have been "repealed by implication" and can no longer be enforced. For example, when the Tennessee legislature passed a law in 1988 requiring parental consent for minors seeking abortion and passed another law in 1989 requiring parental notice, the Tennessee Supreme Court ruled that the 1989 law repealed the earlier statute by implication.[26]

In order to argue successfully that an abortion ban has been repealed by implication, and is therefore no longer enforceable, it is usually necessary to show that the state has subsequently enacted laws regulating abortion that cannot be reconciled with the ban. For example, after *Roe* was decided, the Louisiana Legislature passed several statutes regulating abortion and setting forth the circumstances under which abortions would be permitted, without explicitly repealing its pre-*Roe* ban. A federal district court reviewing the laws found that an irreconcilable conflict existed between the statutes stating when abortion would be legal and the pre-*Roe* ban making abortion illegal. Therefore the ban was repealed by implication.[27]

However, this determination is often not so clear-cut. For example, many states have enacted restrictions on the abortions that are permitted in the state—such as a requirement that women wait 24 hours after receiving certain state-scripted and biased information before obtaining an abortion ("mandatory delay/biased counseling" laws)—rather than passing a statute affirmatively setting forth the conditions under which abortions are permitted. In this situation, a court could decide that these later-enacted statutes were not irreconcilable with an earlier ban statute by interpreting the mandatory delay/biased counseling law as a regulation on the few abortions that might be allowed under the ban statute. For example, if the ban allowed abortions to save the woman's life, the court could interpret the mandatory delay law as regulating those few abortions performed to save the woman's life, not as an indication that additional abortions were allowed. Under this reasoning, an abortion ban would not be viewed as irreconcilable, and therefore might be considered enforceable. A different court could reason that the enactment of the restrictions indicated that abortion was permitted (since there would be nothing to restrict if it wasn't) and therefore find implied repeal of the ban. To complicate things further, although most states recognize the doctrine of implied repeal, courts in many states have resisted applying the doctrine. Thus, while repeal by implication may be the best legal argument available against immediate enforcement of a pre-*Roe* ban, pro-choice advocates should consider other strategies as well.

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[25] For example, this occurred in Florida when the legislature explicitly repealed a parental consent requirement that had been ruled unconstitutional by the Florida Supreme Court. *See In re T.W.*, 551 So 2d 1186 (1989)

[26] *Planned Parenthood of Nashville v. McWherter*, 817 S W 2d 13, 16 (1991), *see also McCorvey v. Hill*, No 03-10711 (5th Cir Sept. 14, 2004) (Texas's pre-*Roe* statute repealed by implication)

[27] *Weeks v Connick*, 733 F Supp 1036 (E D La 1990)

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Thirteen states with bans on the books that *have* been blocked by courts

In 11 states and the Commonwealth of Puerto Rico, pre-*Roe* abortion bans are on the books that have been enjoined, declared unconstitutional, or limited so as to meet the requirements of *Roe* by state or federal courts.[28] Two additional states, Louisiana and Utah, and the Territory of Guam enacted abortion bans even after *Roe*; those bans have been declared unconstitutional.[29] The laws in Louisiana, Utah, and Guam were enacted in the wake of the Supreme Court's 1989 ruling in *Webster v. Reproductive Health Services*,[30] a decision that was widely viewed as heralding the demise of *Roe* and that inspired these legislative efforts to test the continuing vitality of *Roe* by banning abortion.

In all of these states and territories, if *Roe* is overturned, officials could file court actions immediately asking courts to set aside the court orders preventing enforcement of the laws, so that the bans could go back into effect. While in most cases, there will be some delay before the court renders a decision, if the previous judgment is set aside by the court, enforcement of the ban could begin within weeks or even days of a decision overturning *Roe*.[31] (Of course, anti-choice officials in some states and territories might try to enforce the bans immediately without going through proper judicial channels; in such cases, advocates should immediately go to court to block the prosecutions on the basis that the court judgments are still in effect).

Eighteen states that are most vulnerable to the enactment of new bans

Because most state legislatures meet for at least some part of every year, and can be called in to special session at other times, all 50 legislatures would be able to consider a legislative response to a decision overturning *Roe* within days, weeks, or months of the ruling. If *Roe* is overturned, some type of ban on abortion will likely be introduced in every state, just as measures to protect abortion rights will be introduced where needed. Proposals to ban abortion will take on many forms. At their most extreme, these bans

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[28] In addition to Puerto Rico, the states in this category are Arizona, Arkansas, Colorado, Michigan, Mississippi, New Mexico, North Carolina, Oklahoma (with subsequent reenactment, post-decision), Rhode Island, Vermont, and West Virginia In addition, as noted above, the pre-*Roe* ban in Wisconsin was partially blocked by the Court, as to abortions prior to "quickening."

[29] *Sojourner T. v. Edwards*, 974 F 2d 27 (5th Cir. 1992), *Jane L. v Bangerter*, 809 F Supp 865 (D Utah 1992), *aff'd*, 102 F 3d 1112 (10th Cir 1996), *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 776 F Supp 1422 (D Guam 1990), *aff'd*, 962 F 2d 1366 (9th Cir 1992)

[30] 492 U S 490 (1989)

[31] One argument that can be raised in opposition to the motion to set aside the judgment is that of implied repeal, discussed above that is, the court should not set aside the previous judgment and allow enforcement of the ban because statutes enacted subsequent to the ban have repealed it by implication The success of this argument will depend on the particular state's laws and the particular factual situation Another argument against lifting an old injunction or overturning a previous declaratory judgment is that such a motion is untimely because *Roe* has been the law of the land for decades This argument may not prevail, given that a motion to set aside a judgment based on a change in the law under Rule 60(b) of the Federal Rules of Civil Procedure is premature if made before the law has changed It is nonetheless possible that some courts will accept the argument that it is too late to set aside the judgment. *See McCorvey v Hill*, 2003 WL 21448388 (N D Tex June 19, 2003) (rejecting a recent motion to reopen the judgment in *Roe* as untimely), *aff'd on other grounds*, No 03-10711 (5th Cir Sept. 14, 2004). A final potential argument against setting aside the judgment and immediate enforcement of the ban is that it is unfair, or violates due process guarantees, to prosecute providers under a law that has been unenforceable for years, without giving them adequate time to become aware of the change in law and change their practices accordingly The success of this argument will likely depend on the particular state's case law on due process and the particular factual situation.

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will prohibit all abortions, perhaps with limited exceptions for cases in which a woman's life is at stake. Other measures may permit abortions only for certain specified reasons, such as rape, incest, and lethal fetal anomalies. Another approach may be to permit abortions only during the first trimester.

One way to gauge the probable legislative response in a particular state is to look at what restrictions on abortion are already in place and when those restrictions were enacted. A state that has restricted abortions to the extent currently permitted under the U.S. Constitution is likely to pass a broad ban on abortions. This includes states with laws preventing physicians from performing the safest abortion procedures, forcing adult women to wait 24 hours after being subjected to a state-mandated lecture before obtaining an abortion, requiring minors to obtain the consent of their parents before obtaining an abortion, subjecting abortion providers to onerous, unnecessary regulations designed to force them out of business, and prohibiting Medicaid payment for abortions for poor women. Of course, states like Louisiana and Utah, and the Territory of Guam, which had passed bans on pre-viability abortion even while *Roe* was in place, are likely to pass similar bans again if *Roe* is overturned. Moreover, the 13 states with official positions against abortion, including the six states with "trigger laws"—laws that indicate that the state will ban abortions if allowed under the U.S. Constitution— are more likely to enact bans. (See box, "Trigger Laws"). More moderate states with few restrictions may take no action or enact more limited restrictions.

Based on past legislative activity as well as the current composition of their legislatures,[32] 18 states are particularly vulnerable to enactment of a *new* statute banning abortion.[33] These states are comprised of 10 of the states with bans on the books and/or official positions against abortion and 8 additional states whose legislatures have proven particularly hostile to abortion.[34] The Territory of Guam is also likely to enact a ban. Where the state's constitution protects the right to choose, as it does in 4 of these states—Alaska, Florida, Minnesota, and Montana,[35]—bans on abortion should be struck down and the right should continue to be protected. In the remaining states and in Guam, bans are unlikely to be struck down and women will lose the right to choose abortion.

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[32] Only the states that appear most at risk of new enactments are included in this category Some state legislatures, such as those in Pennsylvania and Oklahoma, have histories of hostility to abortion but do not appear to be the most at risk based on political factors.

[33] Alabama, Alaska, Florida, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, South Carolina, South Dakota, Texas, Utah, and Virginia. As noted above, Alabama, Louisiana, Michigan, Mississippi, and Utah already have bans on the books, all of which—except for Alabama's ban—have been blocked by courts Because these states are also likely to enact new bans, any doubts about whether the old bans could be enforced are likely to become moot.

[34] These additional states are Alaska, Florida, Minnesota, Ohio, South Carolina, South Dakota, Texas, and Virginia

[35] It is unclear whether Kentucky's Constitution will provide protection for the right to choose

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Ten states with strong state constitutional protection for the right to choose abortion

Without federal constitutional protections, it will fall to the state courts to decide whether they will offer any independent protection for women's right to choose abortion under state constitutions. State constitutions can provide broader protections for individual rights than the U.S. Constitution and in some cases they already have. In 10 states, any attempts to ban abortion would fail because their highest courts have interpreted their constitutions to provide explicit protection to abortion rights, often affording greater protection than what has been recognized under the U.S. Constitution.[36] In 9 additional states, lower courts have recognized state constitutional protection for the right to choose abortion, or courts have recognized the right of privacy in other contexts, suggesting that protection might be extended to abortion rights.[37] State constitutional protection could be used both to block attempts to enforce pre-*Roe* abortion bans and to invalidate newly enacted legislation.

Six states with strong statutory protection for the right to choose abortion, and seven additional states whose legislatures appear unlikely to ban abortion

Six states have statutes on the books that strongly protect abortion rights.[38] In these states, abortion rights should be protected if *Roe* is overturned (unless the legislature amends or repeals this legislation). In addition, state legislatures in 7 additional states appear unlikely to ban abortions in the near future.[39]

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[36] These states are Alaska, California, Florida, Massachusetts, Minnesota, Montana, New Jersey, New Mexico, Tennessee, and West Virginia

[37] These states are Arizona, Connecticut, Georgia, Hawaii, Illinois, Indiana, Kentucky, Oregon, and Vermont. This also applies to the Commonwealth of Puerto Rico

[38] These states are California, Connecticut, Maine, Maryland, Nevada, and Washington. In addition, Vermont's Legislature enacted a strong pro-choice resolution.

[39] These states are Hawaii, Iowa, New Hampshire, New York, Oregon, Vermont, and Wyoming. Four of these states—Iowa, New Hampshire, New York, and Wyoming—have no established state constitutional protection for the right to choose abortion. The state constitutions in Hawaii, Oregon, and Vermont may provide protection

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TRIGGER LAWS

Beginning shortly after the decision in *Roe*, some states adopted statutes or constitutional amendments that call for abortion bans, or assert that abortion will be banned if the U.S. Supreme Court eliminates federal constitutional protection for the right to choose abortion. Six states[40] have such laws, often called "trigger laws" because they suggest that an abortion ban will immediately and automatically be triggered if *Roe* is overturned. Trigger laws, however, would not have this effect by themselves. For example, Illinois has a trigger law stating that if *Roe* is overturned or modified, the "policy" of Illinois to prohibit abortions will be "reinstated."[41] Illinois has also repealed its pre-*Roe* abortion ban, however, so that even if the Supreme Court overturns *Roe*, there is no ban in place to reinstate. Several other states have enacted statutes providing that it is the policy of the state to prohibit abortions, or to protect fetuses, but these laws do not contain actual bans.[42] Moreover, in all but three of these states (Arkansas, Louisiana, and Utah), pre-*Roe* bans have been repealed, leaving nothing for the policy statements to "trigger." In the three states with bans on the books, courts have declared the laws unconstitutional, thus preventing them from being instantly revived if *Roe* is overturned, in spite of the policy statements. Such laws are, however, a strong indication of future action by the legislature.

[40] These states are Arkansas, Illinois, Kentucky, Louisiana, Missouri, and Montana

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[42] Arkansas, Illinois, Kentucky, Louisiana, Missouri, Montana, Nebraska, North Dakota, Pennsylvania, and Utah

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WHAT CAN BE DONE NOW TO PROTECT ABORTION RIGHTS?

As indicated in the state-by-state legal analysis that follows, the strategy in a particular state to protect reproductive rights depends on the legal and legislative/political reality in that state. There are a number of legislative strategies that advocates should consider now to protect access to abortion. In some states, only defensive strategies are realistic; in others, advocates should consider an affirmative strategy to protect the right to choose abortion.

Enact legislation protecting the right to choose abortion.

Even with *Roe* in place, several states have enacted legislation to protect the right to choose abortion from further erosion at the federal level. In assessing whether this strategy is appropriate for a given state, advocates should consider certain factors. For example, advocates should ask: Does the state's constitution already provide protection for the right to choose abortion? What is the likelihood of passage of a reproductive privacy act in the upcoming session? Will a compromise have to be reached to achieve success? Is the price of such a compromise too steep? What is the possibility of a legislative backlash, leaving the state with something worse than it already has? For example, is abortion ban legislation or an anti-choice ballot initiative process likely to be introduced in response?

If the analysis of these factors indicates that it is a good time to pursue affirmative legislation, advocates may wish to introduce a Reproductive Privacy Act. To help with this task, we have provided model language in the Appendix to this report to serve as a guide in crafting legislation. This is only a model—advocates will need to draft a bill that fits the specific situation and political/legislative climate of their particular state. We are available for consultation about how to adapt these samples into a workable scheme for any given state.

If advocates decide against introducing an affirmative bill, they may want to consider other strategies that may not provide as much protection for reproductive rights, but will send a strong message and promote the right to choose abortion. For example, advocates may introduce a legislative resolution to protect choice as was done in the State of Vermont.[43]

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[43] Vt. Acts & Resolves H R. 4, S R. 8 (2003)

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Repeal pre-Roe laws banning abortion.

In states where pre-*Roe* bans remain on the books, especially those where the law has not been declared unconstitutional, advocates should consider attempting to have the ban explicitly repealed. Here, too, advocates will have to assess the possibility of a legislative backlash.

Monitor constitutional developments.

In those states where abortion rights may be protected under the state constitution, advocates should work to ensure that their highest state court judges—whether elected or appointed—are supportive of privacy and abortion rights. It is also wise to monitor privacy cases not dealing with abortion rights to ensure that protections for reproductive rights are not undermined. Finally, advocates should oppose any efforts to amend the state constitution if the proposed amendment would undermine the right to privacy generally or, more specifically, the right to choose abortion.

Prepare now to block passage of new bans.

Many states will not wait until *Roe* is overturned to consider enacting new bans. As history teaches, anti-choice legislators will be busy introducing and pushing for bans on abortion if they sense that *Roe* is in danger. Their efforts will become more frenzied if the composition of the U.S. Supreme Court changes and as controversial litigation makes its way up to the Court. Therefore, advocates should begin now to formulate their strategy to prevent these bans from being enacted, building strong coalitions and gathering data to demonstrate how truly harmful an abortion ban would be for women and girls in the state. While in many cases it will not be possible ultimately to block passage of these bans, advocates may be successful in reducing the severity of the ban language by, for example, attaching amendments with broad exceptions.

STATE-BY-STATE ANALYSIS

Source: National Conference of State Legislators (NCSL) website
http://www.ncsl.org/programs/legman/about/sess2005.htm

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TESTIMONY OF NORMA MCCORVEY, THE FORMER *ROE* OF *ROE v. WADE*, BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION OF THE SENATE JUDICIARY COMMITTEE

JUNE 23, 2005

I am the woman once known as the *Jane Roe* of *Roe v. Wade*. But I dislike the name Jane Roe and all that it stands for. I am a real person named Norma McCorvey and I want you to know the horrible and evil things that *Roe v. Wade* did to me and others. I never got the opportunity to speak for myself in my own court case.

I am not a trained spokesperson, nor a judge, but I am a real person – a living human being who was supposed to be helped by my lawyers and the courts in *Roe v. Wade*. But instead, I believe that I was used and abused by the court system in America. Instead of helping women in *Roe v. Wade,* I brought destruction to me and millions of women throughout the nation.

In 1970, I was pregnant for the third time. I was not married and I truly did not know what to do with this pregnancy. I had already put one child up for adoption and it was difficult to place a child for adoption because of the natural bond that occurs between a woman and her child. And after all, a woman becomes a mother as soon as she is pregnant, not when the child is born. And women are now speaking out about their harmful experiences from legal abortion.

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Instead of getting me financial or vocational help, instead of helping me to get off of drugs and alcohol, instead of working for open adoption or giving me other help, my lawyers wanted to eliminate the right of society to protect women and children from abortionists.

My lawyers were looking for a young, white woman to be a guinea pig for a great new social experiment, somewhat like Adolf Hitler did.

I wanted an abortion at the time, but my lawyers did not tell me that I would be killing a human being. My lawyers did not inform me about the life-changing consequences of this decision. I was living on the streets. And while I was confused and conflicted about the decision for many years, and while I was once an advocate for abortion, like many women who choose to participate in abortion, my lawyers did not tell me that I would later come to deeply regret that I was partially responsible for killing 40-50 million human beings. Do you have any idea how much emotional grief I have experienced? It is like a living hell knowing that you have had a part to play, though in some sense I was just a pawn of the legal system. But I have had to accept my role in the deaths of millions of babies and the destruction of women's lives. I will tell you later how I have tried to cope with that.

How did I come to the position where I am today?

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Abortion is a shameful and secret thing. I wanted to justify my desire for an abortion in my own mind, as almost every woman who participates in the killing of her own child must also do. I made up the story that I had been raped to help justify my abortion. Why would I make up a lie to justify my conduct? Abortion itself is a lie and it is based on lies. My lawyers didn't tell me that abortion would be used for sex selection, but later when I was a pro-choice advocate and worked in abortion clinics, I found women who were using abortion as a means of gender selection. My lawyers didn't tell me that future children would be getting abortions and losing their innocence. Yet I saw young girls getting abortions who were never the same.

In 1973, when I learned about the *Roe v. Wade* decision from the newspapers, not my lawyers, I didn't feel real elated. After all, the decision didn't help me at all. I never had an abortion. I gave my baby up for adoption since the baby was born before the legal case was over. I am glad today that that child is alive and that I did not elect to abort.

I was actually silent about my role in abortion for many years and did not speak out at all. Then, in the 1980's, in order to justify my own conduct, with many conflicting emotions, I did come forward publicly to support *Roe v. Wade*. Keep in mind that I had not had an abortion and did not know much about it at the time.

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Then around 1992, I began to work in abortion clinics. Like most Americans, including many of you Senators, I had no actual experience with abortion until that point.

When I began to work in the abortion clinics, I became even more emotionally confused and conflicted between what my conscience knew to be evil, and what the judges, my mind and my need for money were telling me was OK. I saw women crying in the recovery rooms. If abortion is so right, why were the women crying? Even Senator Hillary Clinton on January 25, 2005 was reported by the New York Times to finally admit "that abortion is a sad, even tragic choice for many, many women." Actually it is a tragic choice for every child that is killed and every woman and man who participates in killing their own child, whether they know it at the time or not. Many women will be in denial and even pro-choice for years like I was. But participating in the murder of your own child will eat away at your conscience forever if you do not take steps to cleanse your conscience, which I will discuss later. I saw the baby parts, which are a horrible sight to see, but I urge everyone who supports abortion to look at the bodies to face the truth of what they support. I saw filthy conditions in abortions clinics even when "Roe" was supposed to clean up "back alley" abortions. I saw the low regard for women from abortion doctors. My conscience was bothering me more and more, causing me to drink more and more and more. If you are trapped in

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wrongdoing then all you can do is justify and defend your actions, but the pain gets worse and worse, so I drank a lot to kill the pain.

Finally, in 1995, a pro-life organization moved its offices right next door to the abortion clinic where I was working. I acted hatefully towards those people. But those people acted lovingly to me most of the time. One man did angrily accuse me at one point of being responsible for killing 40 million babies, but he later came to me and apologized for his words and said they were not motivated by love. The answer to the abortion problem is forgiveness, repentance, and love.

Many of the women who abort their babies ask the little babies to forgive them. Even some abortionists encourage women to write cards explaining their behavior and asking the child's forgiveness. This is an old Japanese custom also. The web is filled with post-abortion recovery and grief sites. According to an amicus brief filed in my case, 100,000 women a year enter abortion recovery counseling programs. Abortion is not a simple medical procedure that is safer than childbirth, it is the killing of a human being. It produces severe psychological and emotional consequences. We can ask the children to forgive us, but the children are dead. They say – Alone, I was born. Alone, I shall die. We must also ask Almighty God to forgive us for what we have done. We must repent of our action as a nation in allowing this holocaust to come to our shores. We have to turn from our wicked ways. Senators, I urge you to examine your own conscience before

VerDate Nov 24 2008 13:05 Feb 18, 2009 Jkt 047069 PO 00000 Frm 00129 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47069.TXT SJUD1 PsN: CMORC

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Almighty God. God is willing and able to forgive you. He sent His own son Jesus Christ to die on the cross for my sins as *Roe* of *Roe v. Wade*, and for our sins in failing to act to end abortion and to truly help women in crisis pregnancies.

I finally asked the Lord Jesus to forgive me in 1995 and immediately dedicated my life to saving children's and women's lives. In the year 2000, I met the lawyers from The Justice Foundation, Allan Parker and Clayton Trotter who are here behind me. I asked them to help me to reverse *Roe v. Wade* legally. We began collecting evidence from women about the devastating consequences of abortion in their lives. Women are very reluctant to speak about this horrible act which is a crime against humanity. In many cases the denial goes on for decades before they break. Women who have had an abortion often can't even tell their husbands, parents, family, friends or even their physicians or clergy. It is like a time bomb in the heart of every woman who's had an abortion.

Eventually we collected almost 1,500 affidavits and filed a motion to reverse *Roe v. Wade*. As part of my statement to you today, I am enclosing summaries of those women's affidavits along with pictures of some of the women so you can see what abortion does to real women. I am also going to file copies of all the affidavits collected. Also behind me today are some of those witnesses whose affidavits were before the Supreme Court and I would like to ask them to stand at this time.

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These women hurt by abortion have formed a movement they call Operation Outcry to cry out to you, to the courts and to God Almighty to end this scourge of abortion in our nation.

The Rev. Martin Luther King and the Southern Christian Leadership Conference helped lead America non-violently to end the scourge of segregation. When slavery was constitutional, we treated one class of humans as property. We are treating the humans in the mother's womb as property and less than human when we say it is OK to kill them. How can we have life, liberty, and the pursuit of happiness, when we have death by abortion? I have also included an essay on the Scott Peterson double-murder conviction which asks how one baby is a person that can be murdered but not another.

On February 22, 2005, the Supreme Court declined to take my case. I was good enough for the courts when they wanted to impose abortion on America, but I wasn't good enough when I asked them to look at the hard evidence of what they have done to America. The Supreme Court of the United States should be ashamed of itself. It has taken this matter of abortion away from the states, the people, and the legislatures, but it refuses to look at the evidence of what it has done. How shameful is that? How can we have liberty without life? Every member of the Supreme Court who supports *Roe* should be impeached and I believe we should to limit the terms of Supreme Court justices to 8 years. The

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Supreme Court has hurt me and millions of women and children. I urge you to do everything in your power to reverse *Roe v. Wade.*

Since the Supreme Court did not reject our arguments, we are continuing to bring those arguments before the court in case after case after case, including Sandra Cano's case which is in the courts now. Please do not ask a judicial nominee to pledge to maintain *Roe v. Wade.* If new evidence comes before the court, then the court should be willing change its old precedent, as it has many times. *Roe v. Wade* is not in the Constitution. It is just a bad Supreme Court decision with bad effects and needs to be reversed. I also support a constitutional amendment to protect all human life.

I am also attaching a copy of my 13-page affidavit which was filed in our lawsuit to reverse *Roe v. Wade.*

Some things should never be allowed, even if we want to do them. Murder is one, child abuse is another and allowing abortionists to harm women is another.

Thank you, Senators.

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NATIONAL
ABORTION
FEDERATION

1755 Massachusetts Avenue, NW, Suite 600 • Washington, DC 20036
p: 202.667.5881 • f: 202.667.5890 • www.prochoice.org

June 30, 2005

Senator Sam Brownback
Chairman
Committee on the Judiciary,
Subcommittee on the Constitution,
Civil Rights and Property Rights
327 Hart Senate Office Building
Washington, DC 20510

Senator Russ Feingold
Ranking Member
Committee on the Judiciary,
Subcommittee on the Constitution,
Civil Rights and Property Rights
807 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Brownback and Ranking Member Feingold:

The National Abortion Federation (NAF) would like to respond to testimony given by Norma McCorvey during a hearing in your subcommittee entitled "The Consequences of *Roe v. Wade* and *Doe v. Bolton*" held on June 23, 2005. During that hearing, Ms. McCorvey wrongly asserted that the *Roe* decision has harmed American women and used her opinions about abortion and abortion providers to bolster her position. NAF strongly disagrees with Ms. McCorvey's sentiments.

NAF is the professional association of abortion providers in North America. Our members care for more than half the women who choose abortion each year in the United States. In furtherance of our mission to keep abortion safe, legal, and accessible, NAF sets the standards of quality abortion care in North America. NAF's evidence-based *Clinical Policy Guidelines* serve as a set of systematically developed statements that assist practitioners in their efforts to provide quality, patient-centered care.[1] Revised annually, the *Clinical Policy Guidelines* distill a large body of medical knowledge into guidelines developed by consensus, based on rigorous review of relevant literature and known patient outcomes.

NAF members provide the women they care for with compassionate, high quality, comprehensive health care in comfortable settings. As a condition of membership, all NAF members agree to comply with our standards for quality and care and NAF has a Quality Assurance and Improvement (QAI) program that works with our members to ensure compliance with the *Clinical Policy Guidelines*.

At the hearing, Ms. McCorvey made claims about the care women receive at clinics. Generally, women seeking abortion care will have a complete health history, exams and lab work, and a counseling session before the abortion. Counseling can be an opportunity for discussion of a patient's feelings and concerns and can reduce anxiety. The *Clinical Policy Guidelines* state that accurate information must be provided regarding the risks and benefits of abortion, and that the patient affirms that she understands the procedure and its alternatives, the potential risks, benefits, and complications; that her decision is not coerced; and that she is prepared to have an abortion. The *Clinical Policy Guidelines* also recommend that care be delivered as expeditiously as possible in accordance with good medical practice.

[1] The *Clinical Policy Guidelines* are available at www.guidelines.gov and on the NAF web site at www.prochoice.org/pubs_research/publications/clinical_policy.html.

president and ceo: Vicki A. Saporta

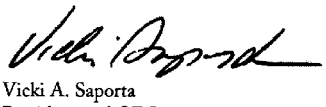
board chair: Vicki Breitbart, EdD, MSW • ***board members:*** Sally Burgess, MBA • Susan Cahill, PA-C, MSW • Rev. Ignacio Castuera
Paul Dragula • Kathleen Glover, MD • Sally Guttmacher • Dian Harrison, MSW • Koryne E. Horbal • Roslyn Kade, MD
E. Steve Lichtenberg, MD, MPH • Deborah Oyer, MD • Paolo Rodriguez, MD • Eric Schaff, MD • Pat Smith, MD
Felicia Stewart, MD • Francine Thompson • Catherine Weiss, JD • Tina Welsh

The experiences of women choosing abortion confirm that abortion providers provide high quality care. A 1999 study conducted by the Picker Institute,[1] a health care quality assessment and improvement research organization affiliated with the Beth Israel Deaconess Medical Center Corporation, found that 60% of women having abortions rated their overall care as "excellent," and an additional 38% described their care as "very good" or "good." Ninety-six percent said they would recommend their abortion provider to a friend or family member. The measure that most influenced women's overall rating of quality of care was the adequacy of the information they received. Other factors influencing their assessments were attention to privacy; confidence and trust in clinic staff; degree to which they were treated with respect and dignity; and post-procedure assistance.

Ms. McCorvey also made statements about women's reactions to abortion. Choosing to have an abortion is an important decision, and sometimes the decision-making process may be stressful. The most common emotion after having an abortion is relief, but there can also be feelings of loss or sadness even when a woman feels her decision was right. Difficulties may also be caused by obstacles or harassment encountered while trying to seek care; feeling alone while making an important decision; or being in an environment where abortion is stigmatized.

Without *Roe v. Wade*, and without the abortion providers who literally put their lives on the line every day to provide high quality abortion services, American women would again risk their lives, health, and fertility in order to terminate an unwanted pregnancy. On behalf of the members of the National Abortion Federation and the women they care for, I appreciate this opportunity to respond to Ms. McCorvey's remarks.

Sincerely,



Vicki A. Saporta
President and CEO

[1] Kaiser Family Foundation, *From the Patient's Perspective: The Quality of Abortion Care*, 1999.

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Prepared testimony of Professor Karen O'Connor
June 23, 2005
"The Consequences of *Roe v. Wade* and *Doe v. Bolton*"

Good afternoon Mr. Chairman, Members of the Subcommittee, and distinguished guests. My name is Karen O'Connor, and I am a Professor of Government at American University and the founder and Director of its nonpartisan Women & Politics Institute. Prior to joining the faculty at American University, I taught at Emory University from 1977 to 1995 where I held appointments in the Political Science Department and the Law School. At both institutions I have taught Women and the Law, Litigating for Constitutional Change, and American Politics. I am the author of *No Neutral Ground: Abortion Politics in an Age of Absolutes* (1995); *American Politics: Continuity and Change*, the ninth edition (with Larry Sabato), the best selling American Politics college textbook in the United States; several books on women and politics; and over fifty articles and book chapters on various aspects of the law and the judicial process as its relates to women and women's rights. I am the past president of the Southern Political Science Association, the National Women's Caucus for Political Science, the past chair of the American Political Science Association's Organized Research Section on Law and the Courts, and the president-elect of its Organized Section on Women and Politics Research.

I am honored to testify regarding the significant implications of *Roe v. Wade* and *Doe v. Bolton* for American women and families. In 1979, I had the privilege to work with Margie Pitts Hames, who argued *Doe v. Bolton*, the companion case to *Roe v. Wade*, in an ultimately unsuccessful effort to invalidate the restrictions of the Hyde Amendment. I was seven months pregnant at the time, and being called a "killer of unborn fetuses" by the court-appointed guardian ad litem failed to deter me from my belief in the importance of *Roe* and its progeny. Today I will address the legal significance of *Roe v. Wade* and *Doe v. Bolton*, their profound consequences for women's health and lives, and the necessity of preserving a woman's right to choose abortion.

Abortion Regulation Prior to Roe v. Wade and Doe v. Bolton

Abortion regulations and restrictions are not rooted in ancient theory or common law; despite the commonality of abortion, no government, be it local, state, or national, attempted to regulate the practice until well into the nineteenth century.[1] As Justice Blackmun noted in *Roe v. Wade*, "at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century . . . a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today."[2] Indeed, in 1812 a Massachusetts Court found that an abortion performed before "quickening," defined as the time when a woman begins to

[1] Abortion was legally practiced in ancient Greece and the Roman empire. *See Roe*, 410 U.S. 113,130 (1973). Likewise, under English common law, the basis for our legal system, abortion was not criminalized. *Id.* at 132-133.

[2] *See Roe*, 410 U.S. at 140-41.

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feel movement in utero, usually between the 16th and 18th week of pregnancy, was not punishable at law.[3]

The first abortion restrictions enacted in the United States were state statutory creations that marked a shift away from common law. In 1821, Connecticut became the first state to criminalize abortion *after quickening*. By 1840, only eight states had enacted statutory abortion restrictions.[4] Other states quickly followed suit; by 1910 every state except Kentucky had made abortion a felony.[5] Interestingly, despite this move toward regulating and criminalizing abortion, an 1871 American Medical Association report found that 20% of all pregnancies were deliberately terminated. [6]

The federal government chose to utilize more indirect regulation of the practice of abortion. In 1873, the U.S. Congress passed the Comstock Act, which prohibited the use of the U.S. mails for distribution of "obscene" materials, including advertisements regarding abortion and advertisement of devices to prevent pregnancy. The constitutionality of this Act was repeatedly questioned through test case litigation. In *U.S. v. One Package*,[7] the Second Circuit declared the law unconstitutional. This decision, along with the hard work of Margaret Sanger and the Planned Parenthood Federation of America, eventually led most states to change their laws that had mirrored the Comstock Act.

Thus, by the late 1950s, only Connecticut and Massachusetts still retained extreme contraceptive laws on their books. Finally, in *Griswold v. Connecticut*,[8] the Supreme Court concluded the U.S. Constitution contained a broad, fundamental right to privacy that encompassed a married couple's right to use birth control. Seven years later, the Court used the same rationale in *Eisenstadt v. Baird*[9] to strike down as unconstitutional a Massachusetts law that allowed only married couples access to contraceptives.

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[3] *See Commonwealth v. Bangs*, 9 Mass. 387, 388 (1812). Moreover, "whether abortion of a *quick* fetus was a felony at common law, or even a lesser crime, is still disputed." *Roe,* 410 U.S. at 134 (emphasis added).

[4] *See Roe*, 410 U.S at 138-39.

[5] Barbara Hinkson Craig and David M. O'Brien, ABORTION AND AMERICAN POLITICS 9 (1993).

[6] Nancy E. McGlen and Karen O'Connor, WOMEN, POLITICS AND AMERICAN SOCIETY 207 (1998).

[7] *U.S. v. One Package*, 86 F.2d 737 (2d Cir. 1936).

[8] 381 U.S. 479 (1965).

[9] *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

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Abortion laws, too, came under reexamination. The American College of Obstetricians and Gynecologists announced its belief that abortions should be decriminalized. And, in 1959 the American Law Institute (ALI) suggested changes in its model penal code that would decriminalize abortion in three situations: (1) when the continuation of the pregnancy would gravely impair the physical or mental health of the woman; (2) when the child might be born with a grave physical or mental defect; and (3) when the pregnancy resulted from rape, incest or other felonious sex.[10] By the early 1970s, fourteen states liberalized their abortion statutes to permit abortion in limited circumstances: when the woman's health was in danger, when the woman was the victim of rape or incest, or when there was a likelihood of a fetal abnormality.[11] Still, only four states -- Alaska, Hawaii, New York, and Washington -- had decriminalized the provision of abortion for any reason during the early stages of pregnancy. [12]

Abortion "Options" Prior to Roe

The fact that abortion was illegal in all but a few states prior to *Roe* did not mean, however, that women were not obtaining the procedure. Instead, the general unavailability of legal abortions meant two things: (1) only a limited number of women -- generally the most affluent women -- were able to obtain *safe* abortions, and (2) the vast majority of women who wanted to terminate a pregnancy were left with only one "option": obtaining illegal and dangerous abortion procedures, commonly referred to as "back-alley abortions."[13]

Options for a Few

As noted above, prior to *Roe*, most states allowed a woman to receive an abortion if she could prove that her life would be endangered by continuing the pregnancy; a few states permitted abortion in cases of rape or incest, or if an abortion was determined to be necessary to preserve the woman's health. Even in these limited circumstances, however, women often had to navigate a complicated medical approval system. This often involved obtaining the approval of a hospital committee, undergoing physical and mental evaluations, or obtaining law enforcement certification of claims of sexual assault.[14] A woman's ability to successfully complete this process often hinged on her economic status: generally, only more affluent, white

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[10] Karen O'Connor, NO NEUTRAL GROUND 27 (1996).

[11] Barbara Hinkson Craig and David M. O'Brien, ABORTION AND AMERICAN POLITICS 9-10 (1993).

[12] *Id.* at 10.

[13] Much of the discussion of the availability and incidence of abortion prior to *Roe* draws heavily on Rachel Benson Gold, Alan Guttmacher Institute, Issues in Brief: *Lessons From Before Roe: Will Past be Prologue?* (2003), available at http://www.agi-usa.org/pubs/ib_5-03.pdf.

[14] *Id.*

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women had the ability to pay for this review process, and had a relationship with a private physician willing to facilitate the process.[15]

A limited number of women had another option: A few states, most notably New York, repealed their abortion statutes in 1970. Because New York did not require that a woman be a resident of the state in order to obtain the procedure, women from across the country traveled to New York for safe, legal abortions.[16] It is estimated that in 1972 alone, more than 100,000 women traveled to New York City to obtain legal abortion services.[17] Of course, such travel and lodging was time consuming and costly, and, in practice, was an option only for women of financial means.

As a young woman growing up in New York State, I saw the dramatic consequences of New York's legalization of abortion. My high school graduating class of 1970, for example, was the first one that any of us knew in our school history that did not have a student drop out for pregnancy. Thus, no one in my class "had" to get married or go away to visit her aunt or other relative to have a child, and return to school forever marked much as Hester Prynne had been in another era.

Resort to the Back Alleys

However, as noted above, many women unable to afford or obtain a legal abortion were desperate enough to take drastic measures to end an unplanned pregnancy. It is estimated that anywhere from 200,000 to 1.2 million illegal or self-induced abortions were performed in the 1950s and 1960s.[18]

Illegal abortions, sometimes performed by lay people who did not have the proper training, equipment, or methods of anesthesia or sanitation, were extremely dangerous and put women at high risk of incomplete abortions, infection, and death. Estimates regarding the number of death and infections resulting from illegal or self-induced abortion are, of course, difficult to estimate given that many women, or their families in cases of the woman's death, were reluctant to attribute the infection or death to illegal abortion. Some estimate, however, that 5,000 women a year died from illegal, unsafe abortions before *Roe v. Wade*. In 1965, illegal abortion accounted for a *reported* 17 percent of all deaths due to pregnancy and

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[15] *Id.*

[16] Other states that had repealed their abortion statutes, such as Alaska, Hawaii, and Washington, required a woman to be a resident of the state for at least thirty days in order to obtain an abortion procedure.

[17] Rachel Benson Gold, Alan Guttmacher Institute, Issues in Brief: *Lessons From Before Roe: Will Past be Prologue?* (2003), available at http://www.agi-usa.org/pubs/ib_5-03.pdf.

[18] *Id.*

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childbirth.[19] These burdens fell disproportionately on women of color: from 1972 to 1974, the mortality rate due to illegal abortions for non-white women was twelve times that for white women.[20] And, none of these numbers include the thousands of women who willingly endured dangerous, invasive hysterectomies or tubal ligations to make certain that they would not have to have abortions should they have additional pregnancies.

Roe v. Wade and Doe v. Bolton

In 1973, against a background of increasing litigation surrounding contraception and abortion, the Supreme Court granted certiorari in the companion cases of *Roe v. Wade* and *Doe v. Bolton*. Jane Roe, who we know today as Norma McCorvey, challenged a Texas abortion law that prohibited abortions in all cases except to save a woman's life. Unlike *Roe*, the statute at issue in *Doe v. Bolton* was based on the Model Penal Code of the ALI. Doe's lawyers, acting on her behalf as well as several doctors, nurses, clergy, and social workers, alleged that the Georgia law was an unconstitutional undue restriction of personal and marital privacy.

In a landmark 7 to 2 decision, the Supreme Court held that the "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[21] The Court also recognized that the decision of whether to have a child is unique to every woman and her life circumstances, and therefore must be a personal, individual decision.

> The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.[22]

In invalidating the Texas and Georgia abortion laws, the Court effectively invalidated the abortion laws of all but four states.[23] However, even in recognizing the fundamental right to

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[19] *Id.*

[20] *Id.*

[21] *Roe*, 410 U.S. at 153.

[22] *Id.* at 153.

[23] Karen O'Connor, NO NEUTRAL GROUND 46-47 (1996). Contrary to arguments that the Court moved too fast, the Court actually followed the trend emerging in the states. As noted above, in

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obtain an abortion, the Court also held that this right was not absolute. To this end, the Court took a trimester approach toward to regulation of abortion, holding:

> For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician. For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health. For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.[24]

The right to privacy so central in *Roe* was well-recognized prior to that case, and has been repeatedly affirmed since *Roe*. As the *Roe* Court itself stated, "In a line of decisions . . . going back perhaps as far as [1891], the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."[25] Indeed, prior to *Roe*, the Court explicitly recognized the fundamental nature of a woman's right to control her reproduction.[26] The Court has also recognized the intensely personal nature of the

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the 1960's the states began reforming their abortion laws; at the time *Roe* was decided, 17 states allowed abortion in at least some circumstances. Moreover, such a vital right must be nationalized. Not to grant women fundamental rights guaranteed in one state, while allowing its exercise to be labeled criminal in others, is akin to arguing that Jim Crow laws should be within the purview of the states to allow or prohibit.

[24] *Roe*, 410 U.S. at 164.

[25] *Roe*, 410 U.S. at 152 (citing *Stanley v. Georgia*, 394 U.S. 557 (1969); *Terry v. Ohio*, 392 U.S. 1 (1968); *Katz v. United States*, 389 U.S. 347 (1967); *Boyd v. United States*, 116 U.S. 616 (1886), *Olmstead v. United States*, 277 U.S. 438 (1928) (Brandeis, J., dissenting); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Loving v. Virginia*, 388 U.S. 1 (1967); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Eisenstadt v. Baird*, 405 U.S 438 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)).

[26] *See Griswold v. Connecticut*, 381 U.S. 479 (1965). In *Griswold,* the Court defined the right to privacy as a fundamental freedom subject to exacting strict scrutiny by the Court. This right, the Court held, could be found in the "penumbras emanating" from several specific guarantees in the Bill of Rights and incorporated through the Fourteenth Amendment. Among these rights were the First Amendment's protection of association, the Third Amendment's bar on the quartering of soldiers in private homes in peacetime without consent, the Fourth Amendment's protection against unreasonable searches and seizures of homes and property, the Fifth Amendment's guarantee of freedom from self-incrimination, and the Ninth Amendment, which gives to all citizens rights not enumerated specifically in the Constitution. The right to privacy, concluded

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decision of whether to have children. In *Eisenstadt v. Baird*, affirming an unmarried individual's fundamental right to obtain contraception, the Court stated "if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[27]

A woman's right to control her own body, articulated in *Griswold, Eisenstadt, Roe,* and *Dos* remains just as fundamental today. The Supreme Court has repeatedly emphasized its continued viability: "*Roe* is clearly in no jeopardy, since subsequent constitutional developments have neither disturbed, nor do they threaten to diminish, the scope of recognized protection accorded to the liberty relating to intimate relationships, the family, and decisions about whether or not to beget or bear a child."[28] Moreover, the Court recently reaffirmed the fundamental right codified in *Roe,* and recognized how central reproductive freedom is to the lives of women. In *Lawrence v. Texas,* discussing the dimensions of the privacy right, the Court stated, "*Roe* recognized the right of a woman to make certain fundamental decisions affecting her destiny and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person."[29]

Roe's Implications for Women and Families

Roe's implications for women were profound and wide-reaching. The most immediate result, of course, was to rescue women from the back alleys, and provide access to safe, legal abortion for women who chose it. Today, abortion is one of the safest and most commonly performed medical procedures. In stark contrast to the soaring death rates from illegal abortions prior to *Roe*, the current death rate from legal abortion at all stages of gestation is 0.6 per 100,000 procedures.[30] Indeed, a woman's risk of death during pregnancy and childbirth is ten times greater than the risk of death from legal abortion.

Moreover, *Roe* marked a new beginning in women's ability to control their own fertility and to choose whether or not to have children. *Roe* recognized that a woman deciding whether to continue a pregnancy, and only that woman, must make the personal choice that is in keeping with her own religious, philosophical, and moral beliefs. This freedom of choice led to

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the Court, was so basic that the Framers saw no need to spell it out more clearly in the Constitution.

[27] 405 U.S. 438, 453 (1972).

[28] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 857 (1992).

[29] *Lawrence v. Texas*, 539 U.S. 558, 555 (2003).

[30] Lichtenberg ES, Grimes DA, Paul M. Abortion complications: *Prevention and management.* in Paul M, Lichtenberg ES, Borgatta L. Grimes DA, Stubblefield PG. A CLINICIAN'S GUIDE TO MEDICAL AND SURGICAL ABORTION 197-216. (1999).

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increased freedom in other areas; as the Supreme Court noted in 1992, "the ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[31] Without this freedom, generations of women would be relegated back to constant fear of pregnancy and its consequences. Fewer women would be able to complete their educations, decide when they wished to have children, and how to order their lives to best accommodate work and family. However, these basic, fundamental rights of women have been under attack since the ink was dry on *Roe* and *Doe*.

Post-Roe Regulation and Access to Abortion

Within six months after *Roe*, 188 anti-abortion bills were introduced in 41 state legislatures. State restrictions -- such as waiting periods, spousal and parental consent requirements, and informed consent requirements -- slowly chipped away at *Roe*'s protections, limiting abortion availability for all women. However, similar to the two-tiered system in place prior to *Roe*,[32] these restrictions fell most heavily on low-income women, especially young women and women of color, who, despite the legality of abortion, often could not access such services. For example, 33 states and the District of Columbia currently restrict low-income women's access to abortion; several federal laws, such as the Hyde Amendment, bar access to abortion care for low-income women who rely on the federal government for their health care, with exceptions only to preserve the woman's life or if the pregnancy results from rape or incest.[33] Likewise, 44 states restrict young women's access to abortion by mandating parental notice or consent. [34]

Battles over abortion continue to be waged in the states today. In 2004 alone, 714 anti-choice measures were considered in state legislatures, which is a 28 percent increase from just one year earlier. Moreover, every state with a regular legislative session, except Maine, considered anti-choice legislation in 2004: 130 of these legislative measures involved mandatory counseling and mandatory delay requirements for women seeking abortion services; 89 legislative measures would permit individuals and/or corporations to refuse to provide abortion, family planning, and other medical services; 45 legislative measures placed restrictions on young women's access to reproductive health services (including abortion and family planning); and

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[31] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 835 (1992).

[32] Rachel Benson Gold, Alan Guttmacher Institute, Issues in Brief: *Lessons From Before Roe: Will Past be Prologue?* (2003), available at http://www.agi-usa.org/pubs/ib_5-03.pdf.

[33] NARAL, *Who Decides: The Status of Women's Reproductive Rights in the United States* (2005) *available at* http://www.naral.org/yourstate/whodecides/trends/issues_low_income.cfm.

[34] NARAL, *Who Decides: The Status of Women's Reproductive Rights in the United States* (2005) *available at* http://www.naral.org/yourstate/whodecides/trends/issues_young_women.cfm.

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41 legislative measures were targeted regulations of abortion providers. Overall, 29 of these anti-choice measures were enacted.[35]

In light of the ever-increasing number of abortion restrictions, it should be no surprise that women continue to struggle with obtaining access to abortion in the United States. These difficulties are compounded by the fact that eighty-seven percent of all U.S. counties have no known abortion provider; in non-metropolitan areas, the figure rises to 97 percent.[36] This limited number of abortion facilities is largely attributable to a rapid decline in the number of doctors providing the service. This decline, and thus women's access to safe medical care, is at least in part due to the fact that medical professionals who provide abortion care do so at risk to their own personal safety --as well as that of their families and co-workers. Since 1977, there have been more than 4400 incidents of violence at clinics providing abortions; seven clinic workers, including three doctors, have been murdered.[37] 1998 saw the advent of a new form of threats against abortion providers: from 1998 to 2005, clinics received more than 650 anthrax threats.[38] Abortion providers are continually stalked, their clinics are bombed, and their families threatened. In addition to leading to a decreasing number of health professionals willing to provide abortions, the violence and intimidation directly impedes women's access to abortion: there have been over 730 clinic blockades since 1977.[39]

Overturning Roe: A Return to the Back Alleys

Despite the severe restrictions placed on a woman's right to choose whether or not to have an abortion, and the ongoing anti-choice campaign to attack and undermine the *Roe* decision itself, the central tenet of *Roe* remains: American women have the fundamental right to choose to terminate a pregnancy.[40] Women depend upon, and make life decisions based on, the

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[35] NARAL, *Who Decides: The Status of Women's Reproductive Rights in the United States* (2005) *available at* http://www.naral.org/yourstate/whodecides/trends/2005_key_findings.cfm#risk.

[36] NAF Factsheet: *Access to Abortion* (2003) *available at* http://www.prochoice.org/pubs_research/publications/downloads/about_abortion/access_abortion.pdf.

[37] NAF Violence and Disruption Statistics (2005), *available at* http://www.prochoice.org/pubs_research/publications/downloads/about_abortion/violence_statistics.pdf

[38] *Id.*

[39] *Id.*

[40] *Casey*, 505 U.S. at 845-46 ("After considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, and the rule of stare decisis, we are led to

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continued availability of abortion. As the Supreme Court so aptly stated in *Planned Parenthood v. Casey*,

> While [*Roe v. Wade*] has engendered disapproval, it has not been unworkable. *An entire generation has come of age free to assume Roe's concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions*; no erosion of principle going to liberty or personal autonomy has left *Roe* 's central holding a doctrinal remnant; *Roe* portends no developments at odds with other precedent for the analysis of personal liberty . . . .[41]

Despite the fact that history demonstrates that the unavailability of legal, safe abortion does not prevent abortion but only leads women to seek unsafe abortions, it is abundantly clear that *Roe's* protections are indeed in jeopardy. President Bush, who could appoint up to three Supreme Court Justices over the next two years, has made known his intent to appoint Justices hostile to *Roe* and a woman's right to control her body.

What then, would happen if *Roe* were overturned? Contrary to assertions that bans on abortion--including first trimester abortions--would occur in only a few states and take considerable time to enact, it is probable that many states would revive and enact immediate abortion bans. Moreover, in the absence of *Roe*, states would be given free reign to erode *Roe*; one only need look at the number of state restrictions placed on abortion provision in 2004, discussed *supra*, to know this is an all too real possibility.

The move toward criminalizing abortion could be immediate: four states (Alabama, Delaware, Massachusetts, and Wisconsin) have abortion bans in place that have never been declared unconstitutional or blocked by courts. *Roe's* reversal could "trigger" these laws; that is, state officials could immediately begin enforcing these bans the day *Roe* is overruled.[42] Another 13 states have abortion bans on the books that have been blocked by courts as unconstitutional. If *Roe* was overturned, officials in such states could immediately file suits asking courts to set aside the orders that prevented enforcement of the laws.[43] And, in the remaining states, legislators would be free to introduce and enact new severe restrictions or bans on abortion.

Ultimately, abortion would likely remain legal in small number of states, but even in such states women's access would likely be severely restricted. This would create a daunting,

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conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.").

[41] *Casey*, 505 U.S at 860-61 (emphasis added).

[42] Center for Reproductive Rights: *What if Roe Fell?* at 8-10 (2004), *available at* http://www.reproductiverights.org/pdf/bo_whatifroefell.pdf.

[43] *Id.* at 10.

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patchwork system of abortion statutes: a woman's right to obtain an abortion would be entirely dependent on the state in which she lived or her ability to travel to another state--assuming the states that keep abortion legal would permit non-residents to obtain abortions in that state. For those women who are able to navigate this patchwork system, the need to travel and the increased demand for a dwindling number of abortion providers could lead to dangerous delays in the provision of abortion care.

Even more frightening, however, is the plight that women who do not live in provider states, and are unable to travel to those states, would face. In essence, overruling *Roe* would force a return to the two-tier system of abortion access that was in place before 1973: women with the financial ability to travel to other states may still be able to exercise their rights, whereas low-income women (disproportionately women of color and young women) would not. We would see a return to the days of back-alley and self-induced abortions; a return to the day where women -- our daughters, our sisters, our mothers, and our wives -- sacrificed their health and lives because they felt they were left with no other option. Re-criminalizing abortion, or so severely restricting it so as to make it practically unavailable, will not end the practice of abortion; it will end the practice of *safe* abortion.

In addition to the grave -- and unacceptable -- health risks women would face if forced to return to the back alleys, overruling *Roe* would also signal a rollback of the autonomy and equality women have achieved since *Roe*. *Roe* was not only a decision that legalized a medical procedure and protected women's health; it was -- and is -- a decision that gave a woman the option to make the reproductive choices that were right for her health, her family, and her life.

Roe protects a woman's bodily integrity, but, just as importantly, protects a woman's right to be responsible for the choices she makes and the options she chooses. A woman's ability to decide when and if she will have children will ultimately make her a better mother, if she chooses to become one, and helps ensure that children are brought into families that are willing and able to both financially and emotionally care for them. A woman's ability to control her own reproduction ensures that she can make the medical decisions central to her physical and emotional well-being. And this autonomy allows women to make the choices we perhaps now take for granted: whether and when to marry, whether and when to have children, and whether to pursue educational opportunities or a professional career. As the Supreme Court stated in upholding *Roe's* central protection for a woman's right to choose abortion,

> the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped

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> to a large extent on her own conception of her spiritual imperatives and her place in society. [44]

Finally, because the constitutional protections enunciated in *Roe* underpin so many other rights, *Roe*'s demise could open the door to encroachments on other fundamental rights grounded in privacy. For example, access to birth control is dependent on the privacy right articulated in *Griswold* and echoed in *Roe*. Contraception availability is crucial toward reducing unintended pregnancies, reducing the number of abortions, and improving women's health. In addition, improved access to contraception will allow more women to control the timing of their pregnancies. This, in turn, helps reduce infant mortality, low birth weight, and maternal health complications during pregnancy. Thus, undermining the privacy right will serve to endanger women's health and lives even beyond the abortion decision.

Conclusion

I am a mother and a sister. In addition, I have had the privilege to teach thousands of students -- young men and women -- over the more than 25 years I have been teaching. Each of these individuals has come of age in a era where his or her private decisions to have sex or remain celibate, to use birth control or not, as well as to resort to a safe and legal abortion if needed or to carry a pregnancy to term, were available options. This right has, for women in particular, given them a power over their destinies that women who came before me did not enjoy. The United States, I have always taught, is a land where rights once hard won, are not to be taken for granted, but to be held precious. No right can be more important nor more fundamental than a woman's right to control her bodily integrity free from governmental interference. As the Court itself has concluded, to do so could be disastrous.

Thank you for your attention and the opportunity to speak to you today.

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[44] *Casey*, 505 U.S. at 852.

VerDate Nov 24 2008 13:05 Feb 18, 2009 Jkt 047069 PO 00000 Frm 00146 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47069.TXT SJUD1 PsN: CMORC

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Statement of Vicki Saporta, President and CEO
National Abortion Federation
Submitted to the Senate Judiciary Committee
Subcommittee on the Constitution, Civil Rights and Property Rights
June 23, 2005

The National Abortion Federation (NAF) is the professional association of abortion providers in North America. NAF's mission is to ensure that abortion remains safe, legal, and accessible. NAF's members include physicians, advanced practice clinicians, nurses, counselors, administrators, and other medical professionals at more than 400 facilities in the United States and Canada. NAF members are recognized experts in abortion care and include non-profit and private clinics, women's health centers, Planned Parenthood facilities, hospitals, and private physicians' offices, as well as nationally and internationally recognized researchers, clinicians, and educators at major universities and teaching hospitals. Together, they care for more than half the women who choose abortion each year in the United States.

NAF welcomes the opportunity to submit comments on the "The Consequences of *Roe v. Wade* and *Doe v. Bolton*." Several NAF member providers have first-hand experience with the devastating health consequences of illegal abortion before the landmark case, *Roe v. Wade*, was decided by the Supreme Court more than thirty years ago. They were there when *Roe* was decided and they have been there since, on the front lines everyday, protecting women's health and saving women's lives despite the harassment, threats, and violence they face on a regular basis. Here are some of their reflections on their experiences before *Roe*:

Dr. Curtis Boyd, MD, Albuquerque, New Mexico

As a physician it never occurred to me to do an abortion. I didn't know how. But as I continued to work with the church groups and to refer women out of the U.S. for abortions, those

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desperate women kept pleading, "But, Doctor, can't *you* do something?" At first, the answer was obvious. Of course not. In their desperation, I'm sure that those women had no idea what they were asking of me. I would risk my medical license, my entire career, my young families' well-being, and my own freedom, if I performed an illegal abortion. Ultimately, I risked all those things which I held dear because I could no longer live with the knowledge that I could do something and I was choosing not to.

Many of the doctors of conscience who have provided abortions though the years were moved to do so by the horrors of botched illegal abortions. I saw those ill and sometimes dying women in my medical training too. I was moved by their plight. But that was not what drove me to risk my career and sometimes my life. I was moved by the certain knowledge that women's lives could be ruined when they could not abort a pregnancy.[1]

Dr. Eugene Glick, MD, MPH, San Francisco, California

"I think the image that I retain was that of a 31-year-old Mexican-American woman who died of endotoxic shock with her husband and four or five children around," he says. "And that scene is in my mind and has been in my mind coming back all the time. I see the bed, I see the kids crying and I see the husband crying."[2]

Dr. Mildred Hanson, MD, Minneapolis, Minnesota

As the head of a hospital committee on abortion and sterilization in the 1960's, Dr. Mildred Hanson coached women through an elaborate system to prove that an unwanted pregnancy threatened their life or mental health. But one day she received a frantic call from a young

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[1] Dr. Curtis Boyd. Sermon Given to the Universalist Unitarian Church of Peoria, Illinois. Sunday, September 20, 1992.

[2] Felicia R. Lee, "Think Tank; Doctors who Performed Abortions Before *Roe v. Wade*," *The New York Times*, October 4, 2003, Section B, Page 9.

47069.104

woman seeking her help, and without a name or number all she could do was familiarize her with the process and ask her to call back.

She never called back. "I later learned that she committed suicide by jumping out of a 17th-story window," said Dr. Hanson, now 81, her voice breaking. "To this day, I feel responsible for her death."[3]

Dr. Hanson also recalls an earlier incident in 1935 when a woman died from a septic abortion, orphaning six children. That memory is still engrained in her head to this day.

It is estimated that if *Roe v. Wade* is overturned and the issue returns to the states, as many as twenty states would ban abortion immediately and as many as ten more could follow. Only about twenty states would keep abortion safe and legal. But the bans would not end abortion in those states. Instead, they would mean that women may once again have to risk their lives, health and fertility in order to terminate an unwanted pregnancy.

Currently, abortion is one of the safest medical procedures provided in the United States and an essential part of the continuum of women's reproductive health care. But that has not always been the case. Between the 1880s and 1973, abortion was illegal in all or most states, and countless women died or experienced serious medical problems as a result. Women often made desperate and dangerous attempts to induce their own abortions or resorted to untrained practitioners who performed back-alley abortions with primitive instruments or in unsanitary conditions. Women streamed into emergency rooms with serious complications -- perforations of the uterus, retained placentas, severe bleeding, cervical wounds, rampant infections, poisoning, shock, and gangrene that resulted in sterility or even death in many cases.

[3] Id.

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In 1973 the Supreme Court struck down state laws that criminalized abortion in the landmark decision *Roe v. Wade.* Doctors working in hospital emergency rooms and obstetrical/gynecological units before that time knew about the medical harm that women suffered as a result of self-induced and back-alley abortions. Today, many of these doctors are retiring and generations of Americans are too young to remember the devastating consequences of limiting access to safe and legal abortion.

Since 1973, despite the Supreme Court's protection of safe and legal abortion, access to abortion has been severely eroded. The most recent survey found that 87% of all U.S. counties have no identifiable abortion provider. In non-metropolitan areas, the figure rises to 97%. As a result, many women must travel long distances to obtain abortion care.

Distance is not the only barrier women face. Many other factors have contributed to the current crisis in abortion access, including a shortage of trained abortion providers; state laws that make getting an abortion needlessly onerous; restrictions on public funding for low-income women; and fewer hospitals providing abortion services.

Unfortunately at the same time the Supreme Court has consistently upheld the principal holding of *Roe*, it has also contributed to *Roe's* erosion by allowing states to impose restrictions that limit access to abortion. It is critical to the lives and health of millions of women that the protections of *Roe* be upheld and not weakened further. On behalf of the members of the National Abortion Federation and the women they care for, I appreciate this opportunity to submit testimony on the critical importance of *Roe v. Wade.*

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Testimony of

Robert Tamis, MD

Member,
Physicians for Reproductive Choice and Health®

Submitted to

The United States Senate Judiciary Committee
Subcommittee on the Constitution, Civil Rights and Property Rights

June 23, 2005

My name is Dr. Robert Tamis. I have been a physician for more than 40 years. I am recently retired from Arizona Reproductive Medicine and Gynecology, Ltd. in Phoenix, Arizona, where I was responsible for producing Arizona's first "test-tube baby" 21 years ago.

I am submitting this testimony as an experienced health care provider, a leader in obstetrics and gynecology and a member of *Physicians for Reproductive Choice and Health®*, or PRCH. PRCH is a national nonprofit organization created to enable concerned physicians to take a more active and visible role in supporting universal, evidence-based reproductive health. PRCH is committed to ensuring that all people have the knowledge, access to quality services and freedom of choice to make their own reproductive health decisions.

I present this testimony on behalf of the PRCH Board of Directors to convey to you the personal implications of *Roe v. Wade*. Before this landmark Supreme Court decision, the abortion issue put women's lives at risk and made criminals out of caring physicians.

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Legal abortion in this country is a public health necessity. It is a luxury for us to be able to discuss the so-called rights and wrongs of abortion when thousands of women would die every year without safe, accessible abortion care. Before *Roe v. Wade*, thousands of women did die every year, while physicians stood helpless before them in emergency departments across the country. According to the International Women's Health Coalition, today—in 2005—approximately 19 million abortions worldwide involve unsafe procedures performed by desperate women themselves, by unskilled providers, or in settings lacking the minimal medical standards, with an estimated 68,000 unnecessary deaths each year from complications resulting from unsafe abortion.

Many of the doctors of my generation are actively committed to maintaining access to this procedure because we saw the horrors of illegal abortion, and how it destroyed women—their health, their lives and their families. Few today are aware of cases like the woman I treated whose four heart valves had been eaten away because she had an illegal abortion and developed septicemia, or blood poisoning, and died. Emergency rooms and doctors' offices were crowded with women who were dying unnecessarily. I don't want to see that happen again.

Prior to the legalization of abortion, we would have patients come into the hospital after having illegal abortions, septic, but still pregnant. It was our mission to try to save the lives of the women, while maintaining their pregnancies. That's how disturbing unwanted pregnancies could be to women and their families—that a woman would knowingly risk her life by seeing a lay person using dirty coat hangers. Women would put potassium permanganate pills or lye into their vagina, which

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would cause bleeding. They thought this would produce abortion. All it was doing was eating away the vagina.

In the mid-60s, a young patient of mine went to her high school prom. She was gang-raped after the prom by five boys. They were all charged, found guilty and sent to prison for six months. My patient became pregnant from that rape, and she gave that baby up for adoption. When she was in labor, all she could say was, "All those guys got was six months." What did she get? She had the emotional horror of having been raped, not just once, but five times, and living with the memory of that terror for the rest of her life.

That young woman was tremendously harmed and forever changed by that event. What benefit was there in forcing her to continue with the pregnancy? If she felt the horrors of all the things that happened to her were such that she didn't want to continue that pregnancy, then she should have had the right to terminate that pregnancy.

Women get abortions for a variety of complex reasons. We live in a world without a fail-proof method of birth control. We have birth control methods that are not universally tolerated. We have a medical community that doesn't spend the necessary time and effort to instruct patients on how to use birth control methods accurately. We have school systems that won't teach young children where babies come from. We have a culture that allows rape and incest. We have a scientific community that cannot guarantee to every pregnant woman that her fetus will be healthy.

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Outlawing abortion will not stop women from getting abortions in this country. Outlawing abortion will stop women from getting safe abortions in this country. Outlawing abortion will put the lives of women at risk. History shows us that women with families, women who are mothers, sisters and daughters, will put their lives at risk in order to decide when and whether to become mothers. Shouldn't a woman decide, together with her family and her physician, when is the best time for her to become a mother?

If *Roe v. Wade* were overturned tomorrow, women would not stop getting abortions. Already we live in a country where 87% of counties have no abortion provider. Many women don't have health insurance, but somehow scrape together the money for this procedure. Overturning *Roe v. Wade* would send these women underground, into risky, life-threatening situations. But it would not stop them. It is therefore the U.S. government's responsibility to spare these women from unnecessary suffering, and permit safe access to a much-needed procedure.

There is a national consensus in the mainstream medical community and the public on this issue. The American Medical Association, the American College of Obstetricians and Gynecologists, the American College of Physicians and the American Public Health Association, along with the majority of Americans, all favor legalized abortion in this country.

We must protect the rights of American women to have access to safe, affordable and appropriate health care. We must make it easier for physicians to provide needed services, not more difficult. As a physician, I believe that overturning *Roe v. Wade* represents bad medicine and places politics before the health of our nation's families.

Testimony of Robert Tamis, MD
Member, *Physicians for Reproductive Choice and Health®*
Submitted to The United States Senate Judiciary Committee
Subcommittee on the Constitution, Civil Rights and Property Rights
June 23, 2005
Page 4 of 4

47069.110

United States Senate Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Property Rights
Hearing on "The Consequences of *Roe v. Wade* and *Doe v. Bolton*"
June 23, 2005

Testimony of M. Edward Whelan III

Good afternoon, Chairman Brownback and Senator Feingold, and thank you very much for inviting me to testify before you and your subcommittee on this important subject.

Introduction

I am Edward Whelan, president of the Ethics and Public Policy Center. The Ethics and Public Policy Center is a think tank that for three decades has been dedicated to exploring and explaining how the Judeo-Christian moral tradition and this country's foundational principles ought to inform and shape public policy on critical issues.

The Ethics and Public Policy Center's program on The Constitution, the Courts, and the Culture, which I direct, explores the competing conceptions of the role of the courts in our political system. This program focuses, in particular, on what is at stake for American culture writ large—for the ability of the American people to function fully as citizens, to engage in responsible self-government, and to maintain the "indispensable supports" of "political prosperity" that George Washington (and other Founders) understood "religion and morality" to be.

1. Why re-examine *Roe v. Wade*?

Why are we here today addressing a case that the Supreme Court decided 32 years ago, that it ratified 13 years ago, and that America's cultural elites overwhelmingly embrace? The answer, I would submit, is twofold.

First, *Roe v. Wade* marks the second time in American history that the Supreme Court has invoked "substantive due process" to deny American citizens the authority to protect the basic rights of an entire class of human beings. The first time, of course, was the Court's infamous 1857 decision in

47069.111

the *Dred Scott* case (*Dred Scott v. Sandford*, 60 U.S. 393 (1857)). There, the Court held that the Missouri Compromise of 1820, which prohibited slavery in the northern portion of the Louisiana Territories, could not constitutionally be applied to persons who brought their slaves into free territory. Such a prohibition, the Court nakedly asserted, "could hardly be dignified with the name of due process." *Id.* at 450. Thus were discarded the efforts of the people, through their representatives, to resolve politically and peacefully the greatest moral issue of their age. Chief Justice Taney and his concurring colleagues thought that they were conclusively resolving the issue of slavery. Instead, they only made all the more inevitable the Civil War that erupted four years later.

Roe is the *Dred Scott* of our age. Like few other Supreme Court cases in our nation's history, *Roe* is not merely patently wrong but also fundamentally hostile to core precepts of American government and citizenship. *Roe* is a lawless power grab by the Supreme Court, an unconstitutional act of aggression by the Court against the political branches and the American people. *Roe* prevents all Americans from working together, through an ongoing process of peaceful and vigorous persuasion, to establish and revise the policies on abortion governing our respective states. *Roe* imposes on all Americans a radical regime of unrestricted abortion for any reason all the way up to viability—and, under the predominant reading of sloppy language in *Roe*'s companion case, *Doe v. Bolton*, essentially unrestricted even in the period from viability until birth. *Roe* fuels endless litigation in which pro-abortion extremists challenge modest abortion-related measures that state legislators have enacted and that are overwhelmingly favored by the public—provisions, for example, seeking to ensure informed consent and parental involvement for minors and barring atrocities like partial-birth abortion. *Roe* disenfranchises the millions and millions of patriotic American citizens who believe that the self-evident truth proclaimed in the Declaration of Independence—that all men are created equal and are endowed by

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their Creator with an unalienable right to life—warrants significant governmental protection of the lives of unborn human beings.

So long as Americans remain Americans—so long, that is, as they remain faithful to the foundational principles of this country—I believe that the American body politic will never accept *Roe*.

The second reason to examine *Roe* is the ongoing confusion that somehow surrounds the decision. Leading political and media figures, deliberately or otherwise, routinely misrepresent and understate the radical nature of the abortion regime that the Court imposed in *Roe*. And, conversely, they distort and exaggerate the consequences of reversing *Roe* and of restoring to the American people the power to determine abortion policy in their respective States. The more that Americans understand *Roe*, the more they regard it as illegitimate.

Reasonable people of good will with differing values or with varying prudential assessments of the practical effect of protective abortion laws may come to a variety of conclusions on what abortion policy ought to be in the many diverse states of this great nation. But, I respectfully submit, it is well past time for all Americans, no matter what their views on abortion, to recognize that the Court-imposed abortion regime should be dismantled and the issue of abortion should be returned to its rightful place in the democratic political process.

2. *Roe v. Wade*

In *Roe v. Wade*, 410 U.S. 113 (1973), the Court addressed the constitutionality of a Texas statute, "typical of those that have been in effect in many States for approximately a century," that made abortion a crime except where "procured or attempted by medical advice for the purpose of saving the life of the mother." *Id.* at 116, 118. The seven-Justice majority, in an opinion by Justice Blackmun, ruled that the Texas statute violated the Due Process Clause of the Fourteenth Amendment (which provides that no state shall "deprive any person of life, liberty, or property, without due process of

VerDate Nov 24 2008 13:05 Feb 18, 2009 Jkt 047069 PO 00000 Frm 00157 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47069.TXT SJUD1 PsN: CMORC

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law"). The Court ruled that the Due Process Clause requires an abortion regime that comports with these requirements that the Court composed:

> "(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
>
> "(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
>
> "(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Id.* at 164-165.

Merely describing *Roe* virtually suffices to refute its legitimacy. One of the two dissenters, Justice Byron White—who was appointed by President Kennedy—accurately observed that Blackmun's opinion was "an exercise of raw judicial power" and "an improvident and extravagant exercise of the power of judicial review." 410 U.S. at 222 (combined dissent from *Roe* and *Doe v. Bolton*).

Here are typical criticisms of *Roe*—from liberals who *support* a right to abortion:

- "What is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure. Nor is it explainable in terms of the unusual political impotence of the group judicially protected vis-à-vis the interest that legislatively prevailed over it.... At times the inferences the Court has drawn from the values the Constitution marks for special protection have been controversial, even shaky, but never before has its sense of an obligation to draw one been so

VerDate Nov 24 2008 13:05 Feb 18, 2009 Jkt 047069 PO 00000 Frm 00158 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47069.TXT SJUD1 PsN: CMORC

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obviously lacking." John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920, 935-937 (1973).

- "One 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." Laurence H. Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 Harv. L. Rev. 1, 7 (1973).
- "As a matter of constitutional interpretation and judicial method, *Roe* borders on the indefensible." "Justice Blackmun's opinion provides essentially no reasoning in support of its holding. And in the almost 30 years since *Roe*'s announcement, no one has produced a convincing defense of *Roe* on its own terms." Edward Lazarus, *The Lingering Problems with* Roe v. Wade*, and Why the Recent Senate Hearings on Michael McConnell's Nomination Only Underlined Them*, Oct. 3, 2002 (at http://writ.corporate.findlaw.com/lazarus/20021003.html). (Mr. Lazarus was a law clerk to Blackmun and describes himself as "someone utterly committed to the right to choose [abortion]" and as "someone who loved *Roe*'s author like a grandfather.")
- "[*Roe*'s] failure to confront the issue in principled terms leaves the opinion to read like a set of hospital rules and regulations.... Neither historian, nor layman, nor lawyer will be persuaded that all the prescriptions of Justice Blackmun are part of the Constitution." Archibald Cox, *The Role of the Supreme Court in American Government* 113-114 (1976).
- "Blackmun's [Supreme Court] papers vindicate every indictment of *Roe*: invention, overreach, arbitrariness, textual indifference." William Saletan, *Unbecoming Justice Blackmun*, Legal Affairs, May/June 2005 (at http://www.legalaffairs.org/issues/May-June-2005/feature_saleton_mayjun05.msp).

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- *Roe* "is a lousy opinion that disenfranchised millions of conservatives on an issue about which they care deeply." Benjamin Wittes, *Letting Go of* Roe, The Atlantic Monthly, Jan/Feb 2005.

The defects of Justice Blackmun's majority opinion in *Roe* are manifest and legion. A brief review of lowlights is nonetheless warranted:

- Blackmun's rambling world-history tour of "man's attitudes toward the abortion procedure over the centuries," 410 U.S. at 117, wanders from the ancient Persian Empire to the position of the American Public Health Association in 1970 and of the American Bar Association in 1972. Yet, even apart from how unreliable and misleading Blackmun's tour has been shown to be, it fails to address squarely the most relevant history—the state of abortion regulation at the time of the adoption of the Fourteenth Amendment in 1868. As then-Justice Rehnquist's dissent points out, as of 1868 "there were at least 36 laws enacted by state or territorial legislatures limiting abortion," including the Texas statute the Court struck down in *Roe*. *See* 410 U.S. at 174-175 & n. 1.
- Blackmun's opinion modestly states:

  > "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." 410 U.S. at 159.

  But while feigning not to decide the question of when a human life begins—a question that is in fact rather simple as a matter of biology—the Court in essence ruled illegitimate any legislative determination that unborn human beings are deserving of protection from abortion.

VerDate Nov 24 2008 13:05 Feb 18, 2009 Jkt 047069 PO 00000 Frm 00160 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47069.TXT SJUD1 PsN: CMORC

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- A critical step in *Roe* is the bare assertion, unsupported by any argument or authority, that the "right of privacy" protected by the Fourteenth Amendment "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153.
- In explaining the abortion regime that he was inventing, Blackmun stated:

  > "This holding, we feel, is consistent with the relative weights of the respective interests involved, with the lessons and examples of medical and legal history, with the lenity of the common law, and with the demands of the profound problems of the present day." 410 U.S. at 165.

This language openly reveals that *Roe* is a policymaker's balancing of considerations, not an authentic judicial interpretation of the Constitution.

3. *Doe v. Bolton*

The same day that the Court decided *Roe*, it rendered its decision in *Doe v. Bolton*, 410 U.S. 179 (1973). As the Court said in *Roe*, *Roe* and *Doe* "are to be read together." *Roe*, 410 U.S. at 165. *Doe* presented the question whether Georgia's abortion legislation, patterned on the American Law Institute's model legislation, was constitutional. 410 U.S. at 181-182. Among other things, the Georgia statute provided that an abortion shall not be criminal when performed by a physician "based upon his best clinical judgment that an abortion is necessary because [a] continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health." *Id.* at 183. In the course of upholding this provision against a challenge that it was unconstitutionally vague, Justice Blackmun's majority opinion determined that the

> "medical judgment [as to health] may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the wellbeing of the

VerDate Nov 24 2008 13:05 Feb 18, 2009 Jkt 047069 PO 00000 Frm 00161 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47069.TXT SJUD1 PsN: CMORC

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patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment." *Id.* at 192.

It is not entirely clear what Blackmun's garbled discussion is intended to mean. The predominant assumption appears to be that Blackmun was construing the Georgia statute's health exception in accord with what he regarded as its natural legal meaning (or, alternatively, in a way that he thought necessary to salvage it from invalidation on vagueness grounds). Under this reading, the authority that *Roe* purports to confer on states to "regulate, and even proscribe, abortion" after viability is subject to the loophole of *Doe*'s health exception. *See, e.g.*, *Women's Medical Professional Corp. v. Voinovich*, 130 F.3d 187, 209 (6th Cir. 1997) ("*Roe*'s prohibition on state regulation when an abortion is necessary for the 'preservation of the life or health of the mother' must be read in the context of the concept of health discussed in *Doe*" (internal citation omitted)). Because the practical meaning of this loophole would appear to be entirely at the discretion of the abortionist, it would swallow any general post-viability prohibition against abortion.

Under an alternative reading, Blackmun's language should be understood merely as construing the Georgia statute and not as speaking, directly or indirectly, to the meaning of the post-viability health exception in *Roe*. *See, e.g.*, *Voinovich v. Women's Medical Professional Corp.*, 523 U.S. 1036, 1039 (1998) (opinion of Thomas, joined by Rehnquist and Scalia, dissenting from the denial of certiorari) ("Our conclusion that the statutory phrase in *Doe* was not vague because it included emotional and psychological considerations in no way supports the proposition that, after viability, a mental health exception *is required as a matter of federal constitutional law*. *Doe* simply did not address that question." (emphasis in original)).

VerDate Nov 24 2008 13:05 Feb 18, 2009 Jkt 047069 PO 00000 Frm 00162 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47069.TXT SJUD1 PsN: CMORC

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4. Myths about *Roe*

Myths about *Roe* abound, and I will not strive to dispel all of them here. One set of myths dramatically understates the radical nature of the abortion regime that *Roe* invented and imposed on the entire country. *Roe* is often said, for example, merely to have created a constitutional right to abortion during the first three months of pregnancy (or the first trimester). Nothing in *Roe* remotely supports such a characterization.

A more elementary confusion is reflected in the commonplace assertion that *Roe* "legalized" abortion. At one level, this proposition is true, but it completely obscures the fact that the Court did not merely legalize abortion—it *constitutionalized* abortion. In other words, the American people, acting through their state legislators, had the constitutional authority before *Roe* to make abortion policy. (Some States had legalized abortion, and others were in the process of liberalizing their abortion laws.) *Roe* deprived the American people of this authority.

The assertion that *Roe* "legalized" abortion also bears on a surprisingly widespread misunderstanding of the effect of a Supreme Court reversal of *Roe*. Many otherwise well-informed people seem to think that a reversal of *Roe* would mean that abortion would thereby be illegal nationwide. But of course a reversal of *Roe* would merely restore to the people of the States their constitutional authority to establish—and to revise over time—the abortion laws and policies for their respective States.

This confusion about what reversing *Roe* means is also closely related to confusion, or deliberate obfuscation, over what it means for a Supreme Court Justice to be opposed to *Roe*. In particular, such a Justice is often mislabeled "pro-life." But Justices like Rehnquist, White, Scalia, and Thomas who have recognized that the Constitution does not speak to the question of abortion take a position that is entirely neutral on the substance of America's abortion laws. Their modest point concerns process: abortion

VerDate Nov 24 2008 13:05 Feb 18, 2009 Jkt 047069 PO 00000 Frm 00163 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47069.TXT SJUD1 PsN: CMORC

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policy is to be made through the political processes, not by the courts. These Justices do not adopt a "pro-life" reading of the Due Process Clause under which permissive abortion laws would themselves be unconstitutional.

5. *Planned Parenthood v. Casey*

In 1992, the Supreme Court seemed ready to reverse *Roe* and to end its unconstitutional usurpation of the political processes on the abortion question. Instead, in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), Justices O'Connor, Kennedy, and Souter combined to produce a joint majority opinion so breathtaking in its grandiose misunderstanding of the Supreme Court's role that it makes one long for the sterile incoherence of Blackmun's opinion in *Roe*.

In *Casey*, the Court relied on the combined force of (a) its "explication of individual liberty" protected by the Due Process Clause and (b) *stare decisis* to reaffirm what it described as (c) the "central holding" of *Roe*. 505 U.S. at 853. Each of these elements warrants scrutiny.

The core of the Court's explanation of the liberty interests protected by the Due Process Clause is its declaration, "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." 505 U.S. at 851. This lofty New Age rhetoric should not conceal the shell game that the Court is playing. What the Court's declaration really means is that the Court is claiming the unconstrained power to define for all Americans which particular interests it thinks should be beyond the bounds of citizens to address through legislation.

Even with this infinitely elastic standard, the authors of the joint opinion are not ready to assert that *Roe* was correctly decided. Instead, they rest their reaffirmation of *Roe* on an understanding of *stare decisis*, and of the role of the Court generally, that betrays a remarkably profound confusion. I cannot quote the full discussion, but these passages are all too typical:

VerDate Nov 24 2008 13:05 Feb 18, 2009 Jkt 047069 PO 00000 Frm 00164 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47069.TXT SJUD1 PsN: CMORC

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- "Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution." 505 U.S. at 866-867.
- "To all those who will be so tested by following [the Court], the Court implicitly undertakes to remain steadfast, lest in the end a price be paid for nothing. The promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives and the understanding of the issue has not changed so fundamentally as to render the commitment obsolete." 505 U.S. at 868.
- "Like the character of an individual, the legitimacy of the Court must be earned over time. So, indeed, must be the character of a Nation of people who aspire to live according to the rule of law. Their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals. The Court's concern with legitimacy is not for the sake of the Court but for the sake of the Nation to which it is responsible." 505 U.S. at 868.

It is probably not possible to improve on Justice Scalia's devastating responses to the joint opinion's bizarre assertions:

- "The Court's description of the place of *Roe* in the social history of the United States is unrecognizable. Not only did *Roe* not, as the Court suggests, *resolve* the deeply divisive issue of

VerDate Nov 24 2008 13:05 Feb 18, 2009 Jkt 047069 PO 00000 Frm 00165 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47069.TXT SJUD1 PsN: CMORC

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abortion; it did more than anything else to nourish it, by elevating it to the national level where it is infinitely more difficult to resolve. National politics were not plagued by abortion protests, national abortion lobbying, or abortion marches on Congress, before *Roe v. Wade* was decided. Profound disagreement existed among our citizens over the issue—as it does over other issues, such as the death penalty—but that disagreement was being worked out at the state level." 505 U.S. at 995.

- "*Roe* fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the selection of Justices to this Court in particular, ever since. And by keeping us in the abortion umpiring business, it is the perpetuation of that disruption, rather than of any *pax Roeana*, that the Court's new majority decrees." 505 U.S. at 995-996.
- "The Imperial Judiciary lives. It is instructive to compare this Nietzschean vision of us unelected, life tenured judges—leading a Volk who will be 'tested by following,' and whose very 'belief in themselves' is mystically bound up in their 'understanding' of a Court that 'speak[s] before all others for their constitutional ideals'—with the somewhat more modest role envisioned for these lawyers by the Founders.

> 'The judiciary . . . has . . . no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will but merely judgment . . . .' The Federalist No. 78.

"Or, again, to compare this ecstasy of a Supreme Court in which there is, especially on controversial matters, no shadow of change or hint of alteration … with the more democratic views of a more humble man:

> '[T]he candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the

VerDate Nov 24 2008 13:05 Feb 18, 2009 Jkt 047069 PO 00000 Frm 00166 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47069.TXT SJUD1 PsN: CMORC

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> Supreme Court, . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.' A. Lincoln, First Inaugural Address (Mar. 4, 1861)." 505 U.S. at 996-997.

While abandoning *Roe*'s trimester framework, the *Casey* joint opinion then reaffirmed what it characterized as *Roe*'s central holding: "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." 505 U.S. at 879. It also stated that it reaffirmed *Roe*'s holding (which, as discussed above, apparently was to be read with *Doe*'s malleable definition of health) that even after viability abortion must be available "where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Id.* In addition, it adopted a subjective and amorphous "undue burden" standard for assessing incidential abortion regulations before viability. *Id.* at 878.

6. <u>*Stenberg v. Carhart*</u>

The Supreme Court's decision in 2000 in *Stenberg v. Carhart*, 530 U.S. 914, provides special insight into the Court's abortion regime. That case presented the question of the constitutionality of Nebraska's ban on partial-birth abortion.

This case crossed my mind five months ago as my daughter was being born and her head was first starting to emerge.

Pardon me as I briefly describe what partial-birth abortion is: It's a method of late-term abortion in which the abortionist dilates the mother's cervix, extracts the baby's body by the feet until all but the head has emerged, stabs a pair of scissors into the head, sucks out the baby's brains, collapses the skull, and delivers the dead baby.

According to estimates cited by the Court, up to 5000 partial-birth abortions are done every year in this much-blessed country.

VerDate Nov 24 2008 13:05 Feb 18, 2009 Jkt 047069 PO 00000 Frm 00167 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47069.TXT SJUD1 PsN: CMORC

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In the face of a division of opinion among doctors over whether partial-birth abortion is sometimes safer than other methods of abortion, the Court, by a 5-4 vote, deferred to the view of those who maintained that it sometimes is and invalidated the Nebraska statute banning it.

I don't have much else to say about this case. I don't dispute at all that its result can reasonably be thought to be dictated by *Roe* and *Casey*. And I certainly don't contend that what partial-birth abortion yields—a dead baby—is any different from what other methods of abortion yield.

I would instead merely submit that this case ought to make manifest to any but the most jaded conscience the sheer barbarity being done in the name of the Constitution in a country dedicated—at its founding, at least—to the self-evident truth that all human beings "are endowed by their Creator" with an unalienable right to life.

7. Conclusion

Despite the fact that the abortion issue was being worked out state-by-state, the Supreme Court purported to resolve the abortion issue, once and for all and on a nationwide basis, in its 1973 decision in *Roe*. Instead, as Justice Scalia has correctly observed, the Court "fanned into life an issue that has inflamed our national politics" ever since. In 1992, the five-Justice majority in *Casey* "call[ed] the contending sides [on abortion] to end their national division by accepting" what it implausibly claimed was "a common mandate rooted in the Constitution." Thirteen years later, the abortion issue remains as contentious and divisive as ever.

As Justice Scalia suggested in his dissent in *Casey*, Chief Justice Taney surely believed that his *Dred Scott* opinion would resolve, once and for all, the slavery question. But, Scalia continued:

> "It is no more realistic for us in this case, than it was for him in that, to think that an issue of the sort they both involved—an issue involving life and death, freedom and subjugation—can be 'speedily and finally settled' by the Supreme Court, as President James Buchanan in his

VerDate Nov 24 2008 13:05 Feb 18, 2009 Jkt 047069 PO 00000 Frm 00168 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47069.TXT SJUD1 PsN: CMORC

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> inaugural address said the issue of slavery in the territories would be.... Quite to the contrary, by foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish.
>
> "We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining." 505 U.S. at 1002.

As increasing numbers of observers across the political spectrum are coming to recognize, Justice Scalia's prescription in *Casey* remains entirely sound, both as a matter of constitutional law and of judicial statesmanship. If the American people are going to be permitted to exercise their authority as citizens, then all Americans, whatever their views on abortion, should recognize that the Supreme Court's unconstitutional power grab on this issue must end and that the political issue of whether and how to regulate abortions should be returned where it belongs—to the people and to the political processes in the states.

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