

REPRODUCING WOMEN'S RIGHTS: ALL OVER AGAIN

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INTRODUCTION: ADVANCES IN REPRODUCTIVE FREEDOM SINCE 1981 AND ONGOING CHALLENGES

Thank you so much for that kind introduction, and thank you to the audience for that warm welcome. Congratulations to the Women's Law Group (WLG) on your first quarter-century, and many happy returns for the next one and beyond! When I was a law student, I was very active in my school's Women's Law Association, which was one of the most positive aspects of my whole law school experience.

In preparing for this talk, I have really enjoyed working with Susan Keane and Pam Lundquist, the superb co-chairs of this superb conference. Susan and Pam surveyed their WLG colleagues and then asked me to discuss the following topics: the significant changes in reproductive rights law over the last quarter-century; how these legal issues have affected my own life and career; and last, but very far from least, some of the major threats to women's reproductive rights today and what you can all do to help maintain and expand those rights.

I love that spirit of activism! As Alice Walker said, "Activism is the rent I pay for living on this planet."¹ I became an activist for civil liberties, including reproductive freedom and other women's rights issues, when I was a student myself. I have had no greater joy throughout my professional life than being able to play a part in the stunning progress that women have made since then, and I wish all of you the same joy! Despite all of the progress we have made since I was in your place as a law student, lots of work still lies ahead.²

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1. PeaceQuotes.net, Quotes for Living a Life of Compassion, <http://www.people4peace.net/quotes/living-quotes.htm> (last visited Sept. 13, 2006).

2. See, e.g., S.D. CODIFIED LAWS § 22-17-5.1 (Supp. 2006) (effective "on the date states are recognized by the United States Supreme Court to have the authority to prohibit abortion at all stages of

Let me start with the good news: how far we have come. Throughout my college years (1968–1972), the Supreme Court had never once recognized that the Constitution’s equality guarantee secured *any* equality rights for women at all. That did not change until Ruth Bader Ginsburg began working for the American Civil Liberties Union (ACLU), and created the ACLU’s Women’s Rights Project in 1972.³ I am so proud that it was an ACLU case, argued by Ruth Bader Ginsburg, in which we achieved that breakthrough; the Court, for the first time, enforced the Constitution’s equality guarantee to strike down gender discrimination.⁴

Likewise, throughout my entire college career, and even later, when I started law school in 1972, abortion was completely outlawed throughout most of this country.⁵ Consequently, many women died or became infertile as a result of illegal back-alley abortions. I am also proud that, in 1971, the ACLU litigated the very first case urging the Supreme Court to hold that women have a constitutional right to choose abortion,⁶ even before the Court accepted that argument in *Roe v. Wade* in 1973.⁷

I have noted the progress women have made on these constitutional rights issues since my own student days so you can see why I am so optimistic about the challenges we still face, and why I am sure we will overcome them—but only with your help! You are so lucky to have lots of opportunities to help promote reproductive freedom right now, thanks to the threats it faces from so many politicians, from President Bush on down.⁸

pregnancy” and criminalizing procurement of abortion except to preserve the life of a pregnant female); Press Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, Women in the Labor Force: A Databook Updated and Available on the Internet (May 13, 2005), *available at* <http://www.bls.gov/bls/databooknews2005.pdf> (reporting that while women’s earnings as a percent of men’s have increased since 1979, women’s earnings were still only 80% of men’s in 2004); Press Release, U.S. Food & Drug Admin., FDA Approves Over-the-Counter Access for Plan B for Women 18 and Older: Prescription Remains Required for Those 17 and Under (Aug. 24, 2006), *available at* <http://www.fda.gov/bbs/topics/NEWS/2006/NEW01436.html> (reporting on the FDA’s decision to allow the sale of the contraceptive drug “Plan B” without a prescription only to women age 18 years and over); A Message from the Honorable Diane M. Stuart, Director, U.S. Dep’t of Justice Office on Violence Against Women (Apr. 2006), *available at* <http://www.usdoj.gov/ovw/saamessagefromdiane.pdf> (noting that “[o]ne in six American women has been the victim of an attempted or completed rape”).

3. Press Release, ACLU, The Legacy of Ruth Bader Ginsburg and WRP Staff (Mar. 7, 2006), *available at* <http://www.aclu.org/womensrights/gen/24412pub20060307.html>.

4. *Reed v. Reed*, 404 U.S. 71, 71, 74 (1971).

5. *See Roe v. Wade*, 410 U.S. 113, 118–19 n.2 (1973) (listing states in which abortion was illegal).

6. *United States v. Vuitch*, 402 U.S. 62, 66 (1971).

7. *Roe v. Wade*, 410 U.S. 113 (1973).

8. *See, e.g.*, Press Release, The White House, President Calls “March for Life” Participants (Jan. 23, 2006), *available at* <http://www.whitehouse.gov/news/releases/2006/01/20060123-2.html> (reporting on the President’s efforts to build a “culture of life” by enacting laws such as the so-called “ban on partial-birth abortion”).

How is that for seeing the silver lining in the cloud?! As Winston Churchill put it, "A pessimist sees the difficulty in every opportunity; an optimist sees the opportunity in every difficulty."⁹

For information about the ACLU's work on the countless current threats to reproductive freedom, and how you can contribute to it, please check out our website at www.aclu.org/reproductiverights/index.html. It shows how each of you can make a difference in so many ways. These range from something so simple, yet so helpful, as emailing your elected officials, forwarding to them messages our experts have prepared, advocating certain actions; to something as extensive as becoming an intern at one of the many ACLU offices around the country. Here in Vermont, for example, the ACLU has an office in Montpelier, where student interns (at various educational levels, from high school through law school and graduate school) work part-time during the school year, or full-time during semester breaks or vacations. Non-student volunteers also work year-round.

I. INTERRELATIONSHIP BETWEEN WOMEN'S RIGHTS AND REPRODUCTIVE FREEDOM

I saw from your website that the WLG does not take a position for or against the constitutional right to choose abortion. I respect that approach, since I think it is important to emphasize what we women have in common, as opposed to what divides us. I also think there are many common concerns that should unite most advocates of both the pro-choice and the pro-life positions. Perhaps the most important area of common ground is reducing the number of unintended pregnancies by increasing comprehensive sex education and improving access to contraception. The U.S. has one of the highest rates of unintended pregnancy in the whole industrialized world.¹⁰ Of the six million pregnancies in our country each year, more than half are unintended.¹¹

As you can tell from what I have said so far, I prefer to call advocates on either side of this issue by their preferred labels, "pro-choice" and "pro-life," respectively. When it comes to these labels, I want to respect *everyone's* freedom of choice, so to speak.

9. BrainyQuote, Winston Churchill Quotes, http://www.brainyquote.com/quotes/authors/w/winston_churchill.html (last visited Aug. 31, 2006).

10. See Ceci Connolly, *Unintended Pregnancy Linked to State Funding Cuts*, WASH. POST, Mar. 1, 2006, at A6 (noting that "[u]nintended pregnancy in the United States is twice as high as in most of Western Europe").

11. *Id.* at A6.

As I am sure you recognized when you invited me, I strongly advocate a woman's right to choose abortion.¹² Speaking not only for myself personally, but also for the ACLU, we see reproductive freedom as an essential aspect of women's rights more generally. This point was stressed by Margaret Sanger, the early twentieth-century crusader for contraception and sex education, who became the founding mother of Planned Parenthood. As she declared,

No woman can call herself free until she can choose consciously whether she will or will not be a mother.

. . . She who earns her own living gains a sort of freedom . . . but . . . it is of little account beside the untrammelled choice of . . . being a mother or not being a mother.¹³

This point was underscored by Susan Faludi's 1992 bestselling book, *Backlash*, which chronicled the cutback on women's rights since the second wave of twentieth-century feminism. She wrote:

All of women's aspirations—whether for education, work, or any form of self-determination—ultimately rest on their ability to decide whether and when to bear children. For this reason, reproductive freedom has always been the most popular item in each of the successive feminist agendas—and the most heavily assaulted target of each backlash.¹⁴

Even more notably, this women's-equality rationale for women's constitutional right to choose abortion has been addressed by the U.S. Supreme Court itself, as I will discuss later.¹⁵

II. SOME CURRENT THREATS TO REPRODUCTIVE FREEDOM

Experts concur that our essential reproductive rights are now more embattled than they have been for decades. *The Nation* magazine's website contains a dictionary of the meanings that powerful politicians have

12. See, e.g., Nadine Strossen, *National Health Care: Will Big Brother's Doctor be Watching Us?*, 4 CORNELL J.L. & PUB. POL'Y 438, 440 (1995) (describing the ability to choose an abortion as a "fundamental constitutional right").

13. Margaret Sanger, *The Right to One's Body*, in *THE AMERICAN READER: WORDS THAT MOVED A NATION* 249, 250 (Diane Ravitch ed., 1991).

14. SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* 414 (1991).

15. See *infra* Part IV.E.3.

ascribed to certain key words, as distinct from their traditional definitions. One example that comes to mind, in light of the current assault on reproductive rights, is the word “woman.” Here is *The Nation*'s definition of “woman,” according to too many politicians: “Person who must have all decisions regarding her reproductive functions made by men with whom she wouldn't want to have sex in the first place.”¹⁶ And another pertinent *The Nation* definition is for the term “pro-life” among too many politicians: “Valuing human life up until birth.”¹⁷

A. Federal and State Abortion Bans

Symptomatic of the dangers we now face to our reproductive freedom is the Supreme Court's impending ruling, during its 2006-2007 term, in which it will probably cut back on our constitutional rights in this crucial area. The Court will hear two cases¹⁸ involving a federal law—the badly misnamed Partial Birth Abortion Ban—that the ACLU has challenged on behalf of the National Abortion Federation and several doctors.¹⁹ This law is badly misnamed because—as the Supreme Court itself has acknowledged—there simply is no scientifically, medically recognized procedure as a “partial-birth abortion.”²⁰

When you look behind this inflammatory term to examine what the underlying laws actually do, you see—as the Court concluded in a prior case on point—that they criminalize one of the safest, most common procedures for performing second trimester abortions.²¹ Moreover, these bans also criminalize abortion procedures that may well be medically

16. Katrina Vanden Heuvel, *Dictionary of Republicanisms*, THE NATION, Dec. 12, 2005, at 23, available at <http://www.thenation.com/doc/20051212/kvh/2>.

17. *Id.*

18. *Gonzales v. Carhart*, 126 S.Ct. 1314 (2006); *Gonzales v. Planned Parenthood*, 126 S.Ct. 2901 (2006).

19. *National Abortion Fed'n v. Gonzales*, 437 F.3d 278, 279–81 (2nd Cir. 2006).

20. *See Stenberg v. Carhart*, 530 U.S. 914, 939 (2000) (distinguishing two medical procedures encompassed by the law's term “partial birth abortion”).

21. *Id.* at 926; *see also Planned Parenthood Fed'n of Am., Inc. v. Gonzales*, 435 F.3d 1163, 1168, 1188 (9th Cir. 2006) (stating that the D & E abortion procedure is “the safest medical option for some women in some circumstances” and that the partial-birth abortion statute inadequately distinguishes between D & E procedures which “constitute the means by which the vast majority of post-first trimester previability abortions are conducted”); *Carhart v. Gonzales*, 413 F.3d 791, 793–94, 801–02 (8th Cir. 2005) (declaring that D & E abortion procedures are the most common second-trimester abortion procedure and that “substantial medical authority” concludes that D & E and D & X abortion procedures obviate risks in certain situations); Stephen Chasen et al., *Dilation and Evacuation at ≥ 20 Weeks: Comparison of Operative Techniques*, 190 AM. J. OBSTETRICS & GYNECOLOGY 1180, 1184 (2004) (“Attempts to regulate intact D&X on the basis of concern for maternal well-being cannot be supported by available evidence.”).

necessary to preserve women's health, and even their very lives, when certain tragic complications arise later in their pregnancies. The federal Partial Birth Abortion Ban is the very first federal law ever to ban any medical procedure.²² Ignoring expert medical conclusions to the contrary,²³ Congress simply declared that these procedures would never be medically necessary,²⁴ thereby elevating politics above women's health and even lives.

Precisely to protect women's health, the Supreme Court struck down the same type of abortion ban in 2000.²⁵ However, that case was decided by a five-four vote, with Justice Sandra Day O'Connor in the majority. Of course, she has now retired, and her seat on the Court has been filled by Samuel Alito, who has maintained that women should have no constitutional right at all to choose safe and legal abortions.²⁶ I say "safe and legal abortions," since we know from the bad old days, before abortion was legalized, that women will still have abortions anyway. But that means too many women will become victims of dangerous back-alley abortions, which too often cause infertility or even death.

After the Supreme Court struck down a state version of the "partial-birth abortion" ban in 2000,²⁷ Congress cynically passed essentially the same law,²⁸ and President Bush signed it, in the hope that by the time the ACLU and other organizations' constitutional challenges worked their way up to the Supreme Court, the Court's composition would have changed. Sure enough, that wish has been fulfilled. With Justice Samuel Alito having replaced Justice Sandra Day O'Connor, the Court is likely to uphold the federal ban despite the cost to women's health and lives.²⁹

22. H.R. REP. NO. 104-267, at 22 (1995) ("There is no other example in Federal law of Congress prescribing which of a series of valid medical procedures a licensed doctor may or may not undertake.").

23. *Planned Parenthood Fed'n of Am., Inc. v. Gonzales*, 435 F.3d 1163, 1168 (9th Cir. 2006) ("According to the American College of Obstetricians and Gynecologists ("ACOG"), the safety advantages offered by intact D & E mean that in certain circumstances it 'may be the best or most appropriate procedure . . . to save the life or preserve the health of a woman.'")

24. *See* Partial-Birth Abortion Ban Act, 18 U.S.C.A. §1531 note (Supp. IV 2006) ("A moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion . . . is never medically necessary and should be prohibited."), *invalidated by* Nat'l Abortion Fed'n v. *Gonzales*, 437 F.3d 278, 290 (2nd Cir. 2006).

25. *See Stenberg*, 530 U.S. at 930 (striking down Nebraska's statute banning partial-birth abortions because it lacked an exception to save the life of a woman or preserve her health).

26. Charlie Savage, *Justices Agree to Hear Abortion Case*, BOSTON GLOBE, Feb. 22, 2006, at A2.

27. *Stenberg*, 530 U.S. at 929-30.

28. 18 U.S.C. § 1531 (Supp. IV 2006), *invalidated by* Nat'l Abortion Fed'n v. *Gonzales*, 437 F.3d 278, 290 (2nd Cir. 2006).

29. *See* ACLU, REPORT OF THE AMERICAN CIVIL LIBERTIES UNION ON THE NOMINATION OF THIRD CIRCUIT COURT JUDGE SAMUEL A. ALITO, JR., TO BE ASSOCIATE JUSTICE ON THE UNITED

More recently, on March 6, 2006, we saw an even more dramatic attack on women's constitutional freedom of choice. The South Dakota Governor signed an anti-abortion law that is directly at odds with *Roe v. Wade* itself. The law completely criminalizes essentially all abortions, even when the pregnancy results from rape or incest.³⁰ Additionally, at least ten other states are also moving toward adopting the same complete ban.³¹ The supporters of these anti-*Roe* laws hope that, by the time the Supreme Court reviews them, there will be yet one more new Justice who will constitute the fifth vote to overturn *Roe*. The current Court still has five *Roe* supporters, but one of them, John Paul Stevens, is 86 years old.³²

B. Recent Government Measures Undermining Rights to Contraception and Accurate Sexuality Information

Even though the Supreme Court can no longer be counted on to secure our reproductive rights, we can still secure them through many other channels, including state and federal legislation. The ACLU's website lists many specific actions you can take to help us support or defeat various pending measures that would either enhance our reproductive rights, or curtail them.³³ Let me mention just a couple, concerning contraception and sex education.

If policy-makers sincerely wanted to prevent or reduce abortions, you would expect them to support sex education and contraception in order to reduce unintended pregnancies. To the contrary, though, too many politicians who strongly oppose abortion also strongly oppose sex education and contraception. President George W. Bush is a case in point.

STATES SUPREME COURT 5 (2005), *available at*

http://www.aclu.org/images/asset_upload_file130_23216.pdf (detailing Justice Alito's historic hostility toward the "right to abortion").

30. S.D. CODIFIED LAWS §§ 22-17-5.1 to 10 (2004 & Supp. 2006).

31. *See, e.g.*, H.B. 791, 2006 Reg. Sess. (Ala. 2006); H.B. 1096, 114 Gen. Assem., 2nd Reg. Sess. (Ind. 2006); H.B. 489, 2006 Reg. Sess. (Ky. 2006); S.B. 2922, 2006 Leg., 121st Sess. (Miss. 2006); S.B. 1248, 93rd Gen. Assem., 2nd Reg. Sess. (Mo. 2006); H.B. 2803, 50th Leg., 2nd Sess. (Okla. 2006); H.B. 4553, 77 Leg., 2nd Reg. Sess. (W. Va. 2006); H.B. 93, 148 Gen. Assem., 2nd Reg. Sess. (Ga. 2005); H.B. 228, 126th Gen. Assem., 2005–2006 Reg. Sess. (Ohio 2005); S.B. 334, 104th Gen. Assem., 1st Reg. Sess. (Tenn. 2005).

32. He was born on April 20, 1920. The remaining *Roe* supporters are Justice Souter, 67, Justice Breyer, 68, Justice Kennedy, 70, and Justice Ginsburg, 73. U.S. Supreme Court, Current Justices, <http://usgovinfo.about.com/blctjustices.htm> (last visited Sept. 12, 2006).

33. ACLU: ACLU Action Center, http://action.aclu.org/site/PageServer?pagename=AP_action_homepage (last visited Oct. 3, 2006).

1. Emergency Contraception

For example, both of President Bush's appointees to head the Food and Drug Administration (FDA) have been blocking the over-the-counter sale of the so-called "morning-after pill," or emergency contraception, despite the fact that its safety and effectiveness have been unanimously certified not only by the FDA's staff, but also by an expert advisory panel.³⁴ This emergency contraception could prevent unintended pregnancies that result from the occasional failure of condoms and other contraception methods, as well as the 22,000 pregnancies that result each year from rape.³⁵ It is literally unheard-of for the FDA Commissioner to ignore recommendations by staff and scientific advisory panels.³⁶ Yet in this situation, the commissioners took extraordinary action contrary to the health and welfare of many thousands of women. This was all in response to a small but vocal minority that insists on labeling emergency contraception as abortion, which is completely contrary to the scientific, medical facts. As one scientific expert retorted to this bogus claim, "[T]he only connection [the emergency contraception] pill has with abortion is that it has the potential to prevent the need for one."³⁷

Sadly, the scientific expert I have just quoted is Dr. Susan Wood, the former Assistant FDA Commissioner, and Director of its Office of Women's Health, who resigned in protest over the FDA's refusal to approve the over-the-counter sale of emergency contraception, thereby abandoning its responsibility to protect women's health. On March 1, 2006, Dr. Wood published a scathing editorial on point entitled "When Politics Defeats Science."³⁸ Here is an excerpt from that editorial:

The manufacturer [of the emergency contraception pill] agreed to take the "controversial" issue of young teens' access to emergency contraception off the table in 2004; now we are talking only about adult access to safe and effective contraception. Over 98 percent of adult women have used some form of contraception. So what is the objection?

34. Marc Kaufman, *Bush Names National Cancer Institute Chief to Lead FDA*, WASH. POST, Mar. 16, 2006, at A7.

35. Press Release, Women's Health Safety Network, Update: Emergency Care for Rape Victims Act of 2005 (May 5, 2005) (on file with Planned Parenthood of Middle and E. Tenn.).

36. Gardiner Harris, *Report Details F.D.A. Rejection of Next-Day Pill*, N.Y. TIMES, Nov. 15, 2005, at A1.

37. Susan F. Wood, *When Politics Defeats Science*, WASH. POST, Mar. 1, 2006, at A17.

38. *Id.*

. . . Emergency contraceptive pills work exactly the same way as other birth control pills, and they do not interfere with or harm an existing pregnancy. Emergency contraception is simply a higher dose of daily birth control pills; it is not RU-486, the "abortion pill." Indeed, emergency contraception has been used as a method to prevent unintended pregnancies for decades by women who had physicians advise them on how many pills in their regular pill pack to take. So people who are comfortable with oral contraceptives . . . should be just as comfortable with emergency contraception.

. . . .

It's been nearly three years since the first application . . . to make . . . emergency contraception available over the counter, so that women, including rape victims, could have a second chance to prevent an unintended pregnancy and the need for an abortion. How many chances have we missed? I still can't explain what is going on here, and why women 17 and older are still denied this product in a timely way. When did adult access to contraception become controversial? And why have we allowed it to happen?³⁹

2. Abstinence-Only Sex Education

In short, ironically, the Bush Administration's policies concerning contraception *undermine* the goal of preventing unintended pregnancies and abortions. The same is true of the Administration's policies concerning sex education. Under President Bush's leadership, hundreds of millions of our tax dollars have been diverted to abstinence-only sex education.⁴⁰ But a more accurate name is "ignorance-only!" Any school that gets any of these federal funds must teach *only* abstinence, and censor any other information,

39. *Id.*

40. Samuel G. Freedman, *Muzzling Sex Education on Anything but Abstinence*, N.Y. TIMES, July 19, 2006, at B7.

[A] trend toward federal financing of abstinence-only education . . . began in the early 1980's but gathered money and momentum as part of the welfare-reform law passed in 1996. That statute provided \$250 million over five years to courses that had the "exclusive purpose" of promoting abstinence. The pace of federal spending on abstinence-only education grew to about \$80 million annually by the last budget of the Clinton administration, and to \$170 million by 2005, according to a report by Representative Henry A. Waxman, a California Democrat.

Id.

including information about contraception and safer sex.⁴¹ This, despite the fact that most teenagers are not only sexually active, but also take many sexual risks.⁴² Under these increasingly pervasive abstinence-only programs, the schools may not teach anything about contraceptives except to emphasize their failure rates, indeed, to exaggerate those rates.⁴³

The prescribed curriculum is overtly hostile to any minority sexual orientation, or, for that matter, any sexual relationship other than marital monogamy. The pertinent federal law specifies that the “exclusive purpose” of federally funded programs must be to teach “that a mutually faithful monogamous relationship in [the] context of marriage is the expected standard of human sexual activity” and “sexual activity outside of [this context] is likely to have harmful psychological and physical effects.”⁴⁴ If anything is likely to have harmful psychological and physical effects, though, it has to be this government-funded disinformation campaign. Studies consistently show that minors’ health is most fully protected by comprehensive sexuality programs, including information about both abstinence and contraception.⁴⁵

The ACLU is now supporting a proposed new federal law that will fund comprehensive sexuality education, and I urge you to support it too. It is called “REAL,” an acronym for “Responsible Education About Life.”⁴⁶ The legislation is supported by all major medical and public health organizations.⁴⁷ In contrast, the REAL bill is strongly opposed by the Bush Administration and its allies.⁴⁸ After all, it contains such highly controversial provisions as requiring that federally funded sex-education programs must be medically accurate.⁴⁹ How radical can you get?!

41. *Id.*

42. *See id.* (stating that teens who participate in abstinence-only programs “tend[] not to use contraceptives if they become sexually active, and engage[] in oral and anal intercourse”).

43. Hazel Glenn Beh & Milton Diamond, *The Failure of Abstinence-Only Education: Minors Have a Right to Honest Talk About Sex*, 15 COLUM. J. GENDER & L. 12, 12 (2006).

44. 42 U.S.C. § 701(b)(2)(A), -(D), -(E) (Supp. 2006).

45. *See, e.g.*, Roger Ingham, *Sexual Health and Young People: The Contribution and Role of Psychology*, in SEXUALITY REPOSITIONED: DIVERSITY AND THE LAW 235, 238 (Belinda Brooks-Gordon et al. eds. 2004) (asserting that abstinence-only programs neither prevent sexual activity among teens nor encourage the use of contraceptives).

46. NAINA DHINGRA, ADVOCATES FOR YOUTH, RESPONSIBLE EDUCATION ABOUT LIFE (REAL) ACT 1 (2005), available at <http://www.advocatesforyouth.org/publications/factsheet/fsreal.pdf>.

47. *Id.* at 2.

48. *Compare id.* at 1 (advocating “age appropriate public health information about both abstinence and also contraception”), and George W. Bush, President, Address Before a Joint Session of the Congress on the State of the Union, (Jan. 20, 2004), in 40 WEEKLY COMP. PRES. DOC. 94, 100 (asserting that “abstinence for young people is the only certain way to avoid sexually transmitted diseases”).

49. DHINGRA, *supra* note 46.

Seriously, in the current political climate, REAL is unlikely to pass. That is why we *really* need your help with it! Indeed, during the fall of 2005, the Senate passed an appropriations bill that would have barred federal funding of abstinence-only programs that contain medically inaccurate information.⁵⁰ But House leaders actually stripped this medical-accuracy requirement from the act!⁵¹ This brings to mind another definition from the *Nation's* dictionary of current political usage, for the term “honesty”: “Lies told in simple declarative sentences.”⁵²

III. PERSONAL REFLECTIONS ABOUT INVOLVEMENT IN THE REPRODUCTIVE FREEDOM MOVEMENT

Your conference topic of reproductive freedom has always been central to my own civil libertarian consciousness and activism, just as it has always been central to the ACLU's agenda. Back in the ACLU's very first decade, the 1920s, we represented the pioneering birth control advocates Margaret Sanger and Emma Goldman, as well as one of our own founding mothers, Mary Ware Dennett, a pioneering sex educator. Their writings and speeches were censored, and they were actually imprisoned, just for giving women information about their reproductive options.⁵³

In my own first decade, the 1950s, I was fortunate to have a mother who defied so many of the conventions that were then imposed on women and mothers. She was a committed supporter of Planned Parenthood, and proudly and provocatively introduced my brother and me to people we met as her two “planned children.” She gave us a scientifically sound sex education early on, and she became a charter member of NOW, the National Organization for Women, as soon as it was founded in 1966. Despite my mother's intelligence and independence, she was greatly constrained in her own life choices by the educational and professional barriers that women faced in her time. But that made her all the more determined to ensure that I, her daughter, could pursue any option I chose. For these reasons, I will never take for granted my freedom of choice, in the broadest sense of that term. Carrying on in my remarkable mother's footsteps, I will never stop working to ensure that future generations have even more freedom of choice.

50. INT'L WOMEN'S HEALTH COALITION, BUSH'S OTHER WAR: THE ASSAULT ON WOMEN'S SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS 11 (2006), *available at* <http://www.iwhc.org/docUploads/BushsOtherWar.pdf>.

51. *Id.*

52. Vanden Heuvel, *supra* note 16, at 22–23.

53. NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS 226–28 (2nd ed. 2000).

I was a college student at the beginning of the second wave of feminism in the U.S., and I quickly became very involved in everything from women's consciousness-raising groups to political action. On the latter front, one of the major causes I championed was reproductive freedom. At that time, abortion was almost completely illegal in almost all states, including Massachusetts, where I was attending college. In fact, while I was a student, the Boston District Attorney was pursuing a high-profile prosecution against a respected doctor because he had performed an abortion, even though this was a therapeutic abortion to preserve the pregnant woman's health.⁵⁴

My student involvement in the campaign for women's abortion rights was a very significant formative experience for me not only because of the importance of the issue, but also because it was my first exposure to women lawyers and other women political leaders and activists. If you can believe it, in those dark ages, it was possible to grow up and go off to college without ever having once met, or even *seen*, a single woman lawyer! Women lawyers were very rare specimens then, especially in the middle-class Minnesota suburb where I grew up, where almost no women worked outside the home at all. Therefore, it was thrilling for me to move to Boston in 1968 and to meet women who were not only practicing law, but also effectively using law as a means for advancing women's rights, including reproductive freedom. Not surprisingly, this experience inspired me to go to law school myself.

I vividly recall that thrilling morning, at the beginning of my second semester in law school, when I was sitting in class and someone came running in, shouting that the Supreme Court had just decided *Roe v. Wade*, recognizing a constitutional right to choose an abortion.⁵⁵

By the way, have you heard what George W. Bush said when he was recently asked about this case? Someone asked him what was at issue in *Roe v. Wade*, and he said it was about two different ways to cross a river!

Before I go any further, I should underscore that the ACLU has always been staunchly nonpartisan. We never endorse or oppose any political officials or candidates. Rather, we praise or criticize all of them on an issue-by-issue basis. Both support for and violations of all civil liberties cross all party and ideological lines, and that is certainly true for

54. The doctor's manslaughter conviction was reversed, and three Justices concluded "that there was insufficient evidence to go to a jury of a live birth, an indispensable element for conviction of manslaughter." *Commonwealth v. Edelin*, 359 N.E.2d 4, 5, 18 (Sup. Jud. Ct. Mass. 1976). See Robert Reinhold, *Boston Indicts Doctors in Fetus Cases*, N.Y. TIMES, Apr. 13, 1974, at 1 (noting that the abortion was therapeutic).

55. *Roe v. Wade*, 410 U.S. 113, 164 (1973).

reproductive freedom issues.

The political and ideological diversity among proponents of reproductive freedom is illustrated by *Roe v. Wade* itself. After all, it was authored by Justice Harry Blackmun, a life-long Republican who had been appointed by a conservative Republican President, Richard Nixon.⁵⁶ Conversely, one of the two dissenters, disagreeing with Blackmun's opinion, was a Democrat: Byron White, who was appointed by that liberal Democratic President, John F. Kennedy.⁵⁷

IV. DEVELOPMENTS IN REPRODUCTIVE FREEDOM LAW IN THE LAST QUARTER CENTURY

So now I have told you how the cause of reproductive freedom deeply influenced my own life up to the point when I was a law student and *Roe* had just been decided. At this point, I will fast-forward to 1981, that momentous year, one quarter century ago, when your Women's Law Group was founded! You have asked me to talk about the development of reproductive freedom law from that point forward. This history—*herstory*—is so rich! Accordingly, in our short time together, I can only share a few reflections about that crucial period. I will convey to you a few impressions that strike me as especially noteworthy, from my dual perspective as both a constitutional law professor and a civil liberties activist. And, as you have asked me to do, throughout my historical and constitutional observations, I will weave in some personal recollections.

A. Reagan and Bush I Administrations' Repeated Calls upon Supreme Court to Overturn Roe

So let us go back to that key historic year of 1981. In that year, in addition to the founding of the WLG here at Vermont Law School, something else happened that was also of great importance for women's rights and reproductive freedom. For the very first time in our history, a woman was appointed to the U.S. Supreme Court; President Ronald Reagan appointed Sandra Day O'Connor.⁵⁸

Throughout her tenure on the Court, Justice O'Connor was a surprisingly strong voice for women's reproductive freedom, considering that she had been appointed by a conservative, Republican, pro-life

56. SUPREME COURT OF THE UNITED STATES, MEMBERS OF THE SUPREME COURT OF THE UNITED STATES (2006), available at <http://www.supremecourtus.gov/about/members.pdf>.

57. *Id.*

58. *Id.*

President, and that she herself was a leading Republican politician in a conservative Republican state, Arizona.⁵⁹ This again illustrates the general point I made above: support for civil liberties, including reproductive freedom, crosses all party and ideological lines. From the moment Justice O'Connor joined the Court, she forcefully advocated women's rights.⁶⁰ She also had an impact in persuading some of her fellow Justices to become more supportive of women's rights and reproductive freedom.⁶¹ Justice O'Connor's influence on the Court's women's-rights jurisprudence shows how important it is for women to continue to break the remaining glass ceilings in our legal profession, so that our perspectives will influence the policies that so deeply affect our own lives.

In that auspicious year of 1981, I was an active volunteer for the ACLU and was working closely with the ACLU's Reproductive Freedom Project.⁶² We realized what too many proponents of reproductive freedom had not: that *Roe* was not the culmination of the struggle, but rather, it was the beginning of a new stage in which the pro-life forces were working harder than ever, with growing political support. In fact, although the ACLU had hired many lawyers and other advocates to focus on reproductive-freedom issues, we could barely keep up with the hundreds and hundreds of state and local laws that were passed all over the country making it very difficult, if not impossible, for many women to enjoy in reality the rights that *Roe* had promised in theory.

The Supreme Court ultimately reviewed a number of these restrictive laws in a series of cases in which the ostensible issue was whether the restrictions were consistent with *Roe* standards.⁶³ I say "ostensibly,"

59. See, e.g., *Planned Parenthood Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (O'Connor, J., Kennedy, J., and Souter, J., plurality opinion) (reaffirming the central holding of *Roe* and recognizing woman's reproductive freedom as essential to the equality of women in society).

60. See, e.g., *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 731 (1982) (holding that the university's "policy of denying males the right to enroll for credit in its School of Nursing violates the Equal Protection Clause").

61. Ruth Bader Ginsburg, *Forward to LENORA M. LAPIDUS ET AL., ACLU, WOMEN'S RIGHTS PROJECT ANNUAL REPORT 2001: 1971-2001: CELEBRATING 30 YEARS 8* (2001) ("Justice O'Connor, in 1982, close to the end of her first year as the first woman on the Supreme Court, had announced the *Mississippi University for Women* opinion for a Court that divided 5-4. The vote in 1996 in the *VM* case [*United States v. Virginia*, 515 U.S. 515 (1996), holding unconstitutional the male-only admissions policy of the state-supported Virginia Military Institute] was 7-1. . . . What occurred in the years intervening from 1982 to 1996 to make the *VM* decision not a close call? . . . The Justices' . . . ever evolving enlightenment has been advanced by . . . the women lawyers and jurists they nowadays routinely encounter.").

62. ACLU, *Reproductive Freedom*, <http://www.aclu.org/reproductiverights/index.html> (last visited Sept. 3, 2006) ("The ACLU's Reproductive Freedom Project protects everyone's right to make informed decisions free from government interference about whether and when to become a parent.").

63. See, e.g., *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 419 (1983) (deciding whether city ordinance "regulat[ing] the performance of abortions" was unconstitutional).

because Ronald Reagan had become President in 1981. And consistent with his pro-life platform, every time the Supreme Court reviewed state or local abortion regulations under *Roe*, the Reagan Justice Department entered the case as a friend of the court to make an additional argument.⁶⁴ Specifically, in addition to arguing that all of these restrictions passed muster under *Roe*, the Reagan Justice Department also used every such case to argue that *Roe* was wrong and should be overturned.⁶⁵ This pattern continued under the administration of the first President Bush.⁶⁶

B. Justice Blackmun's Continuing Defense of *Roe*

The Reagan and Bush I Administrations' repeated attempts to overturn *Roe* were especially infuriating to Justice Harry Blackmun, *Roe*'s author and diehard defender. For example, I vividly recall one argument I watched at the Supreme Court in one of these cases. The ACLU was challenging certain local restrictions on abortions.⁶⁷ As a courtesy to the U.S. Government, the Court routinely grants requests by the U.S. Solicitor General, the Justice Department's Supreme Court advocate, to present oral arguments as a friend of the court. As was typical during the Reagan and Bush I years, the Solicitor General had filed a friend-of-the-court brief urging the Court not only to uphold the state regulations under *Roe*, but also to overturn *Roe*.⁶⁸

When the Solicitor General stood up to make his oral argument in this case, Justice Blackmun hurled at him the following words: "It seems to me that your brief in essence asks either [the overruling of *Roe v. Wade*] or the overruling of *Marbury* against *Madison*."⁶⁹ Justice Blackmun glared at him

64. See, e.g., Rex E. Lee, Oral Argument on Behalf of the City of Akron (Nov. 30, 1982), in 138 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 815, 815-16 (Philip B. Kurland & Gerhard Casper eds., 1984) (advocating rational-basis review for abortion regulations, which would nullify *Roe*'s holding) [hereinafter LANDMARK BRIEFS].

65. See, e.g., Brief for the United States as Amicus Curiae in Support of Petitioners, City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416 (1983) (No. 81-746), in LANDMARK BRIEFS, *supra* note 64, at 359 (arguing for a deferential standard of review of state abortion regulations, which would effectively vitiate *Roe*).

66. See, e.g., Brief for the United States as Amicus Curiae Supporting Respondents at 8, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (Nos. 91-744 & 91-902), in LANDMARK BRIEFS, *supra* note 64, at 363, 378. ("As we explained in our briefs in *Akron I*, *Thornburgh*, *Webster*, *Hodgson*, and *Rust v. Sullivan*, 111 S. Ct. 1759 (1991), *Roe v. Wade* was wrongly decided and should be overruled. We strongly adhere to that position in this case.")

67. *Akron Reprod. Health, Inc.*, 462 U.S. at 419.

68. *Id.*

69. Rex E. Lee, Oral Argument on Behalf of the City of Akron (Nov. 30, 1982), in LANDMARK BRIEFS, *supra* note 64, at 818.

and held up the Justice Department's brief. "[D]id you write this brief personally?" Justice Blackmun demanded, hissing out the "this" with utter contempt.⁷⁰ I should note that Justice Blackmun was in general a very mild-mannered, soft-spoken man, but his determined defense of *Roe* brought out a very different side of him! The Solicitor General acknowledged that he had written "very substantial parts of the brief."⁷¹ This provoked Justice Blackmun to explode at the Solicitor General, infuriated by what he saw as the executive branch's disrespect for the Court and its precedents. Justice Blackmun shook the U.S. brief in the Solicitor General's face, trembling with rage—I was afraid he was actually going to throw the detested brief at the Solicitor General!

Let me interject a couple comments about Harry Blackmun's continuing commitment to *Roe*, which he fiercely defended, not only in all later abortion cases, but also in many other forums. I had the pleasure of meeting him quite a few times when we were both speaking at the same events. He regularly talked about *Roe*, including reading samples of the hate mail he got about it, which continued to pour in until the end of his life. When Justice Blackmun's papers were recently opened to the public, they contained more than 60,000 of these letters!⁷² These letters were astonishingly vitriolic and creatively contemptuous.⁷³ A number of them contained death threats, and indeed, someone did shoot a bullet through Justice Blackmun's bedroom window—a near miss.⁷⁴

As virulent as Justice Blackmun's hate mail was, sometimes these letters inadvertently contained some saving grace of irony or humor. Let me tell you about one of my favorite hate letters in that vein, which I heard Justice Blackmun read aloud at a conference⁷⁵ we both addressed in Seattle in 1989. The writer blamed Justice Blackmun and his opinion in *Roe* for literally everything that was wrong in the world at the time, from a war in

70. *Id.* at 820.

71. *Id.*

72. See *Nearing 85, Blackmun Reflects on Retirement*, N.Y. TIMES, Nov. 9, 1993, § B ("Justice Blackmun is best known for writing the majority opinion in *Roe v. Wade*, which legalized abortion in 1973, and in subsequent rulings on abortions. It has made him the most vilified member of the Supreme Court in history, the recipient of more than 60,000 pieces of hate mail over the last 20 years.").

73. See LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY* 182 (2005) (noting that Justice Blackmun faced "periodic death threats from antiabortion militants").

74. *Id.*

75. See *HE SHALL NOT PASS THIS WAY AGAIN: THE LEGACY OF JUSTICE WILLIAM O. DOUGLAS* xvi (Stephen L. Wasby ed. 1990) ("On April 15–17, 1989, a group of distinguished scholars came to Seattle, Washington, under the auspices of the William O. Douglas Institute, to bring their collective attention to bear in order to provide the first systematic inquiry into Justice Douglas's views on the wide range of subjects about which he spoke and wrote.").

one country, to a drought in another, and everything in between. Accordingly, the letter ended with the wish that Justice Blackmun would burn in hell for all eternity. Well, that was not quite the end of the letter, since it had a postscript: “Would you please send me your autograph?”!

Shortly after one occasion when I heard Justice Blackmun read samples of his most recent hate mail, I described the experience to my constitutional law class, since we happened to be studying *Roe* at the time. One of my students Carol Granoff (New York Law School 1991) said she thought someone should send Justice Blackmun a fan letter to leaven all the hate mail and let him know how many people admired him because of his *Roe* opinion. I told Carol that was a good idea and suggested that she should write such a letter. She was reluctant to do that, assuming that a Supreme Court Justice would not want to be bothered by a law student's letter. But I encouraged her to go ahead and write, and she did so. Just a few days later, my phone rang, and it was Carol, shouting with such excitement that she almost gave me an earache! Justice Blackmun had answered her letter immediately with an extremely gracious thank-you note, stressing that her letter had made him very grateful indeed.

I tell you this story to make a more general point: Supreme Court Justices and other important legal figures are more accessible—including to law students—than you might imagine. Therefore, if you might be interested in communicating with any of them, I encourage you to go ahead. I think there is a good chance you will have the same kind of positive experience that Carol Granoff had with Justice Blackmun. I am also aware of similar gracious responses to student letters from Justices and other legal luminaries.

C. The Court's 1989 Webster Decision, Threatening Roe's Demise

After our benchmark year of 1981, the next major Supreme Court decision concerning *Roe*'s ongoing vitality was *Webster v. Reproductive Health Services* in 1989.⁷⁶ *Webster*'s plurality opinion said that it was not overturning *Roe*,⁷⁷ but its analysis and holding were much less protective of women's reproductive freedom than *Roe* had been. This prompted Justice Blackmun to write an unusually impassioned, apocalyptic opinion, lamenting *Roe*'s evisceration and what he feared would be its imminent demise. Here are some of his harsh words about the plurality opinion:

76. *Webster v. Reprod. Health Serv.*, 492 U.S. 490 (1989).

77. *Id.* at 526 (O'Connor, J., concurring in part and in judgment) (“When the constitutional invalidity of a State's abortion statute actually turns on the constitutional validity of *Roe v. Wade*, there will be time enough to reexamine *Roe*. And to do so carefully.”).

Nor in my memory has a plurality gone about its business in such a deceptive fashion. At every level of its review . . . the plurality obscures the portent of its analysis. With feigned restraint, the plurality announces that its analysis leaves *Roe* “undisturbed,” albeit “modif[ie]d and narrow[ed].” But this disclaimer is totally meaningless. The plurality opinion is filled with winks, and nods, and knowing glances to those who would do away with *Roe* explicitly⁷⁸

Justice Blackmun borrowed from T.S. Eliot’s famous poem, “The Hollow Men,” to conclude: “Thus, ‘not with a bang, but a whimper,’ the plurality discards a landmark case of the last generation.”⁷⁹

In the wake of *Webster*, a number of state legislatures acted on the assumption that *Roe* was effectively a dead letter. Several states passed draconian laws similar to those of the pre-*Roe* era, criminalizing virtually all abortions.⁸⁰ Louisiana went even further, criminalizing some forms of contraception as well.⁸¹ These direct assaults on *Roe* set the stage for the Supreme Court in *Planned Parenthood v. Casey*, just three years later, to decide whether *Roe* should in fact be reaffirmed or reversed.⁸²

D. 1989–1992: The Aftermath of Webster, Leading up to Casey

These frontal assaults on *Roe* and the rights it protected underscore that there was good reason for the high-stakes mood in the years between *Webster* and *Casey*. Both sides had good reason to believe that *Roe* was on its last legs, and this led to enormous activism all over the country. It is hard to overstate the fever pitch, the anxiety on one side and the excitement on the other, which pervaded every sector of public life, including the media, politics, and campuses. In the clear light of hindsight, we now know that we really were facing a dramatic turning point in the ongoing struggle for reproductive freedom.

We now know that *Roe* did come within a hair’s breadth of being reversed in *Casey*, with four Justices voting for that result. Moreover,

78. *Id.* at 538 (Blackmun, J., concurring in part and dissenting in part) (brackets by Justice Blackmun).

79. *Id.* at 557 (quoting T. S. ELIOT, *The Hollow Men*, in *SELECTED POEMS* 75, 80 (1964) (1925)).

80. Tamar Lewin, *Strict Anti-Abortion Law Passed in Utah*, N.Y. TIMES, Jan. 26, 1991 at 10.

81. LA. REV. STAT. ANN. § 14:87 (1991), *invalidated by* Sojourner v. Roemer, 772 F. Supp. 930, 931 (E.D. La. 1991), *aff’d* 974 F.2d 27 (5th Cir. 1992).

82. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992) (responding to request to overturn the central holding of *Roe*).

thanks to the 2004 release of Justice Blackmun's papers, we recently learned that *Roe*'s core holding was saved only by a last-minute change of mind on the part of only one Justice.⁸³ I will say more about these recent revelations a bit later. Now, though, I want to return to the period leading up to the *Casey* decision to try to give you a sense of the overwhelming tension and drama in that crucial period between *Webster* and *Casey*, from 1989 to 1992. This historic period is sadly relevant now, as we are entering a similar period in which anti-choice lawmakers in South Dakota and elsewhere have felt emboldened by the Supreme Court's recent personnel changes and have once again passed laws directly at odds with *Roe* and its progeny.⁸⁴

In preparing for this talk, I looked up some of my old calendars and speeches from that period and saw that I was constantly being asked to speak about abortion rights all over the country to many diverse audiences, including on numerous campuses. There were mass demonstrations for and against *Roe* in Washington, D.C. that broke records in crowd size,⁸⁵ and we saw a huge surge of activism on the part of students in particular. Young women who had taken the option of abortion for granted all their lives suddenly were not taking it for granted any more. They were scared, and they were galvanized into action.

I had the honor of speaking at the largest pro-choice rally in history at the National Mall in Washington, D.C., which took place on April 5, 1992, two weeks before the Supreme Court heard oral arguments in *Casey* on April 22, 1992. I will never forget speaking right after the brother of Becky Bell. Becky was an all-American teenager from Indiana who had gotten pregnant and did not want to disclose her pregnancy to her parents or a judge as Indiana law required before a minor could have a legal abortion. So she had an illegal abortion and bled to death. She had in effect been killed by that law. Her brother was leading the huge crowd in chanting, "No more Becky Bells! No more Becky Bells!"

The Court was besieged with not only many friend-of-the-court briefs, but also record-breaking numbers of letters from members of the general public in the *Casey* case.⁸⁶

83. See GREENHOUSE, *supra* note 73, at 203–04 (detailing the circumstances leading to the *Casey* plurality opinion).

84. See, e.g., S.D. CODIFIED LAWS § 22-17-5.1 (2006) (making procurement of an abortion a felony, except to save a woman's life).

85. Adam Gardner, *Pro-Choice Rally Held to Gain Supporters*, THE DAILY COLLEGIAN, Oct. 23, 2003, <http://www.dailycollegian.com/news/2003/10/23/> ("Organizers for the [October 22, 2003 pro-choice rally] hope to break the record of 750,000 attendees that was set in 1992 during a similar women's rights march in D.C.").

86. See *Casey*, 505 U.S. at 983, 999 (Scalia, J., dissenting opinion) (noting the "dozens upon

To demonstrate specifically what was at stake, I will summarize some of the anti-*Roe* laws passed after *Webster* that would have been constitutional had the Court reached a different result in *Casey*. Indeed, the four dissenters in *Casey* would have held these laws to be completely constitutional.⁸⁷

1. Utah's Anti-*Roe* Law

After *Webster*, Utah passed a law that outlawed most abortions and made it a felony not only for doctors to perform abortions, but also for women to have them.⁸⁸ The ACLU's Reproductive Freedom Project promptly brought a lawsuit to challenge this law.⁸⁹ In working on the case, one of our lawyers discovered that, eight years before, Utah had enacted a separate law that made illegal abortions a capital offense!⁹⁰ When that law was passed, it did not gain too much attention. *Roe* was still accepted as the law of the land, making most abortions legal in Utah as in the rest of the country. In other words, the old Utah law making illegal abortions a capital offense was apparently passed for essentially symbolic reasons and then forgotten. However, after *Webster*, when Utah passed the new law that made most abortions illegal, suddenly this older law had a very concrete impact. To make matters worse, Utah still carried out the death penalty by firing squad.⁹¹

The ACLU conveyed all of this shocking information to the public through a very dramatic, but accurate, ad in the *New York Times* that read: "In Utah, they know how to punish a woman who has an abortion. Shoot her."⁹² We then helped organize an economic boycott of Utah.⁹³

dozens of amicus briefs submitted" in this case and other abortion cases and "the marches, the mail, [and] the protests aimed at inducing us to change our opinions").

87. See *Casey*, 505 U.S. at 944, 966. The four dissenting Justices would have overruled *Roe*, submitting state abortion regulations only to the most deferential judicial scrutiny, rational basis review. *Id.*

88. See Samuel W. Buell, Note, *Criminal Abortion Revisited*, 66 N.Y.U. L. REV. 1774, 1813 (1991) (noting that the ACLU "pointed out that, when read in conjunction with Utah's existing homicide law, the new abortion law would permit women convicted of procuring abortions to be sentenced to life in prison or death").

89. *Jane L. v. Bangerter*, 794 F. Supp. 1537 (D. Utah 1992). See *Suit by A.C.L.U. Challenges New Utah Anti-abortion Law*, N.Y. TIMES, Apr. 7, 1991, at L21, for a short discussion of the lawsuit.

90. See Buell, *supra* note 88 (stating that Utah homicide laws considered killing a fetus in an illegal abortion murder, which was punishable by death).

91. See *Utah: Demise of Last Active Firing Squad*, N.Y. TIMES, Mar. 18, 2004, at A31 (noting that Utah used the firing squad as a method of execution until 1996).

92. Advertisement, ACLU, N.Y. TIMES, Mar. 24, 1991, at E18.

93. *Utah Gets Strict Abortion Law*, CHI. TRIB., Jan. 26, 1991, at 2.

2. Guam's Anti-Roe Law

Let me cite a second example of the dramatic anti-*Roe* developments in the wake of *Webster*. This occurred in the U.S. territory of Guam, which is bound by U.S. law, but whose legislature was emboldened by *Webster* to effectively outlaw all abortions.⁹⁴ In Guam, essentially the entire legislature, reflecting the population, was Catholic.⁹⁵ Moreover, the Archbishop of Guam commanded the legislators in a television interview to outlaw abortions, threatening any of them who did not vote for the abortion ban with excommunication from the Catholic Church!⁹⁶ No wonder that ban sailed through!

When we learned what Guam's legislature had done, the Director of the ACLU's Reproductive Freedom Project, Janet Benshoof, promptly boarded a plane for Guam, hoping to persuade its Governor not to sign the bill. However, the flight from New York to Guam is so long that by the time Janet arrived in Guam, the Governor had already signed the law. As a consummate activist, she did the next best thing: she called a press conference at which she explained why this new law was unconstitutional and announced that the ACLU was launching a lawsuit to challenge it. Alas, Guam's new law not only criminalized abortions; it also criminalized advocacy of abortion rights.⁹⁷ Therefore, shortly after her press conference, Janet found herself in jail! This of course harks back to the ACLU's early cases on behalf of reproductive-freedom advocates such as Margaret Sanger and Emma Goldman, who also faced imprisonment for advocating women's reproductive rights, as I noted above.

3. Louisiana's Anti-Roe Law

Let me cite just one more example of a post-*Webster* state law that treated *Roe* as defunct. Louisiana passed a law that banned almost all

94. See GUAM CODE ANN. tit. 9, § 31.20 to .23 (2003), *invalidated by* Guam Soc'y of Obstetricians & Gynecologists v. Ada, 962 F.2d 1366, 1369 (9th Cir. 1992), *available at* http://www.guamattorneygeneral.com/guam_code_title9.php (punishing persons performing illegal abortions).

95. Rita Ciolli, *Abortion Ban Struck Down: Supreme Court May Hear Guam Case*, NEW YORK NEWSDAY, Aug. 24, 1990, at 7 (stating that twenty of twenty-one legislators and ninety-five percent of the island's population are Catholic).

96. See Tamar Lewin, *Guam's Abortion Law Tested By A.C.L.U. Lawyer's Speech*, N.Y. TIMES, Mar. 21, 1990, at A24 (noting Archbishop Anthony Apuron's threat to Catholic member legislators).

97. See Buell, *supra* note 88, at 1816 (noting that the Guam abortion law sanctioned "anyone who encourages another to seek an abortion").

abortions as well as many forms of contraception.⁹⁸ The Louisiana law contained the most severe restrictions on contraception since the 19th century.⁹⁹

I do not think it was any coincidence that Louisiana had the lowest number of women in its legislature of any state in the country.¹⁰⁰ Conversely, at that same time, both Connecticut and Maryland passed laws that strongly protected reproductive freedom to ensure that women in those states would enjoy this freedom as a matter of state law, even if the Supreme Court should no longer guarantee it as a matter of U.S. constitutional law.¹⁰¹ And I do not think it is any coincidence that both Connecticut and Maryland had unusually high numbers of female representatives at the time.¹⁰² In short, we must never forget that one crucial tactic for ensuring women's reproductive freedom is to elect women to political office, and I really hope that some of you will run for political office yourselves.

The anti-abortion law that Louisiana passed after *Webster* was the most restrictive law in the country because it banned some forms of contraception as well as almost all abortions. Nonetheless, some anti-abortion activists denounced that Louisiana law as a wishy-washy "compromise."¹⁰³ Why did they consider it a compromise?—you might well ask. After all, the law criminalized virtually all abortions, imposing a penalty of ten years imprisonment at "hard labor"—an interesting choice of words!¹⁰⁴ But this law did contain an exception when an abortion was

98. LA. REV. STAT. ANN. § 14:87 (2004), *invalidated by* *Sojourner v. Roemer*, 772 F. Supp. 930 (E.D. La. 1991). See Gina Kolata, *Opponents of Louisiana's New Law Say it Could Limit the Use of Some Contraceptives*, N.Y. TIMES, June 21, 1991, at A11, for a discussion of the Louisiana law and why it threatened the use of some contraceptives.

99. See Buell, *supra* note 88, at 1815 (observing that the Louisiana law resembled pre-*Roe* anti-abortion statutes).

100. Amanda G. Alderman, *A Regional Analysis of Elected Women in the United States: A Case Study of State Legislatures (May 2001)* (unpublished research paper, West Virginia University), available at <http://www.rri.wvu.edu/pdf/aldermanpaper.pdf>.

101. CONN. GEN. STAT. ANN. § 19a-602 (West 1958); MD. CODE ANN., HEALTH-GEN. § 20-209 (LexisNexis 2005).

102. Center for American Women and Politics, Connecticut, <http://www.cawp.rutgers.edu/Facts/StbySt/CT.html> (last visited Nov. 8, 2006); Center for American Women and Politics, Maryland, <http://www.cawp.rutgers.edu/Facts/StbySt/MD.html> (last visited Nov. 8, 2006).

103. Ardent pro-life advocates in the Louisiana legislature are still criticizing anti-abortion bills that allow abortions to save the life of a pregnant woman. See Ed Anderson, *Committee Oks Ban on Most Abortions*, NEW ORLEANS TIMES PICAYUNE, Apr. 20, 2006, at 2 ("[Senate Bill 33] would allow abortions only to save the life of the mother. But Sen. Diana Bajoie, D-New Orleans, said she wanted to 'make it more pro-life' by not allowing any exceptions.").

104. LA. REV. STAT. ANN. § 14:87(E)(1) (2004).

necessary to save the pregnant woman's life.¹⁰⁵ It was this exception that earned the ire of some ardent pro-life advocates who expressly called for protecting the fetus's potential life even at the cost of the pregnant woman's actual life.

I should note that this elevation of potential fetal life over pregnant women's lives is the official position that the Republican Party has taken ever since *Roe*, including in its most recent Platform for the 2004 election.¹⁰⁶ Along with its predecessors, that Platform calls for outlawing all abortions, and it supports *no* exceptions at all—not even to save the pregnant woman's life, and not even when the pregnancy was caused by rape or incest.¹⁰⁷

E. Planned Parenthood v. Casey (1992)

The next major abortion case after *Webster* was *Planned Parenthood v. Casey*, decided in 1992.¹⁰⁸ Since the ACLU was representing Planned Parenthood in that case, I was deeply involved with it. Many, if not most, informed observers assumed that *Casey* would finish the job that *Webster* had started and completely overturn *Roe*.

Casey involved the constitutionality of five regulations that Pennsylvania had imposed on abortions.¹⁰⁹ More fundamentally, both parties explicitly asked the Court to declare whether *Roe* was in fact still good law or whether, as *Webster* had indicated, *Roe* had effectively been overturned.¹¹⁰ Many lawmakers and some judges had interpreted *Webster* as partly or wholly overturning *Roe*, so clarity was called for by both sides.

1. Reasonable Fear that *Casey* Would Overturn *Roe*

It was widely anticipated that the *Casey* Court would in fact overturn *Roe* for two reasons. First, in *Webster*, five Justices had expressed at least some disagreement with *Roe*.¹¹¹ Second, since *Webster*, two new Justices

105. *Id.* § 14:87(B)(2).

106. See Robin Toner, *Below the Campaign Radar, A Values War*, N.Y. TIMES, Apr. 17, 2004, at A10 (noting that the Republican Party Platform calls for an outright ban on abortion).

107. *Id.*

108. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

109. *Id.* at 844.

110. See Brief for Petitioners and Cross-Respondents at 17, *Planned Parenthood of Se. v. Casey*, 505 U.S. 833 (1992) (arguing the Court must reaffirm the central holding of *Roe*); Brief for Respondents at 105, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (arguing the Court should overrule *Roe*).

111. *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 518 (1989) (Rehnquist, C.J., joined by White, J. and Kennedy, J.) ("The key elements of the *Roe* framework—trimesters and viability—are not

had been appointed by President George Bush I, who was committed to appointing judges who would overturn *Roe*.¹¹²

In 1990, Justice Brennan retired and was replaced by Justice Souter.¹¹³ In 1991, Justice Marshall retired and was replaced by Justice Thomas.¹¹⁴ In short, two *Roe* supporters were replaced by two nominees of an anti-*Roe* President, who were both assumed to be anti-*Roe* themselves. When he was appointed, Justice Souter was described by anti-*Roe* proponents as “a home run,”¹¹⁵ and Planned Parenthood and the National Abortion Rights Action League testified against his confirmation specifically on this issue.¹¹⁶

In 1992, as a result of these two post-*Webster* appointments, there were only two sure votes on the Court to uphold *Roe*: Justice Blackmun and Justice Stevens. From the original 7-2 vote in favor of *Roe*, it looked as if those numbers had been turned around 180 degrees.

When the Court agreed to hear the *Casey* case, which squarely presented the issue of whether *Roe* should be overturned, it became the focal point of enormous political and public interest. As I noted above, there were huge demonstrations and rallies in Washington, D.C. by both pro-life and pro-choice supporters, and the Court was flooded by record numbers of amicus briefs and letters.

When the Court ended the suspense by issuing its decision on the last day of its 1991 term, most experts were surprised that Justice O'Connor and Justice Kennedy, who had already written opinions so critical of *Roe*,¹¹⁷ had voted not to overturn it, but instead to reaffirm its central holding, and also

found in the text of the Constitution or in any place else one would expect to find a constitutional principle.”); *id.* at 529–30 (O'Connor, J., concurring) (expressing discomfort with *Roe*'s trimester framework); *id.* at 532 (Scalia, J., concurring) (arguing that the Court should overturn *Roe* explicitly). See Linda Greenhouse, *Supreme Court, 5-4, Narrowing Roe v. Wade, Upholds Sharp State Limits on Abortions*, N.Y. TIMES, July 4, 1989, at A1, for a short analysis of the opinion.

112. See Robin Toner, *Court Vacancy to Challenge President on Volatile Issues*, N.Y. TIMES, July 21, 1990, at A1 (“It is inconceivable that George Bush could nominate a pro-choice jurist given his party's platform and his pronouncements as President.” (quoting Michael M. Murry, Communications Director, Democratic National Committee)).

113. Neil A. Lewis, *Sworn In as 105th Justice, Souter Says Shock Recedes*, N.Y. TIMES, Oct. 9, 1990, at A22.

114. Linda Greenhouse, *Thomas Sworn In as 106th Justice*, N.Y. TIMES, Oct. 24, 1991, at A18.

115. See Jason DeParle, *Souter Gives Little Comfort to Wary Conservatives*, N.Y. TIMES, Sept. 17, 1990, at A18 (noting that the White House referred to Souter's nomination as a home run).

116. See Neil A. Lewis, *2 Groups Oppose Souter at Hearing*, N.Y. TIMES, Sept. 19, 1990, at A24 (noting that the executive director of the National Abortion Rights Action League and the president of the Planned Parenthood Action Fund testified in opposition to Souter's nomination).

117. See *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 518 (Rehnquist, C.J., joined by White, J. and Kennedy, J.) (“The key elements of the *Roe* framework—trimesters and viability—are not found in the text of the Constitution or in any place else one would expect to find a constitutional principle.”); *id.* at 529–30 (O'Connor, J., concurring) (expressing discomfort with *Roe*'s trimester framework).

that the purported “home-run” pro-life appointee, Justice Souter, had joined them.¹¹⁸ Some publications have provided insider accounts of the dramatic behind-the-scenes developments at the Court that led to this dramatic decision. One noteworthy example is the judicial biography of Justice Blackmun, written by Linda Greenhouse, the *New York Times* Supreme Court reporter.¹¹⁹ When it came out, I literally could not put it down because I found the story so fascinating.

Thanks to Justice Blackmun's papers and other inside sources of information that recently have come to light, we now know that Chief Justice Rehnquist had actually drafted an opinion reversing *Roe* as the Court's intended majority ruling.¹²⁰ However, after the Justices' post-argument 5-4 vote in support of that ruling, Justices Souter and O'Connor strongly lobbied Justice Kennedy and persuaded him to change his vote to support *Roe*'s core holding.¹²¹ Thus, the Rehnquist draft opinion overturning *Roe* was transformed from a majority opinion to a dissent.

Shortly after Justice Blackmun's papers were opened to the public, I spoke to the lawyer who had argued *Casey* on behalf of the ACLU and Planned Parenthood, Kitty Kolbert. Kitty told me that she had immediately gone to the National Archives to read the *Casey* papers. She said that it was terrifying to read Rehnquist's opinion overturning *Roe*, even knowing that it had failed to become the Court's opinion. For her, it was like a near-death experience. This underscores that we really were facing a dramatic turning point in the ongoing struggle for reproductive freedom; *Roe*'s core holding was saved only by a last-minute change of mind on the part of only one Justice.

I would like to share with you an advertisement that the ACLU took out in the *New York Times* in 1992 to highlight *Roe*'s then-looming demise and to rally our pro-choice troops not to give up in despair at such a development, but rather to become even more energized and committed to carry on the fight in forums other than the Supreme Court. The ad is in tombstone style, in the format of a death announcement. Its headline reads “Roe v. Wade,” and under that it notes the years 1973–1992, with 1992 being followed by a question mark. In a moment, I will quote part of the text to give you a sense of the post-*Roe*, pro-choice strategy we were planning.

I hate to be the bearer of bad tidings, but we may still need to resort to

118. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 845–46 (1992).

119. GREENHOUSE, *supra* note 73.

120. *Id.* at 203.

121. *See id.* at 203–04 (declaring that “Kennedy . . . O'Connor, and Souter had been meeting privately and were jointly drafting an opinion that, far from overruling *Roe*, would save it”).

these alternative strategies in the future. Based on their past statements,¹²² we should not be shocked if the Court's two new Justices would join the two current Justices who already have called for *Roe*'s reversal, Justices Scalia and Thomas.¹²³ Therefore, it may only take a single new Justice to convert Rehnquist's draft opinion overturning *Roe* into a final opinion for a new majority.

Moreover, even if *Roe* and *Casey* are not completely overturned, there is a great danger that they will be greatly cut back. For example, while Justice Kennedy supported *Casey*, he dissented from the Court's 2000 decision that struck down a state "partial-birth abortion" ban.¹²⁴ Justice Kennedy thus views *Casey*'s "undue burden" standard as permitting laws that prohibit a whole category of abortions, even before the point of fetal viability.¹²⁵

For these reasons, the ACLU's 1992 ad, in the style of a requiem for *Roe*, is sadly pertinent now in 2006. Here is an excerpt from that ad:

This is not a death announcement.

It is a birth announcement.

The birth of a bold new initiative to guarantee the right of all women to decide for themselves whether or when to bear a child—without the interference of government.

Today, instead of mourning the imminent demise of *Roe v. Wade*, the landmark Supreme Court decision that affirmed this

122. See, e.g., ACLU, REPORT OF THE AMERICAN CIVIL LIBERTIES UNION ON THE NOMINATION OF DISTRICT OF COLUMBIA CIRCUIT COURT JUDGE JOHN ROBERTS JR., TO BE ASSOCIATE JUSTICE ON THE UNITED STATES SUPREME COURT 19–22 (2005), available at http://www.aclu.org/FilesPDFs/aclu_roberts_report.pdf (analyzing Chief Justice Roberts' prior record on abortion issues and noting his potential as a Supreme Court Justice to curtail reproductive rights); ACLU, REPORT OF THE AMERICAN CIVIL LIBERTIES UNION ON THE NOMINATION OF THIRD CIRCUIT COURT JUDGE SAMUEL A. ALITO, JR., TO BE ASSOCIATE JUSTICE ON THE UNITED STATES SUPREME COURT 5 (2005), available at http://www.aclu.org/images/asset_upload_file130_23216.pdf (detailing Justice Alito's historic hostility toward the right to abortion).

123. See *Webster v. Reproductive Health Services*, 492 U.S. at 532 (1989) (Scalia, J., concurring in part and concurring in judgment) (stating that the plurality opinion "effectively would overrule *Roe v. Wade*" and "I think that should be done, but would do it more explicitly"); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. at 944 (Rehnquist, J. dissenting, joined by Thomas, J.) ("We believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases.").

124. *Stenberg v. Carhart*, 530 U.S. 914, 957 (2000) (Kennedy, J., dissenting).

125. See *id.* at 964 (arguing that a state's moral interest in banning all procedures which utilize "the natural delivery process to kill the fetus" does not constitute an undue burden or conflict with a woman's right to choose).

right . . . , we call on all Americans to join us in our new and vital struggle.

. . . .

. . . [E]ven though the odds appear to be against us in the courts, we can still win.

Today, we launch a national campaign of historic importance. We hereby call for an Act of Congress . . . to explicitly guarantee the right to reproductive choice, leaving no room for restrictive interpretation by a hostile Court.

When women finally won the right to vote in 1920, it was not because the Supreme Court gave it to them. They fought for it—and won it—in the streets, in state legislatures, in the Congress, and finally through a Constitutional amendment. Reproductive rights must now be won the same way—by mobilizing public support and forcing political change.¹²⁶

The ad then calls upon readers to contact their representatives and senators to urge support for the proposed Freedom of Choice Act, which would have guaranteed the rights laid out in *Roe* as a matter of federal statutory law.¹²⁷ Here is how that ad ends: “Congress will not listen unless they hear your voice—loudly and clearly. Over and over again, if necessary. As the women’s suffrage movement did not rests [sic], neither will we. The Supreme Court has made its move, it’s up to you to make yours.”¹²⁸

2. *Casey*’s Actual Holding: A Glass (Only) Half-Empty

From both the pro-choice and the pro-life perspectives, *Casey* was a glass half-empty. Although it refused to overturn *Roe*, it did narrow *Roe*’s protection. In light of the realistic fear that *Casey* would finish what *Webster* had begun, you can understand the great sense of relief felt by myself and other reproductive rights advocates that *Casey* did not in fact completely overturn *Roe*. This relief was palpable despite the disappointment that *Casey* did clearly cut back on *Roe*.

Casey substituted the more deferential and malleable “undue burden”

126. Advertisement, ACLU, *Roe v. Wade: 1972–1992?* (1992) (on file with author).

127. *Id.*

128. *Id.*

standard for the traditional “strict scrutiny” standard to which the Court had subjected abortion regulations under *Roe*.¹²⁹ Pro-choice advocates feared that this new “undue burden” standard would make it easy for states to effectively outlaw abortion, especially for young women, poor women, and women who did not live close to the shrinking number of abortion providers.

Indeed, in *Casey* itself, the Court applied this new standard to uphold certain types of regulations that it previously had struck down under *Roe*'s more rights-protective standard. The Court upheld one regulation requiring that any woman seeking an abortion must be shown some state-designed, anti-choice propaganda and another requiring her to wait 24 hours before having the abortion.¹³⁰ In consequence, the woman would have to make two trips to the abortion clinic, not one. For many women, these requirements were in fact so burdensome that they made the difference between having an abortion or not having one.

In particular, what would not look like an undue burden to, say, Sandra Day O'Connor, would in fact be an impossible burden, especially for poor women and working women who had to travel far and to take extra time off work. To underscore this point, *TIME* Magazine wrote the following:

Though [a 24-hour waiting period] sounds benign enough, it can confound poor women who already have to travel long distances to find a clinic, only to discover they must also scrape together the price of overnight accommodations. Often by the time they get the money together, they have advanced into the second trimester, when the cost is higher.¹³¹

And here is what the *New York Times* wrote about Mississippi, when it became the first state to enforce a 24-hour waiting period, after *Casey* authorized such a regulation:

Two months after Mississippi became the first state to enforce a 24-hour waiting period for abortions, the two sides in the abortion debate agree on only one thing: a one-day waiting period is about a lot more than a single day.

. . . .

129. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992) (“Only where state regulation imposes an undue burden on a woman’s ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.”).

130. *Id.* at 882, 887.

131. Richard Lacayo, *Abortion: The Future is Already Here*, *TIME*, May 4, 1992, at 28.

Whatever the arguments pro or con, this much is certain: the waiting period has had a striking effect. Since the law went into effect, the number of abortions performed . . . fell by half . . .¹³²

Some cartoonists saw the grim humor in this situation, using humor to highlight what is really tragic. For example, one cartoon, shortly after *Casey* came down, shows two women reading a newspaper headline about the Court's decision upholding the 24-hour waiting period. That prompts one woman to ask the other, "Which state do you think will be the first to uphold a nine-month waiting period?"¹³³

We may laugh and groan in outrage, but these kinds of measures are surely viewed as completely justified by many anti-*Roe* or pro-life advocates. Let us not forget: in *Casey*, four Justices voted to *completely* overturn *Roe*, and to allow complete criminal bans of all abortions—with the sole exception of those necessary to save a pregnant woman's life.¹³⁴

Moving forward from *Casey*, it was hard to predict how the completely new "undue burden" would be enforced. Particularly troubling was the fact that this standard had been crafted by Justice O'Connor in separate opinions in earlier cases, in which she had never found any restrictions or regulations to be "undue burdens."¹³⁵ Accordingly, there was good reason to fear that this standard would largely gut *Roe*'s protection. In fact, that is exactly what Chief Justice Rehnquist said, in his opinion in *Casey*. Although he thought the Court should have expressly and directly overturned *Roe*, he mocked the Joint Opinion as having done that implicitly and indirectly. For example, he wrote, "*Roe* continues to exist, but only in the way a storefront on a western movie set exists: a mere facade to give the illusion of reality."¹³⁶

132. Peter Applebome, *Mississippi Law Fails to Reduce Abortion Strife*, N.Y. TIMES, Oct. 13, 1992, at A14.

133. See generally Sylvia's Home Page, <http://www.nicolehollander.com> (last visited Nov. 8, 2006).

134. *Casey*, 505 U.S. at 944 (Rehnquist, J., concurring in the judgment in part and dissenting in part).

135. See, e.g., *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 464 (1983) (O'Connor, J., dissenting) (arguing that provisions of an ordinance requiring, *inter alia*, a 24-hour waiting period, informed consent, and parental consent was not an undue burden because it did not "involv[e] absolute obstacles or severe limitations on the abortion decision"); see also *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 828 (1986) (O'Connor, J., dissenting) (quoting the *Akron* definition of undue burden to uphold an ordinance requiring, *inter alia*, informed consent, statutory reporting requirements, and the requirement that a second physician be present during the abortion procedure).

136. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 954 (1992); see also *id.* at 966 ("The sum of the joint opinion's labors in the name of *stare decisis* and 'legitimacy' is this: *Roe v. Wade*

Justice Blackmun's separate opinion in *Casey* noted both the positive and negative aspects of the "undue burden" standard. While he praised *Casey*'s principled re-affirmation of *Roe*'s core holding, Justice Blackmun also repeated the dramatic warning he had issued in *Webster*—that women's constitutional freedom of choice was still on the verge of extinction.¹³⁷ Indeed, in light of the recent Supreme Court confirmation process for Chief Justice Roberts and Justice Alito, Justice Blackmun's 1992 warning still rings all too true today. Here is what he wrote: "In one sense, the [*Casey*] Court's approach is worlds apart from that of the [dissenters]. And yet, in another sense, the distance between the two approaches is short . . . but a single vote. I am 83 years old. I cannot remain on this Court forever"¹³⁸

And now Justice Stevens, another stalwart *Roe* supporter, is 86 years old, and is also not able to "remain on [the] Court forever." Throughout U.S. history, we have had a total of 110 Supreme Court Justices, and out of all of those, only three others have remained on the Court after their 86th birthdays. One of those three was Harry Blackmun himself.¹³⁹ In light of these sobering facts, let me again quote from Justice Blackmun's warning dissent in *Webster* which is, alas, very apt right now: "For today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows."¹⁴⁰

The Court has applied *Casey*'s "undue burden" test to a total of six abortion regulations: the five that were involved in *Casey* itself,¹⁴¹ and the so-called "partial-birth abortion" ban in *Stenberg v. Carhart*.¹⁴² The Court has upheld four of these six restrictions,¹⁴³ holding that they were not undue burdens; it has struck down two such restrictions, holding that they were undue burdens.¹⁴⁴ However, the latter two rulings were both decided by

stands as a sort of judicial Potemkin Village, which may be pointed out to passers-by as a monument to the importance of adhering to precedent.").

137. See *id.* at 923 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (expressing fear that just one vote could extinguish the right to reproductive choice).

138. *Id.* at 943.

139. Oliver Wendell Holmes retired at age 90 in 1932; Roger B. Taney died while still on the Court, at age 87, in 1864; and Harry Blackmun retired at age 86 in 1994.

140. *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 560 (1989) (Blackmun, J., dissenting).

141. The five regulations at issue in *Casey* include an "informed consent" requirement, a 24-hour waiting period (requiring women to view certain state-designed materials aimed at discouraging abortion), a parental consent provision, a spousal notification requirement, and reporting and recordkeeping requirements. *Casey*, 505 U.S. at 844.

142. *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000).

143. See *Casey*, 505 U.S. at 880, 884, 887, 899, 901 (upholding an "informed consent" requirement, a 24-hour waiting period, a parental consent provision, and reporting and recordkeeping requirements, but striking down a spousal notification requirement).

144. See *id.* at 898 (striking down the spousal notification requirement); *Stenberg*, 530 U.S. at

five-to-four margins. Thus, there is clearly a deep division as to what exactly that inherently nebulous standard means, and Justices who are less sympathetic to reproductive rights—such as our two new Justices¹⁴⁵—could clearly apply that standard in such a way as to uphold more restrictions.

Samuel Alito has already voted to uphold the one kind of abortion restriction that the Supreme Court struck down in *Casey*. In his capacity as a judge on the U.S. Circuit Court of Appeals for the Third Circuit, then-Judge Alito sat on the *Casey* case and rejected the constitutional challenges to all of the abortion restrictions at issue, including the requirement that a married woman must notify her husband before having an abortion.¹⁴⁶ In contrast, the Supreme Court in *Casey* held that this regulation was an “undue burden” because it gave abusive husbands an “effective veto” power over their wives’ decisions.¹⁴⁷ Since then-Judge Alito had reached his contrary conclusion under *Roe*’s more demanding standard, *a fortiori*, Justice Alito would now be even more likely to uphold a restriction on abortion under the Supreme Court’s subsequently-adopted, more lenient, “undue burden” standard.

3. *Casey* as a Glass Half-Full: A Step Forward for Women’s Equality and Empowerment

Despite these drawbacks of *Casey*, it was nevertheless a positive development, in terms of women’s reproductive rights, in one key respect. As someone who always sees the glass half-full, I want to stress this positive aspect of *Casey*. In reaffirming *Roe*’s core right, the Court for the first time grounded that right in a concern for women’s equality and empowerment. To appreciate how significant this is, we should go back and review precisely how the Court had described the right at issue in *Roe* itself—in particular, *whose* rights were at stake. If you have not noticed this when you have read *Roe*, do not be embarrassed, as many students do

945–46 (striking down a statute proscribing “partial-birth abortions”).

145. See, e.g., ACLU, REPORT OF THE AMERICAN CIVIL LIBERTIES UNION ON THE NOMINATION OF DISTRICT OF COLUMBIA CIRCUIT COURT JUDGE JOHN ROBERTS JR., TO BE ASSOCIATE JUSTICE ON THE UNITED STATES SUPREME COURT 19–22 (2005), available at http://www.aclu.org/FilesPDFs/aclu_roberts_report.pdf (analyzing Chief Justice Roberts’ prior record on abortion issues and noting his potential as a Supreme Court Justice to curtail reproductive rights); ACLU, REPORT OF THE AMERICAN CIVIL LIBERTIES UNION ON THE NOMINATION OF THIRD CIRCUIT COURT JUDGE SAMUEL A. ALITO, JR., TO BE ASSOCIATE JUSTICE ON THE UNITED STATES SUPREME COURT 5 (2005), available at http://www.aclu.org/images/asset_upload_file130_23216.pdf (detailing Justice Alito’s historic hostility toward the right to abortion).

146. Planned Parenthood of Se. Pa. v. Casey, 947 F.2d 682, 719 (1991) (Alito, J., concurring in part and dissenting in part).

147. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 897 (1992).

not notice it and not all professors point this out.

The *Roe* opinion contains two descriptions of the constitutional right at stake. I will quote both of them now. I will leave out the qualifying details about trimesters and so forth, to draw your attention to the core question of what exactly the protected constitutional right is—in particular, whose right it is. Here is *Roe*'s first description of the rights it protected: “[T]he attending physician, in consultation with his patient, is free to determine . . . that, in his medical judgment, the patient’s pregnancy should be terminated.”¹⁴⁸ Here is *Roe*'s second description of the protected right: “[T]he abortion decision . . . must be left to the medical judgment of the pregnant woman’s attending physician.”¹⁴⁹

As you can see, the pregnant woman herself is almost, if not entirely, absent from these formulations of the right at stake. The Court consistently describes the right as belonging to the doctor, not the woman herself. Moreover, the Court always refers to the doctor with male pronouns. For example, the Court recognizes that the doctor might consult with “his patient” about “his medical judgment” about whether “the patient’s pregnancy should be terminated.”¹⁵⁰

I am confident that if I asked all of you to paraphrase the right in *Roe*, you would describe it exactly the other way around: as the pregnant woman’s right to choose, in consultation with her doctor. Indeed, what *Casey* called the “central” or “essential” holding of *Roe*, which it reaffirmed, had somehow morphed from the *doctor’s* right to the *woman’s* right.¹⁵¹ In another departure from *Roe*, whenever the Court in *Casey* does refer to doctors, whom it says the woman might choose to consult, the doctors are referred to in gender-neutral terms.¹⁵²

In *Casey*, the Court explicitly links the woman’s right to choose an abortion to concerns about gender equality.¹⁵³ It still grounds the right in the concept of individual autonomy that it found to be implicit in the “liberty” that the Due Process Clause protects;¹⁵⁴ this was the constitutional concept on which the *Roe* ruling was based.¹⁵⁵ However, the *Casey* Court

148. *Roe v. Wade*, 410 U.S. 113, 163 (1973).

149. *Id.* at 164.

150. *Id.* at 163.

151. *Casey*, 505 U.S. at 845–46 (reaffirming the “essential holding” of *Roe*, including “the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State”).

152. *Id.* at 884 (“In this respect, the statute does not prevent the physician from exercising *his or her* medical judgment.”) (emphasis added).

153. *Id.* at 856 (“The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”).

154. *Id.* at 846.

155. *Roe v. Wade*, 410 U.S. at 164 (1973).

goes on to say that this source of women's constitutional right to choose an abortion is reinforced by concerns for women's equal liberty and women's equal opportunities in the world beyond the traditional domestic sphere. Let me quote one pertinent passage from the Joint Opinion:

[T]he liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.¹⁵⁶

Likewise, the Joint Opinion declares, "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."¹⁵⁷

I do not mean to be hard on Justice Blackmun by noting how far the Court came between *Roe* and *Casey* in moving the pregnant woman from a supporting role as the male doctor's patient to the starring role as someone whose liberty and equality are uniquely at stake in the abortion context. In many significant respects, Justice Blackmun was ahead of his time, but all of us have vision that is to a greater or lesser extent limited by our own experience and milieu. Far from feeling superior to someone such as Justice Blackmun as we look back on his 1973 opinion with twenty-twenty hindsight, to the contrary, we should feel a sense of humility and ask ourselves what limits on our own vision will be clear to *our* successors in the *next* generation or two.

When Justice Blackmun wrote the *Roe* opinion in 1973, women's equality was still essentially unprotected both as a matter of constitutional law and as a matter of social reality. Women were largely absent from the legal profession, and completely absent from the Court itself. The Court's gender-equality jurisprudence was in its infancy, the Court not yet having

156. *Casey*, 505 U.S. at 852.

157. *Id.* at 856.

recognized that gender-based classifications should be constitutionally suspect.¹⁵⁸ Furthermore, as I previously noted, we must not underestimate the importance of the dramatic change on the Court itself in 1981, when Sandra Day O'Connor became the very first female Justice on the Court.¹⁵⁹

Even before the *Casey* decision, Justice Blackmun himself had stressed that the right to choose an abortion was an essential aspect of women's equal rights, as indicated in the excerpt from his *Webster* opinion that I quoted above.¹⁶⁰ In *Casey* itself, his separate opinion lays out a whole series of women's rights that he believes to be violated by restrictions on abortion. He cites these as bolstering the basic due process liberty rationale for *Roe* itself. Justice Blackmun's *Casey* opinion adverts not only to rights protected by the Equal Protection Clause, but also to rights protected by the Thirteenth Amendment's ban on involuntary servitude and the Fifth Amendment's ban on government takings of property without just compensation:

A State's restrictions on a woman's right to terminate her pregnancy also implicate constitutional guarantees of gender equality. . . . By restricting the right to terminate pregnancies, the State conscripts women's bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care. The State does not compensate women for their services; instead, it assumes that they owe this duty as a matter of course. This assumption—that women can simply be forced to accept the “natural” status and incidents of motherhood—appears to rest upon a conception of women's role that has triggered the protection of the Equal Protection Clause. The joint opinion recognizes that these assumptions about women's place in society “are no longer consistent with our understanding of the family, the individual, or the Constitution.”¹⁶¹

Somewhat paradoxically then, *Casey* was a step forward for women's rights more generally, even though it cut back on the scope of the

158. See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (holding for the first time that “classifications by gender must serve important government objections and must be substantially related to achievement of those objectives” in order to withstand constitutional scrutiny).

159. See *supra* notes 58–61 and accompanying text.

160. *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 557 (1989) (Blackmun, J., dissenting) (“millions of women, and their families, have ordered their lives around the right to reproductive choice, and . . . this right has become vital to the full participation of women in the economic and political walks of American life.”).

161. *Casey*, 505 U.S. at 928 (internal citations omitted).

precise right to choose abortion that *Roe* had recognized. Its anchoring of reproductive rights in gender-equity concerns provides a promising source of future support for such rights. Moreover, *Casey's* joint opinion contained eloquent language that described very broadly the concept of liberty under the Due Process Clause on which *Roe* had focused; this broad construction promised to extend to other rights of individual autonomy beyond reproductive freedom.

4. *Casey* as a Building Block for *Lawrence v. Texas*

Indeed, the Court built on this key language in *Casey* in its landmark 2003 decision in *Lawrence v. Texas*, which invalidated laws that criminalized oral and anal sex between consenting adults, and supported the rights of private sexual intimacy regardless of sexual orientation.¹⁶² Additionally, lower courts have built on the language in *Casey* to conclude that adults have the right to make voluntary end-of-life decisions, including death with dignity or “physician-assisted suicide.”¹⁶³

Let me quote this key passage from *Casey*, which rests on the Court's past decisions, but points beyond them. It is a beautiful illustration of the common-law fashion in which our constitutional law evolves. I am going to quote three sentences. As you will hear, the first one is strictly backward-looking, describing the Court's past decisions. The second sentence is a transitional one. It describes the past decisions at a relatively high level of abstraction, as not protecting just a series of particular rights, but rather, as illustrating a more unifying, expansive concept of individual autonomy. Finally, the last of these three sentences is forward-looking, suggesting additional rights that the Court could protect as further aspects of this broad autonomy concept.

First, here is the backward-looking sentence, describing past decisions:

162. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (finding that “[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter” (citing *Casey v. Planned Parenthood of Pa.*, 505 U.S. 833, 847 (1992))).

163. *See, e.g., Kevorkian v. Arnett*, 939 F.Supp. 725, 729–31 (C.D. Cal. 1996) (recognizing the application of the liberty interest to “define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life” and invalidating state statute criminalizing physician-assisted suicide as a violation of the Due Process Clause (citing *Casey v. Planned Parenthood of Pa.*, 505 U.S. 883, 851 (1992))), *vacated*, 136 F.3d 1360 (9th Cir. 1998); *Compassion in Dying v. Washington*, 850 F.Supp. 1454, 1459, 1467 (W.D. Wash. 1994) (finding “the reasoning in *Casey* highly instructive and almost prescriptive” to the question of physician-assisted suicide and invalidating state statute criminalizing the practice), *rev'd*, 49 F.3d 586 (9th Cir. 1995), *reh'g en banc granted*, 62 F.3d 299 (9th Cir. 1995), *reh'g en banc*, 79 F.3d 790 (9th Cir. 1996), *stay granted sub nom.*, *Washington v. Glucksberg*, 517 U.S. 1241 (1996), *cert. granted*, 518 U.S. 1057 (1996), *rev'd by*, 521 U.S. 702 (1997), *remanded to sub nom.*, *Compassion in Dying v. Washington*, 122 F.3d 1262 (9th Cir. 1997).

“Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.”¹⁶⁴ Next, here is the transitional sentence, abstracting a broad concept of liberty from the past decisions: “These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”¹⁶⁵ Finally, this passage concludes with a promise of future rights sheltered by this same broad concept of liberty: “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.”¹⁶⁶

No wonder that last sentence has been quoted approvingly by subsequent opinions that expand the concept of individual liberty under the Due Process Clause!¹⁶⁷ And no wonder it has been denounced by the arch-opponent of protecting individual liberty under the Due Process Clause, Justice Scalia. I have debated these issues with him several times, and he mockingly calls this passage “the mystery passage,” not only because it refers to “the mystery of human life,” but also to underscore his view that what it means is a mystery!¹⁶⁸

CONCLUSION

I want to conclude by continuing to stress my positive perspective and to celebrate the forward strides we have witnessed in the past twenty-five years, as well as the continuing progress we will see in the next twenty-five years, thanks to the ongoing commitment and efforts by all of you and your peers. Yes, the new Roberts Court is likely to cut back on reproductive freedom under the U.S. Constitution.¹⁶⁹ It may even completely overturn *Roe* and *Casey*. But even in such circumstances, we would still have ample alternative tools and forums to fight for our rights.

164. *Casey*, 505 U.S. at 851.

165. *Id.*

166. *Id.*

167. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 574 (2003); *Compassion in Dying v. State of Washington*, 79 F.3d 790, 813 (9th Cir. 1996); *Compassion in Dying v. State of Washington*, 850 F.Supp. 1454, 1459 (W.D. Wash. 1994).

168. See *Lawrence*, 539 U.S. at 588 (Scalia, J., dissenting) (deriding the “famed sweet-mystery-of-life passage”).

169. See ACLU, REPORT OF THE AMERICAN CIVIL LIBERTIES UNION ON THE NOMINATION OF DISTRICT OF COLUMBIA CIRCUIT COURT JUDGE JOHN ROBERTS, JR., TO BE ASSOCIATE JUSTICE ON THE UNITED STATES SUPREME COURT 19–22 (2005), available at http://www.aclu.org/FilesPDFs/aclu_roberts_report.pdf (detailing anti-reproductive rights positions that Justice Roberts has previously taken).

That is exactly the message that I stressed in my remarks to the 1992 pro-choice rally in Washington, D.C. on the eve of the *Casey* argument. So, I would like to conclude my encouraging, forward-looking remarks on the present historic occasion with some of my remarks in that same spirit on that past historic occasion:

We may soon mourn the end of an era in which the Supreme Court protected our rights. But . . . more importantly, we are now celebrating the beginning of a new era, in which we will reclaim our rights for ourselves. We will not let the Supreme Court have the last word about our bodies, our freedom—indeed, our very lives.

History has shown that human-rights struggles can never be finally won in the courts. Instead, they must be won at the ballot box and, ultimately, in the hearts and minds of women and men. This certainly has been true of women's rights. When women finally won the right to vote in this country, it was not because the Supreme Court gave it to us. Instead, it was because our feminist foremothers fought for that right—and won it—in the streets, in state legislatures, in Congress, and finally, through a constitutional amendment.¹⁷⁰ Now we must carry forward their historic struggle.

I believe that any Supreme Court decision cutting back on *Roe* would become, for our generation, what another notorious Supreme Court decision was for an earlier generation of human-rights activists. I refer to the Court's infamous *Dred Scott* decision in 1857, which upheld slavery.¹⁷¹ Yet, the leading abolitionists of the day saw a silver lining to the dark cloud cast by the *Dred Scott* decision. William Lloyd Garrison said it made him feel “a tremendous excitement.”¹⁷² Frederick Douglass greeted the decision “cheerfully.”¹⁷³ They and other abolitionists knew that the Court's abandonment of their constitutional cause would galvanize their political movement to give African Americans control over their own lives and bodies. I believe that any decision limiting *Roe* would have that same

170. U.S. CONST. amend. XIX.

171. *Dred Scott v. Sandford*, 60 U.S. 393, 454 (1856) (holding that Dred Scott “is not a citizen”), *superseded by constitutional amendment*, U.S. CONST. amend. XIV, § 1.

172. See Howard Zinn, *History is a Weapon: Slavery Without Submission, Emancipation Without Freedom*, <http://www.historyisaweapon.com/defcon1/zinnslaem10.html> (last visited Oct. 31, 2006) (“Sir, slavery will not be overthrown without excitement, a most tremendous excitement.”).

173. See Frederick Douglass, Speech on the Dred Scott Decision (May 1857), available at <http://www.teachingamericanhistory.org/library/index.asp?document=772> (“My answer is, and no thanks to the slaveholding wing of the Supreme Court, my hopes were never brighter than now.”).

galvanizing effect on our political movement to give women control over our own lives and bodies.

So, our current reproductive-freedom movement parallels two earlier human-rights movements in this country: the abolition of slavery and women's suffrage. Therefore, I would like to end by quoting an extraordinary woman who was a leader in both these earlier causes, and a great heroine: Sojourner Truth. She was born a slave in 1797 and freed in 1843. In 1851, she gave a famous speech to a women's rights convention in Ohio. I will close my remarks to you by quoting Sojourner Truth's closing remarks to that other group of women's rights activists more than a century and a half ago.

As you consider her inspiring words, remember that an African American woman spoke them fourteen years before the constitutional amendment that abolished slavery and sixty-nine years before the constitutional amendment that ensured women's suffrage. If she could feel such courage and such optimism then, surely we can feel it now. She said, and I echo: "If the first woman God ever made was strong enough to turn the world upside down all alone, these women together ought to be able to turn it back, and get it right side up again!"¹⁷⁴ What can I possibly add to that, except: A-men!

Or, rather—in this forum—A-WOMEN!

174. A Speech Can Reveal Poetic Expressions, CHI. SUN TIMES, Apr. 4, 2006, at 36.