

THE
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ROE V. WADE

Reflections After 40 Years



ALSO IN THIS ISSUE

- When Pro-Life and Pro-Choice Meet
- Did Roe End Back Alley Abortions?
- The Impact of Roe v. Wade from an International Perspective



David Nammo,
Executive Director
and CEO

Life is sacred

I have witnessed the birth of my six children, and every time I am struck by the awesome miracle of life. It is hard to describe the overwhelming awe as a child makes his or her first sound, moves his or her fingers and attempts to open his or her eyes. And when one of my children disappeared into neo-natal intensive care, Laura and I wept and prayed hard for that little baby to heal and stay with us. These were sacred moments.

As lawyers, we know the legal and cultural changes that have taken place in the 40 years since *Roe v. Wade* was decided. The country and its attitudes have moved back-and-forth concerning abortion. Just prior to 1973, the country was decidedly pro-life. It later shifted to be pro-abortion. Now, the majority of people in this country profess to be pro-life again.

And the legal battles have raged on in the past 40 years with *Roe, Doe, Webster, Casey, Stenberg, Carhart*, not to mention the state and federal attempts to pass abortion-related laws. Most lawyers who are pro-life have watched the battle from the sidelines, reading about efforts to overturn *Roe*, make abortion a state-rights issue, stop partial-birth abortion, and persuade by many other arguments. However, at its core, abortion is not a legal, philosophical, or popular debate. It is about real life and death.

Since *Roe*, nearly 55 million unborn children have died at the hands of abortionists in this country alone. And unfortunately, the slippery slope and moral decay continues to result in an even further devaluation of life. In May of this year, the *Journal of Medical Ethics* featured articles titled, "After-birth abortion: why should the baby live?" and "Clarifications on the moral status of newborns and the normative implications." They were arguments as to the morality of infanticide. Is anyone surprised?

Responding to the featured articles in the same journal, Robert George, visiting professor at Harvard Law School and McCormick Professor of Jurisprudence at Princeton University, said, "advocating the moral permissibility of killing healthy newborn infants is moral madness; and it is scandalous, especially in a journal (the *Journal of Medical Ethics*) expressly directed not merely to philosophers ... but to physicians, nurses and other healthcare professionals—people whose attitudes shape decisions they make about the lives of real people, including real infants. ...it should be plain to see that killing an infant because he or she is unwanted is evil."

The fight continues as pro-abortion forces push the envelope to even more unimaginable places. As Professor George states, pro-life forces fight against moral madness and ultimately evil. We have seen this evil firsthand over the last months in the Kermit Gosnell murder trial and its unbearable revelations. As Christians, however, we should not only fight for life, but care for those who have been through abortion, pray for those dealing with the emotional aftermath of such a decision, and work to find ways to care for mothers that think the death of their baby is the only answer. We need to help care for those babies who may be born into difficult situations, as well as the mothers who may have nowhere to turn. It is the gap where the "Church" as a whole should stand.

The Christian Legal Society is privileged to have great pro-life advocates writing in this issue of *The Christian Lawyer*. We are publishing a two-part series—this volume addressing only abortion and the last 40 years. The second volume will deal with the unique issues resulting from the *Roe* decision, like stem cells and conscience rights. It is my prayer that their articles educate and encourage you.

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IN THIS ISSUE

Roe v. Wade: Reflections After 40 Years 2

- Revisiting the Legal Critiques of *Roe v. Wade* by Thomas Brejcha
- The Road to Roe: How the Justices’ Papers Explain Our 40 Year Abortion Controversy by Clarke D. Forsythe
- Did Roe End Back Alley Abortions? by Kristen Day
- Forty Years in a Judicial Desert: How Long Can *Roe v. Wade* Survive the Unraveling of the Supreme Court’s “Abortion Distortion”? by Steven Aden
- A More Pro-Life Union: 40 Years After *Roe v. Wade* by Mary Harned



LAW STUDENT MINISTRIES

A Society Broken and a Youth Ready to Rebuild26

by Michael Acquilano



CENTER FOR LAW & RELIGIOUS FREEDOM

The HHS Mandate & the Pretense of Choice . 28

by Kim Colby



ADVOCATES INTERNATIONAL

The Impact of Roe v. Wade from an International Perspective. 31

by Roma M. Paul, Esq.

CLS Attorney Chapters List34



FROM THE PRESIDENT

When Pro-Life and Pro-Choice Meet.37

by Stephen Tuggy

ROE V. WADE

Reflections After 40 Years

January 22, 2013 marked the 40th anniversary of the *Roe v. Wade* decision by the United States Supreme Court.

In this issue of *The Christian Lawyer*, we will take a look at the impact of the decision over the last 40 years from a variety of perspectives. We hope this issue educates and encourages you. The next issue will explore cutting edge life issues.



STOP
ABORTION
NOW

Revisiting the Legal Critiques of *Roe v. Wade*

BY THOMAS BREJCHA

In orthodox Christian legal circles and especially among those more actively engaged in the pro-life movement, it's become a commonplace to "rue *Roe*" in rhetoric tinged with the consequentialist ethics of our age. Accordingly, in most ordinary conversations when the subject of *Roe v. Wade* comes up, the decision wins quick and easy condemnation on account of its lethal impact. The negative verdicts are typically couched in these or similar terms: Because of that profoundly regrettable decision, which our United States Supreme Court handed down on January 22, 1973, over the last four decades nearly sixty million human beings have been destroyed in the womb or, as Dr. Gosnell's recent trial and conviction demonstrate, shortly after their birth in the wake of so-called "botched abortions." Many Christian young people, born a generation or more after *Roe*, sport t-shirts or sweatshirts emblazoned with arresting slogans such as, "I survived *Roe v. Wade*." Of course, those words also convey the stark and poignant implication that so many of the wearers' brothers and sisters did not "survive" but instead fell victim to the era of "choice" ushered in by *Roe*. These "survivors" of our modern era of *carte blanche* for abortionists and the regime of "abortion on demand" ushered in by *Roe* number among the staggering statistical toll comprising its bloody harvest.

Sociologists, economists, and others have argued about the impact of this huge reduction in the number of births on our society. Some have even applauded the drop in the number of live births in the United States after 1973 as a key factor in reducing crime rates, blaming the birth of so-called "unwanted infants" for high crime statistics. Others disagree, blaming crime on other factors. In politics, *Roe* has come to represent the fulcrum on which our ideological spectrum seems to balance in achieving its very delicate, precarious equilibrium, with so-called "pro-*Roe* liberals" on one side, "moderates" lukewarm about *Roe* huddling uncertainly in the middle, and so-called "anti-*Roe* conservatives" on the other

side. In terms of moral impact, the *Roe* partisans applaud its celebration of the virtues of individual autonomy and "choice" as keys to personal fulfillment and human flourishing; whereas pro-lifers see *Roe* as an abominable cover for killing one's inconvenient offspring, cheapening sexuality, sundering and undermining the bonds of family and community, and achieving, by slower degrees, in the aggregate yet another 20th-21st century mass holocaust.

For Christian lawyers, however, while it is surely important that we, too, address and debate *Roe*'s social, economic, political, and moral consequences, we bear a unique and acute responsibility to come to terms with *Roe v. Wade* on a professional basis, using our legal training and skill to revisit and renew our analysis

For Christian lawyers, we bear a unique and acute responsibility to come to terms with *Roe v. Wade* on a professional basis, using our legal training and skill to revisit and renew our analysis and criticism of this troubling decision, not merely on account of its consequences, but especially on account of its strictly legal errors and flaws.

and criticism of this troubling decision, not merely on account of its consequences, but especially on account of its strictly legal errors and flaws. There remain good and potent grounds for optimism that *Roe*, if repeatedly subjected to analysis and criticism on its face within the four corners of the majority opinion and viewed strictly as a matter of legal craftsmanship, will finally be recognized as such an embarrassing failure of our modern American jurisprudence that it can no longer be tolerated; and therefore, it must be overruled. Again and again the question must be pressed: Was *Roe* properly decided? Is Justice Blackmun's majority opinion, subjected to the test of time and measured strictly from the standpoint

of professional legal norms for judicial decision-making, still defensible to any extent? Or was *Roe*, as many of us believe, a quintessential example of judicial overreaching, an utterly aberrant decision that the late Associate Justice Byron White, a Kennedy appointee and one of *Roe*'s two dissenters, excoriated with this damning phrase, as "an exercise in raw judicial power"? Indeed, Justice White's phrase castigates *Roe* as nothing less than the naked fiat of the seven Justices who joined in Justice

Blackmun's majority opinion—an opinion bereft of support in reason or precedent.

My view is that Justice White's words resonate all the more profoundly now, even though *Roe* has so far withstood its critics and endured for over four decades since it was handed down. But while *Roe* has survived decades of scathing critiques which have grown both in power and intensity, its vital signs are getting feebler every day. Yes, *Roe* hangs on, but only barely. Indeed, I firmly believe that its future seems all the more fragile and shaky as more and more researchers, including successor Supreme Court Justices, cast increasing doubt about the validity of *Roe*'s stated premises and its rationale. Only inertia and apathy among Christian lawyers could spare *Roe* the renewed scrutiny and urgent reconsideration—and overruling—it deserves.

Roe held that the Texas law prohibiting abortion except “for the purpose of saving the life of the mother” violated the constitutional right of the plaintiff, Norma McCorvey who used the alias or pseudonym, “Jane Roe,” to have an abortion. This

new “constitutional right” was grounded in a “right to privacy” whose most important antecedent—and *Roe*'s indispensable foundation—was *Griswold v. Connecticut* which invalidated an old, unenforced law banning the use of contraception at the behest of a married couple. The Court explaining *inter alia* that this statute “invaded the sacred precincts of the marital bedroom.”

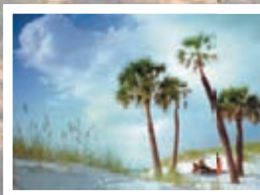
But *Roe*'s true rationale pivots less on *Griswold*, *supra*, than on another decision which followed in *Griswold*'s wake some seven years later, namely, *Eisenstadt v. Baird*. While *Griswold* premised its holding on the traditional privacy of “the sacred precincts of the marital bedroom,” Justice Brennan, who wrote the Court's opinion in *Eisenstadt*, turned that crucial thrust of *Griswold* upon its head declaring for the Court that, “If the right of privacy means anything, it is the right of an 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.” Then a law professor



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and later a federal Judge on the 9th Circuit, John T. Noonan, Jr. wrote in *A Private Choice: Abortion in America in the Seventies* that: “What had been founded on marriage was now said to be the liberty of the unmarried ... a liberty that had been based on the special position of the married was made universal in a way that repudiated the legally privileged status of marriage ... a revolutionary rationale that was probably invented with *Roe v. Wade* [which had been argued the first of two times before *Eisenstadt* was handed down] in view ... premised on a society of isolated individuals ... a massive departure from the long line of cases that [represent] a vindication of the family.”

Roe thus constituted a quantum jump from its supposed line of precedents (apart from *Eisenstadt v. Baird*, its contemporary and immediate launching pad, which itself had turned precedent on its head) and antecedents, which embraced family and marital rights, breaking utterly new ground and striking forward into a new era of judicial lawmaking. Meyer, Pierce, Skinner, and *Griswold* were followed by another antecedent of *Roe*, namely, *Loving v. Virginia* where the Court invalidated a statute that barred marriage between persons of different race in which Chief Justice Warren declared for the Court that, “Under our Constitution, the freedom to marry, or not to marry, a person of another race resides with the individual and cannot be infringed by the State.” Thus all these cases stood for the proposition that marriage and family rights do not depend on the State but are anterior to, and independent of, the State—reflecting the Founders’ principles as proclaimed in our Declaration of Independence, that our essential rights do not flow from, or depend on, the State, but are inalienable rights with which we are endowed by our Creator.

But *Roe*, in one fell swoop, broke free from the jurisprudence embodied in its antecedents and precedents and, at the same time, enunciated a novel constitutional principle which rendered invalid the laws of at least 49 states as well as the District of Columbia.

Scarcely had the ink dried on Justice Blackmun’s majority opinion in *Roe*, however, when a host of eminent contemporary critics—not merely *Roe*’s pair of dissenters (White and

Rehnquist, JJ.)—pounced on the decision as flatly wrong and illegitimate. The esteemed former Solicitor General, Harvard law professor, and Watergate Special Prosecutor (until fired by President Nixon not too long before the latter’s impeachment and resignation), Archibald Cox, wrote about *Roe*, as follows:

The failure to confront the issue [whether the Supreme Court should act as a super-legislature in striking down state laws as unconstitutional] 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.

Professor Alexander Bickel of Yale, who argued the Pentagon Papers appeal for *The New York Times*, described Justice Blackmun’s delineation of trimesters during a pregnancy when different legal standards governed the degree of permissible state regulation, if any, as a sort of “model statute” as if drafted as Uniform State Laws, and posed the question how

such detailed, precise rule-making could be warranted or justified as an exercise of the high function of constitutional adjudication. He questioned how the majority of the Justices could take such a bold step, ignoring the discipline appropriate to their role as interpreters of the Constitution, and not as unfettered lawmakers: “The Court ... refused the discipline to which its function is properly subject [and was] not excused in transgressing all limits, in refusing its own prior discipline.”

Indeed, a precious legacy left to the modern Court by the late esteemed Justices Oliver Wendell Holmes, Louis D. Brandeis, and Felix Frankfurter was repudiated by *Roe v. Wade*. This legacy was epitomized by Justice Holmes’s classic dissenting opinion in *Lochner v. New York* when he rebuked the majority for imposing its preferred laissez-faire economic dogma on citizens by striking down a statute regulating the hours that bakers could work, as follows:

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question

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whether I agreed with the theory, I should desire to study it further and longer before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. ... The Fourteenth Amendment does not enact Mr. Herbert Spender's Social Statics.

Whereas the Court majority in *Lochner* imposed the dogma of laissez-faire economics on the citizens of New York State, overruling the rational choice of their legislators, the Court in *Roe*, "refusing"—as Professor Bickel put it, *supra*—"its own prior discipline," imposed its new dogma of laissez-faire morals on our nation, preempting the legislative judgments of every state.

Professor and later Dean Harry Wellington, also of Yale Law, castigated Justice Blackmun's opinion in *Doe v. Bolton*, *Roe*'s companion case, as another *Lochner*, suggesting that in candor *Doe* would have quoted the majority opinion in *Lochner*, as the majority in *Doe* (as in *Roe*) had no "mandate" to create new morality "when elaborating the concept of liberty in the Fourteenth Amendment."

Instead, Justice Blackmun when speaking of "potential life" in the third trimester simply declared that the unborn child was not a person within the meaning of the Constitution as life did not begin before birth. "But is there not potential life in the unborn child from the moment of conception," asked Wellington, leaving the reader clueless as to how the child should be deemed in law from conception to viability.

These caustic critiques of *Roe* are as valid now as they were forty years ago when *Roe* was handed down, provoking a critical firestorm. Those critiques have prevailed in many quarters, among abortion rights advocates as well as pro-lifers, and yet abortion on demand is still the law of our land.

While the latest effort to overturn *Roe* on appeal seemed close to success in *Pennsylvania v. Casey* only to fail for lack of a single vote in a 5-4 decision reaffirming a constitutional right to abortion," the *Casey* decision was fractured, the Court was splintered, and only a Joint Opinion by three Justices—O'Connor, Kennedy, and Souter, JJ.—reaffirmed what it variously described as the "central" or "essential" holding of *Roe v. Wade*—that viability marks the constitutional frontier between lawful and unlawful prohibitions of abortion. The Joint Opinion held that, "Regardless of whether exceptions are made for particular circumstances, a State may

not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." But *Roe*'s trimester framework was discarded, and a new "undue burden" standard was to measure the legality vel non of abortion regulations prior to viability so that pre-viability regulation is permissible if it does not have "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."

Pro-life forces were disappointed when the appeal in *Casey* didn't fully prevail in overturning *Roe*. But while purporting to "reaffirm" the essence of *Roe*, the authors of the Joint Opinion in *Casey* dealt the serious blow to the entire corpus of constitutional jurisprudence on which the abortion-on-demand regime is precariously balanced. Paul Linton, in a comprehensive law review article concluded as follows:

Ultimately, then, "*Roe v. Wade* was reaffirmed, not because it was correctly decided as a matter of original constitutional interpretation, or because the rule of stare decisis requires it, or because the integrity of the Court demands it, or because other legal doctrines depend upon its continued viability, but because the Supreme Court simply could not imagine an America without legalized abortion. After more than twenty years of abortion on demand ... it is clear that unborn children cannot live with abortion. The challenge to opponents of *Roe* is to demonstrate to the American people and to the Supreme Court that the rest of us can live without it.

Linton's reading of the *Casey* Joint Opinion as refusing to endorse *Roe* even while reaffirming its "essential holding," was echoed by Justice Blackmun's law clerk who was serving when the case was decided. Edward Lazarus wrote in *Closed Chambers*, "*Roe* was difficult if not impossible to defend on its own terms—a far stretch of the already thin doctrine of substantive due process."

In that same vein, several prominent law professors joined in writing a series of mock judicial opinions, purporting to rewrite Justice Blackmun's opinion to put abortion rights on stronger footing. These rewritten opinions were published in a book edited by Yale Law Professor Jack Balkin. That abortion's legal backers feel that they are on shaky ground is apparent from Prof. Balkin's introductory remarks to the effect that, "in hindsight, [the Justices in 1973] should have written the opinions in *Roe* and *Doe* with a much greater degree of care about winning public support and assuaging criticism." But Balkin also included a pair of pro-life "dissenting opinions" by Professors Michael Stokes Paulsen and Teresa Stanton Collett. Space considerations preclude spelling out how *Roe*, even as

rewritten, fails to provide any defensible constitutional footing for abortion-on-demand.

Professor Balkin also quotes Justice Ruth Bader Ginsburg, who claimed that *Roe* “was premature and a political mistake [as it] ‘halted a political process that was moving in a reform direction and thereby ... prolonged divisiveness and deferred stable settlement of the issue’” Just recently, Justice Ginsburg reiterated her criticism of *Roe*, both at Columbia and University of Chicago Law School events, provoking retorts from *Roe* defenders. See, e.g., “Justice Ginsburg’s Misdirection,” Editorial, *The New York Times*, April 2, 2013.

On top of these expressions of concern about *Roe*’s legal frailty on the part of such prominent defenders of abortion rights, earlier this year *Time Magazine* proclaimed in a cover story that after *Roe*’s 40 year reign of abortion-on-demand, the so-called “pro-choice” movement was losing the war as public opinion has been shifting decisively in favor of pro-life positions.

In conclusion, *Roe* remains weak and vulnerable on professional legal grounds. It may be even weaker now on political grounds than it ever has been since 1973. Christian lawyers who believe that every child is a gift from God, formed in the womb with a unique and inherent dignity, and endowed by our Creator with an inalienable right to life, as well as a right to liberty and the pursuit of happiness, should now press the legal cause for overturning *Roe* with the utmost vigor. Equally, we must resist any other purported constitutional basis for the imposition of laissez-faire morals on our nation where the right to life must be secured for all.



Tom Brejcha is the President and Chief Counsel of the Thomas More Society. He has over 35 years of legal experience, and has been fighting court battles for pro-lifers for over 25 years. Countless organizations have

bestowed many awards upon Tom for his extraordinary legal work.



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The Road to Roe: How the Justices' Papers Explain Our 40 Year Abortion Controversy

BY CLARKE D. FORSYTHE

From the 1960s to the 1980s, Henry J. Friendly was considered one of the greatest federal judges to *never* sit on the U.S. Supreme Court. After a superior academic record at Harvard College and Harvard Law School, a clerkship with Supreme Court Justice Louis Brandeis, and a distinguished legal career of 31 years, Friendly served on the U.S. Court of Appeals in Manhattan from 1959 until his death in March 1986. Judge Richard Posner has written that “Friendly’s opinions and academic writings, in field after field, proposed revisions and clarifications of doctrines that time after time the Supreme Court gratefully adopted.” Both Justices William Brennan and John Paul Stevens considered Friendly one of our greatest federal judges.

So, it was significant that Friendly was assigned in 1969 to hear a federal court challenge to the New York State abortion law, one of many cases filed in the federal courts between 1969-1972 to challenge state abortion laws.

Friendly, who favored the legalization of abortion by the state legislature, drafted an opinion in April-May 1970 which rejected the extension of the Supreme Court’s 1965 contraception decision (*Griswold v. Connecticut*) to abortion and would have upheld the constitutionality of the New York abortion law. But Friendly’s draft opinion never saw the light of day. When New York State legalized abortion in July 1970, the case was dismissed as moot, and Friendly’s opinion was left in his personal papers for 36 years, apparently open to the public but little noticed, until 2006. Friendly had written: “The decision what to do about abortion is for the elected representatives of the people, not for three, or even nine, appointed judges... The legislature can make choices among [various abortion policies], observe the results, and act again as observation may dictate. Experience in one state may benefit others... In contrast a court can only strike down a law, leaving a vacuum in its place.”

Forty years after the Supreme Court’s abortion decisions, *Roe v. Wade* and *Doe v. Bolton* remain intensely controversial. By almost any objective measure—years of controversy, number of test cases in the courts, focus of election campaigns, dispute in Congress, challenges by state legislatures, opposition by a major political party for decades—*Roe* (and *Doe*) are the most



Justice Harry Blackmun, author of the Court’s opinion in *Roe*.

controversial Supreme Court decisions since *Dred Scott v. Sandford*, the 1857 decision that struck down Congress’ limitation on slavery in the western territories and heightened North-South tensions in the lead-up to the Civil War.

On the 30th anniversary, Harvard Law Professor Cass Sunstein, President Obama’s former regulatory czar, admitted that it is “unquestionable that *Roe* has become... the preeminent symbol of judicial overreaching.”

How could the Supreme Court have issued such a sweeping, unprecedented decision, with such serious consequences for public health that has provoked 40 years of unending legal, political, medical, and social turmoil?

The Impact of *Roe* and *Doe*

What Americans know as “*Roe v. Wade*” is actually two cases from two states: *Roe v. Wade* from Texas and *Doe v. Bolton* from Georgia. The two cases were argued together, decided together, and issued the same day.

The impact of the decisions was immediate. All of the abortion laws, across all 50 states, were rendered unenforceable,

thereby lifting the threat of prosecution against abortion providers. Though abortion was legal in limited circumstances in some 14 states before January 1973, *Roe* enabled abortion clinics to open in every state. Within weeks, abortion clinics—some run by former back-alley abortionists—opened in major cities like Chicago.

By invalidating Georgia’s hospitalization requirement, the Justices pushed the movement of abortion practice from hospitals into stand-alone clinics. After wiping away all existing laws, the Justices put the burden on the states to devise new laws to meet the vague guidelines that the Justices drafted. The Justices barred public health officials from enforcing health and safety regulations in the first trimester when 90% are performed. The federal courts were given continued oversight over any new regulations that might be passed by state or local governments. The Justices also empowered abortion practitioners—even former back-alley abortionists—to go into federal court to challenge any new abortion regulations, including health and safety regulations. Federal courts across the country proceeded to do just that over the next few years.

The companion case of *Doe v. Bolton* from Georgia has been relatively ignored over the past 40 years, despite its significant impact on abortion policy in the United States. The Court held that *Roe* and *Doe* “are to be read together.” In *Roe*, the Court held that the states could prohibit abortion after fetal viability, “except where it is necessary in appropriate medical judgment, for the preservation of the life or health of the mother.” Then, in *Doe*, the Justices defined “health” as “all factors—physical, emotional, psychological, familial, and the woman’s age—relevant to the well-being of the patient.” The “health exception” after viability swallowed the supposed prohibition. For 40 years, the “health exception” after viability has meant emotional well-being without limits.

When the opinions were released on Monday, January 22, 1973, the decisions developed a political and social dynamic of their own, and the Justices lost significant control over them. Between 1973-2003, approximately 330 constitutional amendments on abortion were introduced in Congress. The political, social and medical turmoil caused by the decisions has lasted for 40 years, and—as the 2012 presidential campaign demonstrated—shows no signs of abating.

The Mistake

Roe was not inevitable. It was not the inevitable outgrowth of prior precedent; indeed, its precedential foundations have

been ridiculed. After citing precedent, Justice Blackmun acknowledged that abortion is “inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education . . .”

Certainly the pressure was on state legislatures to legalize abortion to some degree in the late 1960s, as some 14 did, but it was not inevitable that the Supreme Court would do it, or create a sweeping abortion right from conception to birth. It was the result of a unique moment in U.S. history—the end of the turbulent 1960s—and a unique moment in the Supreme Court’s history.

The Justices decided to hear the abortion cases in April 1971 under the “misapprehension” (in Justice Blackmun’s words) that they only dealt with procedural issues relating to federal court interference in pending state criminal prosecutions. And they chose two cases, *Roe* from Texas and *Doe* from Georgia, that had *no trial and no evidentiary record about abortion or its medical implications*.

Justice Blackmun related this story to at least two people, and it is confirmed by the briefs in the cases, the Justices’ papers, and the oral arguments. In a letter to then-Chief Justice Rehnquist in July 1987, Blackmun wrote:

I remember that the old Chief [Warren Burger] appointed a screening committee, chaired by Potter [Stewart], to select those cases that could (it was assumed) be adequately heard by a Court of seven. I was on that little committee. We did not do a good job. Potter pressed for *Roe v. Wade* and *Doe v. Bolton* to be heard and did so in the misapprehension that they involved nothing more than an application of *Younger v. Harris*. How wrong we were.

Younger, decided 60 days before the Justices agreed to hear *Roe* and *Doe*, dealt with federal court interference in pending state court criminal proceedings. It’s not surprising that the Justices took two cases with no evidentiary record on abortion or its implication if their original purpose was to address state-federal procedural rules and not abortion.

The 15 Week Vacancies

A decisive moment in the consideration of the abortion cases came after the Justices decided to hear the two cases in April 1971 and before the first oral arguments in December 1971: Justices Hugo Black and John Marshall Harlan abruptly retired due to ill health in September 1971 and dramatically changed the balance of the Court.



The Supreme Court Justices who decided Roe v. Wade: Front Row, Left to Right: Associate Justices Potter Stewart; William O. Douglas; Chief Justice Warren E. Burger; Associate Justices William J. Brennan, Jr.; and Byron White (dissented). Back Row: Associate Justices Lewis F. Powell, Jr.; Thurgood Marshall; Harry A. Blackmun; and William Rehnquist (dissented).

Those were not inconsequential retirements. The following spring, Judge Friendly wrote to a friend: “During the current term [1971-72], the Court has lost its two intellectual leaders, Mr. Justice Black and Mr. Justice Harlan, and none of the nine justices approaches them in stature... For the first time since I have been a lawyer, the Court does not contain a single member who would deserve the over-used adjective ‘great.’”

Those two vacancies created a temporary majority for 15 weeks of four Justices—Douglas, Brennan, Stewart and Marshall—who were bent on eliminating the abortion laws. *Roe* and *Doe* were first heard by only seven justices on Monday, December 13, 1971. The cases were so cluttered with jurisdictional and procedural issues that very little time was left over during the first arguments to address the complex constitutional or medical issues. When they met to vote (“in conference”) on Thursday, December 16, 1971 and settled the procedural issues, the four-justice bloc decided to use the cases to eliminate the abortion laws, rather than look for other abortion cases with an evidentiary record.

Thus, *Roe* and *Doe* began as a serious procedural mistake that left the Justices without any factual record to consider the complex historical, legal, medical and constitutional issues

surrounding abortion. Though this oversight seems minor, it was a blunder that skewed the Justices’ consideration of abortion for the next thirteen months. By brushing aside these procedural questions, and deciding the abortion issue with no factual record, the Justices stumbled into 40 years of enduring controversy.

The Medical Myth that Drove the Outcome

With no evidentiary record in either *Roe* or *Doe*, the Justices were left with a large vacuum and the temptation to rely upon their personal experiences, prejudices and hunches in deciding the abortion cases. And, in that evidentiary vacuum, the seven justices were susceptible to untested theories of law, history, and medicine.

The outcome was driven by a novel medical claim—that “abortion was safer than childbirth”—that had no reliable medical data to support it. There was no record in the two cases, so this was argued for the first time in the briefs in the Supreme Court. No existing obstetrical textbook published before 1972 made such a claim. Yet, through repetition, it became a mantra.

The claim was based on a mechanical comparison of childbirth mortality rates and abortion mortality rates from Soviet Bloc countries. But there was no reliable data from these countries, and no reliable data that these rates were comparable or that they showed that “abortion was safer than childbirth.” The mantra—and the data from the Soviet Bloc countries—were challenged as unreliable by the attorneys for Texas and Georgia in their briefs and at the oral arguments in December 1971 and October 1972.

Nevertheless, the Justices ended up citing seven medical references to support the mantra in the *Roe* decision. All except one relied on 1950s statistics from Soviet Bloc countries; even those were not peer-reviewed studies, just raw numbers.

Despite the absence of reliable data, the medical mantra shaped the outcome of the cases, the breadth of the abortion right, and the restraints on public health officials to monitor and regulate clinics.

The Expansion to Viability (and beyond)

Roe and *Doe* were reargued, back to back, on Wednesday, October 11, 1972 and the nine justices met two days later “in confer-

ence” to vote. Blackmun held to his original position, and Justice Powell, for the first time, voiced his support for Blackmun’s opinion. Justice Blackmun distributed his second draft opinion on November 21, 1972, which emphasized the end of the first trimester as the “decisive” limit to the right to abortion:

“You will observe that I have concluded that the end of the first trimester is critical. This is arbitrary, but perhaps any other selected point, such as quickening or viability, is equally arbitrary.”

The Justices then began to negotiate over the scope of the abortion right they were creating. By early December, Justices Powell and Marshall had persuaded Justice Blackmun to expand the right by four whole months, from 12 weeks to 28 weeks (fetal viability). Blackmun’s third draft of December 21, 1972, only four weeks before the decisions were publicly released, expanded the right to viability without any briefing or argument on viability or its implications. *The word viability was not mentioned once during the four hours of argument in December 1971 and October 1972.*

In his *Doe* opinion, Blackmun added the unlimited “health” exception after viability. The scope of the abortion right that the Justices created isolates the U.S. as one of only four nations in the world (along with China, North Korea, and Canada) that allow abortion for any reason after fetal viability.

Though Justice Powell played a pivotal role in influencing Blackmun to extend the ostensible limit from the end of the first trimester to viability, Powell later told his biographer, John Jeffries, that *Roe* and *Doe* were “the worst opinions he had ever joined.”

The Growth of International Medical Data

With *Roe* and *Doe*, the Justices assumed the role of the national abortion control board, but cannot monitor the public health impact as public health officials normally do. As Justice Sandra Day O’Connor observed in 1983: “As today’s decision indicates, medical technology is changing, and this change will necessitate our continued functioning as the Nation’s ‘ex officio medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States.’”

The Justices cannot monitor new abortion procedures, or new medical devices, or medical data on the risks of abortion, except as cases are appealed to them. It has been more than five years since the Justices addressed an abortion case.

Yet, in the 20 years since *Casey*, the number of peer-reviewed

medical studies from many countries has grown significantly. Medical studies over the last two to three decades have created substantial data on five significant risks from abortion: increased risk of placenta previa; increased risk of premature birth in subsequent pregnancies; increased risk of mental distress or suicide; loss of the protective effect from full-term pregnancies against breast cancer; and increased risk of drug and alcohol abuse.

It’s important to handle the data carefully. First, the studies focus on “increased risk” after abortion, which is not the same thing as causation, though increased risk and other indicators may eventually prove causation. Second, there are medical studies that show no increased risks after abortion. They need to be taken into consideration.

Nevertheless, there are now more than 130 studies that have found a statistically significant increased risk in pre-term birth after abortion. And there are more than 100 studies that have found a statistically significant increased risk in mental trauma after abortion. Because of *Roe* and *Doe*, the Justices are insulated by the nature of litigation from monitoring abortion practice or medical developments, as state and local public health officials normally could.

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The Day after Roe

Forty years later, here are several reasons that *Roe* and *Doe* remain so controversial. As Judge Friendly pointed out, the decisions were slipshod judicial work. Without briefing or argument, the Justices expanded the abortion right to fetal viability and beyond. As one of only four nations that allow abortion for any reason after viability, the U.S. is way out of line with international standards. The Justices expanded abortion way beyond public opinion. Only 7% of Americans support the policy that *Roe* has enforced for 40 years: abortion for any reason, at any time of pregnancy. The Justices created a stark schizophrenia in American law: they declared the unborn child to be a virtual nothing in abortion law, despite its growing protection as a person in property, prenatal injury, wrongful death, and criminal law. They've allowed virtually unregulated abortion and live birth abortion; despite several opportunities, the Justices have yet to give a green light to health and safety regulations. Litigation insulates them from reviewing their handiwork; they cannot actively or regularly or fully monitor the impact of their rules. The Court adopted an extreme policy, and the States have been trying to moderate it ever since.

A big part of the public authority of *Roe* in 2013 is the fear that the overruling of *Roe* would mean that abortion immediately becomes illegal (and the social chaos that that implies). But the fact of the matter is that if *Roe* was overturned today, abortion would be legal in at least 42-43 states tomorrow, maybe all 50, throughout the first trimester when 90% are done, and in most states up to viability. This is because—as a 50-state analysis published in 2012 showed—there are no enforceable abortion prohibitions in those states.

Instead, the overruling of *Roe* would return the abortion issue to square one in the majority of state legislatures, in the sense that states could retain or repeal existing regulations and consider broad or narrow prohibitions. Legislatures would be free in about 35-36 states to reconsider regulations or broad or narrow prohibitions. (Courts in 15 states have created their own version of *Roe* under the *state* constitution and taken this option away from the people and their elected representatives.) Some states would allow broad abortion access, much as it is today.

Some states would prohibit abortion except to save the life of the mother. And many states would limit the reasons and time for abortion, perhaps to the first trimester. This was happening in 1967-1970 before the Justices took the issue away from the American people. The debate would not be unprecedented. The states are now considering various regulations, including limits on abortion at 20 weeks of pregnancy.

When in 1985 then-professor Ruth Bader Ginsburg observed that *Roe* went too far, too fast, she quoted Henry J. Friendly's unpublished 1970 observations after New York legalized abortion: "How much better that the issue was settled by the legislature! I do not mean that everyone is happy; presumably those who opposed the reform have not changed their views. But the result is acceptable in the sense that it was reached by the democratic process and thus will be accepted even though many will not regard it as right."

Legislators would have to look to medical fact and public opinion and not just to the interest groups that may not reflect public opinion. Public opinion would have a leavening affect and moderate what comes out of the state legislatures. Activists on both sides would still be free to lobby for their position. But legislatures could have an open debate. The outcome might not satisfy activists on either side of the question but a result, reflecting public opinion, and achieved through the democratic process, would be recognized as fairly legitimate. Over the course of one or two or three legislative sessions, public policy would be better aligned with American public opinion, and public health officials could more effectively monitor the practice. The history of state abortion legislation since the Supreme Court's 2007 decision in *Gonzales v. Carhart* shows that prolife activists and citizens could make much progress in a post-*Roe* world in protecting the unborn child in the law and reducing abortion to the greatest extent possible.



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Did Roe End Back Alley Abortions?

BY KRISTEN DAY

A filthy abortion clinic conducts business even though instruments are regularly not cleaned but reused, sometimes spreading infectious diseases to other women. Bloodstained blankets strewn about the office are covered with cat feces. Baby parts are stored in jars, aborted fetuses are stored in shoe boxes, and medical waste is deposited in the basement. Unlicensed and untrained staff tend to the patients. Babies born alive have their spinal cords severed with scissors, and women are given high—sometimes lethal—doses of drugs.

You might think this is a description of a pre-*Roe* back-alley, hidden clinic run by a doctor who secretly performed illegal abortions. You would be wrong. This gruesome clinic was run by Dr. Kermit Gosnell until 2010 when authorities stormed his clinic, not because of the conditions of the clinic nor the fact that women and babies were dying, but because they suspected he was distributing illegal drugs. He is currently on trial for the murder of one woman and several babies. It is suspected there were many more victims; however, records and evidence were destroyed. It is the chilling testimony from employees that is portraying just how horrifying the clinic was for the mothers seeking abortion and the babies who were born alive by mistake and then killed after birth.

The passage of *Roe* was supposed to be the great equalizer for women, giving them power over their bodies. It was also supposed to end dangerous “back alley” abortions. But are women any safer? In the Gosnell case, the answer is no. The clinic was a dangerous place, and the facts cannot be disputed. It also cannot be disputed that leaders in the abortion industry and state officials knew that violations existed. Yet, they did nothing. The clinic had not been inspected since 1993. The Grand Jury report conveyed that state officials stopped inspecting abortion clinics, including Gosnell’s, because it would put “a barrier up to women” seeking abortion, and it was “better to leave clinics [to] do as they pleased.”

No other industry receives such a laissez-faire attitude when there are safety concerns or violations.

When there was a tragic shooting at Sandy Hook Elementary school, calls for immediate action for stricter gun control measures flooded the media and immediate action was demanded to protect against violent attacks. Several states took immediate action to pass new gun control provisions. When



the fertilizer plant blew up in Texas recently, again there were immediate calls for a review of the regulations for the storage of these chemicals to prevent future tragedies.

But, when a doctor is on trial for victimizing women and murdering infants born alive, there is silence. There has been no call for safety regulations, no call to ensure that abortion clinics are adhering to state laws, and no calls for a review of safety protocols at abortion clinics because “it is better to leave clinics do as they please.”

Better for whom? The abortion business? It surely is not better for the women who are put into unsafe situations.

The industry has consistently opposed clinic regulations that would make it safer for women, including making accommodations to buildings to allow access for emergency technicians, requesting parental consent for minors seeking abortion, and requiring that abortions are performed by licensed physicians only. The business calls the proposals attacks on women’s health designed to deny women access to care.

The industry has consistently opposed providing information to women, including specifics about fetal development. Studies indicate that once a woman sees an ultrasound of her child, she is less likely to choose abortion, so it is better business for the abortionist to deny her a chance to see the ultrasound.

Abortion is big business, and building a customer base and more demand for your product is the key to success. Every industry wants to increase its client base and its profit margin. The

abortion industry has a powerful political relations arm that has the ability to silence critics, strong-arm politicians, and call for media blackouts on certain topics, all under the guise of protecting women's reproductive health. It wasn't until Fox News Analyst Kirsten Powers questioned the media blackout that others acknowledged that, yes, there was an agreement not to cover the case because it did not make abortion clinics look good.

These strong-arm tactics are being used in the state of New York, which is essentially a hub for the abortion industry. One out of ten abortions occur in New York. The abortion rate is twice the national average and, in some cities, abortions outnumber live births. Nonetheless, relatively few restrictions and unlimited public funding do not satisfy those in the abortion industry. They want more. An abortion expansion bill, called the Reproductive Health Act (RHA), would lift the already lenient regulations and allow abortion in all nine months of pregnancy. Current law does not allow late term abortions and specifies only doctors can perform abortions. Current state law prosecutes for two murder counts when someone kills a pregnant women, and her fetus dies.

The abortion expansion measure was proposed as part of a ten-point Women's Equality bill to address violence against women, pay equity, and human trafficking. However, Governor Andrew Cuomo and a group of abortion advocates have adopted an all or nothing approach that is preventing passage of the bill to help women.

The Women's Equality bill, without the abortion expansion measure, would pass the House and Assembly. However, the governor has an incentive to fight for the abortion expansion so he can blame pro-life legislators for opposing equal rights for women and thereby enjoy the benefits of financial support and advocacy from the abortion industry as he pursues his 2016 presidential bid.

No one can deny that the political and financial support is powerful.

The Susan G. Komen Foundation can attest to being on the receiving end of the powerful abortion lobby when the foundation decided not to renew a grant for Planned Parenthood. The media frenzy that followed the Komen decision was fierce. Reports that the decision would jeopardize the health of women were rampant.

Never mind the fact that Planned Parenthood does not perform mammograms and the absence of the \$700,000 Komen grant

would hardly put a dent in their overall coffers. The National Planned Parenthood Federation ended 2011 with a revenue of over \$100 million and an end-of-the-year surplus of almost \$200 million. Forcing a reversal of the Komen decision showcased the abortion industry's political muscle and was extremely profitable. Planned Parenthood reportedly raised \$650,000 in just 24 hours after its media campaign began and upwards of \$3 million in 3 days—triple the amount of the initial grant. It was the Komen Foundation, the leading breast cancer researcher, that suffered. Donations and participation in fundraising events declined as groups and individuals started pulling support.

Roe legalized abortion, but social and political effects have been profound in pushing the abortion issue into one of the longest games ever of political football. The politics of *Roe* has divided the nation and transformed abortion into the greatest wedge issue.

In an effort to find a political advantage, there is little room for compromise and less room for accurate facts. Sound bites to raise funds or defeat candidates are the priority and the norm. Both sides claim to look out for either the best interests of women or the best interests of the child, but in reality neither side is addressing the full picture or the complexity of the decision. It has become more important to rally the base to win votes and raise the necessary funds to win rather than solve the problem.

Roe, and the right to abortion, has not changed the fact that women are still far from equal, and there is still very little support for the right to bear a child. Employers seldom make reasonable accommodations for pregnant women such as allowing a check-out clerk to use a stool. Childcare is expensive and makes it cost-prohibitive for those in lower-paying jobs to work. Women are paid less than their male counterparts, and leave policies are substandard and unsupportive for new parents.

Until there is a united approach to fight for real choice—including the right to bear a child and support for new parents—abortion may continue to be legal, but it will not be safe and will not be rare. The abortion industry will insist that it is better to keep women in the alley of ignorance because it is better for business, and the bottom line trumps true concern for women.



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Forty Years in the Judicial Desert: How Long Can *Roe v. Wade* Survive the Unraveling of the Supreme Court’s “Abortion Distortion”?

BY STEVEN ADEN

Beginning with *Roe v. Wade* in 1973, the rush by activist Supreme Court Justices to ignore medical science, history, and judicial precedent in order to tear down virtually every reasonable restriction on abortion truly has had no parallel in American law. Members of the Court have described this judicial review process as an “ad hoc nullification machine” for laws restricting abortion,¹ and “a major distortion in the Court’s constitutional jurisprudence.” Three Members of the Court famously declared that *Roe* was “on a collision course with itself” because its structural framework for protecting “fundamental” rights depended upon changing medical technology.² And when it comes to the Court’s stubborn unwillingness to protect the First Amendment rights of pro-life advocates, Justices Scalia and Thomas have been bold enough to declare, “Is the deck stacked [against pro-lifers]? You bet.”³

Before *Roe v. Wade* and *Doe v. Bolton*, abortion was illegal in all but a handful of states. The sweeping nationwide changes these decisions wrought were heralded by several others that laid the groundwork for the so-called “fundamental right” to abortion, and that should have made the Court’s pro-abortion turn

in 1973 unsurprising. The “abortion distortion” in fact began with a “marriage distortion.” The Supreme Court held in *Griswold v. Connecticut*⁴ in 1965 that a state’s criminal prohibition on the use of contraceptives unconstitutionally intruded upon the right of marital privacy, a right it famously derived from “emanations” from the “penumbras” of specific guarantees in the Bill of Rights. (It declined to be overly specific about their source.) *Griswold* presaged the expansion of the “right of privacy” to realms beyond marriage by its very definition of the institution, which aped and twisted the words of the Christian marriage vow: “Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred” (emphasis added). To the Justices, it was the intimacy of marriage—its subjective and highly personal quality—not the uniqueness of it as a God-ordained institution that made it “sacred.” By this token, adulterous and sexually immoral relationships outside of marriage could be viewed as “sacrosanct” under the 14th Amendment, as the Court would indeed soon hold shortly before *Roe*, in *Eisenstadt v. Baird*.⁵ Extending *Griswold*’s holding to unmarried cohabiting couples, the “right of privacy” morphed again in *Eisenstadt* into a right of “reproductive privacy” independent of the marital relationship. “It is true that in *Griswold* the right of privacy in question inhered in the marital relationship,” the majority said. “Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup.” Much has been speculated about the Supreme Court’s opportunity to re-define marriage in this year’s term. But when the Court has already reduced marriage from a union of two who become “one flesh” to merely “an association of two individuals,” so that it could be leveled to a par with cohabitation, one wonders what is left of the institution God ordained in the eyes of the nation’s highest judicial authority.

*Roe v. Wade*⁶ nullified an entire chapter of Texas’ criminal abortion laws, as well as the laws of 48 other states. While still looking for a place in the Constitution to anchor its newfound “right of privacy,” the majority plowed straight ahead. “This right of



privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty ... as we feel it is, or as the District Court determined in the Ninth Amendment ... is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe* adopted a "trimester approach" for evaluating claims of abortion rights as against state interests in preserving life and safeguarding maternal health, which elevated abortion above all other medical procedures by ostensibly proscribing any regulation of the procedure in the first trimester.

What is perhaps most striking about the *Roe* decision is its imprudence. Although its author, Justice Harry Blackmun, strained to create the impression that he was hewing to the conventions of constitutional review, the majority opinion reads like a socio-political manifesto rather than a legal opinion. In short, the Constitution's *text* is not the *context*.

The brazen quality of the opinion embarrasses even secular, pro-abortion legal scholars. The late John Hart Ely of Yale, for example, declared that "*Roe* lacks even colorable support in the constitutional text, history, or any other appropriate source of constitutional doctrine..."⁷ Ely called *Roe* "a very bad decision;" bad because "it is not constitutional law and gives almost no sense of an obligation to try to be."

Roe's imprudence was on display in a series of decisions issued by the Court over the next ten years, as the Court was forced to backpedal from the unintended consequences the decision engendered because of its inordinate breadth. In *Connecticut v. Menillo*,⁸ the Court expressed concern that several states had read *Roe* to prohibit any criminal restriction whatsoever on the performance of abortions, even by laypersons. "Even during the first trimester of pregnancy ... prosecutions for abortions conducted by non-physicians infringe upon no realm of personal privacy secured by the Constitution against state interference," the Court explained. This belated guidance on the matter laid the groundwork for later health and safety-related



The Court retreated from its holding in *Roe* that states could regulate abortion to further their interest in “potentially viable” life, holding instead that “actual viability” must be the standard.

restrictions to be upheld, such as in *Planned Parenthood v. Danforth*⁹ the following year, in which Justice Blackmun clarified that laws that were elemental to the regulation of the practice of medicine, such as requiring written informed consent and reporting requirements, were constitutionally permissible as applied to abortion. State and federal courts also generally read *Roe* as striking down any public funding restrictions on abortion, until the Court corrected that view in cases beginning in 1977—over strong dissents from the Court's liberal wing, lead by the author of *Roe* and *Doe*, Justice Blackmun.¹⁰

After this period of retrenchment, the Court began to struggle with the meaning of the “viability” of the pre-born child. In *Colautti v. Franklin*¹¹ in 1979, with Justice Blackmun writing, the Court struck down a Pennsylvania statute that required physicians to use the abortion technique providing the best opportunity for the baby to

be born alive in abortions if the baby is “viable or may be viable.” By employing the term “may be viable,” the Court said the state injected a note of ambiguity and uncertainty into a criminal statute, making it void for vagueness. The Court thus retreated from its holding in *Roe* that states could regulate abortion to further their interest in “potentially viable” life, holding instead that “actual viability” must be the standard. Justice White, in dissent, argued that the Court's decision “now withdraws from the States a substantial measure of the power to protect fetal life that was reserved to them in *Roe v. Wade*...” Several years later, in *Akron v. Akron Center for Reproductive Health, Inc.*,¹² the Court struck down an Akron, Ohio informed consent ordinance that included mandated information on fetal development and the date of possible viability. Justice Sandra Day O'Connor, dissenting and writing for the first time in an abortion case, came out swinging on the evolving nature of the Court's “trimester” framework as it related to “viability.” When *Roe* was decided in 1973, she pointed out, viability before 28 weeks was unusual, where as “recent studies have demonstrated increasingly earlier fetal viability....”

“The *Roe* framework, then, is clearly on a collision course with itself,” Justice O’Connor charged. Justice Blackmun, joined by Justices Brennan and Marshall, responded to this argument in *Webster v. Reproductive Health Services*,¹³ claiming the critique had “no medical foundation.” Why? “[T]here is an ‘anatomic threshold’ for fetal viability of about 23-24 weeks of gestation,” Blackmun asserted, “a threshold of fetal viability [that] is, and will remain, no different from what it was at the time *Roe* was decided. Predictions to the contrary are pure science fiction.” But Blackmun and his fellow dissenters in *Webster* simply ignored the medical evidence Justice O’Connor relied on that documented that viability was regarded as 28 weeks at the time of *Roe*, not 23-24 weeks. It was Justice Blackmun who was writing “science fiction.”

The nadir of nullification jurisprudence came with *Thornburgh v. ACOG*,¹⁴ a 1986 split decision holding unconstitutional Pennsylvania’s Abortion Control Act, including provisions requiring informed consent as to the “particular medical risks” of abortion and the fact that there may be “detrimental physical and psychological effects” from the procedure, as well as mandating that the physician report the basis for his determination that the child is not viable. Justice O’Connor dissented again, complaining of the “abortion distortion.” “This Court’s abortion decisions have already worked a major distortion in the Court’s constitutional jurisprudence,” she charged. “Today’s decision goes further, and makes it painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion.”

Between 1986 and the *Webster* decision in 1989, significant changes occurred in the makeup of the Court. Chief Justice Warren Burger resigned and was replaced by Justice William Rehnquist, a more conservative constitutionalist. Justice Rehnquist’s seat as Associate Justice was taken by Antonin Scalia, who would come to anchor the conservative arm of the Court in the 1990s and beyond. And most significantly for abortion jurisprudence, liberal Justice Lewis Powell was replaced by Anthony Kennedy. *Webster v. Reproductive Health Services*, again a split decision but with Chief Justice Rehnquist writing, upheld a Missouri abortion control statute that is difficult to distinguish from the Pennsylvania statute in *Thornburgh*. Missouri specified that prior to performing an abortion on any woman whom the physician has reason to believe is 20 or more weeks pregnant, he must ascertain whether the fetus is “viable” by performing “such medical examinations and tests as are necessary to make a finding of [the fetus’] gestational age, weight, and lung maturity.” Although the Court demurred to overturn *Roe v. Wade*, in a part of the decision in which Justices White and Kennedy joined, *Webster* did represent a determination by the plurality to “modify and narrow *Roe* and succeeding cases.” Consequently, the plurality stated, “There is no doubt that our holding today will allow some governmental regulation of abortion that would have been prohibited under the language of cases such as *Colautti* and *Akron*.” Significantly, the Missouri statute designated “viability” as the point at which the state’s interest in

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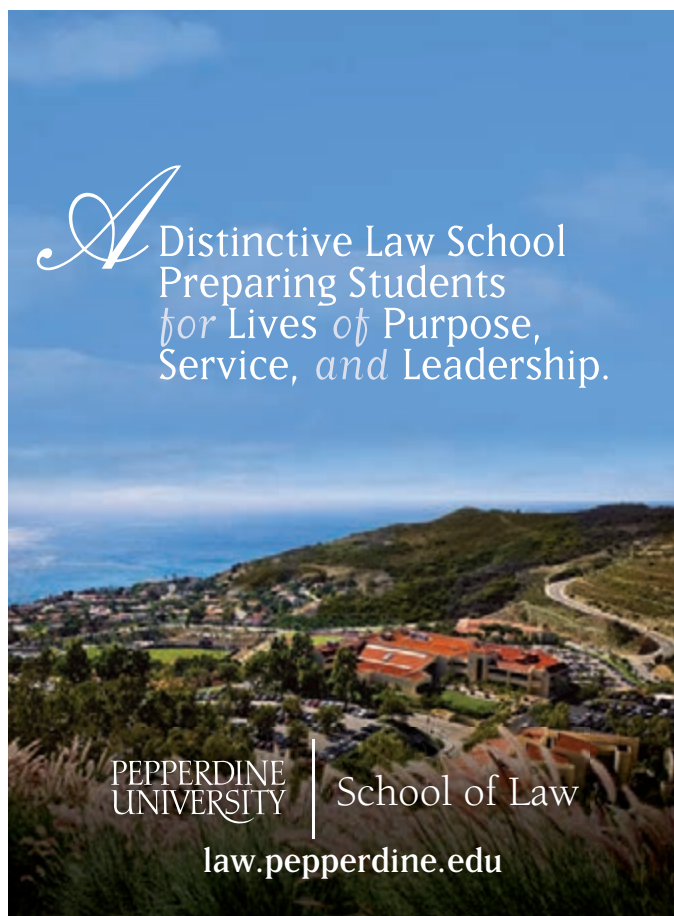
potential human life must be safeguarded, and the majority took no issue with that determination.

After *Webster*, the Court appeared poised to overturn *Roe* when it accepted review of another Pennsylvania abortion statute three years later. *Planned Parenthood of Southeastern Pennsylvania v. Casey*¹⁵ was an immense disappointment to pro-life advocates, however. In another fractured decision, the Court reviewed and reaffirmed the “central” or “essential” holding of *Roe* that “a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.” But the Court rejected the “trimester” framework of *Roe*, resorting instead to a bifurcated pre-viability/post-viability framework and applying a newly adopted “undue burden” standard to gauge the constitutionality of abortion restrictions. For the first time, the Court soundly affirmed the states’ right to promote their “profound interest in potential life” throughout pregnancy by informed consent measures and to enact health and safety regulations before and after viability. The Court upheld provisions requiring informed consent and a 24-hour waiting period before the abortion was to be performed, and a parental consent mandate where a judicial bypass was also available.

As constitutional scholar Paul Benjamin Linton observes,¹⁶ *Casey* was a seismic jurisprudential shift along several fault lines. The Court rooted the right to abortion in the “liberty” language of the Fourteenth Amendment, not, as in *Roe*, in an implied right of privacy. Departing from *Roe*, the *Casey* Court never characterized the right to abortion as “fundamental,” nor asserted that *Roe* had been correctly decided as a matter of original constitutional interpretation. For the Justices willing to adhere to the view that a “fundamental right” to abortion existed, the struggle to ground *Roe*’s conclusions moved from a search for constitutional bases to philosophical ones. The controlling plurality’s refusal to abandon *Roe* was based largely on its absurd contention that “[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society in reliance on the availability of abortion, in the event that contraception should fail.” And then there is, of course, the infamous “mystery” passage: “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. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.” The Court thereby confirmed what had been assumed since *Griswold*: radical autonomy, free from the socializing constraints of government, family and church, had always been its highest value in “reproductive privacy” jurisprudence.

An eight-year hiatus in Supreme Court abortion decisions followed *Casey*, then another split decision overturned Nebraska’s partial-birth abortion ban in *Carhart v. Stenberg*.¹⁷ Imposing on the states an impossible evidentiary burden, the majority concluded that Nebraska had “fail[ed] to demonstrate that banning [partial-birth abortion] without a health exception may not create significant health risks for women.” Five jurists had no difficulty requiring that states prove a negation in order to justify a ban on a horrific and barbaric abortion procedure. “The ‘ad hoc nullification’ machine is back at full throttle,” Justice Clarence Thomas charged.

Another long silence from the Court ensued, during which time two more changes in the Court’s membership occurred. Chief Justice Rehnquist was replaced by John Roberts, and Samuel Alito took Sandra Day O’Connor’s seat as Associate Justice. The result seemed nothing less than astonishing. *Ayotte v. Planned Parenthood*¹⁸ involved a facial challenge to a New Hampshire statute requiring parental notice at least 48 hours before a minor could have an abortion. The First Circuit approved a facial challenge and struck down the statute *in toto*. The Supreme Court



reversed, and signaled a new course for abortion litigation. In a unanimous decision, heretofore unheard of in an abortion case, the Court vacated the First Circuit’s decision and remanded to that court to reconsider its choice of remedy. The Court made it clear in *Ayotte* that facial invalidations of entire abortion control statutes, the stock in trade of the abortion industry since *Roe*, were no longer favored, and that challenges based on actual unconstitutional applications of state law that posed demonstrable risks to women’s health were to be the rule. What, then, of *Stenberg*’s striking down Nebraska’s partial birth abortion statute in its entirety because it lacked a health exception? “But the parties in *Stenberg* did not ask for, and we did not contemplate, relief more finely drawn,” the *Ayotte* Court explained.

The Supreme Court’s most recent abortion opinion, *Gonzales v. Carhart*,¹⁹ may have been the most remarkable one to date. *Gonzales* allowed the Court to reconsider the question of the constitutionality of partial-birth abortion bans.

Congress had responded to *Stenberg* by passing the Partial-Birth Abortion Ban Act of 2003, which sought to remedy the deficiencies in the Nebraska statute through an extensive set of factual findings on the necessity of partial-birth abortion. Congress found that “[a] moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion ... is a gruesome and inhumane procedure that is never medically necessary and should be prohibited” and that “[t] here is no credible medical evidence that partial-birth abortions are safer than other abortion procedures.” Two lower courts struck down the law based on *Stenberg*, and the appellate courts concluded that the absence of a health exception rendered the Act unconstitutional.

Justice Kennedy wrote for the Court. After repeating the gruesome description of the partial-birth abortion procedure he had set out in his dissent in *Stenberg*, Kennedy rejected the argument that the federal statute was unconstitutionally overbroad; by identifying specific “anatomical landmarks” to which the infant must be partially delivered before a partial-birth abortion becomes proscribed, and by adding an “overt-act” requirement that must occur to kill the infant after delivery to the anatomical landmark, the Federal Act was sufficiently differentiated

from the Nebraska statute in *Stenberg*, he concluded. Abortion jurisprudence had distorted the usual deference afforded legislative determinations, Kennedy suggested: “Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts.” Interpretations of *Stenberg* that left “no margin of error for legislatures to act in the face of medical uncertainty” operated as a kind of judicial “zero tolerance policy” for legitimate abortion regulations.

“This is too exacting a standard to impose on the legislative power ... to regulate the medical profession,” the Court concluded. In so ruling, the Roberts Court appeared to be affirming once again, as it did in *Ayotte v. Planned Parenthood*, that challenges to restrictions on abortion must play by the same juridical rules as constitutional challenges in other contexts. The “abortion ad hoc nullification machine” had finally ground to a halt.

Now that abortion jurisprudence seems to have been set right, what about abortion itself? The future

of abortion in the courts depends, of course, on changing the mind and heart of one man, Anthony Kennedy, who holds the swing vote that can overturn *Roe*. But the future of abortion itself depends upon the pro-life movement boldly “speaking the truth in love” to all men and women. The Church has been here before. Journalist Marvin Olasky observed that the earliest record of abortion in America dates from 1652—a reference to a criminal prosecution of a young man who suborned an abortion for his mistress.²⁰ Abortion numbers increased slowly in the Seventeenth and early Eighteenth centuries, but spiked in the Nineteenth Century. The practice was so extensive in the mid-1800s, Olasky says, that *The New York Times* called it “The Evil of the Age....” As a national, church-led pro-life movement gained strength after the Civil War, focusing on compassionately aiding women at risk through intervention efforts and maternity homes, the abortion rate declined dramatically from 1860 to 1910 and stayed relatively low until the sexual revolution in the 1960s sent the numbers up again.

Beginning shortly after the Supreme Court approved greater abortion restrictions in *Casey*, though, the rate has dropped precipitously—almost by one-third. America is now seeing the lowest number of abortions since the mid-1970s. Today, there

Abortion jurisprudence had distorted the usual deference afforded legislative determinations, Kennedy suggested: “Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts.”

are three times as many pro-life pregnancy resource centers as abortion clinics, and a recent *Time* magazine article, reporting on polling data, observed that “something dramatic has happened” in public opinion, as the number of persons calling themselves “pro-life” has risen from one-third in 1995 to a majority within fifteen years.²¹

When truth is spoken, it has the power to change hearts and minds, even, perhaps, those of Supreme Court Justices. Justice Kennedy remarked in one case on “the profound difference a leaflet can have in a woman’s decision-making process.... speech makes a difference, as it must when acts of lasting significance and profound moral consequence are being contemplated.”²² And Justice Kennedy reminds us of the power of life-affirming words to change hearts and minds regarding the sanctity of life—including, it seems, possibly his own:

In a fleeting existence we have but little time to find truth through discourse. No better illustration of the immediacy of speech, of the urgency of persuasion, of the preciousness of time, is presented than in this case.... So committed is the Court to its course that it denies these protesters, in the face of what they consider to be one of life’s gravest moral crises, even the opportunity to try to offer a fellow citizen a little pamphlet, a handheld paper *seeking to reach a higher law*.²³

One can only hope and pray that, having apparently abandoned the “ad hoc nullification machine” that was distorting abortion jurisprudence, the Court will renew its commitment in future cases to conform that jurisprudence to “a higher law.”



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A More Pro-Life Union: 40 Years After Roe v. Wade

BY MARY HARNED

Since the U.S. Supreme Court's decision in *Roe v. Wade*¹, pro-life Americans have fought tirelessly to protect women and their unborn children in diverse ways, including through legislation, litigation, the provision of assistance and services for pregnant women, sidewalk counseling, and public education. However, restoring a culture of life in the United States in the aftermath of *Roe* was—and continues to be—unquestionably daunting. On the eve of *Roe*, abortion-on-demand was legal in only a small number of states; but through *Roe* and its companion case *Doe v. Bolton*², the Court invalidated laws protecting women and their unborn children in all 50 states.

Encouragingly, nearly 40 years later we have achieved solid victories in our efforts to protect mothers and their unborn children—gains described by one prominent journalist as “unheralded.”³ After rising dramatically in the years immediately after *Roe*, the abortion rate is in decline. Public opinion polls suggest that more Americans now identify themselves as “pro-life.” Subsequent Supreme Court decisions have permitted states to enact hundreds of laws that provide greater legal protection for mothers and their unborn children, while also reducing the number of abortions.

These gains should give hope to those who long for the day when a Court-created “right” to abortion will constitute a former, dark chapter in American history.

America's Abortion Rate is Declining

The number of abortions in America is declining, after it predictably rose in the years immediately following *Roe*. In 1990, 24 percent of all pregnancies ended in abortion. By contrast, in 2008, 18 percent of pregnancies ended in abortion.⁴ Academics, pollsters, statisticians, and others debate the reasons behind the decline. Evolving public sentiment about abortion certainly plays a part. Regardless of the reasons for the decline, this is a development worth celebrating.

Polls Demonstrate Increasing Pro-Life Majority

Perhaps the most promising indication of the success of the pro-life movement since *Roe* lies in the shift in public opinion. According to a May 23, 2012 Gallup poll, the percentage of Americans who identify themselves as “pro-choice” has hit a record low of 41 percent. The poll further found that “Americans now tilt ‘pro-life’ by nine-point margin, 50% to 41%.”⁵ Further, regardless of whether they believe abortion should be legal, a majority of Americans view abortion as “morally wrong.” Gallup reports that 51 percent of those surveyed believe that abortion is “morally wrong,” while only 38 percent believe that it is “morally acceptable.” This continuing trend began in 1999.⁶

An earlier 2011 Gallup poll examined American attitudes toward common pro-life laws. The poll demonstrated, among other things, that 87 percent of Americans support informed consent laws, 71 percent support parental involvement requirements, and 64 percent support laws that would make it illegal to perform a partial-birth abortion.⁷



Notable Demographics: All Political Affiliations and Young Americans Increasing Pro-Life

Gallup reports that “[t]he decline in Americans’ self-identification as ‘pro-choice’ is seen across the three U.S. political groups.” Forty-seven percent of independent voters—often seen as the decisive voices in close elections—described themselves as “pro-life” in the most recent Gallup poll, compared with 41 percent who said they are “pro-choice.”⁸

Young Americans are also increasingly self-reporting as pro-life. This positive development is in spite of concerted efforts by pro-abortion groups like Planned Parenthood to target young children with sex education that promotes abortion as the appropriate response to teenage pregnancy.⁹ Since 1975, Gallup has surveyed four separate age groups on whether abortion should be legal (a) in all circumstances, (b) only under some circumstances, or (c) in no circumstances. From 1990 to 1994, 14 percent of 18- to 29-year-olds believed abortion should be illegal in all circumstances. But beginning in 2005, at least 23 percent of 18- to 29-year-olds believed abortion should be illegal in all circumstances. Gallup notes that “young adults are now roughly tied with seniors as being the most likely age group to favor having abortion ‘illegal in all circumstances.’”¹⁰

Pregnancy Care Centers Continue to Flourish

Shortly after *Roe*, pregnancy care centers (PCCs) began to spring up in different parts of the United States. Today, these centers—with almost 2,000 PCCs affiliated with national organizations such as Care Net, Heartbeat International, and National Institute of Family and Life Advocates—provide a variety of services to pregnant women who are considering abortion.¹¹ Notably, *Time* magazine once called PCCs the “kind, calm, nonjudgmental” face of the pro-life movement.¹²

Thanks to the support of volunteers, private donations, and even public funding, PCCs offer a wide range of services, which generally include the following: free pregnancy tests; one-on-one, nonjudgmental peer counseling; material assistance; medical referrals; childbirth and parenting classes; education and employment counseling; risk avoidance education for youth; information on and/or testing for sexually transmitted diseases (STDs); post-abortion counseling; 24-hour hotlines; and referrals to adoption agencies and other support services. Some PCCs provide medical services, including obstetrical care and nursing, ultrasonography, labor coaching, and lactation consultation.¹³

Though these centers have been the focus of unrelenting attacks from pro-abortion groups, they continue to flourish. In 2010, about 230,000 ultrasounds were performed at 1,969 PCCs throughout the country.¹⁴

There is little doubt that pregnancy care centers are responsible for saving countless lives and significantly helping women who face unexpected motherhood, and that they have contributed appreciably toward growing a culture of life in America.

Indisputable Progress Toward Legal Protection for Women and the Unborn

Two notable U.S. Supreme Court decisions, rendered nearly 20 years apart, have given state legislatures (and Congress) broader discretion to enact laws limiting or regulating abortion: *Planned Parenthood v. Casey* (1992)¹⁵ and *Gonzales v. Carhart* (2007).¹⁶ While not overturning *Roe*, the *Casey* decision offered a new rationale for the abortion “right,” one grounded in sociology. In *Casey*, the determining factor for whether a law regulating abortion is constitutional became whether the law creates an “undue burden” on a woman’s ability to obtain an abortion. The Court found that women have come to “rely” on the availability of abortion; therefore, no law that created an “undue” barrier to her access to the procedure was constitutionally permitted.¹⁷

However, the Court’s subsequent decision in *Gonzales* took *Casey* a step farther, opening the door to any regulation on or restriction of abortion that makes medical sense. Specifically, in its decision, the Court acknowledged that in areas where there is medical and scientific uncertainty, state and federal legislatures have wide discretion to pass and enact legislation; therefore, courts are to be more deferential toward state abortion-related laws designed to protect women’s health.

Courts Uphold Commonsense Protective Laws

In recent years, federal and state courts have continued to decide challenges to abortion-related laws. While some of these decisions have not been positive, others have resulted in important victories for life. Recent examples of pro-life litigation victories include:

- In *Planned Parenthood v. Rounds*, the Eighth Circuit Court of Appeals upheld South Dakota’s “suicide advisory”—the portion of its informed consent law requiring that women be informed that there is an increased risk of suicide ideation and suicide following abortion.¹⁸

- In *Texas Medical Providers Performing Abortion Services v. Lakey*, the Fifth Circuit Court of Appeals upheld the 2011 Texas ultrasound requirement, finding that performing an ultrasound and checking for fetal heartbeat are both “routine measures in pregnancy medicine today” and viewed as “medically necessary” for the mother and unborn child. The Fifth Circuit ruled that providing this information is “the epitome of truthful, non-misleading information.”¹⁹

These and other court victories help ensure the successful implementation and appropriate enforcement of life-affirming laws, providing encouraging victories for today and laying the groundwork for the “day after *Roe*,” when the American people’s elected representatives will again be able to freely debate and decide abortion policy for each of the individual states. Importantly, pro-life laws are also saving lives today because they are focused on safeguarding women from the harms inherent in abortion, while also defending unborn children because they are human beings worthy of legal recognition and protection.

Conclusion

Forty years after *Roe v. Wade*, the stage is being set for the Court to correct this infamous, colossal mistake. In the meantime, pro-life Americans can take great encouragement from the ever-increasing number of pro-life successes. The road to the “day after *Roe*” seems long, but so were the roads to other great victories over social injustice. The great British abolitionist William Wilberforce and his colleagues worked over 40 years to end slave trade and slavery itself in Britain.. Thirty-one years after that, the United States abolished slavery; however, that was just the beginning of the long battle for racial equality.

Just as incremental victories helped propel abolitionist and civil rights activists forward, the pro-life movement has enjoyed increasing success in the drive toward the day when all human beings are welcomed in life and protected in law.



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A Society Broken and a Youth Ready to Rebuild



BY MICHAEL ACQUILANO

On February of 1962 a 19-year-old scared, lonely, and pregnant Connecticut woman gave birth to a baby girl that she would place into the hands of a local adoption center. An orphanage in Hartford would be the home of this newborn girl for the majority of her first year of life. Like many young women in that era, this young mother had been disowned her large Irish family and was left alone to provide for herself and her unborn baby in a complex and confusing world.

Thirteen months later, in March of 1963, a baby boy was born in New York with severe deformities that left his doctors doubting whether he would survive his first few days of life. His doctors placed his emaciated body in a linen closet to let him die in solitude. However, those doctors did not expect that the baby boy's family, a passionate Catholic family, would fight for his life no matter the cost. His parents insisted that doctors take any possible measure to save their son. Many of the local doctors refused to perform surgeries on this young baby stating that they did not intend to waste their time on a child that would never survive. Nevertheless, the couple continued to persistently advocate for their child in the hospital and through the prayer of friends and family. Finally, two doctors agreed to perform the necessary surgeries that saved the baby's life. After a series of surgeries, large bank loans, and months of recuperation, the little boy was fortunate to live a life like many other children. Fifteen years later, that miracle baby boy met that baby girl from Connecticut in a high school student government meeting.

They married and now have proudly pro-life children.

That baby girl and that baby boy are my parents. This story is not uncommon; it is a common trend found in society today. To my family and families with similar circumstances, life is the first priority before anything else. We are a part of the damaged generations post- *Roe v. Wade*, plagued by abortion and a declining respect for all human life. Let's think for a minute of my parents. What if abortion were legal in 1963? What if my mother were never born? What if my grandparents had not fought for the life of their son? Selfishly, I could reason that I would not be in existence today. However, those two miracles reach much further than just my immediate family or their respective families.

In 1990, at the age of 28, my mother and father founded a local Birthright in New York with several other pro-life couples. Birthright is a pregnancy care center that aids needy pregnant women through both emotional and financial support. Since then my mother has worked tirelessly as a volunteer and now as the organization's executive director to protect the unborn and provide support to women in difficult pregnancy situations. Together my parents have continued their pro-life work by opening many more clinics in southern New York and sub-Saharan Africa. Hundreds, and likely thousands, of women and children have been given a new lease on life because my mother and father lived—they are both champions of rights of

the unborn. The many families that have been touched by the pro-life cause are multiplying, perpetuating the pro-life mission every day and generating a new culture of life. These individuals live the pro-life mission every day and are examples to their neighbors and fellow Americans as to the importance of every human life, no matter what stage of development. Children that experience the Christian love and charity found in these situations understand the importance of continually touching the lives of women in these unplanned situations. Each life, no matter how small or disabled, is critical to society and deserves a chance at life.

One of my fondest memories was during an autumn visit to my hometown in upstate New York. One bright morning, my mother and I were strolling down the quaint downtown-shopping district of my hometown in New York during a festival, when a woman in her mid-30's approached us. I remembered her face from my childhood, she was a Birthright client from many years ago that my mother had developed a close relationship with. Her only living family had abandoned her during the most difficult period of her young life, an unplanned pregnancy. She called my mom almost everyday, at all hours, seeking her support and guidance. My mom was more than willing to aid this young woman because she knew a precious life, like her own decades earlier, hung in the balance. That cold fall day in New York I met her son, the young boy my mother knew was valuable before even meeting him, for the very first time. He did not know who my mom was as he was too young to remember her, but she certainly knew who he was.

Our youngest generation is springing forth from situations like these and they continue to bring light to the importance of life. It is not uncommon to see a large number of very young and a small number of very old individuals outside an abortion clinic or at the annual March for Life. The tides are turning! This new generation has been equipped with life experiences and lessons from their parent's generation and will build a stronger nation with respect for all human life. The surge in pro-life laws during the 2011 and 2012 legislative sessions is proof of this new trend. Within those two years, our nation experienced the largest number of pro-life laws passed in its history. This younger generation demands these results and is willing to work hard to attain the best possible outcome for the unborn.

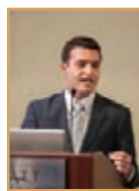
Our generation is bruised and beaten. We need to bring His light back to the people. We must live out our faith and be the strength and force in society that will bring people to His truth. Our society cannot continue down this path of death and destruction.

This battle for the right to life is difficult and emotionally wearisome. Those of us in the movement must remember that, "Those who hope in the Lord will renew their strength. They will soar on wings like eagles; they will run and not grow weary, they will walk and not be faint" (Isaiah 40:31). We must march on and continue to be loud, proud and passionately pro-life while continuing to increase our support across the country. Precious lives are lost with each passing day we fail to bring an end to abortion.

Young attorneys entering a multitude of legal professions must carry the pro-life torch with them into all circumstances. The life issue touches every industry, every person, and must be given attention by everyone. Our generation will abolish abortion in our lifetime, but we must work to educate and activate this generation of young people to pursue the right to life from every corner of this great nation. We are a country that follows its youth, and our youth is organizing for life. Since 2006, Students for Life of America has established over 550 student pro-life organizations and has trained tens of thousands of students nationwide. There are over 700 pro-life student organizations on college campuses across the United States.

After 40 years of legalized abortion in America, both sides of the abortion debate remain impassioned and driven to pursue their end goals. However, one truth remains, our country, our world, and especially our youngest generation is greatly damaged by the expansive access to abortion. Not only have we aborted 56 million innocent children, but we have also harmed the mothers, fathers, brothers, sisters, and all others connected to that unborn child. The impact is far greater than most imagine. Each and every one of us has been affected by this abortion-on-demand mentality. Our youngest generation is still reeling from decades of bad leadership, bad decisions, and lack of public involvement in the discussion.

We are the pro-life generation, and we will be victorious in the fight for life because of stories like this that invigorate and embolden our young people. We are impassioned and ready to sacrifice time, talent, and treasure to ensure that the unborn receive the right to life.



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THE HHS MANDATE & the Pretense of Choice



BY KIM COLBY

For two years, religious individuals and organizations have tried to reason with the Administration, asking it to reconsider its requirement that some employers provide coverage for drugs that violate their religious beliefs, but to no avail. The “temporary enforcement safe harbor” put into place in January 2012, ostensibly to protect religious organizations while HHS responded to their concerns, will be closed and the Mandate fully implemented as to most religious employers.

A litigation stall tactic

Of course, the “temporary enforcement safe harbor” was never really about protecting religious organizations. Instead it was a deliberate litigation tactic that allowed the government to put the religious non-profits’ legal challenges on the slow-track to the Supreme Court. For obvious reasons, the government did not want Wheaton College or Notre Dame University to be the first religious employers to arrive at the Supreme Court.

The government preferred that the first arrivals be the for-profit employers, and the “safe harbor” served that purpose.

Relying on the “temporary enforcement safe harbor,” many courts dismissed or “held in abeyance” the religious non-profits’ lawsuits. Three district courts in New York, Texas, and Pennsylvania appropriately rejected the government’s argument that the courts should give it an additional year to tinker with the Mandate. But most courts told the religious organizations to wait a year to see whether the government would find a solution to the problem the Mandate created: how to require employers to provide coverage for drugs to which they have strong religious objections without either the employers or the employees actually paying for the drugs.

The for-profit cases to the fore: About half of the sixty cases filed against the Mandate involve for-profit businesses and their owners. Most are family owned businesses that have been run for decades according to the family’s religious beliefs in ways

that have benefitted not only the owners and their businesses, but their employees and communities. In nineteen of the thirty for-profit cases, twelve have obtained some form of preliminary injunctive relief, while seven have been denied preliminary relief. Oral argument will be heard on May 22 in the Seventh Circuit, May 23 in the Tenth Circuit (en banc), May 30 in the Third Circuit, and June 6 in the Sixth Circuit.

It is entirely conceivable that the Supreme Court could decide one of these challenges in the 2013 Term. A year from now we may well be awaiting a decision on whether the First Amendment and the Religious Freedom Restoration Act (RFRA) protect employers with religious convictions from governmental coercion.

Two key issues: As the for-profit cases have evolved, two issues have emerged as the keys to religious liberty victories. RFRA requires the government to have a compelling governmental interest, achieved by the least restrictive alternative, before it can require an individual claimant to violate his or her religious convictions. It's a powerful test, and in 2006, the Supreme Court made clear that the burden was on the government to show a compelling interest as to the specific individual claimant. The HHS Mandate does not have a compelling interest achieved by the least restrictive means. To avoid getting to the compelling interest part of the RFRA analysis, the government must deny that the religious claimant has shown that his or her religious exercise has been substantially burdened by the Mandate.

May a religious citizen retain religious liberty while earning a livelihood? The employer must first show that he or she is engaged in the exercise of his or her sincerely held religious beliefs. Although often conceding that religious exercise is sincerely held in other RFRA cases, in the Mandate cases, the government aggressively argues that businesses cannot "exercise religion," an argument accepted by some courts and rightly rejected by others. No one questions that a for-profit business can exercise other First Amendment rights. *Turner Broadcasting* and *The New York Times* have managed to hold onto both freedom of press and freedom of speech while turning a profit. In the 2010 *Citizens United* decision, the Supreme Court vindicated corporations' right of political speech.

Even when the courts have rejected the ability of a business to engage in religious exercise, they have almost always then found that the business owners, as individuals, were engaged in religious exercise. The government then falls back to the unsatisfying argument that an individual forfeits his or her religious exercise

if he or she enters the "stream of commerce." But why a person should have to choose between feeding one's body and losing one's soul is not apparent. The Supreme Court did not rule that Ms. Sherbert or Mr. Thomas forfeited their religious liberty because their religious claims were tied to mundane jobs in the "stream of commerce."

For the first time in nearly 300 years, important forces in American society are questioning the free exercise of religion in principle—suggesting that free exercise of religion may be a bad idea, or at least, a right to be minimized.

Furthermore, federal laws protecting conscience in the abortion context are not limited to non-profit religious conscientious objectors, but instead protect both non-profit and for-profit entities and individuals engaged in for-profit commerce. Hospitals, nurses, and doctors do not forfeit their federal conscience protections because they are paid for their services. The Hyde-Weldon Amendment and the Affordable Care Act (ACA) both protect health insurance plans (despite the Mandate's requirements), as well as hospitals, HMOs, and provider-sponsored entities. Nor does RFRA distinguish between for-profit and non-profit institutions in its scope.

Has the employer's religious exercise been substantially burdened? The second critical issue then emerges: does the HHS Mandate substantially burden the owner's religious exercise to the degree necessary to trigger RFRA's strict scrutiny requirements? The answer seems obvious. By its very existence, the unacceptably crabbed, extant exemption, which is limited to churches and their auxiliaries, demonstrates that the government itself recognizes that the Mandate creates a substantial burden on religious employers when it forces them to purchase objectionable coverage. Yet the Mandate places this identical substantial burden on many other employers with religious convictions against providing such coverage.

The courts have reached differing results depending on the particular way the court frames the issue. The Seventh and Eighth Circuits have correctly framed the burden inquiry as

whether requiring religious business owners to “purchase group health insurance with objectionable coverage provisions constitutes a substantial burden on their exercise of religion.” The Seventh Circuit explained that “[t]he religious-liberty violation at issue here inheres in the coerced coverage of contraception, abortifacients, sterilization, and related services, not—or perhaps more precisely, not only—in the later purchase or use of contraception or related services.” In contrast, in denying a preliminary injunction pending appeal, the Tenth and Third Circuits incorrectly framed the “substantial burden” inquiry by stating that “the line ... delineating when the burden on a plaintiff’s religious exercise becomes ‘substantial’ ... does not extend to the speculative ‘conduct of third parties with whom plaintiffs have only a commercial relationship.’”

Whether genuine choice and the bipartisan tradition of respecting religious conscience will survive the HHS Mandate: For forty years, federal law has protected religious conscience in the abortion context, in order to ensure that the “right to choose” includes citizens’ right to choose not to participate in, or fund, abortions. Examples of bipartisanship at its best, the federal conscience laws have been sponsored by both Democrats and Republicans.

Before the ink had dried on *Roe v. Wade*, a Democratic Congress passed the Church Amendment to prevent hospitals that received federal funds from having to perform abortions, as well as to protect doctors and nurses who refuse to participate in abortion. The Senate vote was 92-1.

In 1976, a Democratic Congress adopted the Hyde Amendment to prohibit certain federal funding of abortion. In upholding its constitutionality, the Supreme Court explained that “[a]bortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life.” Every subsequent Congress has reauthorized the Hyde Amendment.

In 1996, President Clinton signed into law Section 245 of the Public Health Service Act, to prohibit federal, state, and local governments from discriminating against health care workers and hospitals that refuse to participate in abortion. During the 1994 Senate debate regarding President Clinton’s health reform legislation, Senate Majority Leader George Mitchell and Senator Daniel Patrick Moynihan championed the “Health Security Act” that included vigorous protections for participants who had religious or moral opposition to abortion.

Since 2004, the Weldon Amendment has prohibited HHS and the Department of Labor from funding government programs

that discriminate against religious hospitals, doctors, nurses, and health insurance plans on the basis of their refusal to “provide, pay for, provide coverage of, or refer for abortions.”

As enacted in 2010, the ACA itself provides that “[n]othing in this Act shall be construed to have any effect on Federal laws regarding (i) conscience protection; (ii) willingness or refusal to provide abortion; and (iii) discrimination on the basis of the willingness or refusal to provide, pay for, cover, or refer for abortion or to provide or participate in training to provide abortion.” The ACA further provides that it shall not “be construed to require a qualified health plan to provide coverage of [abortion] services ... as part of its essential health benefits.”

Essential to ACA’s enactment, Executive Order 13535, entitled “Ensuring Enforcement and Implementation of Abortion Restrictions in [ACA],” affirms that “longstanding Federal Laws to protect conscience ... remain intact and new protections prohibit discrimination against health care facilities and health care providers because of an unwillingness to provide, pay for, provide coverage of, or refer for abortions.” Former Representative Bart Stupak (D-Mich.), who voted for ACA based on his belief that Executive Order 13535 would protect conscience rights, has filed an amicus brief in some courts explaining how the Mandate violates the ACA itself, as well as the Hyde and Weldon Amendments.

At bottom, the Mandate is a challenge to this forty-year tradition that allows individuals to follow their consciences in the context of funding or participating in abortions. The question is whether a genuine “freedom to choose” will survive the Mandate’s insistence that employers fund abortion drugs despite their religious objections.

One leading religious liberty scholar recently warned: “For the first time in nearly 300 years, important forces in American society are questioning the free exercise of religion in principle—suggesting that free exercise of religion may be a bad idea, or at least, a right to be minimized.” Religious liberty is among America’s most distinctive contributions to humankind. But it is fragile, too easily taken for granted and too often neglected. By sharply departing from our nation’s historic, bipartisan tradition of respecting religious conscience, the Mandate poses a serious threat to religious liberty and pluralism.



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The Impact of Roe v. Wade From An International Perspective

BY ROMA M. PAUL, ESQ. TRINIDAD & TOBAGO

We often speak of landmark decisions. Forty years later the landmark decision of *Roe v. Wade* is still impacting the nations of the world, and more profoundly, it now determines whether an individual should have a right to life even before he or she is born. It's a decision that has a life of its own. Having not enjoyed any significant periods of remission and re-ignition,

Recently, an update on abortion in the United States revealed that the annual number of legal abortions increased through the 1970s, levelled in 1980s, fell in 1990s and is now stable. Stable in this context means more than one million abortions are performed every year, which by any measure is unacceptable.

It is instructive to view a snapshot of the legislative timeline on abortion in the 20th century. Countries such as the Soviet Union, Mexico, Sweden, Poland, Iceland, Japan, Britain, Canada and some U.S. states had already legalised abortion under varying circumstances in the first half of the century. Therefore, there was significant activity in progress with regards to abortion law reform. In the latter part of the 20th century, the landmark decision of *Roe v. Wade* by the United States Supreme Court, although neither precedent nor persuasive authority for many other jurisdictions, fuelled the worldwide abortion debate. The decision declared unconstitutional the ban on abortion during the first trimester, and the court founded its reasoning for abortion and abortion rights under the ambit of the right to privacy. The court also held that a fetus was not a person under the Constitution. This decision was and is still perceived by pro-abortion advocates and women all over the world as a form of liberalization for women that never existed before. It is reasonable to accept that it was a significant catalyst used to propel other jurisdictions to lobby for abortion reform. Within a

seven-year period subsequent to the *Roe* decision, France, West Germany, New Zealand, Italy and the Netherlands legalized abortion in limited circumstances.

The post *Roe v. Wade* decision in the case of *Planned Parenthood v. Casey* delivered in 1992 proved to be very significant. The court overturned *Roe's* strict trimester formula, but re-emphasized the right to abortion as grounded in the general sense of liberty and privacy protected under the Due Process Clause of the Fourteenth Amendment to the United States Constitution: Where *Roe v. Wade* further created a greater crack in the abortion door, *Planned Parenthood v. Casey* widely opened the door.

Pro-abortion advocates worldwide continue to capitalise on the principle of the decision to generate momentum for reform of abortion legislation. Many women internationally refer to wanting similar rights to that of their U.S. counterparts. In Australia the legislature was minded to follow the "medicalisation" of abortion in *Roe v. Wade*.

During the last forty years, some U.S. states and other jurisdictions have secured amendments to legislation which inter alia include legalizing the abortion pill, anti-abortion provisions and restrictions to delay abortion, anti-abortion counseling and waiting periods. These have been met with mixed reaction from those on the different sides of the abortion debate.

Caribbean Region

Operating in this global village, the Caribbean is not to be left out of the impact of *Roe v. Wade*. While it is not precedent for the Caribbean region, the influence and funding

Pro-abortion advocates worldwide continue to capitalise on the principle of the decision to generate momentum for reform of abortion legislation.

of international agencies such as International Planned Parenthood Federation has kept the issue on the front burner for the Caribbean countries that have not legalized abortion. Therefore, it is not unusual for advocates in the region to refer to the *Roe v. Wade* decision. One such instance is an article on Reproductive Freedom by Trinidadian Dr. Grace Sirju-Charran in which she alludes to the erosion of rights to an abortion which were secured by the decision in *Roe v. Wade*.

For many of the Caribbean countries, the common laws of England are of persuasive effect on their jurisprudence; therefore the impact of the English case of *R v. Bourne* in 1938 is significant in this regard. *R v. Bourne* was decided in favour of an abortion performed on a 14 year old girl who had been raped. The court felt that the girl's mental health would have suffered had she given birth. This therefore established that the mother's mental suffering could be sufficient reason for an abortion. This is the case for consideration for countries in the English-speaking Caribbean that have not legalised abortion. Where abortion has been legalized, the laws vary in spite of the close proximity of the countries. Currently there is a strong lobby in Jamaica and Trinidad and Tobago to legalize abortion. The *Roe v. Wade* decision, not disregarding attempts to have it overturned, still provides a ray of hope and impetus for the continuous abortion debate in the Caribbean. On the other side of the debate, the legalisation of abortion in the predominantly Catholic Latin American jurisdictions provided no comfort to those persuaded by their religious beliefs on the issue.

Emerging Issues

Some of the emerging issues worthy of mention include low fertility rates, decreasing birth rates, fetal reduction related to multiple births as a result of fertility drugs and in vitro fertilization and post-abortion syndrome.

It is quite ironic that as pro-abortion advocates continue to lobby for legalization of abortion, some governments are concerned about low fertility levels and birth rates which could impact a country's economic and social development. Member countries from the Organisation for Economic Co-operation and Development (OECD) which experience generally low fertility levels have concerns because it contributes to aging societies and mean fewer taxpayers to fund pensions and health services, just to highlight some of the fall outs. In the Caribbean region, the Finance Minister expressed concern over Trinidad and Tobago's fertility rate and its impact on

the labor force and social security system to support the aging population. As recent as February 2013, *USA Today* reported on the United State's fertility rate which is slipping below replacement levels partly because of the recession and a decline in immigration, thereby raising concerns about the nation's future.

On the other end of the spectrum, because fertility issues are on the increase, many couples are seeking the assistance of fertility clinics which pose yet another type of risk, that of multiple births. To address this aberration, the recommended procedure is fetal reduction, a procedure whereby the parents select the number of fetuses which should be eliminated. Isn't this abortion? What type of legislation is now required to address this recent development? What medical and social infrastructure is needed to address these new paradigms?

Yet another concern that is emerging is that of post-abortion syndrome. The medical and psychological jury have ruled on this issue; there is no recognised syndrome to this effect. Pro-abortion advocates have argued that it is a strategy of the pro-life advocates to gain political allies for their cause. Yet, in some U.S. state legislatures, providers are mandated to advise their patients that abortion increases the risk of suicide and depression. Just probably, a greater degree of objectivity is required in researching this real concern.

Summary

In moving forward both pro-abortion and pro-life advocates may want to consider widening and deepening the tenor of the conversation. Abortion rights which are not fundamental rights have been granted; however, it is evident that these rights have given rise to more pressing problems for governments and societies, which require significant resources just to think about resolutions. It is akin to turning back the hand of time. Consider China's demise arising from its one child policy. Advocates and legislators need to consider objectively the emerging issues which will cause great distress with the governance of nations in the not too distant future. There will be further serious social implications that require attention.

Societies continue to remove the ancient landmarks of morality and are now experiencing the negative effects of this. There are little or no boundaries left concerning morality. Conversations on morality have a deafening silence. This poses a serious challenge to steering nations back on course so that men and women can respect their own personhood and the value of



human life. It's a type of decadence that is manifested in other gruesome offences against individuals for which authorities seek answers.

It should be noted that at the heart of the matter surrounding abortion advocacy is the personhood of the unborn and the sanctity of that life. Our advocacy on these issues has been based on our Christian conviction, for which no apology is required. We consider the account found in Jeremiah 1:5 which has inspired and boosted the morale of many over the ages, "Before I formed you in the womb I knew[you, before you were born I set you apart; I appointed you as a prophet to the nations." Or what or who can persuade us to forget the words of the author in Psalm 139:13-16, "For you created my inmost being; you knit me together in my

mother's womb. I praise you because I am fearfully and wonderfully made; your works are wonderful, I know that full well. My frame was not hidden from you when I was made in the secret place when I was woven together in the depths of the earth. Your eyes saw my unformed body; all the days ordained for me were written in your book before one of them came to be." This is the hope that we continue to give them that are without.



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Stephen Tuggy,
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When Pro-Life and Pro-Choice Meet

Those who support abortion rights refer to themselves as “pro-choice” both because that term suggests they side with liberty and because it allows them to distance themselves from the dark sides of abortion and the abortion industry. Generally, the “pro-choice” strategy appears to be to eliminate or at the very least minimize all they perceive as obstacles or barriers to a woman’s access to abortion.

Those who believe abortion is morally wrong often refer to themselves as “pro-life,” which emphasizes the protection they hope to provide to at-risk unborn children. Those who are pro-life generally pursue one of two paths. First, they may seek to limit or eliminate a woman’s access to abortion usually through legislative enactments. These enactments cross a spectrum of laws from notice requirements to outright prohibitions against abortion. This path is often referred to as the “political solution.” Second, some pro-life advocates provide women with information and social support so that women can make a decision about abortion that is as informed and free as possible, believing that doing so will make abortion an unwanted choice and therefore rare.

Ironically, pro-lifers who follow this second path are this culture’s true ministers of “pro-choice” for women considering abortion—they have found a way to be powerfully pro-life and pro-choice. They are pro-choice because they enable women to make fully informed decisions as unencumbered as possible by undue social pressures pushing them toward abortion. They are pro-life because they operate believing that a woman given complete information consistent with her values and full social support will rarely chose abortion.

Who are these ministers of choice and life? They are churches and pregnancy resource centers who are driven by God’s love to help women who are considering abortion by providing them with comprehensive information and loving social support. Jesus made it clear that we are called to love and show amazing grace. When our hearts ache for women considering abortion to the point where we make ourselves available in real and practical ways so they can make decisions about their pregnancies that are fully informed and free from undue social pressures, we are showing them genuine, Christ-like love. We follow Jesus’ example when we show grace by rejecting tools such as shame and guilt to stigmatize women who have chosen abortion in the past. Shame and guilt cause women who are considering abortion to seek it out in secret, which keeps them away from those in the church who can provide the support they need to choose life.

What constructive social support can be provided to women considering abortion? What destructive social pressures need to be addressed? What information needs to be provided to these women? These are not easy questions, but they must be answered, often on a case-by-case basis, for us to provide help to women who are considering abortion. The pregnancy resource center movement has developed tremendous expertise in these areas and their best practices need to be spread throughout the country and better understood in the church. In our local churches, we need to create environments where women in crisis pregnancies can access counseling, share their hurts, and access practical help without being judged.

Churches and pregnancy resource centers that provide pregnancy counseling and support for women who may be considering abortion must avoid using any form of deception or coercion in their work. Their task is to provide complete information, extend love and grace, and give effective support. Their task is not to use their position to deceive women or to somehow coerce them to do what the church or pregnancy resource center worker wants. The goal of reducing abortions does not justify deception or coercion. When those tactics are used, the church is tarnished and our witness dulled.

May we join together to support churches and pregnancy resource centers as they extend love and grace to women who may be considering abortion. In so doing, they give those women an opportunity for a fully informed choice, as unencumbered as possible by destructive social pressures, which will most often lead them to choose life.

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