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"The Scope and Myths of Roe v. Wade"
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Good afternoon, Chairman Chabot, Representative Nadler, Members of the Subcommittee, and distinguished guests. My name is Karen O'Connor, and I am a Professor of Government at American University and the founder and Director of its nonpartisan Women & Politics Institute.

Prior to joining the faculty at American University, from 1977 to 1995, I taught at Emory University, where I held appointments in the Political Science Department and the Law School. At both institutions, I have taught Women and the Law, Litigating for Constitutional Change, and American Politics. I am the author of *No Neutral Ground: Abortion Politics in an Age of Absolutes* (1995); *American Politics: Continuity and Change*, the ninth edition (with Larry Sabato), the best selling American Politics college textbook in the United States; several books on women and politics; and over fifty articles and book chapters on various aspects of the law and the judicial process as its relates to women and women's rights. I am the past president of the Southern Political Science Association, the National Women's Caucus for Political Science, the past chair of the American Political Science Association's Organized Research Section on Law and the Courts, and the president-elect of its Organized Section on Women and Politics Research.

I am honored to testify regarding the significant implications of *Roe v. Wade* and *Doe v. Bolton* for American women and families. Today I will address the legal significance of *Roe v. Wade* and *Doe v. Bolton*, their strong constitutional underpinnings, their profound consequences for women's health and lives, and the legal and public health necessity of preserving a woman's right to choose abortion. With new membership on the Supreme Court and several critical legal tests on the horizon, reproductive freedom is truly at a crossroads.

Abortion Regulation Prior to Roe v. Wade and Doe v. Bolton and the Consequences for Women's Lives

Abortion Regulation Prior to Roe

Abortion regulations and restrictions are not rooted in ancient theory or common law; despite the fact that abortion was common throughout history, no government -- be it local, state, or national -- attempted to regulate the practice until well into the nineteenth century.[1] As Justice Blackmun noted in *Roe v. Wade*, "at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century . . . a woman enjoyed a

[1] Abortion was legally practiced in ancient Greece and the Roman empire. *See Roe*, 410 U.S. 113,130 (1973). Likewise, under English common law, the basis for our legal system, abortion was not criminalized. *Id*. at 132-133.

substantially broader right to terminate a pregnancy than she does in most States today."[2] Indeed, in 1812, a Massachusetts Court found that an abortion performed before "quickening," defined as the time when a woman begins to feel movement in utero, usually between the 16th and 18th week of pregnancy, was not punishable at law.[3]

The first abortion restrictions enacted in the United States were state statutory creations that marked a shift away from common law. In 1821, Connecticut became the first state to criminalize abortion *after quickening*. By 1840, eight states had enacted statutory abortion restrictions.[4] Other states quickly followed suit; by 1910 every state except Kentucky had made abortion a felony.[5]

By the early 1970s, however, following the lead of the American College of Obstetricians and Gynecologists and the American Law Institute (ALI), [6] fourteen states liberalized their abortion statutes to permit abortion in limited circumstances: when the woman's health was in danger, when the woman was the victim of rape or incest, or when there was a likelihood of a fetal abnormality.[7] Still, only four states -- Alaska, Hawaii, New York, and Washington -- had decriminalized the provision of abortion for any reason during the early stages of pregnancy. [8]

Abortion "Options" Prior to Roe: Resort to Back Alleys

The fact that abortion was illegal in all but a few states prior to *Roe* did not mean, however, that women were not obtaining the procedure. Indeed, an 1871 American Medical Association report found that 20% of all pregnancies were deliberately terminated. [9] It is estimated that anywhere from 200,000 to 1.2 million illegal or self-induced abortions were performed in the 1950s and 1960s.[10] The general unavailability of *legal* abortions meant that the vast majority of women who wanted to terminate a pregnancy were left with only one "option":

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[2] *See Roe*, 410 U.S. at 140-41.

[3] *See Commonwealth v. Bangs*, 9 Mass. 387, 388 (1812). Moreover, "whether abortion of a *quick* fetus was a felony at common law, or even a lesser crime, is still disputed." *Roe,* 410 U.S. at 134 (emphasis added).

[4] *See Roe*, 410 U.S at 138-39.

[5] Barbara Hinkson Craig and David M. O'Brien, ABORTION AND AMERICAN POLITICS 9 (1993).

[6] Karen O'Connor, NO NEUTRAL GROUND 27 (1996).

[7] Barbara Hinkson Craig and David M. O'Brien, ABORTION AND AMERICAN POLITICS 9-10 (1993).

[8] *Id.* at 10.

[9] Nancy E. McGlen and Karen O'Connor, WOMEN, POLITICS AND AMERICAN SOCIETY 207 (1998).

[10] *Id.*

obtaining illegal and dangerous abortion procedures, commonly referred to as "back-alley abortions."[11]

Illegal abortions, sometimes performed by lay people who did not have the proper training, equipment, or methods of anesthesia or sanitation, were extremely dangerous and put women at high risk of incomplete abortions, infection, and death. Estimates regarding the number of death and infections resulting from illegal or self-induced abortion are, of course, difficult to make given that many women, or their families in cases of the woman's death, were reluctant to attribute the infection or death to illegal abortion. Some estimate, however, that 5,000 women a year died from illegal, unsafe abortions before *Roe v. Wade*. In 1965, illegal abortion accounted for a *reported* 17 percent of all deaths due to pregnancy and childbirth.[12] These burdens fell disproportionately on women of color: from 1972 to 1974, the mortality rate due to illegal abortions for non-white women was twelve times that for white women.[13] And, none of these numbers include the thousands of women who willingly endured dangerous, invasive hysterectomies or tubal ligations to make certain that they would not have to have abortions should they have additional pregnancies.

Roe v. Wade* and *Doe v. Bolton

In 1973, against a background of increasing litigation surrounding contraception and abortion -- and the horrifying reality that American mothers, sisters, and daughters were being forced into the back alleys -- the Supreme Court granted *certiorari* in the companion cases of *Roe v. Wade* and *Doe v. Bolton*. Jane Roe, who we know today as Norma McCorvey, challenged a Texas abortion law that prohibited abortions in all cases except to save a woman's life. Unlike *Roe*, the statute at issue in *Doe v. Bolton* was based on the Model Penal Code of the ALI. Doe's lawyers, acting on her behalf as well as several doctors, nurses, clergy, and social workers,

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[11] Much of the discussion of the availability and incidence of abortion prior to *Roe* draws heavily on Rachel Benson Gold, Alan Guttmacher Institute, Issues in Brief: *Lessons From Before Roe: Will Past be Prologue?* (2003), available at http://www.agi-usa.org/pubs/ib_5-03.pdf. Prior to *Roe*, a limited number of women had access to safe abortions. Most states allowed a woman to receive an abortion if she could prove that her life would be endangered by continuing the pregnancy; a few states permitted abortion in cases of rape or incest, or if an abortion was determined to be necessary to preserve the woman's health. However, women were still forced to navigate a complicated medical approval system, including obtaining the approval of a hospital committee, undergoing physical and mental evaluations, or obtaining law enforcement certification of claims of sexual assault. A woman's ability to successfully complete this process often hinged on her economic status: generally, only more affluent, white women had the ability to pay for this review process, and had a relationship with a private physician willing to facilitate the process. Likewise, a limited number of women -- again, women with financial means -- had another option: A few states, most notably New York, repealed their abortion statutes in 1970. Because New York did not require that a woman be a resident of the state in order to obtain the procedure, women from across the country traveled to New York for safe, legal abortions. It is estimated that in 1972 alone, more than 100,000 women traveled to New York City to obtain legal abortion services. Of course, such travel and lodging was time consuming and costly, and, in practice, was an option only for women of financial means. *Id.*

[12] *Id.*

[13] *Id.*

alleged that the Georgia law was an unconstitutional undue restriction of personal and marital privacy.

In a landmark 7 to 2 decision, the Supreme Court held that the "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[14] The Court also recognized that the decision of whether to have a child is unique to every woman and her life circumstances, and therefore must be a personal, individual decision.

> The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.[15]

In invalidating the Texas and Georgia abortion laws, the Court effectively invalidated the abortion laws of all but four states.[16]

The Constitutional Underpinnings of <u>Roe v. Wade</u> and <u>Doe v. Bolton</u>

The right to privacy so central in *Roe* was not "announced" for the first time in the *Roe* decision. Rather, in the decades prior to *Roe*, the Court defined the right to privacy as a fundamental freedom subject to exacting strict scrutiny by the Court.

The right to privacy was well-recognized -- both in the reproductive freedom context and outside the reproductive freedom context -- decades before the *Roe* decision. As the *Roe* Court itself stated, "In a line of decisions . . . going back perhaps as far as [1891], the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." *Roe*, 410 U.S. at 152 (citing, inter alia, *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Terry v. Ohio*,

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[14] *Roe*, 410 U.S. at 153.

[15] *Id.* at 153.

[16] Karen O'Connor, NO NEUTRAL GROUND 46-47 (1996). Contrary to arguments that the Court moved too fast in deciding *Roe*, the Court actually followed the trend emerging in the states. As noted above, in the 1960's the states began reforming their abortion laws; at the time *Roe* was decided, 17 states allowed abortion in at least some circumstances. Moreover, such a vital right must be nationalized. Not to grant women fundamental rights guaranteed in one state, while allowing its exercise to be labeled criminal in others, is akin to arguing that Jim Crow laws should be within the purview of the states to allow or prohibit**.**

392 U.S. 1 (1968); *Katz v. United States*, 389 U.S. 347 (1967); *Boyd v. United States*, 116 U.S. 616 (1886), *Olmstead v. United States*, 277 U.S. 438 (1928) (Brandeis, J., dissenting); *Meyer v. Nebras*ka, 262 U.S. 390 (1923); *Loving v. Virginia*, 388 U.S. 1 (1967); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)).

Griswold and *Eisenstadt*, *Roe's* immediate predecessors, made clear that the U.S. Constitution contained a broad, fundamental right to privacy that encompassed the right to control one's decision whether or not to have a child. In *Griswold v. Connecticut*,[17] the Court recognized that the privacy right encompassed a married couple's right to use birth control. This right, the Court held, could be found in the "penumbras emanating" from several specific guarantees in the Bill of Rights and incorporated through the Fourteenth Amendment. Among these rights were the First Amendment's protection of association, the Third Amendment's bar on the quartering of soldiers in private homes in peacetime without consent, the Fourth Amendment's protection against unreasonable searches and seizures of homes and property, the Fifth Amendment's guarantee of freedom from self-incrimination, and the Ninth Amendment, which gives to all citizens rights not enumerated specifically in the Constitution. The right to privacy, concluded the Court, was so basic that the Framers saw no need to spell it out more clearly in the Constitution.

Seven years later, the Court utilized this same privacy rationale in *Eisenstadt v. Baird*[18] to invalidate a Massachusetts law that allowed only married couples access to contraceptives. Affirming an unmarried individual's fundamental right to obtain contraception, the Court stated "if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[19]

Importantly, then, questions about the legitimacy of the privacy right relied on in *Roe* are not simply a quarrel with *Roe,* but an attack on the broader foundations of the right to privacy. If the right of a woman to maintain control over her own body established in *Roe* cannot stand on privacy grounds, neither can the right to be free from nonconsensual physical examinations (*Union Pacific Railroad*); the right to exercise First Amendment freedoms (*Stanley*); the right to educate our children according to our own beliefs (*Meyer* and *Pierce*); the right to choose who we will marry (*Loving*); or the right to obtain birth control (*Griswold* and *Casey*).

Roe's Implications for American Women

Roe's implications for women were profound and wide-reaching. The most immediate result was to rescue women from the back alleys, making access to safe, legal abortion possible

[17] 381 U.S. 479 (1965).

[18] *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

[19] 405 U.S. 438, 453 (1972).

for women who chose it. [20] Just as importantly, *Roe* marked a new beginning in women's ability to control their own fertility and to choose whether or not to have children. *Roe* recognized that the woman deciding whether to continue a pregnancy, and only that woman, must make the personal choice that is in keeping with her own religious, philosophical, and moral beliefs. This freedom of choice led to increased freedom in other areas; as the Supreme Court noted in 1992, "the ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[21]

Roe protects a woman's bodily integrity, but, just as importantly, protects a woman's right to be responsible for the choices she makes and the options she chooses. A woman's ability to decide when and if she will have children will ultimately make her a better mother, if she chooses to become one, and helps ensure that children are brought into families that are willing and able to both financially and emotionally care for them. A woman's ability to control her own reproduction ensures that she can make the medical decisions central to her physical and emotional well-being. And this autonomy allows women to make the choices we perhaps now take for granted: whether and when to marry, whether and when to have children, and whether to pursue educational opportunities or a professional career.

Post-Roe Attacks on the Fundamental Right to Choose Abortion

Legal and political attacks on *Roe* began even before the ink was dry on the decision. Within six months after *Roe* was decided, 188 anti-abortion bills were introduced in 41 state legislatures. State restrictions -- such as waiting periods, spousal and parental consent requirements, and informed consent requirements -- slowly chipped away at *Roe*'s protections, limiting abortion availability for all women. These restrictions fell most heavily on low-income women, especially young women and women of color, who, despite the legality of abortion, often could not access such services. For example, 33 states and the District of Columbia currently restrict low-income women's access to abortion; several federal laws, such as the Hyde Amendment, bar access to abortion care for low-income women who rely on the federal government for their health care, with exceptions only to preserve the woman's life or if the pregnancy results from rape or incest.[22] Likewise, 44 states restrict young women's access to abortion by mandating parental notice or consent. [23]

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[20] Today, abortion is one of the safest and most commonly performed medical procedures. In stark contrast to the soaring death rates from illegal abortions prior to *Roe*, the current death rate from legal abortion at all stages of gestation is 0.6 per 100,000 procedures. Lichtenberg ES, Grimes DA, Paul M. Abortion complications: *Prevention and management*. in Paul M, Lichtenberg ES, Borgatta L. Grimes DA, Stubblefield PG. A CLINICIAN'S GUIDE TO MEDICAL AND SURGICAL ABORTION 197-216. (1999).

[21] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 835 (1992).

[22] NARAL, *Who Decides: The Status of Women's Reproductive Rights in the United States* (2006).

[23] NARAL, *Who Decides: The Status of Women's Reproductive Rights in the United States* (2006).

Battles over abortion continue to be waged in the states today. In 2005 alone, 614 anti-choice measures were considered in state legislatures.[24] Moreover, every state with a regular legislative session, except the District of Columbia, considered anti-choice legislation in 2005: 77 of these legislative measures involved mandatory counseling and mandatory delay requirements for women seeking abortion services; 33 legislative measures would permit individuals and/or corporations to refuse to provide abortion, family planning, and other medical services; 60 legislative measures placed restrictions on young women's access to reproductive health services (including abortion and family planning); and 61 legislative measures were targeted regulations of abortion providers. Overall, 58 of these anti-choice measures were enacted--a 100% increase from 2004.[25]

Tellingly, however, despite countless legal challenges, and thousands of legislative attacks on *Roe*, the Supreme Court has continually reaffirmed the continued validity and constitutionality of the basic principles articulated in the decision, recognizing that a woman's right to control her own body, articulated in *Griswold, Eisenstadt*, *Roe,* and *Doe* remains just as fundamental today. As the Court so aptly stated in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, "*Roe* is clearly in no jeopardy, since subsequent constitutional developments have neither disturbed, nor do they threaten to diminish, the scope of recognized protection accorded to the liberty relating to intimate relationships, the family, and decisions about whether or not to beget or bear a child."[26] Likewise, in *Stenberg v. Carhart,* the Court again reaffirmed, "Taking account of these virtually irreconcilable points of view, aware that constitutional law must govern a society whose different members sincerely hold directly opposing views, and considering the matter in light of the Constitution's guarantees of fundamental individual liberty, this Court, in the course of a generation, *has determined and then redetermined that the Constitution offers basic protection to the woman's right to choose*."[27] In *Lawrence v. Texas*, in which the Court invalidated a criminal ban on sodomy, the court reaffirmed the fundamental right to privacy embodied in *Roe*, stating, "*Roe* recognized the right of a woman to make certain fundamental decisions affecting her destiny and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person."[28] Finally, just this term the Supreme Court decided *Ayotte v. Planned Parenthood of Northern New England*.[29] Relying on *Roe* and *Casey*, the Court once again reaffirmed that states' ability to restrict abortion access in constitutionally limited, most notably in cases where a woman's life or health is endangered.[30]

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[24] NARAL, *Who Decides: The Status of Women's Reproductive Rights in the United States* (2006).

[25] NARAL, *Who Decides: The Status of Women's Reproductive Rights in the United States* (2006).

[26] 505 U.S. 833, 857 (1992).

[27] 530 U.S. 914, 920 (2000) (emphasis added).

[28] *Lawrence v. Texas*, 539 U.S. 558, 555 (2003).

[29] 126 S.Ct. 961(2006).

[30] 126 S.Ct. 961, 967(2006).

A Return to the Back Alleys: Banning Abortion Without Regard for Women's Health

Despite over thirty years of Supreme Court precedent reaffirming *Roe*, the past year has seen unprecedented -- and unconscionable -- attacks on the fundamental right to choose. Many of these most recent measures have been proposed or enacted without any regard for protecting a woman's health, a principle that has underpinned the Supreme Court's abortion jurisprudence for more than three decades. Just last week, the South Dakota Senate passed a law, which is awaiting the Governor's signature, that would ban abortions in that state *at any stage in pregnancy*. The ban, in flat violation of Supreme Court precedent, does not contain any exception whatsoever to protect a woman's health, nor does it contain an exception for pregnancies that result from rape or incest. Similarly, in 2003, this Congress passed an abortion ban without any exception for women's health; every court to examine that ban has ruled that it is unconstitutional for this very reason. Just last week, the Supreme Court granted review in one of those cases, setting the stage for a potential reversal of the Court's 2000 ruling on this issue. Just last year, this very House of Representatives passed the Child Interstate Abortion Notification Act, which restricts a young woman access to abortion and demands parental involvement *even when the young woman's health is in danger or she has been the victim of rape or incest*.

Thus, despite the fact that history demonstrates that the unavailability of legal, safe abortion does not prevent abortion, but only leads women to seek unsafe abortions, it is abundantly clear that *Roe*'s protections are in jeopardy. Given President Bush's appointment of two Supreme Court Justices who appear likely to be hostile to *Roe* and a woman's right to control her body, we can no longer be assured that the Supreme Court will protect the fundamental right to choose.

What then, would happen if *Roe* were overturned? It is probable that many states would revive and enact immediate abortion bans. Four states (Alabama, Delaware, Massachusetts, and Wisconsin) have so-called "trigger" laws on their books, so named because they are "triggered" by the reversal of *Roe*, and would outlaw abortion immediately if the decision were overturned.[31] Another thirteen states have abortion bans on the books that have been blocked by courts as unconstitutional. If *Roe* was overturned, officials in such states could immediately file suit asking a court to set aside the prior order that prevented enforcement of the state law. [32] Even if states did not outlaw abortion entirely, they would be given free reign to restrict or ban abortion in a variety of circumstances if *Roe* were reversed. One need only look at the number of state restrictions placed on abortions in 2005, and the legislation that is likely to be enacted in South Dakota, to know this possibility is all too real.

Ultimately, abortion would likely remain legal in small number of states, but even in such states, women's access to abortion would likely be severely restricted. This would create a

[31] Center for Reproductive Rights: *What if Roe Fell?* at 8-10 (2004), *available at* http://www.reproductiverights.org/pdf/bo_whatifroefell.pdf.

[32] *Id.* at 10.

daunting, patchwork system of abortion statutes: a woman's right to obtain an abortion would be entirely dependent on the state in which she lived or her ability to travel to another state--assuming the states that keep abortion legal would permit non-residents to obtain abortions in that state. For those women who are able to navigate this hodgepodge, the need to travel and the increased demand for a dwindling number of abortion providers could lead to dangerous delays in the provision of abortion care.

Even more frightening, however, would be the plight of women who live in states where abortion is illegal or providers unavailable. In essence, overruling *Roe* would force a return to the two-tier system of abortion access that was in place before 1973: women with the financial ability to travel to other states may still be able to exercise their rights, while low-income women (disproportionately women of color and young women) would not. For these women, we would see a return to the days of back-alley and self-induced abortions; a return to the day where women -- our daughters, our sisters, our mothers, and our wives -- sacrificed their health and lives because they felt they were left with no other option. Re-criminalizing abortion, or so severely restricting it so as to make it practically unavailable, will not end the practice of abortion; it will simply end the practice of *safe* abortion.

And, because the constitutional protections enunciated in *Roe* underpin so many other fundamental rights that are critical to women's health and well-being, *Roe*'s demise could open the door to future encroachments these rights. For example, access to birth control also depends on the privacy right articulated in *Griswold* and echoed in *Roe*. The availability of contraception is critical to reducing unintended pregnancies, reducing the number of abortions, and improving the health of women and their children. The ultimate safety of these rights depends in large measure on the security of *Roe*.

Conclusion

I am a mother, a daughter, and a sister. The right to make private decisions to have sex or remain celibate, to use birth control or not, to resort to a safe and legal abortion if needed or to carry a pregnancy to term, has given women power over their destinies that women who came before me did not enjoy. As the Supreme Court so aptly stated in *Planned Parenthood v. Casey*, "An entire generation has come of age free to assume *Roe*'s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions; no erosion of principle going to liberty or personal autonomy has left *Roe*'s central holding a doctrinal remnant; *Roe* portends no developments at odds with other precedent for the analysis of personal liberty . . . ."[33]

Roe was not only a decision that legalized a medical procedure and protected women's health; it was -- and is -- a decision that gave a woman the option to make the reproductive choices that were right for her health, her family, and her life. No right can be more important or more fundamental than a woman's right to control her bodily integrity free from governmental interference -- the right safeguarded by a very fragile, very threatened *Roe*.

[33] 505 U.S. 833, 860 (1992).