

**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

¹ 410 U.S. 113 (1973).

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

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 & Roachat, *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).

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

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).

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

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 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

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).

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.