

How the Supreme Court Talks About Abortion: The Implications of a Shifting Discourse*

Linda Greenhouse**

I.

It was late in November of 1972. *Roe v. Wade*¹ had been under consideration at the Supreme Court for a year,² with release of the opinion now less than two months away.³ Justice Lewis F. Powell, Jr., one of Justice Harry A. Blackmun's most steadfast allies throughout the decisional process, received a memo from one of his law clerks critiquing Blackmun's most recent draft.⁴

"HAB has placed considerable emphasis on the role of the physician and the free exercise of his professional judgment," the law clerk, Larry A. Hammond, wrote.⁵ Hammond continued:

Indeed, on page 49, he states, "The abortion decision inherently is a medical one, and the responsibility for that decision must rest with the physician." Doesn't it seem that this language overstates the doctor's role and undercuts the woman's personal interest in the decision? All medical decisions are the product of an agreement between patient and doctor. I see no reason, therefore, not to add a clause to this sentence indicating that the abortion decision must rest "with the physician *and his patient*."⁶

The law clerk urged Powell to take the matter up with Blackmun. If Powell ever did, the documentation is lacking. Any effort Powell might have made to persuade the author of *Roe v. Wade* to take account of the woman's role in the

* This article is based upon a speech Ms. Greenhouse delivered on April 10, 2008 as part of the Donahue Lecture Series. The Donahue Lecture Series is a program instituted by the *Suffolk University Law Review* to commemorate the Honorable Frank J. Donahue, former faculty member, trustee, and treasurer of Suffolk University. The Lecture Series serves as a tribute to Judge Donahue's accomplishments in encouraging academic excellence at Suffolk University Law School. Each lecture is designed to address contemporary legal issues and expose the legal community to outstanding authorities in various fields of law.

** Linda Greenhouse is the Knight Distinguished Journalist-in-Residence and Joseph M. Goldstein Senior Fellow in Law at Yale Law School. From 1978-2008, the author was the *New York Times* Supreme Court Correspondent.

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

2. The case was argued twice, first on December 13, 1971, and again on October 11, 1972.

3. The Court delivered *Roe v. Wade* on January 22, 1973.

4. Memorandum from Larry A. Hammond to Justice Lewis F. Powell, Jr., Supreme Court of the U.S. (Nov. 27, 1972) (on file with Lewis F. Powell, Jr., Collection, Box 5, Washington & Lee University Law School Library).

5. *Id.*

6. *Id.*

abortion decision was in any event unavailing.

Blackmun's language in the published opinion, issued on January 22, 1973, remained exactly as it had been in the draft:

The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician.⁷

Thirty-five years later, these words, which comprise the heart of the summary paragraph near the end of the Court's fifty-page opinion, sound oddly discordant. After all, isn't it obvious that women, not their doctors, are the central actors in the human drama of pregnancy and reproductive decision-making? The experience of an unintended pregnancy is widely shared among women, one that half of all American women will have faced by the age of forty-five.⁸ By that age, one-third of American women will have had an abortion, making abortion one of the most common of all medical procedures, performed 1.3 million times a year in the United States and terminating twenty-two percent of all pregnancies.⁹ To modern ears, regardless of one's opinion about the acceptability of abortion, *Roe's* paternalistic assumption that doctors (always male, evidently) know what is best for their female patients sounds archaic. Those who expound upon *Roe* without ever having read it, and they are many, might be surprised to find that the decision is much more a doctor's bill of rights than it is a feminist manifesto.

Fast forward to April 18, 2007, when the Court issued its decision in *Gonzales v. Carhart*,¹⁰ upholding a federal law called the Partial-Birth Abortion Ban Act of 2003.¹¹ Justice Kennedy, writing for the five-to-four majority, described this law as "a federal statute regulating abortion procedures."¹² But as its placement in Title 18 of the United States Code indicates, this is not a regulatory but a criminal law, subjecting doctors to two years in prison and a fine of \$250,000 for performing an abortion by the prohibited means,¹³ known to the medical profession not by the politically-charged term "partial-birth

7. *Roe v. Wade*, 410 U.S. 113, 165-66 (1973).

8. See Alexi A. Wright, M.D. & Ingrid T. Katz, M.D., M.H.S., *Roe versus Reality—Abortion and Women's Health*, 355 NEW ENG. J. MED. 1, 1-2 (2006).

9. See ALAN GUTTMACHER INST., FACTS ON INDUCED ABORTION IN THE UNITED STATES (2008), http://www.guttmacher.org/pubs/fb_induced_abortion.html (last visited Sept. 15, 2008); *Wright & Katz, supra note 8* at 1-9; see also Rachel K. Jones et al., *Abortion in the United States: Incidence and Access to Services, 2005*, 40 PERSPS. ON SEXUAL AND REPROD. HEALTH 6, 9-10 (2008) (detailing recent abortion-trend statistics by state and region).

10. 127 S. Ct. 1610 (2007).

11. 18 U.S.C. § 1531 (2007).

12. *Carhart*, 127 S. Ct. at 1619.

13. 18 U.S.C. § 1531(a)-(b)(1)(B).

abortion” but as either dilation and extraction (D & X) or intact dilation and evacuation (intact D & E).

In *Carhart*, women are once again without intellectual or moral capacity, little more than putty in the hands of their doctors. With respect to women, it is as if two decades of post-*Roe* discourse have been erased, decades during which the Court by fits and starts constructed a unified jurisprudence of women’s rights and abortion rights. Beginning with the *Thornburgh* decision in 1986,¹⁴ and reaching a peak in *Planned Parenthood v. Casey* in 1992,¹⁵ the Court gradually came to place women at the center of decision-making about their own reproductive lives, and to understand freedom of reproductive decision-making as central to women’s equality.¹⁶

This is where matters stood in April 2007. But with the decision in *Carhart*, women were suddenly whisked out of the world of *Casey*, the world in which Justice Kennedy and the others in the majority had confidently declared that “[t]he ability of women to participate equally in the economic and social life of the nation has been facilitated by their ability to control their reproductive lives,”¹⁷ and dumped back into the world of Myra Bradwell, deemed by the nineteenth-century Court to be unsuited, by virtue of her sex, “for many of the occupations of civil life,” including that of attorney, because “[t]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother.”¹⁸

Indeed, Justice Kennedy instructs us in *Carhart*, albeit without citing Myra Bradwell’s case, that “[r]espect for human life finds an ultimate expression in the bond of love the mother has for her child,”¹⁹ and that “[w]hile 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.”²⁰ Worse still, abortion has dire consequences for women who choose it: “Severe depression and loss of esteem can follow.”²¹

This depiction of the moral and psychological disaster that awaits any woman who chooses to terminate a pregnancy finds no counterpart in *Roe* or any previous Supreme Court decision on abortion. But the image of women as less than fully capable adult decision-makers, who cannot be assumed to know their own best interests, does at least mark a return to familiar territory.

The same cannot be said for the *Carhart* majority’s treatment of doctors.

14. *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986).

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

16. *See id.* at 856 (recognizing women’s equal participation in society linked to birth-control choices).

17. *Id.*

18. *Bradwell v. State*, 83 U.S. 130, 141 (1873) (discussing common-law and traditional distinctions between roles and destinies of men and women).

19. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1634 (2007) (noting federal statute’s recognition of “difficult and painful moral decision” attached to abortion).

20. *Id.*

21. *Id.*

While in *Roe* physicians were all-knowing professionals whose judgment was not to be questioned, the doctors depicted in *Carhart* were so untrustworthy that the Court must permit Congress to come between them and their hapless patients. (The memory of Congress's effort to "rescue" Terry Schiavo might come to mind.)²² The *Carhart* majority assumes, without ever explaining, that doctors would otherwise seek to trick unknowing women into undergoing abortions by the prohibited method, a method that supposedly will bring the woman grief and regret once she realizes what has happened.²³ "It is self-evident," the Court tells us—self-evidently lacking any proof beyond the self-referential assumption of five Justices—"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 once did 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."²⁴

Why the cure for this presumed state of affairs would not be a straightforward informed-consent requirement rather than a criminal prohibition, the Court does not tell us. That analytical lapse is beyond the scope of this piece. What I wish to examine is the path the Court has traveled in its discourse about abortion: its reversion to an earlier view of women and its surprising adoption of a harsh and cynical view of doctors from whom women must be protected. In exploring these shifts in their cultural context and suggesting their implications for the future, it is clear that the full dimensions of what occurred in *Gonzales v. Carhart* cannot be understood without looking beyond the holding to the majority's deepest assumptions about human nature and behavior.

II.

Suppose a reader stumbled upon the majority opinion in *Roe* and tried to deduce, solely from its fifty pages, some key facts about the context in which the decision was produced and the world in which it landed. Emerging from behind a veil of ignorance, our reader would learn these things: that criminal prohibitions against abortion were widespread but of "relatively recent vintage";²⁵ that after more than a century of taking a hard-line prohibition against abortion, the American Medical Association had recently reevaluated its position and now permitted doctors to perform abortions "in accordance with good medical practice and under circumstances that do not violate the

22. See Robin Toner and Carl Hulse, *Congress Ready to Approve Bill in Schiavo Case*, N.Y. TIMES, Mar. 20, 2005, at A1 (detailing extraordinary congressional effort to save brain-damaged woman whose feeding tube was removed).

23. See *Carhart*, 127 S. Ct. at 1634 (noting why doctors decline to describe D & E procedures in detail).

24. *Id.* (emphasis added).

25. *Roe v. Wade*, 410 U.S. 113, 129 (1973) (surveying history of abortions and examining criminal abortions).

laws of the community”;²⁶ that the American Public Health Association had similarly changed its position and was now in favor of making “rapid and simple abortion referral” readily available through public-health departments and elsewhere;²⁷ and that the American Bar Association, “in recognition of a more liberal trend in laws on this subject,” had recently approved a liberalized model abortion law promulgated by the Conference of Commissioners on Uniform State Laws.²⁸

Our novice reader of *Roe* would also learn that advances in medicine had made abortion “relatively safe,” and, for early abortions, perhaps even safer than normal childbirth.²⁹ It would also be clear that as a matter of constitutional doctrine, the Court had recently begun to draw the outlines of an unenumerated “right of privacy” that was now deemed “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”³⁰ Here, the reader would find, almost in passing, a description of what a woman’s interest might be in making such a decision: “Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care.”³¹ These, along with the “distress” of bringing an unwanted child into the world and the “stigma of unwed motherhood,” were all “factors the woman and her responsible physician necessarily will consider in consultation.”³²

Our reader would come away with no reason to suspect that outside the four corners of this opinion, society was in ferment over a new discourse of women’s rights—a discourse that had even begun to enter the Supreme Court itself,³³ although the Court’s formal recognition of sex discrimination as being subject to heightened scrutiny for equal protection purposes was still three years away.³⁴ It would be quite reasonable for our reader to assume, in fact, that none of this discourse had even been presented to the Court in *Roe*.

That assumption would be incorrect. In fact, the briefs submitted to the Court in *Roe* were filled with the new feminist discourse of women’s rights. While there is a considerable literature on the absence of an equal-protection analysis in *Roe*,³⁵ little attention has been paid to the disconnect between what

26. *Id.* at 144 n.39 (tracing history of American Medical Association’s position on physician-performed abortions).

27. *Id.* at 144 (highlighting American Public Health Association’s standards for abortion services).

28. *Id.* at 146-47 n.41.

29. *Roe*, 410 U.S. at 149.

30. *Id.* at 152-53.

31. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

32. *Id.*

33. *See Reed v. Reed*, 404 U.S. 71, 74 (1971) (holding state’s arbitrary preference of men over women violative of equal protection clause of Fourteenth Amendment).

34. *See Craig v. Boren*, 429 U.S. 190, 210 (1976) (Powell, J., concurring).

35. *See generally* Ruth Bader Ginsburg, *Essay: Some Thoughts on Autonomy and Equality in Relation to*

the Court heard in *Roe* and what it chose to say. This kind of selectivity, which also emerged thirty-four years later in *Carhart*, is highly illuminating as a window into how the Court sees the world at a moment in time. Given that no Supreme Court opinion is written on a clean slate, exactly what is on the slate as the Justices begin their work?

The feminist discourse in some of the *Roe* briefs was as pointed as any that has subsequently been submitted to the Court. At the furthest extreme was a brief filed by several organizations, including the California Committee to Legalize Abortion and Zero Population Growth, Inc. The brief argued that abortion restrictions violated the Thirteenth Amendment “by imposing involuntary servitude without due conviction for a crime.”³⁶ Pregnancy was no “mere inconvenience,” this brief told the nine men of the Supreme Court, but was rather a form of slavery: “The pregnant woman’s body is in a state of constant service, providing warmth, nutrients, oxygen and waste disposal for the support of the conceptus. These activities are always to the detriment of the woman’s body.”³⁷ There follow pages of vivid descriptions of the physical burdens that even normal pregnancy places on a woman’s body, as well as the potential for dangerous and deadly complications.³⁸

On the cover of his copy of this brief, Harry Blackmun made a dismissive notation: “13th Am NG”—suggesting that in his view, the Thirteenth Amendment argument was “no good.”³⁹

A brief filed by Nancy Stearns of the Center for Constitutional Rights for a coalition of groups including New Women Lawyers offered a pointed, if more conventional, women’s-rights argument that reflected the broader social and political context in which the right to abortion was being debated:

As women have become aware of the myriad levels of unconstitutional discrimination they face daily, they have become most acutely aware of the primary role which restrictions on abortions plays [sic] in that discrimination. As a result, women throughout the country have become determined to free themselves of the crippling and unconstitutional restrictions on their lives.⁴⁰

Beyond the Fourteenth Amendment’s protection for life, liberty, and

Roe v. Wade, 63 N.C. L. REV. 375 (1985).

36. Brief of California Committee to Legalize Abortion et al. as Amici Curiae Supporting Appellants at 5, *Roe*, 410 U.S. 113 (Nos. 70-18, 70-14).

37. *Id.* at 9.

38. *Id.* at 10-11 (mentioning “disabling thrombophlebitis . . . kidney infections . . . extensive and irreparable damage to the pelvic organs and their supporting connections”).

39. The copy is in folder 3 of Box 730 of the Harry A. Blackmun Collection in the Manuscript Division of the Library of Congress. “NG” for “no good” was one of his standard notations, found throughout his collected papers. Yet his check marks throughout the brief show that he did read it through, rather than dismiss it outright; responding to the statement on page twenty-six of the brief, “Unfortunately, our abortion law is dangerously out of date,” the Justice wrote in the margin: “Why, then, not change it?” *Id.* at 26.

40. Brief of New Women Lawyers et al. as Amicus Curia Supporting Appellants at 1, *Roe v. Wade*, 410 U.S. 113 (1973) (Nos. 70-18, 70-14).

equality, the brief also invoked the Eighth Amendment's prohibition on cruel and unusual punishment.⁴¹ The issue, the brief told the Court, was one of "overwhelming importance to more than 50% of the nation's population."⁴²

Finally, there was a brief from a coalition led by the American Association of University Women, and signed by several dozen prominent women including Margaret Mead, Bess Myerson, and Pauli Murray. That brief offered an array of feminist arguments, including a discussion of "the present place of women in the American scene."⁴³ There had been "a basic change in the legal status of women in our society," it said, listing gains including suffrage and changes in family law and economic opportunities.⁴⁴

But these gains were at risk, the brief warned:

However, the value of the present right to vote, to equal pay, to equal job opportunities, to choose one's marriage partner, to joint custody of children – which did not, in a legal sense, exist for most women at the time of the passage of state anti-abortion laws – can be sharply decreased by an unwanted pregnancy. To fully implement those rights, this Court should recognize the paramount right of reproductive autonomy which is sought here.⁴⁵

The mild tone of the brief then became passionate:

A woman whom the law would force to carry an unwanted pregnancy to term is, quite plainly, restricted and imposed upon to a greater degree than by any other action which the state could take, save execution of a sentence of death or possibly long term imprisonment.⁴⁶

Nor was feminist discourse limited to the amicus briefs. The brief on the merits for Jane Roe told the Court that under the Texas law, "When pregnancy begins, a woman is faced with a governmental mandate compelling her to serve as an incubator for months and then as an ostensibly willing mother for up to twenty or more years," perhaps causing her to forgo education and career and "endure economic and social hardships."⁴⁷ The brief added that "[t]he law impinges severely upon her dignity, her life plan and often her marital relationship."⁴⁸

The language was strong but the impact on the Court was slight. Instead, the Court was clearly responsive to the brief filed by a coalition of medical groups that included the American College of Obstetricians and Gynecologists and the American Psychiatric Association, as well as 178 individual physicians. The

41. *See id.* at 7 (noting potential argument under Eighth Amendment).

42. *Id.* at 4-5.

43. Brief of Am. Ass'n of Univ. Women et al. as Amicus Curia Supporting Appellants at 23, *Roe*, 410 U.S. 113 (Nos. 70-18, 70-14).

44. *Id.* at 23-24.

45. *Id.*

46. *Id.* at 25.

47. Brief on the Merits for Appellants at 106, *Roe v. Wade*, 410 U.S. 113 (1973) (Nos. 70-18, 70-14).

48. *Id.* at 107.

Texas law was a “serious obstacle to good medical practice,” this group told the Court, imposing restrictions that “interfere with the physician-patient relationship and with the ability of physicians to practice medicine in accordance with the highest professional standards.”⁴⁹

Why was the Court so attentive to one set of voices while evidently remaining oblivious to others? I referred earlier to a disconnect between what the Court heard and what it chose to say. Perhaps the Court in 1972-1973 was not ready to listen to the feminist voices, from the fringes to the mainstream, that were being raised in defense of reproductive freedom. Perhaps it did not really “hear” them at all. Or perhaps, as Jack M. Balkin has observed, reflecting on the simultaneous but distinct rise of the movements for abortion rights and for women’s equality: “The Justices were simply not able to traverse two revolutions in thought in a single opinion.”⁵⁰

If that reflection offers the beginning of an explanation for the absence of women in *Roe*, how to explain the overwhelming presence of doctors—or, as Nan D. Hunter has described it, “the medicalized framing [of *Roe*]”?⁵¹ Professor Hunter argues that medicine offered the Court a safe realm—only fleetingly safe, as it turned out—to which to entrust “decisions which required normative rather than scientific judgments, under a mask of professional expertise.”⁵² She concludes that the Justices, who “shared a liberal belief in the value of medical authority because they assumed it to be a sphere which could operate independently of the state,”⁵³ therefore “in essence delegated juridical authority to physicians.”⁵⁴ *Roe*, Professor Hunter argues, should be read “as a cultural text explaining how late twentieth-century liberals constructed medicine as a mythically independent, parallel realm to the state.”⁵⁵ If that is the case, one wonders what *Carhart* tells us about the state of our culture in the early twenty-first century.

III.

Before attempting to answer that question, a brief tour through the Court’s post-*Roe* and pre-*Carhart* landscape is in order. It is a landscape rich in social, political, and legal change, full of crosscurrents and reaction—much richer than I can account for here. I will limit myself to describing, from the perspective of Supreme Court case law, a few of the landmarks.

49. Brief of the Am. Coll. of Obstetricians & Gynecologists et al. as Amici Curia Supporting Appellants at 2, *Roe*, 410 U.S. 113 (Nos. 70-18, 70-14).

50. See JACK M. BALKIN, WHAT *ROE V. WADE* SHOULD HAVE SAID 23 (2005).

51. Nan D. Hunter, *The Myth of Medical Independence*, 72 BROOK. L. REV. 147, 197 (2006) (assessing “materialized framing” of *Roe*).

52. See *id.* (suggesting medicinal explanation as insufficient means to settle abortion dispute).

53. See *id.* at 149.

54. See *id.* at 194.

55. See Hunter, *supra* note 51, at 151 (suggesting proper reading of *Roe*).

Not long after *Roe*, the Court was presented with an opportunity to say a bit more about women and abortion. The question in *Planned Parenthood v. Danforth*,⁵⁶ which reached the Court early in 1976, was the constitutionality of a Missouri law that required married women to obtain their husbands' consent before getting a legal abortion.⁵⁷ The Court invalidated the law, but said no more than necessary. Justice Blackmun's tone in the majority opinion was dry, almost clinical:

The obvious fact is that when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor.⁵⁸

A balancing test, or to put it more precisely, a zero-sum game: this was evidently no occasion to reflect on privacy, liberty, equality, or a woman's "own conception of her spiritual imperatives and her place in society," as the Court, sixteen years later in *Casey*,⁵⁹ would describe as the context for the personal decision of whether to terminate a pregnancy. Clearly, in *Danforth*, the Court was not yet ready to move beyond the prosaic to confront the deeper meaning of what it had unleashed in *Roe*. Or, perhaps, the image of husbands and wives fighting over whether to "keep the baby" was just too painful to contemplate except at arm's length.

The next Term gave the Court a chance to think about pregnant women again, this time in a context that proved even more distancing: poverty. A trio of cases presented the question whether the government had an obligation, either by existing statute or under the Constitution, to pay for abortions for women who could not afford them.⁶⁰ For the first time in the post-*Roe* period, the state prevailed. In none of the three decisions did the six Justices in the majority come to grips with the plaintiffs' plight: pregnant, poor, and desperate. Instead, Justice Powell wrote for the majority in one of the cases: "There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy."⁶¹ The "legislative policy" referred to was a policy "to favor normal childbirth" over abortion.⁶²

The cases inspired Justice Blackmun's well-known dissent, which he attached to all three decisions: "There is another world 'out there,' the

56. 428 U.S. 52 (1976).

57. See *id.* at 60 (stating issue considered by Court).

58. *Id.* at 71 (holding Missouri statute unconstitutional).

59. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851-52 (1992).

60. *Beal v. Doe*, 432 U.S. 438, 440 (1977); *Maher v. Roe*, 432 U.S. 464, 466 (1977); *Poelker v. Doe*, 432 U.S. 519, 521 (1977).

61. *Maher*, 432 U.S. at 475.

62. *Id.* at 477.

existence of which the Court, I suspect, either chooses to ignore or fears to recognize.”⁶³ The outcome of the cases, Blackmun said, was “punitive and tragic” for the “indigent and financially helpless” women whose claims the Court rejected.⁶⁴ This dissent marked Blackmun’s first step on the road to a woman-centered view of the right to abortion, but the step was tentative and the Court was unwilling to follow.⁶⁵

Two terms later, the Court returned to safe, familiar ground, deciding whether a state’s new abortion restriction impermissibly interfered with the rights of doctors. *Colautti v. Franklin*⁶⁶ struck down Pennsylvania’s Abortion Control Act, which required a doctor with “sufficient reason to believe that the fetus may be viable” to perform the abortion by the technique most likely to enable the fetus to be delivered alive.⁶⁷ The Court found the viability-determination requirement to be void for vagueness, noting that *Roe* had “stressed repeatedly the central role of the physician, both in consulting with the woman about whether or not to have an abortion, and in determining how any abortion was to be carried out.”⁶⁸ Justice Blackmun’s majority opinion in *Colautti* both reiterated the *Roe* description of the abortion decision as “inherently, and primarily, a medical decision” and cited *Roe*’s companion case, *Doe v. Bolton*, for “the importance of affording the physician adequate discretion in the exercise of his medical judgment.”⁶⁹ The Court issued the opinion on January 9, 1979. Six years almost to the day after *Roe*, women seeking abortions remained all but invisible to the Supreme Court.

IV.

But significantly, outside the context of abortion, women seeking economic opportunity and equal status in the eyes of the law were becoming increasingly visible to the Court. Term after Term, throughout the 1970s, the Court confronted claims of constitutional equality between the sexes. In 1973, during the same Term as *Roe*, the Justices came within a single vote in *Frontiero v. Richardson*⁷⁰ of making classifications on the basis of sex inherently suspect, subject to strict scrutiny.⁷¹ Eventually, in *Craig v. Boren*⁷² in 1976, the Court

63. *Beal*, 432 U.S. at 463.

64. *Id.* at 462 (Blackmun, J., dissenting).

65. See LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN’S SUPREME COURT JOURNEY 110-12 (2005). Blackmun’s dissent was joined by Justices Brennan and Marshall. *Beal*, 432 U.S. at 462.

66. 439 U.S. 379 (1979).

67. 1974 Pa. Laws, Act No. 209, § 5(a).

68. *Colautti v. Franklin*, 439 U.S. 379, 387, 397 (1979).

69. *Id.* (quoting *Roe v. Wade*, 410 U.S. 113, 166 (1973), and *Doe v. Bolton*, 410 U.S. 179, 192 (1973)).

70. 411 U.S. 677 (1973).

71. See *id.* at 677. The Court heard argument in *Frontiero* on January 17, 1973, five days before handing down the decision in *Roe*.

72. 429 U.S. 190 (1976).

settled on scrutiny that was heightened but not strict.⁷³

These developments make the absence of equal protection from the Court's abortion discourse all the more puzzling. Reva Siegel offers a possible explanation: the troubled course of the effort to ratify the Equal Rights Amendment (ERA), which was under attack from those who warned that if ratified, the amendment would anchor the abortion right more firmly to the Constitution than *Roe* ever did.⁷⁴ According to Siegel, "The ERA's advocates responded by doing what they could to separate abortion and sex equality talk, on the streets and in the courts," as a result perpetuating the "doctrinal separation of abortion and equal protection."⁷⁵

But with the failure of the ERA in 1982, and in the face of unrelenting attacks on *Roe*, the equal-protection language that had been presented to the Court in some of the original *Roe* briefs began to reemerge. A brief filed by Sylvia Law and other feminist lawyers during the 1982 Term, when the Court was considering an array of abortion restrictions enacted by the city of Akron, Ohio,⁷⁶ argued that the city's waiting-period and informed-consent requirements "are all premised upon and perpetuate an inaccurate stereotype of women as incompetent, dependent upon male authority and incapable of moral decision making."⁷⁷ The brief argued that the Akron regulations⁷⁸ reflected "the stereotype of women as incapable of making significant life choices" and were an "attempt to force [women] to fulfill the 'noble and benign' mission of motherhood."⁷⁹

The Court struck down the Akron ordinance on *stare decisis* grounds without venturing into the equal-protection arena. But a tide was running that would be difficult to ignore or deflect. Ruth Bader Ginsburg, a leading theorist of women's rights who had become a federal court of appeals judge, published a widely noted article in 1985 arguing that the doctrinal force of *Roe* had been "weakened, I believe, by the opinion's concentration on a medically approved autonomy idea, to the exclusion of a constitutionally based sex-equality perspective."⁸⁰ She urged the Court to recognize that the right to abortion reflected "a woman's autonomous charge of her full life's course."⁸¹

73. *Id.* at 197-99.

74. Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 827-29 (2007).

75. *Id.* at 827-28.

76. See generally *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983).

77. Brief of Comm. for Abortion Rights and Against Sterilization Abuse et al. as Amici Curiae for Respondents at 15, 34, *Akron Ctr. for Reprod. Health*, 462 U.S. 416 (Nos. 81-746, 81-1172).

78. The ordinance included a twenty-four hour waiting period and a requirement that doctors recite to their patients a list of warnings about the dangers of abortion. See *Akron Ctr. for Reprod. Health*, 462 U.S. at 423-24.

79. Brief of Comm. for Abortion Rights and Against Sterilization Abuse et al. as Amici Curiae for Respondents, *supra* note 77, at 15, 34.

80. Ginsburg, *supra* note 35, at 386.

81. *Id.* at 383, 386.

During the 1985 Term, the Court considered and invalidated still another set of abortion restrictions from Pennsylvania. Justice Blackmun's files from that case, *Thornburgh v. American College of Obstetricians and Gynecologists*,⁸² contain an article by Susan Frelich Appleton noting the "tension between the Court's systematic deference to the physician and the conflicting notion (derived from both intuition and precedent) that the woman has at stake a privacy right independent of and entitled to greater constitutional protection than the interests of her doctor."⁸³

I cannot prove that Blackmun read this article because the copy in his case file does not contain the little penciled check marks he commonly made while reading. His opinion for the Court in *Thornburgh*, however, contains a description of what the right to abortion means to women that is strikingly different in tone from any previous Supreme Court opinion on the subject:

Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision—with the guidance of her physician and within the limits specified in *Roe*—whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.⁸⁴

It was a powerful description of the right to abortion as grounded in the liberty interests of women, not of their doctors. While the equal-protection language that was swirling around the Court⁸⁵ did not make an appearance in *Thornburgh*, women had at last achieved center stage in the Court's abortion discourse. The equal-protection reasoning came six years later, in *Casey*.⁸⁶ Still another challenge to abortion restrictions enacted by the Pennsylvania Legislature, *Casey* reached the Court as the Justices' adherence to *Roe* was at its most tenuous. Of the seven members of the *Roe* majority, only Harry Blackmun remained. Of his key allies in 1973, Justice Brennan had been succeeded by David Souter, Lewis Powell by Anthony Kennedy, and Thurgood Marshall by Clarence Thomas. Potter Stewart's successor, Sandra Day O'Connor, had made apparent her distaste for *Roe*, having declared in a dissenting opinion in the *Akron* case nine years earlier that "[t]he *Roe* framework . . . [was] clearly on a collision course with itself."⁸⁷

82. 476 U.S. 747 (1986).

83. Susan Frelich Appleton, *Doctors, Patients, and the Constitution: A Theoretical Analysis of the Physician's Role in 'Private' Reproductive Decisions*, 63 WASH. U. L.Q. 183, 218-19 (1985). A reprint of the article is in folder 5 of Box 743 of the Harry A. Blackmun Collection in the Manuscript Division of the Library of Congress.

84. *Thornburgh*, 476 U.S. at 772.

85. See Siegel, *supra* note 74, at 829 (discussing emergence of equality reasoning in 1980s). Siegel writes, "In this period, equality reasoning began to emerge as a dominant rationale for the abortion right in the legal academy." *Id.*

86. See generally *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1982).

87. *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 458 (1983) (O'Connor, J.,

The story of how five Justices, against most expectations, came together in *Casey* to preserve the constitutional right to abortion is beyond the scope of this article.⁸⁸ Suffice it to say that it was in *Casey* that the equality rationale for the right to abortion made its first appearance. It appeared not, as one might have expected, in the section of the majority opinion dealing with the constitutional framework (Part II) but rather in the stare decisis section that is usually attributed to Justice Souter (Part III). In a paragraph describing the reliance interest in adhering to *Roe*, the Court noted that “for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail.”⁸⁹

In an earlier portion of the opinion, usually attributed to Justice Kennedy, the Court expresses a distinctly woman-centered view of the abortion right, placing Blackmun’s observations in *Thornburgh* on a somewhat grander rhetorical scale. In the decision whether to have an abortion, the Court says, “[t]he liberty of the woman is at stake in a sense unique to the human condition and so unique to the law.”⁹⁰ The opinion continues:

The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman’s role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.⁹¹

For these reasons, and others, the *Casey* court declared, “with clarity,” that “the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.”⁹²

V.

The fifteen years between *Casey* and *Carhart* saw a number of significant changes in the Court and the world around it. A Republican majority gained control in Congress. Dissatisfied with the Supreme Court’s invalidation of

dissenting.)

88. See GREENHOUSE, *supra* note 65, at 182-206.

89. *Casey*, 505 U.S. at 856.

90. *Id.* at 852.

91. *Id.*

92. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1982).

Nebraska's "partial birth" abortion law in *Stenberg v. Carhart* in 2000,⁹³ Congress enacted the federal Partial-Birth Abortion Ban Act of 2003⁹⁴ as a vehicle for bringing the issue back to the Supreme Court. The Nebraska and federal statutes were so similar that the strategy would have failed, but for one factor: the Court's changed membership by the time the case got there. The vote in *Stenberg* had been five to four, with an emotion-laden dissent by Justice Kennedy. Justice O'Connor, a member of the *Stenberg* majority, retired in January 2006 and was succeeded by Samuel A. Alito, Jr. That made all the difference. As Justice Ginsburg noted, with understatement, in her dissent from the bench when *Carhart* was handed down on April 18, 2007, the Court was "differently composed than it was when we last considered a restrictive abortion regulation."⁹⁵

This is not the occasion to analyze how the Court finessed the stare decisis effect of *Stenberg* in reaching its conclusion, by a vote of five to four, that the federal statute was constitutional. Rather, as noted earlier, the stunning aspect of *Carhart* was the view the majority expressed of both women and their doctors. Not only were doctors no longer referred to by their medical specialties, obstetrician-gynecologists and surgeons, but as Justice Ginsburg noted in dissent, they were referred to "by the pejorative label 'abortion doctor.'"⁹⁶ Now, doctors were no longer presumed to have their patients' interests at heart or to act as their patients' surrogates. Without attempting to explain the basis for his conclusion, Justice Kennedy depicts doctors, in his majority opinion, as concealing from their patients the truth about "partial-birth" abortion: that they planned to "pierce the skull and vacuum the fast-developing brain" of a fetus that was "a child assuming the human form."⁹⁷

Rather than imposing a rigorous informed-consent requirement on doctors, which the *Casey* Court's treatment of informed consent would appear to have permitted, the *Carhart* majority was willing to uphold a criminal prohibition on a procedure that experts had testified had physical and psychological benefits, at least for some women under some foreseeable circumstances.⁹⁸ According to the respondents' brief, the American College of Obstetricians and Gynecologists (ACOG) concluded that there were "at least 25-30 different circumstances" in which the intact dilation and extraction procedure "would be the safest option."⁹⁹

93. 530 U.S. 914 (2000).

94. 18 U.S.C. § 1531 (2007).

95. *Gonzalez v. Carhart*, 127 S. Ct. 1610, 1652 (2007) (Ginsburg, J., dissenting) (criticizing majority for its failure to follow *Stenberg*).

96. *Id.* at 1650 (observing notable hostility toward abortions by majority's choice of words).

97. *Id.* at 1634.

98. See Brief for Am. Med. Women's Ass'n, Am. Pub. Health Ass'n et al. as Amici Curiae Supporting Respondents at *15 n.10, *Carhart*, 127 S. Ct. 1610 (No. 05-1382), 2006 WL 2710731 (describing psychological benefit of increasing successful future pregnancies for women having procedure).

99. Brief of Respondents at *21-22, *Carhart*, 127 S. Ct. 1610 (No. 05-380), 2006 WL 2345934 (noting

Justice Kennedy acknowledged this evidence, and that three federal district courts had accepted it in striking down the federal act.¹⁰⁰ Without concluding that this finding was clearly erroneous, Justice Kennedy simply rejected it—perhaps because it got in the way of the opinion’s premise that doctors were not to be trusted.¹⁰¹

And as for women—what had become of their “intimate and personal” suffering that the *Casey* Court had recognized, or of woman’s “destiny” that “must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society?”¹⁰² Now, in *Carhart*, women were barely able to comprehend their own best interests, let alone act on them. To quote from the five men in the *Carhart* majority: “Respect for human life finds an ultimate expression in the bond of love the mother has for her child.”¹⁰³ So much for women exercising for themselves the “right to define one’s own concept of existence,” a right the *Casey* majority informed us lies “at the heart of liberty.”¹⁰⁴

Abortion itself is bad enough, the *Carhart* majority tells us, but “a mother” whose pregnancy is terminated by “partial-birth” abortion “must struggle with grief more anguished and sorrow more profound” when she learns, only after the event, what really happened.¹⁰⁵ The opinion cites a brief filled with personal testimonies from women who regret their abortions.¹⁰⁶ The brief’s “180 Women Injured by Abortion,” however, fails to mention that the testimonies are about abortion in general, not “partial-birth” abortion in particular, thus mitigating their relevance to the current case.¹⁰⁷ Moreover, Justice Kennedy’s opinion ignores a brief offering opposite testimonies from women who chose the intact procedure during the second trimester of pregnancy as the best way of extracting some meaning from the personal tragedy of terminating a much wanted pregnancy after the discovery of fetal anomalies incompatible with continued development or post-natal life. The intact procedure, these women wrote, enabled them to see, hold, and mourn

policy statement by ACOG regarding merits of abortion method in question).

100. *Carhart*, 127 S. Ct. at 1635 (acknowledging evidence of D & E as safest method in some circumstances).

101. FED. R. CIV. P. 52 (requiring finding of fact to be deemed clearly erroneous before set aside). *See generally* *Gonzalez v. Carhart*, 127 S. Ct. 1610 (2007) (upholding federal act without specifically addressing contrary district court decisions).

102. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992) (explaining foundation for women’s choice as her own).

103. *Carhart*, 127 S. Ct. at 1634.

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

105. *Carhart*, 127 S. Ct. at 1634.

106. *See generally* Brief of Sandra Cano et al. as Amici Curiae in Support of Petitioners, *Carhart*, 127 S. Ct. 1610 (No. 05-380), 2006 WL 1436684 (advocating ban on partial-birth abortion procedure by including affidavit of post-abortive women).

107. *See id.*

what they had lost.¹⁰⁸

Candidly admitting to a lack of evidence for its conclusion about the harmful impact of abortion, the majority tells us: “While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.”¹⁰⁹

The *Carhart* majority opinion thus adopts the discredited theory of a “post-abortion syndrome” that inflicts lasting emotional damage on women who have had abortions. Although embraced by such organizations as Feminists for Life of America, where Jane Sullivan Roberts, the wife of Chief Justice Roberts, once served as executive vice president of the board of directors and currently serves as pro bono legal counsel,¹¹⁰ the theory has been widely debunked in the medical literature. A brief submitted to the Court by the American Psychological Association in an earlier case during Justice Kennedy’s tenure noted that “five major reviews of the psychological and psychiatric literature” had concluded that abortion had “no long-term negative effects” for the “overwhelming majority of women,” and that in fact for some women, abortion and the resulting sense of self-empowerment induced “positive psychological changes.”¹¹¹

Even Dr. C. Everett Koop, an abortion foe who served as Surgeon General during the Reagan Administration, could not fulfill the President’s assignment to document the harmful effects of abortion on women. “The science was simply not conclusive either way,” Dr. Koop recalled in his memoir.¹¹² This incident, which occurred in 1989, was widely publicized at the time.¹¹³ Under its prior doctor-centric view of abortion, the Supreme Court would surely have considered the question of abortion’s harm to women to be settled. Now, Dr. Koop is just another doctor, waiting to lead hapless women astray. The only expertise that matters is the Court’s own, in its smug assumptions about what women need.

108. Brief of the Inst. for Reproductive Health Access et al. as Amici Curiae in Support of Respondents, *Gonzalez v. Carhart*, 127 S. Ct. 1610 (2007) (No. 05-380).

109. *Carhart*, 127 S. Ct. at 1634.

110. Kerri-Ann Kinorski, *The Aftermath of Abortion*, AM. FEMINIST, Spring 1998, at 6 (explaining Feminist for Life’s view on “post abortion distress”); see also Emily Bazelon, *Is There a Post-Abortion Syndrome*, N.Y. TIMES MAG., Jan. 21, 2007, at 41 (outlining general absence of scientific support for “post abortion distress” theory).

111. Brief for Amicus Curiae Am. Psychological Ass’n in Support of Appellees at *19, *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) (No. 88-605), 1989 WL 1127695 (finding lack of perceived negative psychological effects post-abortion).

112. See C. EVERETT KOOP, M.D., *KOOP: THE MEMOIRS OF AMERICA’S FAMILY DOCTOR* 278 (1991).

113. See, e.g., Chris Mooney, *Bucking the Gipper*, WASH. MONTHLY, Oct. 2004; Martin Tolchin, *Koop, Parting, Reviews a Contentious Tenure*, N.Y. TIMES, June 16, 1989, at A14; Martin Tolchin, *Koop’s Stand on Abortion’s Effect Surprises Friends and Foes Alike*, N.Y. TIMES, Jan. 11, 1989, at A20.

VI.

The title of this piece promises not only to describe the Court's shifting discourse on abortion, but also to discuss its implications for the future. Surely, one of the most disturbing aspects of the Court's performance in *Carhart* is its willingness to rely on purported "facts" to the exclusion of the evidence-based testimony contained in the record and in briefs. This result-oriented selectivity has implications for decisions far beyond the abortion cases on the Court's docket.¹¹⁴

Where the Supreme Court next takes the law of abortion depends, much as the outcome in *Carhart* depended, on the Court's membership. Unless Justice Kennedy were to repudiate his formal position in *Casey*, which is unlikely despite his evident repudiation of *Casey*'s more soaring rhetoric about women's destiny, I would not expect him to provide a fifth vote to overturn *Roe*. But the other four Justices in the *Carhart* majority give every sign of being ready and willing to do so.

More immediately, the views that *Carhart* embodies of women and of doctors are likely to give immediate comfort in the political realm to state legislatures considering what they can do to restrict access to abortion in a world where *Roe* is still nominally good law. South Dakota, where voters in 2006 repealed a ban on abortion that the legislature had enacted earlier that year, still has on the books an "informed consent" law requiring doctors to read to their patients a series of tendentious and misleading statements.¹¹⁵ These requirements include informing a patient twenty-four hours before an abortion "[t]hat the abortion will terminate the life of a whole, separate, unique, living human being," that a pregnant woman has "an existing relationship with that unborn human being and that the relationship enjoys protection under the United States Constitution and under the laws of South Dakota," and that abortion presents risks of "depression and related psychological distress, . . . suicide, . . . infection, hemorrhage, danger to subsequent pregnancies, and infertility."¹¹⁶ The obvious goal of the statute is to discourage women from exercising their constitutional right to choose abortion. A similar informed-consent requirement was upheld by the plurality in *Casey*, although it imposed a less flagrantly anti-abortion script and upheld it on the premise that the required recitation was "truthful and not misleading."¹¹⁷ Certainly if Congress can make it a crime for doctors to perform a medically accepted procedure, states can expect increased leeway for conscripting doctors as agents for

114. See Linda Greenhouse, *The Counter-Factual Court*, U. LOUISVILLE L. REV. (forthcoming 2008) (presented as the Brandeis Lecture at the University of Louisville Louis D. Brandeis School of Law, Mar. 5, 2008).

115. See S.D. CODIFIED LAWS § 34-23A-10.1(b)-(e) (2007).

116. *Id.* See generally Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939 (2007).

117. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882 (1973).

conveying an official anti-abortion message.

It is noteworthy that the South Dakota abortion ban, now repealed, was entitled not an “Abortion Control Act,” in Pennsylvania’s familiar and unvarnished nomenclature, but rather the Health and Human Life Protection Act.¹¹⁸ Its stated purpose was “to fully protect the rights, interests, and health of the pregnant mother, the rights, interest, and life of her unborn child, and the mother’s fundamental natural intrinsic right to a relationship with her child.”¹¹⁹ To protect those “rights,” the statute provided that “abortions in South Dakota should be prohibited” except to prevent a pregnant woman’s death.¹²⁰

In other words, as Reva Siegel describes it, the state was “prohibiting abortion to protect women.”¹²¹ The *Carhart* Court’s acceptance of the premise that women need such protection in the first place can only encourage the further spread of what Siegel has called “the gender-based antiabortion argument,” the product of anti-abortion strategists who have concluded in recent years that a focus on protecting women rather than fetuses has greater public appeal and will better serve their cause.¹²² Yet, in *Carhart*, a Court so concerned with protecting women accepted, for the first time, an abortion restriction that lacks an exception to protect a pregnant woman’s health.¹²³ As Justice Ginsburg observed in her dissenting opinion, “[T]he Court deprives women of the right to make an autonomous choice, even at the expense of their safety.”¹²⁴

Looking ahead, it is important to recognize the unrelenting pressure on the Court to uphold new abortion restrictions. The restrictions are limited only by the imaginations of public officials seeking to make a point or win an election. The Sheriff of Maricopa County, Arizona, devised a policy for the county jail under which an inmate could get an abortion—at her own expense—only if she could persuade a court to issue an order requiring jail officials, who transport inmates for medical care on a regular basis, to provide transportation.¹²⁵ The Arizona Court of Appeals ruled in 2007 that the policy served no legitimate penological interest and thus violated the inmate’s constitutional rights,¹²⁶ and

118. H.R. 1215, 2006 Leg., 81st Sess. (S.D. 2006) (repealed 2006). On June 27, 2008, the en banc Eighth Circuit, voting seven to four, vacated a preliminary injunction that the United States District Court for the District of South Dakota had entered against the informed consent requirement. *Planned Parenthood Minn. v. Rounds*, 530 F.3d 724, 738 (8th Cir. 2008).

119. H.R. 1215.

120. *Id.*; see also Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 1007 (2007).

121. See Siegel, *supra* note 120, at 1008.

122. See *id.* at 1023-29.

123. See *Gonzales v. Carhart*, 127 S. Ct. 1610, 1641 (Ginsburg, J., dissenting) (accusing majority of ignoring precedent and pregnant women’s health).

124. *Id.* at 1641 (arguing majority presented no support for argument that women regret and suffer emotionally from abortion decision).

125. *Doe v. Arizona*, 150 P.3d 1258, 1259-60 (Ariz. Ct. App. 2007).

126. *Id.* at 1267.

on March 24, 2008, the Supreme Court denied certiorari.¹²⁷

Whether *Gonzales v. Carhart* eventually proves to be an anomaly in the Supreme Court's abortion jurisprudence or a step toward further regression remains to be seen. The reality of women's reproductive lives, meanwhile, stays the same—a reality at once unpredictable, messy, glorious, and impervious to the changing tides of politics and law.

127. Doe v. Arpaio, 150 P.3d 1258, 1264 (Ariz. Ct. App. 2007), cert. denied, 128 S. Ct. 1704 (2008).