In Their Words:
The Supreme Court Justices on Abortion

A report by

Alliance for Justice
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About Alliance for Justice

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Executive Summary

Because of their profound impact on Americans’ fundamental rights, reproductive rights cases are among those watched most closely when they reach the United States Supreme Court. This term, the Court is scheduled to decide at least three such cases.

**McCullen v. Coakley** deals with the constitutionality of a Massachusetts law establishing a 35-foot “buffer zone” around entrances to clinics that perform abortions, in order to protect women and families from harassment when accessing reproductive and family planning services. Opponents argue that the law violates the First Amendment. Oral argument in *McCullen* is set for January 15, 2014.

The Court also is expected to decide two cases—*Hobby Lobby Stores, Inc. v. Sebelius* and *Conestoga Wood Specialties Corp. v. Sebelius*—concerning whether profit-making companies owned by individuals with religious objections to birth control must be exempted from the contraception coverage requirement in the Affordable Care Act.

In this report, we provide the views of the current justices on reproductive rights issues, as expressed through their public statements before and during their confirmation hearings, their legal writing and their decisions. The voting records of the justices on the most significant reproductive rights cases are provided in the chart on page 7. Below and in the full report, their statements are set forth, beginning with the chief justice and then in order of seniority.

**Chief Justice John Roberts, pp. 8 to 12**

During his time as a lawyer in the Reagan Administration John Roberts condemned the right to privacy—on which the right to abortion is predicated—as nothing more than judicial activism. Roberts also approved a statement by President Reagan comparing *Roe v. Wade* to the Dred Scott decision sanctioning slavery. During his confirmation hearing, Roberts emphasized his respect for precedent. He spoke of needing judges who “have the humility to recognize that they operate within a system of precedent.”

**Justice Antonin Scalia, pp. 13 to 16**

During his confirmation hearings Scalia would not express an opinion on *Roe v. Wade*. He said he believed some precedents are stronger than others, but did not say whether he viewed *Roe* as a strong or a weak precedent.

During his time on the Supreme Court, Scalia partially dissented from *Planned Parenthood v. Casey*, writing that “*Roe* was plainly wrong,” and he answered the question of whether abortion is a liberty protected by the Constitution by writing, “I am sure it is not.” He also wrote that “the Constitution contains no right to abortion.”

Scalia has rarely shied away from sharing his opinions about abortion in public speeches and to the media. He has said:
• “You think there ought to be a right to abortion? No problem. . . . Pass a law.”
• “Abortion? Absolutely easy. Nobody ever thought the Constitution prevented restrictions on abortion.”

Justice Anthony Kennedy, pp. 16 to 22

During his confirmation hearings, Kennedy said he believed there is a fundamental right to privacy. On the Supreme Court, he coauthored the controlling opinion in Planned Parenthood v. Casey. The opinion upheld a series of restrictions on abortion rights, but also said that “the woman’s right to terminate her pregnancy before viability is the most central principle of Roe v. Wade. It is the rule of law and a component of liberty we cannot renounce.” Kennedy also has written opinions that condemn certain abortion procedures in harsh terms, including referring to doctors as “abortionists,” and he authored a dissent in a case upholding a Colorado law requiring buffer zones around abortion clinics.

Justice Clarence Thomas, pp. 23 to 25

During his confirmation hearings, Thomas said he had given no thought to Roe v. Wade during or since his days in law school. Thomas said he did believe there is a constitutional right to privacy, and that he had no agenda to prejudge the issue of abortion.

On the Court, Thomas has repeatedly criticized Roe. He wrote that the majority decision in Roe was “grievously wrong,” that the Court’s “abortion jurisprudence is a particularly virulent strain of constitutional exegesis,” and that “the Court’s abortion jurisprudence, including Casey and Roe v. Wade, has no basis in the Constitution.”

Justice Ruth Bader Ginsburg, pp. 25 to 32

In 1985, Ginsburg wrote in a law review article that the Roe decision was too broad and helped provoke a backlash. She has also said, “The emphasis must not be on the right to abortion but on the right to privacy and reproductive control.”

On the Court, Ginsburg read from the bench a strong dissent in Gonzales v. Carhart, in which the majority upheld a law banning “partial birth” abortions, even when there is no exception for the health of the mother. She wrote that when the government controls the decision to bear a child, a woman “is being treated as less than a fully adult human responsible for her own choices.” Ginsburg has been part of the majority in cases upholding “buffer zones” around abortion clinics.

Justice Stephen Breyer, pp. 32 to 36

During his confirmation hearings, Breyer said it was clear that Roe is the law of the land. He also outlined in detail his view that there is a constitutional right of privacy.

On the Court, Breyer dissented from a decision last year allowing a Texas bill imposing significant new restrictions on abortion providers to take effect. Allowing the law to take effect, Breyer wrote, “seriously disrupts” access to abortion in Texas. Previously, Breyer wrote the
majority opinion striking down a law banning “partial birth” abortion in Nebraska. Breyer joined Ginsburg’s dissent in *Gonzales v. Carhart* and he joined the majority in upholding buffer zones.

**Justice Samuel Alito, pp. 36 to 41**

Alito’s writings on abortion during his time in the Reagan Administration led some newspapers to publish pieces titled, “Alito Helped Craft Reagan-Era Move to Restrict ‘Roe,’” and “Alito File Shows Strategy to Curb Abortion Ruling.” In a job application he wrote: “I am particularly proud of my contributions to recent cases in which the government has argued in the Supreme Court that . . . the Constitution does not protect a right to an abortion.” When asked about these statements during his confirmation hearings Alito said the role of an advocate is different from the role of a judge.

While a judge on the Third Circuit Court of Appeals, Alito said that that court’s decision in *Planned Parenthood v. Casey*, upholding all but one restriction on abortion, did not go far enough—all of the restrictions should have been upheld.

During his confirmation hearings, Alito expressed respect for precedent but refused to characterize *Roe* as “settled law.” While on the Supreme Court, Alito voted with the majority in *Gonzales v. Carhart*.

**Justice Sonia Sotomayor, pp. 41 to 47**

During her confirmation hearings Sotomayor indicated that *Roe* is settled law and that there is a constitutional right to privacy. While on the Supreme Court Sotomayor signed onto Breyer’s dissent in the Texas case discussed above.

Recently, Sotomayor issued two rulings in cases related to contraception and the Affordable Care Act. She rejected a request by for-profit company Hobby Lobby to delay enforcement of a provision of the Affordable Care Act requiring companies to cover birth control in their insurance policies for their employees. In a second case involving another portion of the law affecting contraception coverage for employees of religiously-affiliated organizations, she granted a request to delay application of that part of the law to a nursing home they run by a group of nuns, pending further review.

**Justice Elena Kagan, pp. 47 to 51**

During her confirmation hearing, Kagan said this about the right of the government to regulate abortion: “As I understand the law after *Planned Parenthood v.* *Casey*, it’s that, after viability, the state can regulate as it pleases, except for situations where the woman’s life or health interests are at issue. Before viability, the question is whether there is an undue burden on the woman’s ability to have an abortion.”

While on the Court, Kagan signed onto Justice Breyer’s dissent in the Texas case discussed above.
# The Line-Up: How the Justices Voted on Major Supreme Court Abortion Decisions

**X:** Vote against advocates arguing for abortion rights.

**✓:** Vote in favor of advocates arguing for abortion rights.

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**The Cases:**

1. *Webster v. Repro. Health Servs.* (1989). Challenge to Missouri law that included a variety of restrictions on abortion: prohibiting public employees from providing or assisting in non-life threatening abortions; prohibiting the use of public facilities for abortion unless necessary to save the woman’s life; and requiring physicians to perform test to determine viability of fetuses after 20 weeks of pregnancy. Court upheld the law.


3. *Rust v. Sullivan* (1991). Challenge to President Reagan’s “gag rule,” prohibiting family planning programs funded by Title X from discussing, counseling on, or making referrals for abortion; funds could only be used for prenatal care. Court upheld regulation.

4. *Planned Parenthood v. Casey* (1992). Challenge to Pennsylvania Abortion Control Act, which included a variety of abortion restrictions: an “informed consent” provision requiring doctors to inform women of the health risks of abortion and of childbirth—as well as the probable gestational age of the fetus and the availability of printed materials published by the state—before attaining women’s written consent; a 24-hour waiting period between the initial “informed consent” appointment and an abortion; parental consent for young women under 18 with a judicial bypass procedure; a “spousal notification” provision requiring married women to attain written consent from their husbands prior to an abortion; and a variety of reporting requirements. The Court upheld all restrictions except spousal notification and imposed a new “undue burden” standard, though the plurality “once again reaffirmed” the “essential holding of *Roe v. Wade.*” *Id.* at 846. Justice Kennedy receives a checkmark for co-authoring the decision to reaffirm *Roe’s* “essential holding.”

5. *Schenck v. Pro-Choice Network of West. NY* (1992). Challenge to fixed and floating “buffer zones” to restrict abortion clinic blockaders. Court upheld “fixed” buffer zones because of public safety interests, and struck down “floating” buffer zones (requiring protestors to stay 15 feet away from individuals accessing clinic) as imposing too great a burden on speech. Justice Ginsburg voted to uphold the constitutionality of the fixed buffer zones, but voted to strike down the floating buffer zones. Justices with red Xes voted against the constitutionality of both kinds of buffer zones; Justice Breyer voted to uphold both.


8. *Gonzales v. Carhart* (2007). Challenge to federal Partial-Birth Abortion Ban Act of 2003, which did not include an exception to protect the health of the woman. The Court upheld the law. Justice Kennedy authored the majority opinion; Justice Ginsburg authored a strong dissent, which she read aloud from the bench.
In Their Words: The Supreme Court Justices on Abortion

The following report documents what each of the Supreme Court Justices has said about abortion as nominees to the Supreme Court, as Justices on the Supreme Court, and, where relevant, in their roles prior to their nomination to the Supreme Court.

A. Chief Justice John Roberts

Chief Justice John G. Roberts, Jr. was appointed to the Supreme Court by President George W. Bush and confirmed by the Senate in 2005. Before being appointed to the Supreme Court, Chief Justice Roberts served as judge on the U.S. Court of Appeals for the D.C. Circuit—to which he was appointed by President George W. Bush—as well as in the Solicitor General’s office during the George H.W. Bush Administration, and as a lawyer for the Reagan Administration.

1. The Reagan Administration

In a draft article on “judicial restraint,” John Roberts condemned the right to privacy as nothing more than judicial activism; he quoted Justice Black’s dissent in Griswold v. Connecticut, saying that to call a right to privacy “fundamental,” is a “loose, flexible, uncontrolled standard for holding laws unconstitutional,” and that the “broad range of rights which are now alleged to be ‘fundamental’ . . . with only the most tenuous connection to the Constitution, bears ample witness to the dangers of this doctrine.” Although Roberts’ objection to the right to privacy did not mention Roe or abortion, in citing the dissent in Griswold, he went to the heart of the right and criticized all of the Supreme Court’s fundamental rights jurisprudence.

Moreover, in a memorandum, Roberts summarized a speech by former Harvard Law School Dean Erwin Griswold that criticized the Supreme Court’s privacy decisions. In his summary, Roberts explained that the speech was consistent with Attorney General William French Smith’s “policymaking themes.” Agreeing with Griswold’s critique, Roberts wrote that Griswold “devotes a section to the so-called ‘right to privacy,’ arguing as we have that such an amorphous right is not to be found in the Constitution. He specifically criticized Roe v. Wade in the memorandum as well, and later drafted a reply to Griswold on Smith’s behalf saying, “[y]ou

9 381 U.S. 479, 521 (1965). In Griswold, the Court struck down a Connecticut law that prohibited the prescription, sale, or use of contraception by married couples. The 6-2 majority opinion, authored by Justice William O. Douglas, struck down the law as an unconstitutional violation of marital privacy—a right that Justice Douglas called, “older than the Bill of Rights—older than our political parties, older than our school system.” Id. at 486.

10 Draft Article on Judicial Restraint (updated) (on file with Alliance for Justice). This Draft Article was attached to a memorandum from John Roberts, to Kenneth W. Starr, re: Judicial Restraint Drafts (Nov. 24, 1981) (on file with Alliance for Justice).


12 Id.
were quite right that I would find a ‘measure of resonance’ in your lecture.” Roberts also approved of remarks that called for “reversing ‘the tragedy of Roe v. Wade and Doe v. Bolton,'” another abortion rights case.14

Roberts was also involved in presidential messaging around abortion. He signed off on proposed answers to an interview with fundamentalist Pat Robertson, in which President Reagan cited the “tragedy of abortion” as something about America that displeases God.15 With only minor editorial change, Roberts also approved of a presidential telegram to a memorial service for 16,500 fetuses. Again referencing the “abortion tragedy,” the telegram compared the Dred Scott decision sanctioning slavery to Roe v. Wade and said that the toll at Gettysburg could be traced to Dred Scott like the 16,500 deaths could be traced to Roe. The Washington Post reported that this memorandum “provide[d] the clearest insight to date into Roberts’ personal views on abortion . . . .”16

2. Solicitor General’s Office

During his time in the Solicitor General’s office during the George H.W. Bush Administration, Roberts advocated positions adverse to women’s reproductive rights in two significant cases.

Rust v. Sullivan:17 Roberts co-authored the government’s brief in Rust, in which the Supreme Court upheld newly-revised regulations prohibiting U.S. family planning programs receiving federal aid from giving any abortion-related counseling or other services. The provision barred such clinics not only from providing abortions, but also from “counseling clients about abortion” or even “referring them to facilities that provide abortion.” Roberts’ brief argued that the regulation gagging doctors and others participating in government-financed programs from discussing medical options with patients was necessary to fulfill Congress’s intent not to fund abortions through these programs, even though several members of Congress, including sponsors of the amendment dealing with abortion funding, disavowed that position, and even though the Department of Health and Human Services had not previously interpreted that provision in such a restrictive manner.18 Although holding of Roe v. Wade was not directly at issue in the case, Judge Roberts’ brief argued that “[w]e continue to believe that Roe was wrongly decided and

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14 Memorandum from John G. Roberts, to Fred F. Fielding, re: Talking Points Regarding Phone Call to Americans Against Abortion Rally (June 7, 1985) (on file with Alliance for Justice).
19 Brief for the Respondent, Rust v. Sullivan, 500 U.S. 173 (1991) (Nos. 89-1391, 1392). A 1978 memorandum from the Department of Health and Human Services stated that, “This office has traditionally taken the view that . . . the provision of information concerning abortion services, mere referral of an individual to another provider of services for abortion, and the collection of statistical data and information regarding abortion are not considered to be proscribed by [the regulation at issue].” Id. (citing memorandum from Carol C. Conrad, Office of General Counsel, Dep’t of Health, Education & Welfare, to Elsie Sullivan, Ass’t for Information and Education, Office of Family Planning, BCHS (Apr. 14, 1978)).
should be overruled . . . [T]he Court’s conclusion[] in Roe that there is a fundamental right to an abortion . . . find[s] no support in the text, structure, or history of the Constitution.”  

Bray v. Alexandria Women’s Health Clinic:21 As Deputy Solicitor General, Roberts argued in an amicus curiae brief in Bray v. Alexandria Women’s Health Clinic that Operation Rescue protestors and six other individuals who blocked access to reproductive health care clinics did not discriminate against women because “the right to have an abortion is not a fact that is specific to one gender.”22 In oral argument for the case, Roberts compared Operation Rescue’s attempts to prevent women from accessing clinics to an ecologist’s efforts to block an Indian tribe from using their exclusive fishing rights.23

3. Supreme Court Confirmation Hearings

During his confirmation hearings to be Chief Justice of the United States Supreme Court, John Roberts spent a great deal of time discussing his respect for precedent and stare decisis. In his opening statement, he famously remarked, “What we must have, what our legal system demands, is a fair and unbiased umpire, one who calls the game according to the existing rules and does so competently and honestly every day. This is the American ideal of law.”24 He spoke of needing judges who “have the humility to recognize that they operate within a system of precedent shaped by other judges equally striving to live up to the judicial oath, and [who] have the modesty to be open in the decisional process to the considered views of their colleagues on the bench.”25 Respect for precedent became a theme of his hearings:

- “[T]he principle [of following precedent] goes back even farther than Cardozo and Frankfurter. Hamilton, in Federalist No. 78, said that, ‘To avoid an arbitrary discretion in the judges, they need to be bound down by rules and precedents.’ So, even that far back, the founders appreciated the role of precedent in promoting evenhandedness, predictability, stability, adherence of integrity in the judicial process.”26
- “I do think that it is a jolt to the legal system when you overrule a precedent. Precedent plays an important role in promoting stability and evenhandedness. It is not enough—and the Court has emphasized this on several occasions. It is not enough that you may think the prior decision was wrongly decided. That really doesn’t answer the question. It just poses the question. And you do look at these other factors, like settled expectations, like the legitimacy of the Court, like whether a particular precedent is workable or not,

20 Brief for the Respondent, Rust (nos. 89-1391, 1392).
24 Id. at 31.
25 Id. at 55.
26 Id. at 141-42.
whether a precedent has been eroded by subsequent developments. All of those factors go into the determination of whether to revisit a precedent under the principles of *stare decisis.*”

Throughout his hearings, senators questioned Roberts on his previous writings about *Roe v. Wade* and abortion, and he continued his theme of respecting precedent:

- Roberts stated that *Roe* is “settled as precedent.” Senator Specter asked, “Judge Roberts, in your confirmation hearing for circuit court, your testimony read to this effect, and it has been widely quoted: ‘*Roe* is the settled law of the land.’ Do you mean settled for you, settled only for your capacity as a circuit court judge, or settled beyond that?” Roberts replied, “Well, beyond that, it’s settled as precedent of the Court, entitled to respect under principles of *stare decisis.* And those principles, applied in the *Casey* case, explain when cases should be revisited and when they should not. And it is settled as a precedent of the Court, yes.”

- In his questioning of Roberts, Senator Arlen Specter cited to the joint opinion in *Planned Parenthood v. Casey,* which said, “After nearly 20 years of litigation in *Roe*’s wake, we are satisfied that the immediate question is not the soundness of *Roe*’s resolution of the issue, but the precedential force that must be accorded to its holding,” and asked Judge Roberts if he agreed. Roberts replied, “That is the general approach when you’re considering *stare decisis.* It’s the notion that it’s not enough that you might think that the precedent is flawed, that there are other considerations that enter into the calculus that have to be taken into account, the values of respect for precedent, evenhandedness, predictability, stability; the consideration on the other side . . . . So to the extent that the statement is making the basic point that it’s not enough that you might think the precedent is flawed to justify revisiting it, I do agree with that.”

- Speaking of the Supreme Court’s 1992 opinion in *Planned Parenthood v. Casey,* Roberts said that the Supreme Court “went through the various factors in *stare decisis* and reaffirmed the central holding in *Roe* while revisiting the trimester framework and substituting the undue burden analysis with strict scrutiny. So as of ’92, you had a reaffirmation of the central holding in *Roe.* That decision, that application of the principles of *stare decisis* is, of course, itself a precedent that would be entitled to respect under those principles.”

- “I think people’s personal views on this issue [abortion] derive from a number of sources, and there’s nothing in my personal views based on faith or other sources that would prevent me from applying the precedents of the Court faithfully under principles of *stare decisis.*”

Roberts also noted, however, that the principle of *stare decisis* does not always control a decision. When Senator John Cornyn asked Roberts, “Is *stare decisis* an insurmoutable

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27 Id. at 144.
28 Id. at 145.
31 Id. at 143.
32 Id. at 146.
obstacle to revisiting a decision based on an interpretation of the Constitution,” Roberts replied, “What the Supreme Court has said, in the Casey decision, for example, is that it is not an inexorable command. In other words, it’s not an absolute rule.”

Senators also raised concerns about the opinions Roberts expressed in his memos and writings from his work in the Reagan Administration and the Solicitor General’s office. For example, in discussing Roberts’ statements about the right to privacy and Roe in memos for the Reagan Administration, Senator Herb Kohl asked, “You have today suggested on numerous occasions that the things that you represented in writing or an opinion back in the 1980s and into the 1990s, working for the Reagan Administration and working for the attorney general and then finally working as deputy solicitor attorney general, were, in many cases, the opinions of people for whom you worked, not necessarily your own. I assume, therefore, there are—those are opinions that you are prepared to disavow?” Roberts did not disavow any particular opinions, insisting he was writing on behalf of the administration and not himself. He did, however, express an opinion on Griswold v. Connecticut, stating, “I agree with the Griswold Court’s conclusion that marital privacy extends to contraception and availability of that. The Court, since Griswold, has grounded the privacy right discussed in that case in the liberty interest protected under the due process clause.”

After addressing Judge Roberts’ 1981 memo that discussed the “so-called right to privacy,” Senator Specter asked Judge Roberts: “Do you believe today that the right to privacy does exist in the Constitution?” Roberts replied, “Senator, I do. The right to privacy is protected under the Constitution in various ways. . . . [T]he Court has, with a series of decisions going back 80 years, has recognized that personal privacy is a component of the liberty protected by the Due Process Clause.”

4. Record on Abortion at the Supreme Court

Chief Justice John Roberts voted with a 5-4 majority to uphold the Partial-Birth Abortion Ban Act of 2003 in Gonzales v. Carhart. The Chief Justice signed onto a decision that upheld—for the first time at the level of the Supreme Court—a ban on a kind of abortion procedure that did not include an exception for the health of the woman. Justice Ruth Bader Ginsburg called the majority decision both “alarming” and noted that it “refuse[d] to take Casey and Stenberg seriously.”

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33 Id. at 270.
34 Id. at 206-07.
35 Id. at 146-47.
37 550 U.S. at 170 (Ginsburg, J., dissenting).
B. Justice Antonin Scalia

Antonin Scalia was appointed Justice to the United States Supreme Court by President Ronald Reagan in 1986, making him the longest-serving justice on the current Supreme Court. Prior to his elevation to the Supreme Court, Justice Scalia was a judge on the U.S. Court of Appeals for the D.C. Circuit, to which he was appointed by President Ronald Reagan in 1982.

1. Confirmation Hearings

At his confirmation hearings in 1986, Scalia would not express an opinion on Roe v. Wade, nor would he clarify whether he believed the case to be a “strong precedent or a weak precedent.” He was not, however, heavily pressed on controversial social issues, including abortion rights. Instead, then-Judge Scalia referenced his ability to be neutral:

- “I assure you, I have no agenda. I am not going onto the Court with a list of things that I want to do. My only agenda is to be a good judge.”
- After a back-and-forth attempt to gauge Scalia’s stance on Roe, Senator Ted Kennedy said, “[Y]ou are not prepared to indicate . . . in the Roe v. Wade case, where you come out, as to whether you feel that that is a strong precedent or a weak precedent. But evidently you believe that some precedents are weaker and some are stronger in the doctrine of stare decisis.” Scalia replied, “That is right, sir. And nobody arguing that case before me should think that he is arguing to somebody who has his mind made up either way.”
- When Scalia stated, “[L]ongstanding cases are more difficult to overrule than recent cases,” Senator Joe Biden followed up, “What do you have to find, as a matter of constitutional principle, to overrule longstanding cases?” Scalia replied, “Well, in every case, Senator, you have to find that it’s simply wrong, that it’s not a correct interpretation of the Constitution. . . . But some cases are so old, even if you waved in my face a document proving that they were wrong when decided in 1803, I think you’d have to say, sorry, too late.” Senator Biden then asked, “How about 1969?” to which Scalia responded, “Well, that’s not 1803.”

2. Media Statements about Abortion

Unlike at his confirmation hearings, during his time on the Supreme Court Justice Scalia has rarely shied away from sharing his opinions about abortion in public speeches and to the media. He has said:

38 Confirmation Hearing on the Nomination of Antonin Scalia, to be an Associate Justice of the Supreme Court of the United States: Hearing before the Committee on Judiciary, 99th Cong. 38 (1986).
40 Id.
41 Id. at 104.
• “You think there ought to be a right to abortion? No problem. . . . Pass a law.”


• Saying that the legal theory of substantive due process that was central to the Roe decision “doesn’t make any sense,” Justice Scalia stated that regardless of differing individual views on abortion, “the Constitution does not say anything about it. . . . What Roe v. Wade said was that no state can prohibit it. That is simply not in the Constitution.”

• “My difficulty with Roe v. Wade is a legal rather than a moral one: I do not believe (and, for two hundred years, no one believed) that the Constitution contains a right to abortion. And if a state were to permit abortion on demand, I would—and could in good conscience—vote against an attempt to invalidate that law for the same reason that I vote against the invalidation of laws that forbid abortion on demand: because the Constitution gives the federal government (and hence me) no power over the matter.”

• “There is nothing in the Constitution on the abortion issue for either side.”

3. **Supreme Court Record on Abortion**

As a Justice, Scalia has argued consistently that there is no constitutional right to abortion, and that Roe v. Wade was incorrectly decided.

Planned Parenthood v. Casey: Justice Scalia joined Chief Justice Rehnquist’s partial concurrence and partial dissent, in which the Chief Justice wrote, “We believe that Roe was wrongly decided, and that it can and should be overruled . . . .” Justice Scalia also wrote separately to concur and dissent in part. He wrote:

• “Roe was plainly wrong—even on the Court’s methodology of ‘reasoned judgment,’ and even more so (of course) if the proper criteria of text and tradition are applied.”

• “The States may, if they wish, permit abortion on demand, but the Constitution does not require them to do so. The permissibility of abortion, and the limitations upon it, are to

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49 Id. at 944 (Rehnquist, CJ., concurring in the judgment in part and dissenting in part).

50 Id. at 983 (Scalia, J., concurring in the judgment and dissenting in part).
be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting.”\textsuperscript{51}

- “The issue is whether [abortion] is a liberty protected by the Constitution of the United States. I am sure it is not. . . . (1)[T]he Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed.”\textsuperscript{52}

\textit{Stenberg v. Carhart}.\textsuperscript{53} Justice Scalia dissented from this 2000 decision, which struck down a Nebraska ban on so-called “partial-birth” abortion. Justice Scalia’s strongly-worded dissent called for overruling \textit{Planned Parenthood v. Casey}, and evoked analogies between the Court’s decision in \textit{Stenberg} to notorious Supreme Court decisions like \textit{Korematsu v. United States}\textsuperscript{54} and \textit{Dred Scott v. Sandford}.\textsuperscript{55} He wrote:

- “I am optimistic enough to believe that, one day, \textit{Stenberg v. Carhart} will be assigned its rightful place in the history of this Court’s jurisprudence beside \textit{Korematsu} and \textit{Dred Scott}.”\textsuperscript{56}
- “If only for the sake of its own preservation, the Court should return this matter to the people—where the Constitution, by its silence on the subject, left it—and let them decide, State by State, whether this practice should be allowed. \textit{Casey} must be overruled.”\textsuperscript{57}
- “The notion that the Constitution of the United States, designed, among other things, ‘to establish Justice, insure domestic Tranquility, . . . and secure the Blessings of Liberty to ourselves and our Posterity,’ prohibits the States from simply banning this visibly brutal means of eliminating our half-born posterity is quite simply absurd.”\textsuperscript{58}

\textit{Ohio v. Akron Center for Reproductive Health}.\textsuperscript{59} In this case, the Supreme Court upheld a parental notification statute for minors that included a judicial bypass procedure to parental consent. In his brief concurrence, Justice Scalia stated:

I continue to believe …that the Constitution contains no right to abortion. It is not to be found in the longstanding traditions of our society, nor can it be logically deduced from the text of the Constitution—not, that is, without volunteering a judicial answer to the nonjusticiable question of when human life begins. Leaving this matter to the political process is not only legally correct, it is pragmatically so. That alone—and not lawyerly dissection of federal judicial precedents—can produce compromises satisfying a sufficient mass of the

\textsuperscript{51}Id. at 979 (emphasis in original).
\textsuperscript{52}Id. at 980 (citation omitted).
\textsuperscript{53}530 U.S. 914 (2000).
\textsuperscript{54}323 U.S. 214 (1994). This case upheld Presidential Executive Order 9066, which ordered Japanese Americans into internment camps during World War II.
\textsuperscript{55}60 U.S. 393 (1857). This case held that African Americans were not American citizens and therefore could not sue in federal court.
\textsuperscript{56}530 U.S. at 953 (Scalia, J., dissenting).
\textsuperscript{57}Id. at 956 (emphasis in original).
\textsuperscript{58}Id. at 953.
electorate that this deeply felt issue will cease distorting the remainder of our democratic process. The Court should end its disruptive intrusion into this field as soon as possible.  

**Hodgson v. Minnesota**: In another parental notification case, the Court partially upheld and partially struck down a Minnesota law requiring two-parent consent followed by a 48-hour waiting period before minors could attain an abortion. Justice Scalia concurred in the judgment and dissented in part, writing:

> One will search in vain the document we are supposed to be construing for text that provides the basis for the argument over these distinctions; and will find in our society’s tradition regarding abortion no hint that the distinctions are constitutionally relevant, much less any indication how a constitutional argument about them ought to be resolved. The random and unpredictable results of our consequently unchanneled individual views make it increasingly evident, Term after Term, that the tools for this job are not to be found in the lawyer’s—and hence not in the judge’s—workbox. I continue to dissent from this enterprise of devising an Abortion Code, and from the illusion that we have authority to do so.

**Bray v. Alexandria Women’s Health Clinic**: Justice Scalia has also sided with abortion protestors over patients in cases involving access to reproductive health care facilities. He authored the majority opinion in *Bray*, finding that protestors blockading access to reproductive health care clinics did not violate federal civil rights law.

**Schenck v. Pro-Choice Network**: In a separate case on a similar issue, Justice Scalia wrote, “There is no right to be free from unwelcome speech on the public streets while seeking entrance to or exit from abortion clinics.”

### C. Justice Anthony Kennedy

Anthony Kennedy was appointed to the Supreme Court by President Ronald Reagan in 1987 and was confirmed in early 1988. Prior to serving on the Supreme Court, Kennedy was a judge on U.S. Court of Appeals for the Ninth Circuit, to which he was appointed by President Gerald Ford in 1975.

#### 1. Confirmation Hearings

During his confirmation hearings, Justice Kennedy discussed the liberty interest found in the 14th Amendment and the right to

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60 Id. at 520-21.  
62 Id. at 480.  
privacy. He said, “[T]here is a zone of liberty, a zone of protection, a line that is drawn where
the individual can tell the Government: Beyond this line you may not go.” Further, Senator
Dennis DeConcini referenced a speech Kennedy made at the Canadian Institute in 1986, saying,
“[I]t appears from reading your speech, that you have concluded, without question, that there is a
fundamental right to privacy. . . . That is your position, correct?” Justice Kennedy replied, “I
have indicated that is essentially correct. I prefer to think of the value of privacy as being
protected by the liberty clause; that is a semantic quibble, maybe it’s not.” Getting a bit more
specific, Senator Joseph Biden asked Kennedy whether he believed *Griswold v. Connecticut*
was reasoned properly. Without discussing the specifics of *Griswold*, Kennedy responded, “I
would say that if you were going to propose a statute or a hypothetical that infringed upon the
core values of privacy that the Constitution protects, you would be hard put to find a stronger
case than *Griswold,*” and then agreed with Senator Biden that there is a “marital right to
privacy.”

Kennedy also discussed the importance of impartiality and open-mindedness in a judge:

[T]he role of the judge is to approach the subject with an open mind, to listen to
the counsel, to look at the facts of the particular case, to see what the injury is, see
what the hurt is, to see what the claim is, and then to listen to his or her
colleagues, and then to research the law. What does the most recent precedent . . .
say? . . . *Stare decisis* ensures impartiality. It ensures that from case to case, from
judge to judge, from age to age, the law will have a stability the people can
understand and rely upon . . .

2. Supreme Court Record on Abortion

When it comes to his Supreme Court jurisprudence, Justice Kennedy may be best known for
serving as a co-author, along with Justices O’Connor and Souter, of the joint opinion in *Planned
Parenthood v. Casey*. However, Justice Kennedy also has authored dissenting and majority
opinions in opposition to abortion rights.

*Planned Parenthood v. Casey*: Because *Casey* was co-authored by three justices—O’Connor,
Souter, and Kennedy—it is unknown which words were written by which specific justice. In
that decision, the three authors of the joint opinion wrote that “the essential holding of *Roe v.
Wade* should be retained and once again reaffirmed”:

- “Liberty finds no refuge in a jurisprudence of doubt. . . . After considering the
fundamental constitutional questions resolved by *Roe*, principles of institutional integrity,

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65 Confirmation Hearing on the Nomination of Anthony Kennedy, to be an Associate Justice of the Supreme Court of
the United States: Hearing before the Committee on Judiciary, 100th Cong. 86 (1987).
66 Id. at 120-21.
67 381 U.S. 479 (1965). The Supreme Court in *Griswold* ruled that the Constitution protects a right to privacy, and
struck down a Connecticut law that prohibited the use of contraceptives based on the “right to marital privacy.” Id.
68 Confirmation Hearing on the Nomination of Anthony Kennedy, to be an Associate Justice of the Supreme Court of
the United States: Hearing before the Committee on Judiciary, 100th Cong. 1645-65 (1987).
69 Confirmation Hearing on the Nomination of Anthony Kennedy, to be an Associate Justice of the Supreme Court of
and the rule of *stare decisis*, we are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed. . . The woman’s right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce.”

- “It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.”

- “Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code. The underlying constitutional issue is whether the State can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter, except perhaps in those rare circumstances in which the pregnancy is itself a danger to her own life or health, or is the result of rape or incest.”

- “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. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”

The joint opinion did, however, express concerns about abortion, reject *Roe*’s trimester framework, and set forth an “undue burden” test for abortion regulation:

- “Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one’s beliefs, for the life or potential life that is aborted.”

- “Not all governmental intrusion is of necessity unwarranted; and that brings us to the other basic flaw in the trimester framework: even in *Roe*’s terms, in practice it undervalues the State’s interest in the potential life within the woman. *Roe v. Wade* was express in its recognition of the State’s ‘important and legitimate interests in preserving and protecting the health of the pregnant woman [and] in protecting the potentiality of human life.’ The trimester framework, however, does not fulfill *Roe*’s own promise that the State has an interest in protecting fetal life or potential life. *Roe* began the contradiction by using the trimester framework to forbid any regulation of abortion designed to advance that interest before viability. Before viability, *Roe* and subsequent cases treat all governmental attempts to influence a woman’s decision on behalf of the potential life within her as unwarranted. This treatment is, in our judgment, incompatible

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71 *Id.* at 844-46, 871.
72 *Id.* at 847.
73 *Id.* at 850-51.
74 *Id.* at 851.
75 *Id.* at 852.
with the recognition that there is a substantial state interest in potential life throughout pregnancy.”

- “A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman’s free choice, not hinder it . . . . Unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal. Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden.”

- “We reject the rigid trimester framework of Roe v. Wade. To promote the State’s profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman’s choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.”

Using this framework, the joint opinion upheld some abortion restrictions while striking down another:

- “Our prior decisions establish that as with any medical procedure, the State may require a woman to give her written informed consent to an abortion. . . . We also see no reason why the State may not require doctors to inform a woman seeking an abortion of the availability of materials relating to the consequences to the fetus, even when those consequences have no direct relation to her health.”

- In upholding the 24-hour waiting period requirement, the Court said that “the District Court found that for those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others, the 24-hour waiting period will be ‘particularly burdensome.’ . . . These findings are troubling in some respects, but they do not demonstrate that the waiting period constitutes an undue burden . . . . We also disagree with the District Court’s conclusion that the ‘particularly burdensome’ effects of the waiting period on some women require its invalidation.”

- “The spousal notification requirement . . . does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle. We must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases.”

- “The [undue burden] analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects. . . . The proper focus of

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76 Id. at 875-76.
77 Id. at 877-78.
78 Id. at 878.
79 505 U.S. at 881-83.
80 Id. at 886-87.
81 Id. at 893-94.
constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant."  

*Stenberg v. Carhart.* Justice Kennedy authored a strongly-worded dissent in *Stenberg*, in which the Supreme Court struck down Nebraska’s “partial birth” abortion ban, which did not include an exception to protect the health or life of the mother. In his dissent, he referred to physicians as “abortionists,” and wrote that *Casey* did not intend to require that a law protect the health of the mother. He wrote:

- “The majority views the procedures from the perspective of the abortionist, rather than from the perspective of a society shocked when confronted with a new method of ending human life.”
- “Demonstrating a further and basic misunderstanding of *Casey*, the Court holds the ban on the D&X procedure fails because it does not include an exception permitting an abortionist to perform a D&X whenever he believes it will best preserve the health of the woman. Casting aside the views of distinguished physicians and the statements of leading medical organizations, the Court awards each physician a veto power over the State’s judgment that the procedures should not be performed.”
- “The fetus, in many cases, dies just as a human adult or child would: It bleeds to death as it is torn from limb from limb.”
- In describing the procedure, Justice Kennedy wrote that the fetus must “be partially delivered . . . ‘before’ the abortionist kills it.”

*Gonzales v. Carhart.* Merely seven years following the decision in *Stenberg v. Carhart*, Justice Kennedy wrote the majority opinion overruling that case in *Gonzales v. Carhart*. The language in his majority opinion was similar to language from his previous dissent in *Stenberg*:

- Throughout the majority opinion, Justice Kennedy referred to physicians and OBGYN as “abortion doctors.”
- Justice Kennedy wrote that the Partial Birth Abortion Ban recognizes that “[r]espect for human life finds an ultimate expression in the bond of love the mother has for her child.”

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82 *Id.* at 894.
84 *Id.* at 957 (Kennedy, J., dissenting).
85 *Id.* at 964-65.
86 *Id.* at 958-59.
87 *Id.* at 975.
89 *Id.* at 138, 144, 154, 155, 161, 163.
90 *Id.* at 159.
Justice Kennedy used the assumption that women are uninformed about what their abortion entails and that they will regret having an abortion as reasons to allow the state to restrict abortion. He said:

While we find no reliable data to measure the phenomenon, it seems unexceptional to conclude some women come to regret their choice to abort the infant life they once created and sustained. . . . The State has an interest in insuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she did once not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.  

Justice Ruth Bader Ginsburg called the majority decision both “alarming” and noted that it “refuse[d] to take Casey and Stenberg seriously.”

*Hill v. Colorado:* Justice Kennedy dissented in *Hill,* which upheld a Colorado law establishing a protestor-free “buffer zone” in front of abortion clinics. He wrote:

- “For the first time, the Court approves a law which bars a private citizen from passing a message, in a peaceful manner and on a profound moral issue, to a fellow citizen on a public sidewalk. If from this time forward the Court repeats its grave errors of analysis, we shall have no longer the proud tradition of free and open discourse in a public forum.”
- “In addition to undermining established First Amendment principles, the Court’s decision conflicts with the essence of the joint opinion in *Planned Parenthood of Southeastern Pa.* v. *Casey . . . .”
- “The majority insists the statute aims to protect distraught women who are embarrassed, vexed, or harassed as they attempt to enter abortion clinics. If these are punishable acts, they should be prohibited in those terms. In the course of praising Colorado’s approach, the majority does not pause to tell us why, in its view, substantially less restrictive means

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91 *Id.* at 159-60.
92 *Id.* at 170 (Ginsburg, J., dissenting).
93 530 U.S. 703 (2000).
94 530 U.S. at 765 (Kennedy, J., dissenting).
95 *Id.*
cannot be employed to ensure citizens access to health care facilities or to prevent physical contact between citizens.”

- “Perhaps the leaflet will contain a picture of an unborn child, a picture the speaker thinks vital to the message. One of the arguments by the proponents of abortion, I had thought, was that a young woman might have been so uninformed that she did not know how to avoid pregnancy. The speakers in this case seek to ask the same uninformed woman, or indeed any woman who is considering an abortion, to understand and to contemplate the nature of the life she carries within her. To restrict the right of the speaker to hand her a leaflet, to hold a sign, or to speak quietly is for the Court to deny the neutrality that must be the first principle of the First Amendment. . . . It would be remiss, moreover, not to observe the profound difference a leaflet can have in a woman’s decisionmaking process.”

- “The means of expression at stake here are of controlling importance. Citizens desiring to impart messages to women considering abortions likely do not have resources to use the mainstream media for their message, much less resources to locate women contemplating the option of abortion. Lacking the aid of the government or the media, they seek to resort to the time honored method of leafleting and the display of signs. Nowhere is the speech more important than at the time and place where the act is about to occur.”

- “The Court now strikes at the heart of the reasoned, careful balance I had believed was the basis for the joint opinion in Casey. The vital principle of the opinion was that in defined instances the woman’s decision whether to abort her child was in its essence a moral one, a choice the State could not dictate. Foreclosed from using the machinery of government to ban abortions in early term, those who oppose it are remitted to debate the issue in its moral dimensions. In a cruel way, the Court today turns its back on that balance.”

- “The Court tears away from the protesters the guarantees of the First Amendment when they most need it. So committed is the Court to its course that it denies these protesters, in the face of what they consider to be one of life’s gravest moral crises, even the opportunity to try to offer a fellow citizen a little pamphlet, a handheld paper seeking to reach a higher law.”

The constitutionality of buffer zones is coming before the Supreme Court again in January 2014 in McCullen v. Coakley, which involves a Massachusetts law. The Court is explicitly being asked to consider limiting or overruling its decision in Hill.
D. Justice Clarence Thomas

Clarence Thomas was appointed to the Supreme Court in 1991 by President George H.W. Bush. Thomas previously was appointed by President George H.W. Bush to serve as Chairman of the Equal Employment Opportunity Commission until 1990, when Bush appointed him to the D.C. Circuit Court of Appeals, where Thomas served a brief 16 months before his nomination to the Supreme Court.

1. Confirmation Hearings

At his confirmation hearings, Thomas claimed to have devoted no thought and no discussion to Roe v. Wade during or since his law school days, even though, as Senator Patrick Leahy noted, the Supreme Court decided the case while Thomas was in law school. In a back-and-forth with Senator Leahy about whether the case was discussed in law school, Thomas said, “My schedule was such that I went to classes and generally went to work and went home.” Senator Leahy responded, “I am sure you are not suggesting that there wasn’t any discussion at the time of Roe v. Wade?” Thomas replied, “Senator, I cannot remember personally engaging in those discussions.”

Senator Leahy continued, “Have you ever had discussion of Roe v. Wade, other than in this room, in the 17 or 18 years it has been there?” Thomas responded, “Only, I guess, Senator, in the fact in the most general sense that other individuals express concerns one way or the other, and you listen and try to be thoughtful. . . . I have not made a decision one way or the other with respect to that important decision.”

Thomas did, however, say that he believed in a constitutional right to privacy. He stated, “My view is that there is a right to privacy in the 14th Amendment.” He told Senator Metzenbaum, “I believe the Constitution protects the right to privacy. And I have no reason or agenda to prejudge the issue or to predispose to rule one way or the other on the issue of abortion, which is a difficult issue.” He acknowledged—without commenting on his opinion of Roe—that the Supreme Court said in Roe that women have a fundamental interest in terminating a pregnancy:

Senator, I think that the Supreme Court has made clear that the issue of marital privacy is protected, that the State cannot infringe on that without a compelling interest, and the Supreme Court, of course, in the case of Roe v. Wade has found an interest in the woman’s right to—as a fundamental interest a woman’s right to terminate a pregnancy.

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103 Confirmation Hearing on the Nomination of Clarence Thomas, to be an Associate Justice of the Supreme Court of the United States: Hearing before the Committee on Judiciary, 102nd Cong. 222 (1991).
104 Id. at 222-23.
105 Id. at 127.
106 Id. at 180.
107 Id. at 127-28.
In addition to privacy rights under the 14th Amendment, Senator Leahy asked Thomas whether he “would have an open mind on Ninth Amendment cases,” referencing Justices Harlan’s and Goldberg’s views that the Ninth Amendment protects privacy rights in abortion-related cases, to which Thomas replied, “That’s right.”

Justice Thomas did express a personal—if not constitutional—view on abortion, referring to back-alley illegal abortions as torture. Senator Howard Metzenbaum brought up the subject, saying, “Prior to the Roe decision, only wealthy women could be sure of having access to safe abortions. Poor, middle-class women were forced to unsafe back alleys, if they needed an abortion, where coat-hangers are substitutes for surgical instruments.” Thomas responded,

As a kid we heard the hushed whispers about illegal abortions and individuals performing them in less than safe environments. If a woman is subjected to the agony of an environment like that, on a personal level, certainly, I am very, very pained by that. I think any of us would be. I would not want to see people subjected to torture of that nature. On the question that you asked me, as difficult as it is for me to anticipate or to want to see that kind of illegal activity, I think it would undermine my ability to sit in an impartial way on an important case like that.

2. Supreme Court Record on Abortion

Despite having claimed in his confirmation hearings that he never thought about Roe in law school, nor discussed the case in law school or since, Justice Thomas has expressed strong opposition to Roe while on the Supreme Court.

Stenberg v. Carhart. Justice Thomas dissented from the Supreme Court’s decision striking down a Nebraska law banning “partial birth” abortion. In his dissent, he called the Roe decision “grievously wrong,” and the undue burden standard established in Planned Parenthood v. Casey “as illegitimate as the Roe standard.” Specifically, he said:

- “In 1973, this Court struck down an Act of the Texas Legislature that had been in effect since 1857, thereby rendering unconstitutional abortion statutes in dozens of States. As some of my colleagues on the Court, past and present, ably demonstrated, that decision was grievously wrong.”
- “Nothing in our Federal Constitution deprives the people of this country of the right to determine whether the consequences of abortion to the fetus and to society outweigh the burden of an unwanted pregnancy on the mother. Although a State may permit abortion, nothing in the Constitution dictates that a State must do so.”
- “The Casey joint opinion was constructed by its authors out of whole cloth. The standard set forth in the Casey plurality has no historical or doctrinal pedigree. The standard is a product of its authors’ own philosophical views about abortion, and it

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108 Id. at 225.
109 Id. at 181.
111 Id. at 980 (Thomas, J., dissenting).
112 Id. at 980 (emphasis in original).
should go without saying that it has no origins in or relationship to the Constitution and is, consequently, as illegitimate as the [Roe] standard . . .”

- “Today’s decision is so obviously irreconcilable with Casey’s explication of what its undue-burden standard requires, let alone the Constitution, that it should be seen for what it is, a reinstatement of the pre-Webster abortion-on-demand era in which the mere invocation of ‘abortion rights’ trumps any contrary societal interest. If this statute is unconstitutional under Casey, then Casey meant nothing at all, and the Court should candidly admit it.”

- “[T]he Court’s abortion jurisprudence is a particularly virulent strain of constitutional exegesis. And so today we are told that 30 States are prohibited from banning one rarely used form of abortion that they believe to border on infanticide. It is clear that the Constitution does not compel this result.”

Gonzales v. Carhart: In the Supreme Court opinion that upheld the federal Partial-Birth Abortion Ban Act, Justice Thomas issued a brief concurring opinion. He wrote, “I write separately to reiterate my view that the Court’s abortion jurisprudence, including Casey and Roe v. Wade, has no basis in the Constitution.”

E. Justice Ruth Bader Ginsburg

Ruth Bader Ginsburg was appointed to the Supreme Court by President Bill Clinton in 1993. Prior to her nomination, she served on the U.S. Court of Appeals for the D.C. Circuit, to which she was appointed by President Jimmy Carter in 1980. Ginsburg previously was the director of the Women’s Rights Project of the American Civil Liberties Union, having co-founded the Project in 1972. During her time there, she argued six landmark cases on gender equality before the Supreme Court.

1. Prior Writings on Abortion and Roe

In a law review article she wrote in 1985, Ginsburg argued that the Supreme Court should have grounded Roe v. Wade in equality reasoning, and argued that, had the Court invalidated the Texas statute criminalizing abortion on those grounds rather than

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113 Id. at 982.
114 Id. at 983.
115 Id. at 1020.
117 Id. at 169 (Thomas, J., concurring).
adopting the trimester analysis, it may not have prompted such social opposition:

- “I earlier observed that, in my judgment, *Roe* ventured too far in the change it ordered. The sweep and detail of the opinion stimulated the mobilization of a right-to-life movement and an attendant reaction in Congress and state legislatures. In place of the trend ‘toward liberalization of abortion statutes’ noted in *Roe*, legislatures adopted measures aimed at minimizing the impact of the 1973 rulings, including notification and consent requirements, prescriptions for the protection of fetal life, and bans on public expenditures for poor women’s abortions.”

- “If *Roe* had left off at that point [of invalidating the Texas law] and not adopted what Professor Freund called a ‘medical approach,’ . . . the legislative trend might have continued in the direction in which it was headed in the early 1970s,” and the “animus” against the Court might have been “‘diverted to the legislative halls.’ . . . I believe the Court presented an incomplete justification for its action. Academic criticism of *Roe*, charging the Court with reading its own values into the due process clause, might have been less pointed had the Court placed the woman alone, rather than the woman tied to her physician, at the center of its attention.”

- “I do not pretend that, if the Court had added a distinct sex discrimination theme to its medically oriented opinion, the storm *Roe* generated would have been less furious. I appreciate the intense divisions of opinion on the moral question and recognize that abortion today cannot fairly be described as nothing more than birth control delayed. The conflict, however, is not simply one between a fetus’ interests and a woman’s interests, narrowly conceived, nor is the overriding issue state versus private control of a woman’s body for a span of nine months. Also in the balance is a woman’s autonomous charge of her full life’s course—as Professor Karst put it, her ability to stand in relation to man, society, and the state as an independent, self-sustaining, equal citizen.”

- “*Roe*, I believe, would have been more acceptable as a judicial decision if it had not gone beyond a ruling on the extreme statute before the Court. The political process was moving in the early 1970s, not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict.”

In a later law review article, Ginsburg continued her discussion on *Roe*, and how *Casey* reflected a different view of women than *Roe* did:

- “In the 1992 *Planned Parenthood* [v. *Casey*] decision, the three controlling Justices accepted as constitutional several restrictions on access to abortion that could not have survived strict adherence to *Roe*. While those Justices did not closely consider the plight of women without means to overcome the restrictions, they added an important strand to the Court’s opinions on abortion—they acknowledged the intimate connection between a woman’s ‘ability to control her reproductive life’ and her ‘ability . . . to participate

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119 Id. at 381-82.
120 Id. at 383.
121 Id. at 385-86.
equally in the economic and social life of the Nation.’ The idea of the woman in control of her destiny and her place in society was less prominent in the Roe decision itself, which coupled with the rights of the pregnant woman the free exercise of her physician’s medical judgment. The Roe decision might have been less of a storm center had it . . . homed in more precisely on the women’s equality dimension of the issue . . . .”

- “The seven to two judgment in Roe v. Wade declared ‘violative of the Due Process Clause of the Fourteenth Amendment’ a Texas criminal abortion statute that intolerably shackled a woman’s autonomy; the Texas law ‘excepted from criminality only a life-saving procedure on behalf of the pregnant woman.’ Suppose the Court had stopped there, rightly declaring unconstitutional the most extreme brand of law in the nation, and had not gone on, as the Court did in Roe, to fashion a regime blanketing the subject, a set of rules that displaced virtually every state law then in force. Would there have been the twenty-year controversy we have witnessed, reflected most recently in the Supreme Court's splintered decision in Planned Parenthood v. Casey? A less encompassing Roe, one that merely struck down the extreme Texas law and went no further on that day, I believe . . . might have served to reduce rather than to fuel controversy.”

Ginsburg expressed her view repeatedly that Roe should have dealt more specifically with the issue of women’s equality. In other words, she has said, “The emphasis must not be on the right to abortion, but on the right to privacy and reproductive control.”

2. Confirmation Hearings

Throughout her confirmation hearings, Ginsburg spoke directly about her thoughts on Roe v. Wade and abortion, often in response to questions from senators regarding her previous writings. Many of the questions and her answers focused on an equal protection argument for abortion rights.

Regarding Ginsburg’s statements on the reach of Roe:

- Senator Howard Metzenbaum asked Ginsburg, “I am puzzled by your often repeated criticisms that Roe went too far and too fast. . . . You have also stated that Roe curtailed a trend toward liberalization of State abortion statutes. . . . I . . . would question whether women really were making real progress towards obtaining reproductive freedom, when Roe was decided. Would you be willing to explain your basis for making those statements?” Ginsburg responded, “The statement you made about the law moving in a reform direction is taken directly from Justice Blackmun’s decision in Roe itself. He explained that, until recently, the law in the States had been overwhelmingly like the Texas law, but that there had been a trend in the direction of reform. . . . I took that

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123 Id. at 1199 (1992).
124 See supra note, 114, at 1199.
statement not from any source other than the very opinion, which I surely do not criticize for making that point. I accept it just as it was made in *Roe v. Wade.*”\(^{126}\)

- “My view is that if *Roe* had been less sweeping, people would have accepted it more readily, would have expressed themselves in the political arena in an enduring way on this question. I recognize that this is a matter of speculation.”\(^{127}\)

Ginsburg also addressed questions during her confirmation hearing regarding her views on including an equal protection rationale for the right to choose.

- “It is essential to woman’s equality with man that she be the decisionmaker, that her choice be controlling. If you impose restraints that impede her choice, you are disadvantaging her because of her sex.”\(^{128}\)

- Abortion prohibition by the State, however, controls women and denies them full autonomy and full equality with men. . . . The two strands—equality and autonomy—both figure in the full portrayal.”\(^{129}\)

- Regarding equal protection and privacy, “I never made it an either/or choice. That has been said in some accounts of my lectures. It is incorrect. I have always said both, that the equal protection strand should join together with the autonomy of decisionmaking strand, so that it wasn't a matter of equal protection or personal autonomy, it was both.”\(^{130}\)

- “The decision whether or not to bear a child is central to a woman’s life, to her well-being and dignity. It is a decision she must make for herself. When Government controls that decision for her, she is being treated as less than a fully adult human responsible for her own choices.”\(^{131}\)

In discussing how she draws a relationship between the right to choose and the Equal Protection Clause, Ginsburg told the senators of a story that she said helped her develop her own thoughts on the issue. She said:

> [I]t has never in my mind been an either/or choice, never one rather than the other; it has been both. I will try to explain how my own thinking developed on this issue. It relates to a case involving a woman’s choice for birth rather than the

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\(^{126}\) *Confirmation Hearing on the Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States: Hearing before the Committee on Judiciary, 103rd Cong. 148-49* (1993).

\(^{127}\) *Id.* at 148-49.

\(^{128}\) *Id.* at 207.

\(^{129}\) *Id.* at 207.

\(^{130}\) *Id.* at 208.

\(^{131}\) *Id.* at 243.
termination of her pregnancy. It is one of the briefs that you have. It is the case of Captain Susan Struck v. Secretary of Defense (1972). This was Capt. Susan Struck’s story.

She became pregnant while she was serving in the Air Force in Vietnam. . . . She was told she could have an abortion at the base hospital . . . . Capt. Susan Struck said, I do not want an abortion. I want to bear this child. It is part of my religious faith that I do so. However, I will use only my accumulated leave time for the childbirth. I will surrender the child for adoption at birth. I want to remain in the Air Force. That is my career choice. She was told that that was not an option open to her if she wished to remain in the Air Force. . . .

In that case, all three strands were involved: her equality right, her right to decide for herself whether she was going to bear the child, and her religious belief. So it was never an either/or matter, one rather than the other. It was always recognition that one thing that conspicuously distinguishes women from men is that only women become pregnant; and if you subject a woman to disadvantageous treatment on the basis of her pregnant status, which was what was happening to Captain Struck, you would be denying her equal treatment under the law. . . .

The Struck brief, which involved a woman’s choice for birth, marks the time when I first thought long and hard about this question. At no time did I regard it as an either/or, one pocket or the other, issue. But I did think about it, first and foremost, as differential treatment of the woman, based on her sex. “

Ginsburg’s nomination in 1993 right on the heels of the Supreme Court’s 1992 decision in Planned Parenthood v. Casey. Ginsburg spent some time during her confirmation hearing responding to questions regarding the meaning and impact of Casey:

- Regarding whether Casey stands for the proposition that the right to choose is a fundamental constitutional right, Ginsburg responded by quoting a piece of the Casey decision that cited Roe, and said, “The Court has once again said that abortion is part of the concept of privacy or liberty under the 14th Amendment. . . . The Roe decision is a highly medically-oriented decision, not just in the three-trimester division. Roe features, along with the right of the woman, the right of the doctor to freely exercise his profession. . . . The Casey decision, at least the opinion of three of the Justices in that case, makes it very clear that the woman is central to this. She is now standing alone. This is her right. It is not her right in combination with her consulting physician. The cases essentially pose the question: Who decides; is it the State or the individual? In Roe, the answer comes out: the individual, in consultation with her physician. We see in the physician something of a big brother figure next to the woman. The most recent decision, whatever else might be said about it, acknowledge that the woman decides. “

- Senator Hank Brown asked Ginsburg about whether, with regard to the equal protection argument, a father would also have a right to choose or have some related rights.

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132 Id. at 205-06.
133 Id. at 149-50.
Ginsburg responded, “That was an issue left open in *Roe v. Wade*. But . . . it was put to rest in *Casey*. In that recent decision . . . the Court struck down one [regulation] requiring notice to the husband. The *Casey* majority understood that marriage and family life is not always all we might wish them to be. There are women whose physical safety, even their lives, would be endangered, if the law required them to notify their partner. And *Casey*, which in other respects has been greeted in some quarters with great distress, answered a significant question, one left open in *Roe; Casey* held a State could not require notification to the husband.”

- “The *Casey* decision recognizes that it is her body, her life, and men, to that extent, are not similarly situated. They don’t bear the child.”
- “The Supreme Court’s precedent is that access to abortion is part of the liberty guaranteed by the 14th Amendment.”

### 3. Supreme Court Record on Abortion

**Gonzales v. Carhart:** In a strong dissent that Justice Ginsburg read from the bench, she wrote:

- “Today’s decision is alarming. It refuses to take *Casey* and *Stenberg* seriously. It tolerates, indeed applauds, federal intervention to ban nationwide a procedure found necessary and proper in certain cases by the American College of Obstetricians and Gynecologists (ACOG). It blurs the line, firmly drawn in *Casey*, between previability and postviability abortions. And, for the first time since *Roe*, the Court blesses a prohibition with no exception safeguarding a woman's health.”
- The right to abortion protects “a woman’s autonomy to determine her life’s course, and thus to enjoy equal citizenship stature.”
- “Revealing in this regard, the Court invokes an antiabortion shibboleth for which it concededly has no reliable evidence: Women who have abortions come to regret their choices, and consequently suffer from ‘[s]evere depression and loss of esteem.’ Because of women’s fragile emotional state and because of the ‘bond of love the mother has for her child,’ the Court worries, doctors may withhold information about the nature of the intact D&E procedure. The solution the Court approves, then, is not to require doctors to inform women, accurately and adequately, of the different procedures and their attendant risks. Instead, the Court deprives women of the right to make an autonomous choice, even at the expense of their safety. This way of thinking reflects ancient notions about women’s place in the family and under the Constitution—ideas that have long since been discredited.”
- “The Court’s hostility to the right *Roe* and *Casey* secured is not concealed. Throughout, the opinion refers to obstetrician-gynecologists and surgeons who perform abortions not by the titles of their medical specialties, but by the pejorative label ‘abortion doctor.’

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134 *Id.* at 207.
135 *Id.*
136 *Id.* at 269.
138 *Id.* at 170-71 (Ginsburg, J., dissenting).
139 *Id.* at 172.
140 *Id.* at 183-85.
fetus is described as an ‘unborn child,’ and as a ‘baby’; second-trimester, previability abortions are referred to as ‘late-term’; and the reasoned medical judgments of highly trained doctors are dismissed as ‘preferences’ motivated by ‘mere convenience.’ Instead of the heightened scrutiny we have previously applied, the Court determines that a ‘rational’ ground is enough to uphold the Act. And, most troubling, Casey’s principles, confirming the continuing vitality of ‘the essential holding of Roe,’ are merely ‘assume[d]’ for the moment, rather than ‘retained’ or ‘reaffirmed.’”

Stenberg v. Carhart: Justice Ginsburg joined in the majority and wrote a concurrence in this case, striking down a Nebraska law banning “partial birth” abortion.

- “I write separately only to stress that amidst all the emotional uproar caused by an abortion case, we should not lose sight of the character of Nebraska’s ‘partial birth abortion’ law. As the Court observes, this law does not save any fetus from destruction, for it targets only ‘a method of performing abortion.’ Nor does the statute seek to protect the lives or health of pregnant women. Moreover, as Justice Stevens points out [in his concurring opinion] the most common method of performing previability second trimester abortions is no less distressing or susceptible to gruesome description.”
- “A state regulation that ‘has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus’ violates the Constitution. Such an obstacle exists if the State stops a woman from choosing the procedure her doctor ‘reasonably believes will best protect the woman in [the] exercise of [her] constitutional liberty.’ [A]s stated by Chief Judge Posner [of the Seventh Circuit], ‘if a statute burdens constitutional rights and all that can be said on its behalf is that it is the vehicle that legislators have chosen for expressing their hostility to those rights, the burden is undue.”
- “[T]he law prohibits the procedure because the state legislators seek to chip away at the private choice shielded by Roe v. Wade, even as modified by Planned Parenthood v. Casey.”

Hill v. Colorado, Schenck v. Pro-Choice Network of Western New York, Madsen v. Women’s Health Center: In these three cases, Justice Ginsburg joined with the Court in supporting buffer zones around abortion clinics.

Mazurek v. Armstrong: Justice Ginsburg joined in Justice Stevens’ dissent, arguing that the Court should have struck down the Montana “physician only” law that did not allow “licensed

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141 Id. at 186-87.
142 530 U.S. 914 (2000).
143 Id. at 951 (Ginsburg, J., concurring).
144 Id. at 952.
145 Id.
146 530 U.S. 703, 705 (2000).
147 519 U.S. 357, 360 (1997).
physician assistants working under the supervision of a doctor to perform abortions.”¹⁵¹ She
joined language that said that the majority of the Court “concludes that the record is barren of
evidence of any improper motive. . . . [T]his is not quite accurate; there is substantial evidence
indicating that the sole purpose of the statute was to target a particular licensed professional.
The statute removed the only physician assistant in the State who could perform abortions, yet
there was no evidence that her practice posed any greater health risks than those performed by
doctors with the assistance of unlicensed personnel. When one looks at the totality of
circumstances surrounding the legislation, there is evidence from which one could conclude that
the legislature’s predominant motive was to make abortions more difficult.”¹⁵²

F. Justice Stephen Breyer
Stephen Breyer was appointed to the Supreme Court by
President Bill Clinton in 1994. Prior to serving on the Court,
Breyer was nominated to the U.S. Court of Appeals for the
First Circuit by President Jimmy Carter in 1980. Breyer
served as the court’s Chief Judge from 1990-1994.

1. Confirmation Hearings

During his confirmation hearings, Breyer was clear that he
viewed Roe as the law of the land, saying, “[T]he case of Roe
v. Wade has been the law for 21 years or more, and it was
recently affirmed by the Supreme Court of the United States
in the case of Casey. That is the law.”¹⁵³

Breyer also spoke directly about his views on where the Constitution guarantees a right of
privacy. At one point he was asked, “From where do you see the right to privacy emerging” in
the Constitution. He said:

Basically, I think that word “liberty” in the 14th Amendment has been recognized
by most—almost all—modern judges on the Supreme Court, and is pretty widely
accepted, that that word “liberty” includes a number of basic, important things
that are not those only listed in the first eight amendments to the Constitution.

And the Ninth Amendment helps make that very clear, because it says do not use
that fact of the first eight to reason to the conclusion that there are no others. So it
is not surprising to me that there is widespread recognition that that word
“liberty” does encompass something on the order of privacy. People have
described those basic rights not mentioned in words like “concept of ordered

¹⁵¹ NARAL Pro-Choice America Foundation, Justice Ruth Bader Ginsburg (March 2010), available at
¹⁵² 520 U.S. at 979-80 (Stevens, J., dissenting).
¹⁵³ Confirmation Hearing on the Nomination of Stephen G. Breyer, to be Associate Justice of the Supreme Court of
the United States: Hearing before the Committee on Judiciary, 103rd Cong. 138 (1994).
liberty,” that which the traditions of our people realize or recognize as fundamental, and in looking to try to decide what is the content of that, I think judges have started with text, and after all, in amendments to the Constitution, there are words that suggest that in different contexts, privacy was important. They go back to the history; they look at what the Framers intended; they look at traditions over time; they look at how those traditions have worked out as history has changed, and they are careful, they are careful, because eventually, 20 or 30 years from now, other people will look back at the interpretations that this generation writes if they are judges, and they will say: Were they right to say that that ought permanently to have been the law?

If the answer to that question is yes, then the judges of today were right in finding that that was a basic value that the Framers of the Constitution intended to have enshrined. That is a kind of test of objectivity. But the source I think is the 14th Amendment and that word “liberty.”

Justice Breyer also discussed his judicial philosophy and view on *stare decisis* and precedent:

- At a general level, he said, “My view is that *stare decisis* is very important to the law. Obviously, you can’t have a legal system that doesn’t operate with a lot of weight given to *stare decisis*, because people build their lives, they build their lives on what they believe to be the law. And insofar as you begin to start overturning things, you upset the lives of men, women, children, people all over the country. So be careful, because people can adjust, and even when something is wrong, they can adjust to it. And once they have adjusted, be careful of fooling with their expectation.”

- In speaking more specifically, he said, “[I]t seems to me that there are identifiable factors that are pretty well established. If you, as a judge, are thinking of overturning or voting to overturn a preexisting case, what you do is ask a number of fairly specific questions. How wrong do you think that prior precedent really was as a matter of law, that is, how badly reasoned was it? You ask yourself how the law has changed since, all the adjacent laws, all the adjacent rules and regulations, does it no longer fit. You ask yourself how have the facts changed, has the world changed in very important ways. You ask yourself, insofar, irrespective of how wrong that prior decision was as a matter of reasoning, how has it worked out in practice, has it proved impossible or very difficult to administer, has it really confused matters. Finally, you look to the degree of reliance that people have had in their ordinary lives on that previous precedent. Those are the kinds of questions you ask. I think you ask those questions in relation to statutes. I think you ask those questions in relation to the Constitution. The real difference between the two areas is that Congress can correct a constitutional court, if it is a statutory question, but it can’t make a correction, if it is a constitutional matter. So be pretty careful.”

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154 Id. 268-69.
155 Id. at 291.
156 Id. 291.
2. Supreme Court Record on Abortion

Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott: Justice Breyer authored an opinion dissenting from the Supreme Court’s denial of application to vacate the Fifth Circuit’s stay of Texas’s omnibus abortion bill. In that case, the district court struck down a provision of an omnibus abortion bill—HB 2—that required physicians performing abortion to obtain admitting privileges at a hospital within 30 miles of their practice. The district court further enjoined that provision from going into effect. The Fifth Circuit then granted the state’s request to stay the injunction pending resolution of the appeal, thereby allowing the admitting privileges requirement to go into effect immediately. Petitioners then appealed to the Supreme Court to vacate the Fifth Circuit’s stay and reinstate the district court’s injunction at least through the normal appeals process. The Supreme Court denied their appeal. Justice Breyer wrote in dissent:

- “As a practical matter, the Fifth Circuit’s decision to stay the injunction meant that abortion clinics in Texas whose physicians do not have admitting privileges at a hospital within 30 miles of the clinic were forced to cease offering abortions. And it means that women who were planning to receive abortions at those clinics were forced to go elsewhere—in some cases 100 miles or more—to obtain a safe abortion, or else not to obtain one at all. . . . Under the status quo that existed in Texas prior to the enactment of the admitting privileges requirement, women across the State of Texas who needed abortions had a certain level of access to clinics that would provide them. . . . The Fifth Circuit’s stay seriously disrupts that status quo.”

- “Applicants assert that 20,000 women in Texas will be left without service. While the State denies this assertion, it provides no assurance that a significant number of women seeking abortions will not be affected, and the District Court unquestionably found that ‘there will be abortion clinics that will close.’ The longer a given facility remains closed, the less likely it is ever to reopen even if the admitting privileges requirement is ultimately held unconstitutional.”

- “[T]he balance of harms tilts in favor of applicants. If the law is valid, then the District Court’s injunction harms the State by delaying for a few months a change to the longstanding status quo. If the law is invalid, the injunction properly prevented the potential for serious physical or other harm to many women whose exercise of their constitutional right to obtain an abortion would be unduly burdened by the law. And although the injunction will ultimately be reinstated if the law is indeed invalid, the harms to the individual women whose rights it restricts while it remains in effect will be permanent.”

Stenberg v. Carhart: Breyer authored the majority opinion in Stenberg, which struck down a Nebraska ban on “partial birth” abortion. He wrote:

- “Taking account of these virtually irreconcilable points of view, aware that constitutional law must govern a society whose different members sincerely hold directly opposing

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158 Id. at **9-10 (Breyer, J., dissenting).
159 Id. at **10.
160 Id. at **11.
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.162

- “[B]efore ‘viability the woman has a right to choose to terminate her pregnancy.’”163
- “‘[A] law designed to further the State’s interest in fetal life which imposes an undue burden on the woman's decision before fetal viability’ is unconstitutional.” 164
- “[S]ubsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.”165

- “Casey recognize[d] that a State cannot subject women’s health to significant risks both in that context, and also where state regulations force women to use riskier methods of abortion. Our cases have repeatedly invalidated statutes that in the process of regulating the methods of abortion, imposed significant health risks. They make clear that a risk to a women’s health is the same whether it happens to arise from regulating a particular method of abortion, or from barring abortion entirely.”166

- “In sum, using this law some present prosecutors and future Attorneys General may choose to pursue physicians who use D&E procedures, the most commonly used method for performing previability second trimester abortions. All those who perform abortion procedures using that method must fear prosecution, conviction, and imprisonment. The result is an undue burden upon a woman’s right to make an abortion decision. We must consequently find the statute unconstitutional.”167

Mazurek v. Armstrong:168 Justice Breyer joined in Justice Stevens’ dissent, arguing that the Court should have struck down the Montana “physician only” law that did not allow “licensed physician assistants working under the supervision of a doctor to perform abortions.”169 He joined language that said that the majority of the Court “concludes that the record is barren of evidence of any improper motive. . . . [T]his is not quite accurate; there is substantial evidence

162 Id. at 920-21.
163 Id. at 921 (quoting Casey, 505 U.S. at 870).
164 Id. at 921 (quoting Casey, 505 U.S. at 877).
165 Id. at 921 (quoting Casey, 505 U.S. at 879).
167 Id. at 945-46 (2000).
indicating that the sole purpose of the statute was to target a particular licensed professional. The statute removed the only physician assistant in the State who could perform abortions, yet there was no evidence that her practice posed any greater health risks than those performed by doctors with the assistance of unlicensed personnel. When one looks at the totality of circumstances surrounding the legislation, there is evidence from which one could conclude that the legislature’s predominant motive was to make abortions more difficult.”

_Hill v. Colorado_,171 _Schenck v. Pro-Choice Network of Western New York_:172 In these two cases, Justice Breyer joined with the Court in supporting buffer zones around clinics.173

_Gonzales v. Carhart_:174 Justice Breyer joined Justice Ginsburg’s dissent in this case, agreeing that the majority’s decision is “alarming” and “refuses to take _Casey_ and _Stenberg_ seriously. It tolerates, indeed applauds, federal intervention to ban nationwide a procedure found necessary and proper in certain cases by the American College of Obstetricians and Gynecologists (ACOG). It blurs the line, firmly drawn in _Casey_, between previability and postviability abortions. And, for the first time since _Roe_, the Court blesses a prohibition with no exception safeguarding a woman’s health.”175

G. **Justice Samuel Alito**

Justice Samuel Alito was appointed to the Supreme Court by President George W. Bush in 2005 to fill the seat vacated by Justice Sandra Day O’Connor, and was confirmed in early 2006.

Before being appointed to the Supreme Court, Alito served as a judge on the U.S. Court of Appeals for the Third Circuit—appointed by President George H.W. Bush in 1990—and as a lawyer in the Justice Department during the Reagan Administration.

1. **The Reagan Administration**

Alito’s writings on abortion during his time in the Reagan Administration led newspapers to publish pieces with titles like, “Alito Helped Craft Reagan-Era Move to Restrict ‘Roe,’”176 and “Alito File Shows Strategy to Curb Abortion Ruling.”177 Specifically, he:

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170 520 U.S. at 979-80 (Stevens, J., dissenting).
172 519 U.S. 357, 360 (1997).
175 _id._ at 170-71 (Ginsburg, J., dissenting).
• Advocated a legal strategy to “advance the goals of bringing about the eventual overruling of Roe v. Wade, and, in the meantime, of mitigating its effect.”¹⁷⁸

• “Eagerly volunteered” to contribute to a government brief that called for overturning Roe.¹⁷⁹

• Acknowledged that “no one seriously believes that the Court is about to overrule Roe v. Wade,” while then writing, regarding the Court’s decision to grant two cases involving state restrictions on abortion, “But the Court’s decision to review these cases [including Thornburgh v. American College of Obstetricians and Gynecologists¹⁸¹] nevertheless may be a positive sign. . . . [B]y taking these cases, the Court may be signaling an inclination to cut back. What can be made of this opportunity to advance the goals of bringing about the eventual overruling of Roe v. Wade and, in the meantime, of mitigating its effects?”¹⁸²

• Called on the Justice Department to take advantage of the “opportunity” the abortion cases presented by:

fil[ing] a brief as amicus curiae supporting the appellants in both cases. In the course of the brief, we should make clear that we disagree with Roe v. Wade and would welcome the opportunity to brief the issue of whether, and if so to what extent, that decision should be overruled. Then, without great formal discussion of levels of scrutiny or degrees of state interest, we should demonstrate that many of the provisions struck down by the Third and Seventh Circuits are eminently reasonable and legitimate and would be upheld without a moment’s hesitation in other contexts.¹⁸³

• Remarked on a job application, “[I]t has been an honor and source of personal satisfaction for me . . . to help advance legal positions in which I personally believe very strongly. I am particularly proud of my contributions to recent cases in which the government has argued in the Supreme Court that . . . the Constitution does not protect a right to an abortion.”¹⁸⁴


¹⁸¹ 476 U.S. 747 (1986). Thornburgh involved the constitutionality of a Pennsylvania law that erected a variety of abortion-related restrictions.


¹⁸³ Id.

¹⁸⁴ Memorandum from Mark Sullivan, Associate Director, Presidential Personnel, to Mark Levin, Associate Deputy Attorney General, re: Samuel A. Alito, Jr., Deputy Assistant Attorney General, SES I (Dec. 12, 1985) (on file with Alliance for Justice).
During his time as a judge on the Third Circuit, Alito advocated positions adverse to women’s reproductive rights in two significant cases.

*Planned Parenthood v. Casey:* While Alito sat as a judge on the Third Circuit, the court heard arguments in *Planned Parenthood v. Casey* before it went up to the Supreme Court. The case challenged a Pennsylvania statute that included a variety of new restrictions on a woman’s right to choose abortion. Although the Third Circuit found most of the statute’s restrictions to be constitutional, then-Judge Alito dissented from the Court’s decision to strike down one provision: spousal notification. Judge Alito advocated for a “rational basis standard” for review of abortion-related laws, and expressed his belief that the spousal notification provision would restrict a small subset of all women seeking abortion and therefore would neither impose “severe limitations” on, nor “substantially limit access” to abortion. When Alito tried to distance himself from past statements on abortion, the *New York Times* said Judge Alito’s rather stark record obligates the Senate, as the *New York Times* put it, “to look through the cloud of explanations and excuses and examine where Judge Alito really stands on abortion rights.”

*Planned Parenthood v. Farmer.* Nine years after the *Casey* decision, the Third Circuit addressed New Jersey’s statute banning late-term abortions. In *Farmer,* the majority affirmed the district court’s finding that the statute, which did not include a health exception and covered certain routine earlier term abortions, was unconstitutionally vague and created an “undue burden” on a woman’s right to choose. The court’s conclusion was consistent with that of virtually every other circuit court reviewing similar statutes. Judge Alito, however, refused to join in the panel opinion, instead filing a terse, one-page concurrence urging that the case be decided on a narrow basis. In his concurrence, Judge Alito argued that the Supreme Court’s decision in *Stenberg v. Carhart,* decided while *Farmer* was pending, compelled affirmance of the lower court’s decision. *Stenberg* held that a similar statute—which also did not contain an exception to preserve the health of the pregnant woman and potentially covered common second-term abortions—was unconstitutional. Because the New Jersey statute suffered from the same deficiencies, Judge Alito concluded that it must be struck down, but asserted that everything else in the majority opinion was “never necessary and is now obsolete.” Judge Alito’s refusal to join the panel’s opinion in *Farmer* suggests that he never agreed with it and that, barring the Supreme Court’s intervening ruling in *Stenberg,* he was poised to rule the other way.

### 3. Supreme Court Confirmation Hearings

During his confirmation hearings to be Justice of the United States Supreme Court, Alito often answered senators’ questions by referring the importance of precedent and *stare decisis,* but distanced himself from Chief Justice John Roberts’ statements on abortion by refusing to call


*Roe v. Wade* “settled law” as the Chief Justice had. Nonetheless, he attempted to emphasize his philosophy of following precedent:

- “I think the doctrine of *stare decisis* is a very important doctrine. It’s a fundamental part of our legal system. And it’s the principle that courts in general should follow their past precedents. And it’s important for a variety of reasons. It’s important because it limits the power of the judiciary. It’s important because it protects reliance interests. And it’s important because it reflects the view that courts should respect the judgments and the wisdom that are embodied in prior judicial decisions. It’s not an exorable command, but it is a general presumption that courts are going to follow prior precedents.”¹⁹¹

- “[I]n every case in which there is a prior precedent, the first issues is the issue of *stare decisis*, and the presumption is that the Court will follow its prior precedents. There needs to be a special justification for overruling a prior precedent.”¹⁹²

Senators attempted to understand Justice Alito’s views on abortion and his respect for the Supreme Court precedents on abortion, particularly *Roe v. Wade* and *Planned Parenthood v. Casey*:

- Senator Arlen Specter quoted a part of the *Planned Parenthood v. Casey* decision to Alito that said there would be “a terrible price” to pay for overruling *Casey* or *Roe*, and that doing so “would subvert the Court’s legitimacy.” Senator Specter then asked Alito, “Do you see the legitimacy of the Court being involved in the precedent of *Casey,*” to which Alito replied, “Well, I think that the court and all the courts—the Supreme Court, my court, all of the federal courts—should be insulated from public opinion. They should do what the law requires in all instances.”¹⁹³

- Senator Specter also asked Judge Alito whether he agreed that *Casey* represents a “super-precedent” that created a foundation for the Court to not revisit the principles of *Roe*. Alito responded, “Well, I personally would not get into any categorizing precedents as super-precedents or super-duper precedents . . . . Any sort of categorization like that sort of reminds me of the size of the laundry detergent in the supermarket.”¹⁹⁴

- Senator Dianne Feinstein asked Alito, “[Y]ou did say that you believe the Constitution provides a right of privacy?” Alito replied, “I did say that. The 14th Amendment protects liberty. The Fifth Amendment protects liberty. And I think it’s well accepted that this has a substantive component and that that component includes aspects of privacy that have constitutional protection.”¹⁹⁵

- Senator Feinstein, turning to “one of the core principles of *Roe* that a woman’s health must be protected,” asked Alito whether he agrees that “if a statute restricts access to abortion that it must protect the health of the mother in order for it to be constitutional?” Alito replied, “Well, I think that the case law is very clear that protecting the life and the health of the mother is a compelling interest throughout pregnancy. I think that’s very clear in the case law.”¹⁹⁶

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¹⁹¹ Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing before the Committee on Judiciary, 109th Cong. 318-19 (2006).

¹⁹² *Id.* at 319.

¹⁹³ *Id.* at 319.

¹⁹⁴ *Id.* at 321.

¹⁹⁵ *Id.* at 400.

¹⁹⁶ *Id.* at 401.
Senator Richard Durbin asked Judge Alito, “John Roberts said that *Roe v. Wade* is the settled law of the land. Do you believe it is the settled law of the land?” Alito replied, “*Roe v. Wade* is an important precedent of the Supreme Court.”

Senators also asked Alito about his prior writings on abortion, looking for explanation or clarification. Alito attempted to distance himself from his prior statements, often arguing that the role of an advocate is different from the role of a judge:

- Senator Specter addressed Alito’s 1985 statement that the “Constitution does not provide a basis for a woman’s right to an abortion.” Judge Alito replied that he would have an open mind on the Supreme Court, saying, “Well, that was a correct statement of what I thought in 1985 from my vantage point in 1985, and that was as a line attorney in the Department of Justice in the Reagan Administration. Today, if the issue were to come before me . . . the first question would be . . . the issue of *stare decisis*. And if the analysis were to get beyond that point, then I would approach the question with an open mind and I would listen to the arguments that were made.”

- Senator Specter again addressed Alito’s past writings: “Well, Judge Alito, coming to the role you had in the solicitor general’s office where you wrote the memorandum in the *Thornburgh* case urging restriction and ultimate appeal of *Roe*, that was in your capacity as an advocate. And I have seen your other statements that the role of an advocate is different from the role of a judge. But when you made the statement that the Constitution did not provide for the right to an abortion, that was in a statement you made where you were looking to get a job, a promotion, within the federal government. So there’s a little difference between the 1985 statement and your advocacy role in the Thornburgh memorandum, isn’t there?” Alito replied, “Well, there is, Senator. And what I said was that that was a true expression of my views at the time, the statement in the 1985 appointment form that I filled out. It was a statement that I made at a time when I was a line attorney in the Department of Justice. I’m not saying that I made the statement simply because I was advocating the administration’s position. But that was the position that I held at the time. And that was the position of the administration.”

- Senator Feinstein discussed Judge Alito’s dissent in *Planned Parenthood v. Casey* when it was heard at the Third Circuit. She asked, “In *Casey*, you wrote about the harms caused by spousal notification to the practical effect of a law will not amount to an undue burden unless the effect is greater than the burden imposed on minors. Just to go back to that, is this what you meant?” Alito replied, “Well Senator, I don’t—I did not equate the situation of a married woman with the situation of a minor.” Senator Feinstein responded, “I mean, you keep saying that, but I keep going back to the words and it seems they seem to say that.” Alito responded, “Well, I think if you look at the words, I actually said that I don’t equate these two situations. I was mindful of the fact that they are very different situations. But often the law proceeds on the basis—legal reasoning is based on analogy. And so if you take a situation that’s quite different and yet has some

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197 *Id.* at 454-55.
198 *Id.* at 322.
199 *Id.* at 322.
relationship to a situation that comes up later, you can draw some analogies while still recognizing that the two situations are very different.”

4. Record on Abortion at the Supreme Court

Justice Samuel Alito voted with a 5-4 majority to uphold the Partial-Birth Abortion Ban Act of 2003 in *Gonzales v. Carhart.* Alito signed onto a decision that upheld—for the first time at the level of the Supreme Court—a ban on a kind of abortion procedure that did not include an exception for the health of the woman. Justice Alito cast this vote notwithstanding his statement to Senator Feinstein at this confirmation hearing that “the case law is very clear that protecting the life and the health of the mother is a compelling interest throughout pregnancy.” Justice Ruth Bader Ginsburg called the majority decision in *Carhart* both “alarming” and noted that it “refuse[d] to take *Casey* and *Stenberg* seriously.”

H. Justice Sonia Sotomayor

Sonia Sotomayor was appointed to the Supreme Court by President Barack Obama in 2009. Justice Sotomayor is the third woman on the Court and the first Latina. Prior to her Supreme Court nomination Sotomayor sat on the U.S. Court of Appeals for the Second Circuit, to which she was appointed by President Bill Clinton in 1997, as well as the US District Court for the Southern District of New York, to which she was appointed by President George H.W. Bush in 1991.

1. Second Circuit

While serving as a lower court judge, Sotomayor never ruled on a case directly implicating a woman’s right to choose, but there are four cases that tangentially touch on the subject.

*Center for Reproductive Law & Policy v. Bush.* In this case, Judge Sotomayor authored an opinion rejecting the claims of a public interest organization challenging the “Mexico City Policy” (also known as the “global gag rule”), which prohibited foreign nongovernmental organizations receiving United States funding from performing or advocating abortion services as a method of family planning abroad. With respect to the First Amendment issue, Judge Sotomayor followed the decision in an earlier and nearly identical Second Circuit decision and rejected the claim. Turning to claims that were not addressed in the earlier case, Judge Sotomayor held that the plaintiff organization lacked standing with respect to their due process claim, but had standing to bring an equal protection claim. On the merits of the equal protection

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200 *Id.* at 401-02.
202 See supra note 183, at 401.
203 550 U.S. at 170 (Ginsburg, J., dissenting).
204 304 F.3d 183 (2d Cir. 2002).
claim, she held that it failed because “the government is free to favor the anti-abortion position over the pro-choice position, and can do so with public funds.”

*Port Washington Teachers’ Association v. Board of Education:* Judge Sotomayor joined an opinion dismissing a case brought by teachers for lack of standing to challenge a school district policy instructing school staff that if they learned that a student was pregnant they should inform the student’s parents if the student was not willing to tell her parents herself.

*Amnesty America v. Town of West Hartford:* Judge Sotomayor wrote an opinion in this case reversing a district court’s grant of summary judgment for defendants in a case brought by anti-abortion protesters claiming town police used excessive force during a protest. Judge Sotomayor sent the case back to the district court, holding that the case should be heard by a jury to make the determination of whether the police officers “gratuitously inflicted pain in a manner that was not a reasonable response to the circumstances” and whether the town was liable for failing to properly supervise its officers.

*Lin v. U.S. Dep’t of Justice:* In this immigration case, the Second Circuit upheld a Board of Immigration Appeals (BIA) decision denying asylum for three refugees who allegedly suffered persecution when their non-spouse partners suffered involuntary abortions and sterilizations by Chinese authorities. The BIA’s decision was based on an interpretation of statutory language giving per se refugee status to an asylum applicant and her spouse where she had been subject to involuntary abortion or sterilization. In upholding the BIA’s decision denying per se asylum to non-spouse partners, the Second Circuit went further and held that per se asylum status should not be granted to spouses either. In *Lin*, Judge Sotomayor concurred with the en banc opinion to the extent it rejected the claims of non-spouse partners, but disagreed with the majority with respect to the claims for spouses.

2. **Confirmation Hearings**

Sotomayor’s confirmation hearings included discussion of *stare decisis* and the importance of precedent, along with direct discussion of abortion and reproductive rights. In a telling conversation with Senator Dianne Feinstein, Sotomayor outlined her view of *stare decisis* and when cases can or should be overturned. Senator Feinstein asked Sotomayor her thoughts on how a precedent should be overruled, whether it is okay to do so quietly and indirectly, or whether it is important to do so “outright and in a way that is clear to everyone.” Sotomayor had a lengthy response:

> The doctrine of *stare decisis*, which means stand by a decision—stand by a prior decision, has a basic premise and that basic premise is that there is a value in society to predictability, consistency, fairness, evenhandedness in the law. And the society has an important expectation that judges won't change the law based on personal whim or not, but that they will be guided by a humility they should show in the thinking of prior judges who have considered weighty questions and

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205 478 F.3d 494 (2d Cir. 2007).
206 361 F.3d 113 (2d Cir. 2004).
207 494 F.3d 296 (2d Cir. 2007).
determined, as best as they could, given the tools they’ve had at the time, to establish precedent.

There are circumstances in which a court should reevaluate precedent and perhaps change its direction or perhaps reject it, but that should be done very, very cautiously. And I keep emphasizing the “very” because the presumption is in favor of deference to precedent. The question then becomes, what are the factors you use to change it? And then courts have looked at a variety of different factors, applying each in a balance and determining where that balance falls at a particular moment.

It is important to recognize, however, that the development of the law is step by step, case by case, and there are some situations in which there is a principled way to distinguish precedent from application to a new situation. No, I do not believe a judge should act in an unprincipled way, but I recognize that both the doctrine of stare decisis starts from a presumption that deference should be given to precedence and that the development of the law is case by case. It’s always a very fine balance.\textsuperscript{208}

Senator Orrin Hatch also asked Sotomayor about precedent and settled law. He asked her, “If the holding in the Supreme Court means that it’s settled, do you believe that Gonzales v. Carhart, upholding the “partial birth” abortion ban, is settled law?” Sotomayor responded, “All precedent of the Supreme Court I consider settled law, subject to the deference the doctrine of stare decisis would counsel.”\textsuperscript{209} She also said in response to questions from other Senators:

- “The history of a particular holding of the Court and how the court has dealt with it in subsequent cases would be among one of the factors as many that a court would likely consider. Each situation, however, is considered in a variety of different viewpoints and arguments and—but most importantly, factors of the court applies to this question of should precedence be altered in a way.”\textsuperscript{210}
- “Casey itself applied, or by opinion offered by Justice Souter, talked about the factors that a court thinks about in—whether to change precedent. And among them were issues of whether or not or how much reliance society has . . . placed in the prior precedents? What are the costs that would be occasioned by changing it? Was the rule workable or not? Have the—either factual or doctrinal basis of the prior precedent altered, either from developments in related areas of law or not, to counsel a re-examination of the question.”\textsuperscript{211}

During her confirmation hearings, Sotomayor answered several questions from Senators regarding privacy, as it relates to reproductive rights:

\textsuperscript{208} Confirmation Hearing on the Nomination of Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States: Hearing before the Committee on Judiciary, 111th Cong. 96 (2009).
\textsuperscript{209} Id. at 85.
\textsuperscript{210} Id. at 376.
\textsuperscript{211} Id. at 376-77 .
Senator Kohl asked Sotomayor whether she agreed that *Griswold v. Connecticut*212 “guarantees there is a fundamental constitutional right to privacy as it applies to contraception,” and whether she considers it to be “settled law.” Sotomayor responded, “That is the precedent of the Court, so it is settled law.”213 He later asked her whether she considered *Roe v. Wade* to be settled law. She responded, “The Court’s decision in *Planned Parenthood v. Casey* reaffirmed the core holding of *Roe*. That is the precedent of the Court and settled in terms of the holding of the Court.”214

Sotomayor also made clear that she believed in a constitutional right to privacy generally, particularly as applied to 4th Amendment search-and-seizure cases, and 14th Amendment due process cases, saying, “There is a right of privacy. The Court has found it in various places in the Constitution, has recognized rights under those various provisions of the Constitution. It’s founded in the Fourth Amendment’s right and prohibition against unreasonable search and seizures. Most commonly, it’s considered—I shouldn’t say most commonly, because search-and-seizure cases are quite frequent before the court—but it’s also found in the Fourteenth Amendment of the Constitution, when it is considered in the context of the liberty interests protected by the due process clause of the Constitution.”215

Senator Benjamin Cardin asked Sotomayor how she saw “privacy challenges being confronted in the 21st century” in the Constitution and the courts. She replied,

> The right to privacy has been recognized, as you know, in a wide variety of circumstances for more than probably 90 years now, close to 100. That is a part of the Court’s precedents. In applying the immutable principles of the Constitution, the liberty provision of the due process clause and recognizing that that provides a right to privacy in a variety of different settings, you’ve mentioned that line of cases, and there are many others in which the court has recognized that as a right.

> In terms of the coming century, it’s guided by those cases, because those cases provide the court's precedents and framework—and with other cases—to look at how we will consider a new challenge to a new law or to a new situation.

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212 381 U.S. 479 (1965).
213 Confirmation Hearing on the Nomination of Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States, at 82.
214 Id.
215 Id.
That’s what precedents do. They provide a framework. The Constitution remains the same; society changes. The situations that bring before courts change, but the principles are in— are the words of the Constitution, guided by how precedent gives or has applied those principles to each situation, and then you take that and you look at the new situation.216

Sotomayor also discussed the importance of specific precedents in the area of reproductive rights. Regarding the precedent of protecting women’s health in abortion restrictions, Senator Feinstein asked Sotomayor, “The Supreme Court has decided on more than seven occasions that the law cannot put a woman’s health at risk. . . . [In 2007, in Carhart II [referencing Gonzales v. Carhart] the Court essentially removed this basic constitutional right from women. . . . When there are multiple precedents and a question arises, are all the previous decisions discarded, or should the Court reexamine all the cases on point?” Sotomayor responded:

It’s somewhat difficult for me to answer that question . . . because before the Court in any one case is this particular factual situation. And so how the Court’s precedents apply to that unique factual situation—because often what comes before the Court is something that’s different than its prior decision—not always, but often.

In the Carhart case, the Court looked to its precedents. And as I understood that case, it was deciding a different question, which was whether there were other means—safer means, and equally effective means—for a woman to exercise her right than the procedure at issue in that case. That was, I don’t believe, a rejection of its prior precedents. Its prior precedents are still the precedents of the court. The health and welfare of a woman must be—must be a compelling consideration. . . . [The health of the woman] has been a part of the Court’s jurisprudence and a part of its precedents. Those precedents must be given deference in any situation that arises before the Court.217

Senator Tom Coburn entered into a discussion with Sotomayor about the role of technology and whether or what kind of bearing it has on Roe and its progeny. Sotomayor responded to the initial question by saying, “The law has answered a different question. It has talked about the constitutional right of women. . . . As I indicated, the issue becomes one of what is the state regulation in any particular circumstance.” She continued, saying that she could not answer the question of whether technology advances should have any bearing on how judges look at the law “in the abstract because the question as it would come before me wouldn’t be in the way that you form it as a citizen. It would come to me as a judge in the context of some action that someone is taking, whether if it is the state, the state, if it is a private citizen being controlled by the state challenging that action.” Senator Coburn pushed further, asking “All I’m asking is whether it should. Should viability, should technology at any time be considered as we discuss these very delicate issues that have such an impact on so many people. Your answer is that you can’t answer it.” Sotomayor responded:

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216 Id. at 340.
217 Id. at 95-96.
I can’t because that’s not a question that the Court reaches out to answer. That is a question that gets created by a state regulation of some sort or an action by the state that may or may not according to some claimant, place an undue burden on her. We don’t make policy choices in the court. We look at the case before us with the interests that are argued by the parties, look at our precedent and try to apply its principles to the arguments parties are raising. . . . All state action is looked at within the context of what the state is attempting to do and what liabilities it is imposing.\textsuperscript{218}

3. \textit{Supreme Court Record on Abortion}

There have been very few cases concerning abortion that have come to the Supreme Court since Justice Sotomayor was sworn in.

\textit{Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott:}\textsuperscript{219} Justice Sotomayor signed onto Justice Breyer’s dissent from denial of application to vacate the Fifth Circuit’s stay of Texas’s omnibus abortion bill. Justice Sotomayor signed onto Justice Breyer’s dissent from the Court’s denial.\textsuperscript{220}

\textit{Hobby Lobby Stores Inc. v. Sebelius:}\textsuperscript{221} In 2012, Hobby Lobby Stores challenged the provision of the Affordable Care Act that required profit-making employers with more than 50 employees to cover birth control in their health insurance policies. Hobby Lobby applied to Justice Sotomayor as Circuit Justice for the Tenth Circuit for an injunction pending appellate review after a denial by the Tenth Circuit. Justice Sotomayor rejected the application, finding that “whatever the ultimate merits of the claims, the employers’ entitlement to relief” was not “‘indisputably clear’ as required for the U.S. Supreme Court to issue an injunction.”\textsuperscript{222} In December 2013, the Supreme Court granted certiorari to hear this case in its 2013-2014 term.

\textit{Little Sisters of the Poor Home for the Aged v. Sebelius:}\textsuperscript{223} As Circuit Justice for the Tenth Circuit, in December 2013 Justice Sotomayor issued a temporary order delaying implementation of one aspect of the Affordable Care Act’s (ACA) birth control coverage requirement as it applies to the Little Sisters nursing home, which is a religious organization. Even though the ACA already exempts religious organizations from its coverage requirement, those organizations must fill out and file a form so that whatever entity manages its health insurance can provide for those services, without charge, to the organization’s female employees. Although the government argues that this process puts a gap between the religious organization and access to birth control for its employees, Little Sisters argues that signing and filing the form itself is a violation of its religious freedom, since it is the first step towards inevitably covering

\textsuperscript{218} \textit{Id.} at 343-44.
\textsuperscript{220} \textit{Id.} at **9-10.
\textsuperscript{221} 133 S. Ct. 641 (U.S. 2012).
\textsuperscript{222} \textit{Id.} at 643.
\textsuperscript{223} 2013 U.S. Lexis 9151 (2013).
contraception.\textsuperscript{224} Justice Sotomayor’s order temporarily bars enforcement of the duty to sign and file the form. The government has filed a brief opposing further delay and asking for immediate review by the Supreme Court; Little Sisters filed a reply brief. Justice Sotomayor may act alone, or refer the case to the full Court. As of January 7, 2014, no further action has yet occurred.

\section{Justice Elena Kagan}

Elena Kagan was appointed to the Supreme Court in 2010 by President Barack Obama. She is the fourth woman ever to serve on the Supreme Court, and her addition to the Court marked the first time that three women sat together on the Supreme Court. Prior to her Supreme Court nomination, Kagan served as the United States Solicitor General, and before that as Dean of Harvard Law School. During the Clinton Administration, Kagan spent four years in various roles in the White House. She began her legal career as a law clerk, first for D.C. Circuit Judge Abner Mikva, and then for Justice Thurgood Marshall.

\subsection{Clerkship for Justice Marshall}

As a clerk for Justice Thurgood Marshall, Kagan wrote that it was “ludicrous” to suggest that the Eight Amendment protects incarcerated women’s ability to access medically necessary abortions.\textsuperscript{225}

\subsection{Clinton Administration}

In 1996, Congress passed a “partial birth” abortion ban, prohibiting certain kinds of abortion techniques used in second- and third-trimester abortions; President Clinton vetoed the bill because it lacked an exception where necessary to preserve the health of the woman. Kagan appears to have been significantly involved in advising the President of the legal issues and political calculations involved in the legislative developments as the bill was drafted and amended in 1995 and 1996. Whether offering her own legal analysis or drafting press statements, talking points, or statements by the President, Kagan tended to be cautious about accurately reflecting the medical facts about and circumstances of the procedures under consideration. Nowhere in the files does she clearly express a personal view about “partial birth” abortion; she was evidently motivated by her sense of duty to protect the President’s chosen position on the issue and to advocate for the smoothest and least controversial agenda. Kagan and her colleagues claimed that limiting pre-viability “partial birth” abortions to certain medically necessary circumstances met Roe’s requirements.\textsuperscript{226}

\begin{itemize}
\item \textsuperscript{225} Memorandum from Elena Kagan to Justice Marshall re: Lanzaro v. Monmouth County Correctional Institutional Inmates, 87-1431 (Apr. 26, 1988).
\item \textsuperscript{226} Memorandum from Elena Kagan to Jack Quinn & Kathy Wallman (Apr. 2, 1996), William J. Clinton Presidential Library & Museum, DPC, Box C69, Folder 008, 61-62.
\end{itemize}
Kagan and her colleagues also disagreed with the Office of Legal Counsel (OLC) about the scope of the health exception that Clinton insisted Congress include in any bill. As she wrote in an April 1996 memo regarding a contested sentence in a proposed presidential statement, “The sentence says that the Constitution requires that women be protected from serious health threats. It does. Of course, under OLC’s view, the Constitution also requires that women be protected from non-serious health threats. But we say nothing to the contrary. On OLC’s view, the sentence may be underinclusive, but it is not inaccurate. If this is cutting the baloney too fine, we can (1) tell OLC we just don’t care, or (2) change the sentence to make OLC happy. . . . I vote for option (1) because I think we should talk about both the Constitution and serious health threats[.]”

The following year, anti-abortion members of Congress reintroduced “partial birth” abortion legislation. Kagan was highly engaged with pro-choice Democratic Senators’ attempts to amend the bill to contain a life and health exception that would meet President Clinton’s requirements for signing a bill. In May 1997, Kagan and a colleague sent a memo to the President explaining an amendment proposed by Senator Tom Daschle (D-SD), an amendment proposed by Senator Dianne Feinstein (D-CA), and the Senators’ respective attempts to cure the constitutional defects of the original bill.

Both amendments changed the criminal penalties to civil penalties, applied only to post-viability abortion, and applied to all abortion procedures, not just “partial birth.” The Feinstein Amendment essentially captured the language for which President Clinton had been advocating: it would exempt an abortion deemed medically necessary to avert serious health consequences to the woman. Kagan described the Daschle Amendment as “more stringent,” exempting an abortion only when it posed a risk of “grievous injury.” Kagan noted in her memo that the OLC concluded that both the Daschle and Feinstein Amendments, “properly read, violate Roe because they countenance tradeoffs involving women’s health.”

Kagan also reported that the choice groups “somewhat reluctantly” supported the Feinstein language but opposed the Daschle amendment because its health exception was limited to physical harm and undermined Roe’s comprehensive protections regarding the health of the woman. Other memos in Kagan’s file notified her that Senator Boxer’s (D-CA) staff was “outraged” and suggested the need to do “[d]amage control” with women’s groups over the issue.

Nevertheless, Kagan and Reed recommended that President Clinton write a letter to Congress indicating his willingness to support either the Feinstein or the Daschle Amendment. Ultimately, both amendments failed. The bill passed in October 1997, without an adequate health exception, and President Clinton vetoed it.

The issue of whether the Hyde Amendment—an amendment passed by Congress in 1977 banning Medicaid coverage of abortion—prohibited Medicare coverage of abortions arose in

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227 Id.
228 Memorandum from Elena Kagan & Bruce Reed to President William Clinton (May 13, 1997), William J. Clinton Presidential Library & Museum, White House Office of Records Management [hereinafter WHORM], Box 004, Folder 008, 4.
229 Id.
230 E-mail from Tracey Thornton to Elena Kagan et. al. (May 12, 1997), William J. Clinton Presidential Library & Museum, DPC, Box 001, Folder 005, 30.
231 In 2003, Congress passed a similar ban, which President Bush signed into law. In a 2007 ruling, Gonzales v. Carhart, 550 U.S. 124 (2007), the Supreme Court upheld the ban, reversing a 2000 precedent and for the first time upholding the constitutionality of an abortion regulation that did not include a health exception.
1998, and Kagan weighed in on recommendations to the President as to which course to take on the question. In 1991, the Health Care Finance Administration (HCFA, the Medicare funding division of HHS) had issued a directive tracking the Hyde Amendment, in effect at the time, stating that Medicare would cover abortions only where the woman’s life was endangered. Congress later expanded the Hyde Amendment to exempt cases of rape or incest, but HCFA did not change its directive. A June 1998 memo to President Clinton stated that all of the President’s advisors, including Kagan, recommended broadening the 1991 HCFA directive to permit Medicare funding of abortions in cases of rape or incest.232 However, HHS urged the President to support a broader new rule allowing Medicare to cover abortions necessary to protect a woman’s health. The memo stated that Clinton’s advisors understood that failing to advocate HHS’s preferred position “may expose us to criticism about non-coverage of extremely sympathetic cases involving vulnerable and disabled women” and “will anger women’s groups, which would prefer us to provide Medicare coverage of the widest possible range of abortions, even if doing so would provoke the Republicans to enact contrary legislation.”233 Nevertheless, Kagan and her colleagues concluded that limiting the directive to cases of rape or incest was the option most likely to “avoid a legislative showdown on abortion funding that we are unlikely to win.”234

3. Solicitor General’s Office

Despite several thousand documents concerning reproductive rights from Kagan’s time in the Solicitor General’s office under the Clinton Administration, there is little that reflects her personal views on abortion. However, her confirmation hearings to serve in that role are telling. During her Solicitor General confirmation process, Kagan expressed a strong commitment to the role played by *stare decisis* in reproductive rights policy. In written answers to questions posed by Senator Chuck Grassley, Kagan wrote, “[u]nder prevailing law, the Due Process Clause of the Fourteenth Amendment protects a woman’s right to terminate a pregnancy, subject to various permissible forms of state regulation. As Solicitor General, I would owe respect to this law, as I would to general principles of *stare decisis*.“235

4. Confirmation Hearings

There was little discussion of abortion during Kagan’s confirmation hearing to the Supreme Court. Senator Feinstein—in referencing both the Supreme Court’s 2007 decision in *Gonzales v. Carhart* upholding the federal partial-birth abortion ban without an exception protecting a woman’s health, and a memo that Kagan authored in 1997 advising President Clinton to support an amendment to the partial-birth abortion ban that would ensure that the health of the mother be protected—asked, “Do you believe the Constitution requires that the health of the mother be

232 Memorandum from Sean Maloney to President Clinton, (Jun. 16, 1998), William J. Clinton Presidential Library & Museum, DPC, Box 001, Folder 016, 11-15.
233 Memorandum from Elena Kagan & Bruce Reed to President Clinton (May 13, 1997), William J. Clinton Presidential Library & Museum, DPC, Box 001, Folder 005, 6.
234 Id.
protected in any statute restricting access to abortion?” Kagan responded, “I do think that the continuing holding of Roe . . . is that women’s life and women’s health have to be protected within—in abortion regulation. . . . I think that the continuing holdings of the Court are that the woman’s life and that the woman’s health must be protected in any abortion regulation.”236 In discussing her views on viability, Kagan stated:

• “As I understand the law after Casey, it’s that, after viability, the state can regulate as it pleases, except for situations where the woman’s life or health interests are at issue. Before viability, the question is whether there is an undue burden on the woman’s ability to have an abortion.”237

• When Senator Lindsey Graham asked Kagan whether she thought it was “fair for the Court to consider scientific changes in—when a fetus becomes viable as medical science evolves,” Kagan responded, “I do think that in every area it is fair to consider scientific changes. We’ve—I’ve—I’ve talked in the past about how different forms of technology influence the evolution of the Court’s Fourth Amendment jurisprudence.”238

There was more discussion regarding Kagan’s judicial philosophy and views on stare decisis. Almost every senator who questioned Kagan spent time asking her about the judicial philosophy she would bring to the Court. In her opening statement, she framed her view of the Court’s role in terms of modesty: “[T]he Supreme Court is a wondrous institution. But the time I spent in the other branches of government remind me that it must also be a modest one—properly deferential to the decisions of the American people and their elected representatives.”239 Kagan expressed her views on the relevance of framers’ intent and the role of judges:

• “The Constitution is a document that does not change, that is timeless, and timeless in the principles that it embodies. But it, of course, is applied to new situations, to new facts, to new circumstances all the time. And in that process of being applied to new facts and new circumstances and new situations, development of our constitutional law does indeed occur.”240

• While she recognized the significance of the framers’ intent, Kagan also acknowledged that “in [some] cases, the original intent is unlikely to solve the question. And that might be because the original intent is unknowable or it might be because we live in a world that is very different from the world in which the framers lived. . . .”241

• Kagan declined to adopt Chief Justice Roberts’ judge-umpire analogy: “Judging is not a robotic or automatic enterprise, especially on the cases that get to the Supreme Court. A lot of them are very difficult. And people can disagree about how the constitutional text

236 Confirmation Hearing on the Nomination of Elena Kagan, to be an Associate Justice of the Supreme Court of the United States: Hearing before the Committee on Judiciary, 112th Cong. (2010).
237 Id.
238 Id.
239 Id.
240 Id.
241 Id.
or precedent, how they apply to a case. But it’s the law all the way down, regardless.” She did, however, agree that judges and umpires should both be impartial and free from bias, and that judges, like umpires, should realize that they are not the most important people in our democratic system of government.242

Kagan also explained what she believes to be the factors involved in overturning *stare decisis*. Acknowledging that “*stare decisis* is at its height when statutes are concerned,” Kagan said that the factors in overturning a settled issue of statutory construction would be:

[T]he workability of the precedent, if the precedent has just proved unworkable in the sense that courts struggle to apply the test and come up with widely differing results and it produces a kind of erraticism and instability in the law. . . . Another [factor] is if the precedent has been eroded over time, and that might be because it’s eroded by other doctrinal change. Let’s say one precedent is relied on, on three cases, and then two of those cases have been reversed themselves, so the precedent is standing on nothing in the way of doctrine. That is an important consideration. Still a third is if the facts change such that a precedent becomes sort of silly. And the best example I can give you of that is the search and seizure context. There used to be a rule that said something was only a search if there was an actual trespass on physical property. And then a case came along . . . which involved surveillance issues. And the Court said, well, wait a minute, why should we require a physical trespass on property?243

5. **Supreme Court Record on Abortion**

There has not been an opportunity for Justice Kagan to write an opinion in or vote on any Supreme Court cases involving abortion since she was confirmed to the Court in 2010.

*Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott:*244 Justice Kagan signed onto Justice Breyer’s dissent from denial of application to vacate the Fifth Circuit’s stay of Texas’s omnibus abortion bill. The Supreme Court denied their appeal. Justice Kagan signed onto Justice Breyer’s dissent from the Court’s denial.245

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242 Id.
243 Id.
245 2013 U.S. Lexis 8415 at **9-10.