



NARAL
Pro-Choice America

THE IMPACT OF A SUPREME COURT VACANCY ON A WOMAN'S RIGHT TO CHOOSE

*"Today's decision is alarming...And, for the first time since Roe, the Court blesses a prohibition with no exception safeguarding a woman's health."*¹

- Justice Ruth Bader Ginsburg, dissenting

As Justice Ginsburg's statement in the recent Federal Abortion Ban case indicates, the addition of President Bush's two recent nominees to the Supreme Court has dramatically impacted the constitutional protection of a woman's right to choose. The anti-choice Bush Administration is one Supreme Court vacancy away from having the opportunity to take away this right. The confirmation of a third Bush nominee to the Supreme Court would likely have devastating implications for privacy protections and could provide the vote necessary to overturn *Roe v. Wade*.

From 7-2 to 5-4: Choice in Jeopardy on the Court

In 1973, in the case of *Roe v. Wade*, the Supreme Court held that the constitutional right to privacy encompasses a woman's decision whether or not to terminate a pregnancy. The Court reasoned that prior to the point of viability, a state may not restrict a woman's right to choose abortion, but after the point of viability, a state may ban any abortion not necessary to preserve a woman's life or health.² Seven Supreme Court justices joined the majority ruling and only two did not.³

By the time the seminal case of *Planned Parenthood v. Casey* reached the Court in 1992, only two justices supported *Roe* in its entirety; six of the seven members of the original *Roe* majority had retired, but both members of the *Roe* dissent—Chief Justice Rehnquist and Justice White—remained on the court. The *Casey* decision upheld the "essential holding" of *Roe*, that the Constitution prohibits an outright ban on abortion prior to the point of viability, by a vote of just 5-4.⁴ *Roe*'s protections were nevertheless weakened when the *Casey* Court adopted a new standard for reviewing abortion restrictions. The Court declared that states may impose restrictions on the right to access abortion care *prior* to the point of viability, as long as they do not "unduly burden" a woman's right to choose.⁵ That new standard gave the state and federal governments substantially more power than they had under the *Roe* decision to enact excessive and unnecessary limitations on the right to choose. The justices split into three groups:

- Two justices voted to uphold *Roe* in its entirety. Of these two, only Justice Stevens remains on the Court.
- Four justices firmly opposed a woman's right to choose and stated that *Roe* should be overturned. Of these four, two – Justices Scalia and Thomas – remain on the Court.
- Three justices jointly authored the “controlling opinion” and announced the new “undue burden” standard of review. Two of the justices who authored this opinion – Justices Kennedy and Souter – remain on the Court.

In 2000, with Clinton nominees Ruth Bader Ginsburg and Steven Breyer sitting on the Court, the Court considered a Nebraska law that was styled as a ban on so-called “partial-birth” abortions, but in fact would have outlawed multiple safe procedures without allowing for an exception to protect women's health. The Court declared the ban unconstitutional under the *Casey* undue burden standard, but again by a vote of just 5-4.⁶

- Justices Breyer, Ginsburg, Souter, O'Connor and Stevens found the Nebraska law clearly unconstitutional, as it imposed an undue burden upon women seeking to exercise their right to choose an abortion and failed to include an exception to protect a woman's health. Justice O'Connor wrote an additional opinion expressing her belief that a narrower statute with a health exception would likely be constitutional.
- Justice Kennedy broke from the co-authors of the *Casey* controlling opinion and joined the anti-choice members of the Court in dissent, retreating further from the core holding of *Roe*.

The 2007 Federal Abortion Ban Decision: The Shift to Undermine *Roe*

On April 18, 2007, only seven years after striking down the Nebraska ban, the U.S. Supreme Court upheld the first-ever federal ban on some abortions in the cases of *Gonzales v. Carhart* and *Gonzales v. Planned Parenthood*.⁷ By a vote of 5-4, the Court upheld a law which outlaws certain second-trimester abortions and has no exception in cases when a woman's health is in danger. This decision not only represents a stunning retreat from more than three decades of precedent, but with it the Court effectively eliminated one of *Roe v. Wade*'s core protections: that a woman's health must always be paramount.

Perhaps most ominously, President Bush's appointees to the Court provided the critical votes needed to erase this core protection of *Roe* – therefore likely signaling a seismic shift in the Court's future rulings in reproductive rights cases. The ramifications of the decision are not limited to a single dangerous and invasive federal law. The majority decision gave the green light to anti-choice politicians to enact new restrictions at both the state and federal level in order to test the shrinking contours of the right to privacy under the new Roberts Court.

- Justices Kennedy, Roberts, Alito, Scalia, and Thomas held the ban constitutional in its entirety, with Justice Kennedy writing the opinion for the majority. In upholding the ban, the majority allowed Congress to outlaw certain previability abortions without providing any exception to protect women’s health, despite the evidence that doing so would force doctors to use less-safe procedures. This decision is squarely at odds with the Court’s holdings in *Roe* and its progeny, and cannot be credibly reconciled with the Court’s 2000 *Stenberg* decision. The majority opinion focuses almost exclusively on the fetus, while virtually dismissing out of hand extensive medical evidence and lower court findings that the banned procedures are sometimes necessary to protect women’s health.
- Justice Thomas wrote a brief concurring opinion, joined by Justice Scalia, to “reiterate [his] view that the Court’s abortion jurisprudence, including *Casey* and *Roe v. Wade*, 410 U.S. 113 (1973), has no basis in the Constitution.”⁸
- Justices Ginsburg, Stevens, Breyer, and Souter joined in a stinging and vigorous dissent, authored by Justice Ginsburg. The dissent argued that the Court should have struck down the Federal Abortion Ban just as it did Nebraska’s ban in *Stenberg* as unconstitutional. These four Justices, along with former Justice Sandra Day O’Connor, formed the majority in *Stenberg*. The dissent sums up the enormity of the departure from precedent by concluding:

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.⁹

As *Roe* and the freedom to choose hang in the balance, a vacancy on the Court is likely. All four of the pro-choice justices are either approaching or are over the age of 70, while the two new Bush appointees are in their 50’s. The impact of any vacancy depends upon which Justice leaves the Court and the views held by his or her replacement.

Four Justices Oppose the Constitutional Right to Choose

- *Justice Clarence Thomas*
 - Justice Thomas, like Justice Scalia, believes that the Constitution does not encompass the right to choose. In *Casey* he joined the Chief Justice’s opinion in *Casey*, which stated that “*Roe* was wrongly decided, and . . . it can and should be overruled.”¹⁰ In *Stenberg*, he wrote a dissent that not only would have upheld Nebraska’s abortion

ban legislation, but in which he also described the Court's decision in *Roe* as "grievously wrong."¹¹ He also joined the majority opinion to uphold the Federal Abortion Ban and wrote the concurring opinion stating that *Roe* has "no basis in the Constitution."¹²

- ***Justice Antonin Scalia***

- Justice Scalia is a vocal opponent of a woman's right to choose. He has repeatedly expressed his opinion that the Constitution does not provide a right of privacy that extends to reproductive rights. "[T]he Constitution contains no right to abortion."¹³ "The issue is whether [abortion] is a liberty protected by the Constitution of the United States. I am sure it is not."¹⁴ "*Casey* must be overruled."¹⁵ He also joined the majority opinion in *Gonzales v. Carhart* and *Gonzales v. Planned Parenthood* upholding the Federal Abortion Ban and joined Justice Thomas's concurring opinion.¹⁶

- ***Chief Justice John Roberts***

- Chief Justice Roberts joined in the majority decision to uphold the Federal Abortion Ban. In addition, as a high-ranking attorney in the Bush I Administration, Justice Roberts developed a record of opposition to the right to privacy and reproductive choice. In an official memorandum to the Attorney General, Justice Roberts summarized a lecture titled "Equal Justice Under Law" and observed that the presenter "devote[d] 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."¹⁷ As Deputy Solicitor General, Justice Roberts co-authored a Supreme Court brief in which the opening argument stated: "We continue to believe that *Roe* was wrongly decided and should be overruled. . . . [T]he Court's conclusions in *Roe* that there is a fundamental right to an abortion and that government has no compelling interest in protecting prenatal human life throughout pregnancy find no support in the text, structure, or history of the Constitution."¹⁸

- ***Justice Samuel Alito***

- Justice Alito joined Chief Justice Roberts in voting to uphold the Federal Abortion Ban. Additionally, in a 1985 memo to the Solicitor General, he stated that he does not believe the Constitution protects the right to choose and he set forth a strategy to undermine *Roe's* premises asking: "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?"¹⁹ He answered, "...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."²⁰

Four Justices Support the Constitutional Right to Choose

- *Justice John Paul Stevens*

- The most senior associate justice on the Supreme Court, Justice Stevens has consistently voted to protect a woman's right to choose. In his concurring opinion in *Stenberg* in 2000, Justice Stevens stated: "[D]uring the past 27 years, the central holding of *Roe* has been endorsed by all but 4 of the 17 Justices who have addressed the issue. That holding -- that the word "liberty" in the Fourteenth Amendment includes a woman's right to make this difficult and extremely personal decision -- makes it impossible for me to understand how a State has any legitimate interest in requiring a doctor to follow any procedure other than the one that he or she reasonably believes will best protect the woman in her exercise of this constitutional liberty."²¹ In *Casey*, Justice Stevens went further than any of the current members of the Court who heard that case, arguing that the Court should not abandon *Roe*'s stronger protections in favor of the "undue burden" standard, stating: "*Roe* is an integral part of a correct understanding of both the concept of liberty and the basic equality of men and women."²² Justice Stevens has cast many pro-choice votes during his long tenure on the Court, including those to equalize public funding of abortion with other pregnancy-related services, to protect clinics, and to strike down restrictions that burden a woman's right to choose.²³ Most recently, he voted to strike down the Federal Abortion Ban.

- *Justice Ruth Bader Ginsburg*

- Justice Ginsburg believes that the Constitution encompasses the right to choose. She authored the strong dissent in the Federal Abortion Ban case. Similarly in *Stenberg*, she voted to strike down Nebraska's abortion ban.²⁴ Also, in 1997, she disagreed with the Court's opinion upholding a "physician-only" requirement, which prohibits qualified health care providers from performing abortions unless they are licensed physicians, joining Justice Stevens' dissent.²⁵ In addition, she has consistently cast pro-choice votes in cases involving clinic violence.²⁶

- *Justice Stephen G. Breyer*

- Justice Breyer has also consistently voted to protect the right to choose. In addition to joining Justice Ginsburg's dissent in the Federal Abortion Ban decision, he wrote the majority opinion in *Stenberg*, which struck down the Nebraska ban on abortion procedures, and reaffirmed the constitutional protection afforded to a woman's right to choose.²⁷ He also joined Justice Stevens' dissent from the Court's 1997 decision to uphold a "physician-only" requirement,²⁸ and he has consistently ruled to protect clinics from anti-choice violence.²⁹

- *Justice David H. Souter*

- Although Justice Souter was appointed by anti-choice President George H.W. Bush, his opinions have usually demonstrated support for the constitutional rights of privacy and choice. In the first reproductive rights case he decided on the Court, Justice Souter cast the deciding vote to join an anti-choice majority in upholding a ban on distribution of federal family-planning funds to medical facilities that provided abortion counseling and referrals.³⁰ However, just a year later, he was one of the three justices who co-authored the “controlling opinion” in *Casey* that reaffirmed the core holding of *Roe*, but announced the “undue burden” standard. In *Stenberg*, he joined the majority opinion that declared the Nebraska abortion ban unconstitutional and most recently in 2007, he joined in Justice Ginsburg’s dissent arguing against the Federal Abortion Ban’s constitutionality.

One Justice Has a Mixed Record on the Constitutional Right to Choose

- *Justice Anthony Kennedy*
 - Justice Kennedy’s differing decisions in reproductive rights cases fail to indicate whether he would ultimately vote to overturn *Roe*, but they nevertheless clearly reveal that he is willing to uphold greater restrictions than Justice O’Connor would have upheld. Most recently, he wrote the majority opinion in *Gonzales v. Carhart* and *Gonzales v. Planned Parenthood* upholding the Federal Abortion Ban.³¹ His opinion in these cases sets distressing precedent not only from a legal perspective, but also for its incorporation of anti-choice rhetoric and propaganda. The majority opinion in *Carhart* echoed his 2000 dissent in *Stenberg*, where he argued that Nebraska abortion ban should be upheld.³² However, prior to the *Carhart* and *Stenberg* decisions, in 1992 he joined with Justices Souter and O’Connor in the “controlling opinion” in *Casey*, voting to uphold the core protections of *Roe*. Additionally, only adding to the uncertainty surrounding Justice Kennedy’s views about choice, in a 1989 case involving state restrictions on women’s access to abortion, Justice Kennedy joined Justice Rehnquist’s plurality opinion, which included an attack on *Roe*: “We have not refrained from reconsideration of a prior construction of the Constitution that has proved ‘unsound in principle and unworkable in practice.’ . . . We think the *Roe* trimester framework falls into that category.”³³

Effect of a Vacancy

Just over a decade ago, the Supreme Court in *Casey* severely limited the protections originally afforded in *Roe* by a margin of one vote. In 2000, the *Stenberg* ruling protected women’s health, once again by a margin of only one vote. In 2007, President Bush’s two nominees provided the critical votes needed to hold the Federal Abortion Ban constitutional and eradicate the long-established protection for women’s health in certain circumstances. At this time, five sitting justices have a record of supporting at least the core protections of *Roe*. If President Bush has

yet a third opportunity to fulfill his promise to appoint a justice in the mold of Justices Scalia and Thomas,³⁴ that justice's vote could eliminate the essential and constitutionally protected right to choose.

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BIOGRAPHICAL INFORMATION ABOUT THE CURRENT JUSTICES

JUSTICE	BORN	APPOINTED BY	WHEN	OTHER
Samuel A. Alito	4/01/50	Pres. Bush (II)	2006	Second youngest member of Court
Stephen Breyer	8/15/38	Pres. Clinton	1994	
Ruth Bader Ginsburg	3/15/33	Pres. Clinton	1993	Only woman on the Court
Anthony Kennedy	7/23/36	Pres. Reagan	1988	
John Roberts (Chief Justice)	1/27/55	Pres. Bush (II)	2005	Youngest member of Court
Antonin Scalia	3/11/36	Pres. Reagan	1986	
David Souter	9/17/39	Pres. Bush (I)	1990	
John Paul Stevens	4/20/20	Pres. Ford	1975	Oldest member of Court
Clarence Thomas	6/23/48	Pres. Bush (I)	1991	Third Youngest Member of the Court

Notes:

- ¹ *Carhart/PPFA*, at *31 (Ginsburg, J., dissenting).
- ² *Roe v. Wade*, 410 U.S. 113, 163-64 (1973)
- ³ *Roe v. Wade*, 410 U.S. 113 (1973).
- ⁴ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).
- ⁵ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).
- ⁶ *Stenberg v. Carhart*, 530 U.S. 914 (2000).
- ⁷ *Gonzales v. Carhart and Gonzales v. Planned Parenthood Federation of America*, ---U.S.---- WL 1135596 (U.S. Apr. 18, 2007).
- ⁸ *Carhart/PPFA*, at *30.
- ⁹ *Carhart/PPFA*, at *31 (Ginsburg, J., dissenting).
- ¹⁰ *Casey*, 505 U.S. at 944 (Rhenquist, C.J., dissenting).
- ¹¹ *Stenberg*, 530 U.S. at 980 (Thomas, J. dissenting).
- ¹² *Carhart/PPFA*, at *30.
- ¹³ *See Akron Center for Reproductive Health, Inc.*, 497 U.S. at 520 (Scalia, J., concurring)
- ¹⁴ *Casey*, 505 U.S. at 980 (Scalia, J., dissenting).
- ¹⁵ *Stenberg v. Carhart*, 530 U.S. at 955 (Scalia, J., dissenting).
- ¹⁶ *Carhart/PPFA*, at *30.
- ¹⁷ Memorandum from John Roberts, Special Assistant to the Attorney General, to William French Smith, Attorney General (Dec. 11, 1981) (National Archives & Records Administration, Record Group 60, #60-89-372).
- ¹⁸ Brief for the Respondent at 13, *Rust v. Sullivan*, 500 U.S. 173 (1991) (Nos. 89-1391, 89-1392).
- ¹⁹ Memorandum to the Solicitor General from Samuel A. Alito, re: *Thornburgh v. American College of Obstetricians & Gynecologists*, No. 84-1379, June 3, 1985, at 8.
- ²⁰ Memorandum to the Solicitor General from Samuel A. Alito, re: *Thornburgh v. American College of Obstetricians & Gynecologists*, No. 84-1379, June 3, 1985, at 9.
- ²¹ *Stenberg v. Carhart*, 530 U.S. 914 (2000)530 U.S. at 946 (Stevens, J., concurring) (citations omitted).
- ²² *Casey*, 505 U.S. at 912 (Stevens, J., concurring).
- ²³ *See, e.g., Scheidler v. National Organization For Women, Inc.*, 123 S.Ct. 1057, 1069 (2003) (Stevens, J., dissenting); *Hill v. Colorado*, 530 U.S. 703, 707 (2000); *Ashcroft*, 462 U.S. at 494 (Blackmun, J., dissenting); *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Harris v. McRae*, 448 U.S. 297, 351-352 (1980) (Stevens, J., dissenting).
- ²⁴ *Stenberg*, 530 U.S. at 914.
- ²⁵ *Mazurek v. Armstrong*, 520 U.S. 968, 977 (1997) (Stevens, J., dissenting).
- ²⁶ *See, e.g., Hill*, 530 U.S. at 735 (Souter, J., concurring).
- ²⁷ *Stenberg*, 530 U.S. at 914.
- ²⁸ *Mazurek*, 520 U.S. at 968 (Stevens, J., dissenting).
- ²⁹ *See, e.g., Hill*, 530 U.S. at 735 (Souter, J., concurring).
- ³⁰ *Rust v. Sullivan*, 500 U.S. 173 (1991).
- ³¹ *Gonzales v. Carhart and Gonzales v. Planned Parenthood Federation of America*, ---U.S.---- WL 1135596 (U.S. Apr. 18, 2007).
- ³² *Stenberg*, 530 U.S. at 957 (Kennedy, J. dissenting).
- ³³ *Webster v. Reproductive Health Services*, 492 U.S. 490, 518 (1989).
- ³⁴ *See, e.g., CNN, Court Watchers Consider Future of U.S. Supreme Court* (November 6, 2000) available at <http://www.cnn.com/2000/LAW/11/06/election.intro/>.