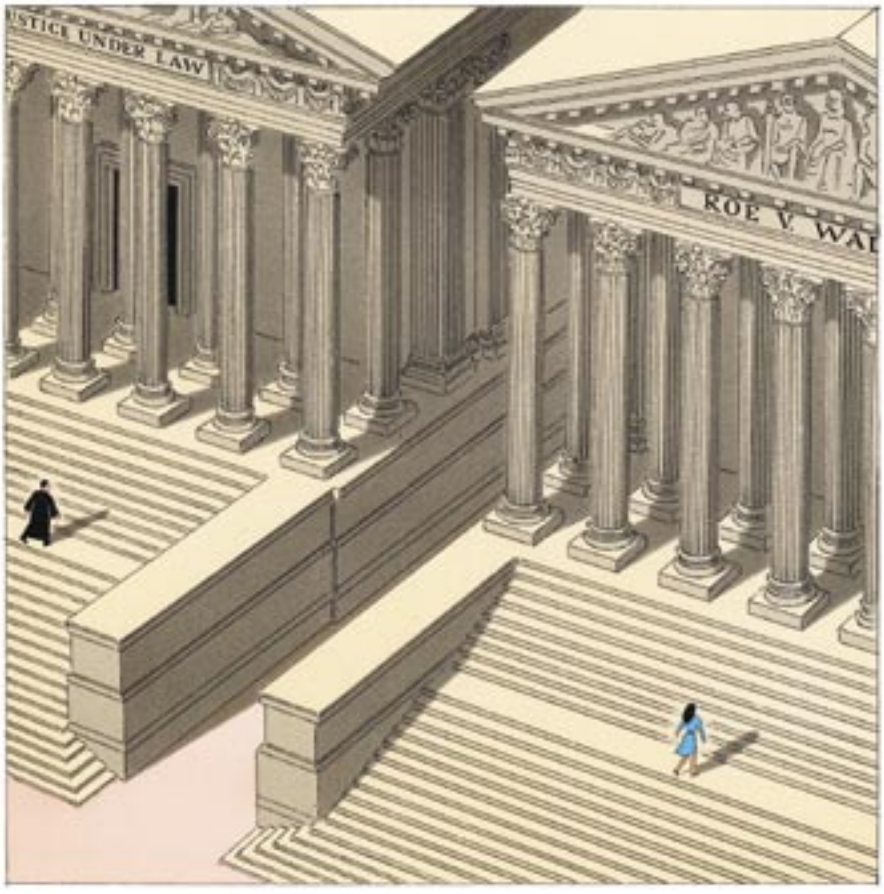
ANNALS OF LAW

STILL STANDING

The resilience of Roe v. Wade.

BY JEFFREY TOOBIN

The Supreme Court decided Roe v. Wade on January 22, 1973, the day that Lyndon B. Johnson died, and obituaries of the former President, who had left the White House only four years earlier, led the news the next morning. But in the subsequent three decades Roe has dominated public debate about the Court; only the Dred Scott case, which, in 1857, established that the Constitution regarded slaves as property, not as people, and helped precipitate the Civil War, and Brown v. Board of Education, which, in 1954, began the process of public-school integration, have had a comparable impact. Through eight Presidential elections and the nominations of thirteen Justices (some of which failed, at least in part, because of the nominees' views on Roe), no other controversies involving the Constitution—about such issues as civil rights or the relationship between church and state—have generated as much discussion as the holding, in Roe, that women have a right under the Constitution to terminate their pregnancies.



Since 1973, the Court has had many opportunities to overturn Roe.

Of the three Republican Presidents since 1980, two have called for Roe's reversal—George W. Bush has said that he favors restrictions on abortion law but has stopped short of demanding that Roe be overturned—and opposition to the decision has been a central organizing principle of the religious right. Among liberals, support for Roe has often been grudging. Many proponents of legal abortion have criticized the reasoning behind the opinion, and some have asserted that their cause would have been better served by taking their fight to state legislatures rather than to the Supreme Court. Some Justices, Sandra Day O'Connor prominent among them, have argued that the medical science on which Roe rests is outmoded. "These Supreme Court nominations always come down to the same thing," Orrin Hatch, the Utah Republican and longtime member of the Senate Judiciary Committee, told me. "It's one case: Roe, Roe, Roe."

Interest in the case has recently become particularly intense. On November 30th, for the first time in five years, the Supreme Court will hear arguments in an abortion-rights case, a challenge to part of a New Hampshire law that requires minors seeking abortions to notify their parents. Then, on January 9th, the Judiciary Committee will begin hearings on the nomination of Samuel A. Alito, Jr., a judge on the United States Court of Appeals for the Third Circuit, to replace O'Connor, who is retiring from the Supreme Court after twenty-four years. O'Connor's central role in determining the abortion jurisprudence of the Court since Roe, and Alito's controversial record in abortion cases as an appeals-court judge, make this transition an especially momentous one. In a 1985 application for a promotion in President Reagan's Justice Department, Alito wrote that he was "particularly proud" to have participated in writing a brief to the Supreme Court arguing that "the Constitution does not protect a right to an abortion."

Yet Roe has withstood attacks remarkably well. Only four of the seventeen Justices who have served since 1973 have voted to overturn it, though the Court has had many opportunities to do so, and public-opinion polls show strong, if not overwhelming, support for the decision. Roe v. Wade may be a rickety landmark, but it has proved to be resilient.

The events leading up to Roe were haphazard. In the summer of 1969, a carnival worker named Norma McCorvey went to see a doctor in Dallas because she suspected that she was preg-

GUY BILLOUT

"Yes, I would love you more if you didn't make mobiles out of old cutlery and beads."

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nant. She was twenty-two years old, and this was her third pregnancy, the product of a brief affair with a man whom she had met at a carnival. McCorvey had given up custody of her first two children and, distraught at the prospect of bearing a third child, decided that she wanted an abortion. Abortion was illegal in Texas, as it was in most states, except to save the life of the mother. As David J. Garrow recounts in his 1994 book "Liberty and Sexuality," "Another woman in the waiting room, upon hearing Norma's story, told her that she ought to tell the doctor that she had been raped, for that news might well make the difference." Thus misinformed, the doctor referred McCorvey to a local lawyer who knew a lawyer who was considering a challenge to Texas's abortion law. In March, 1970, McCorvey's lawyer filed a suit against the state, giving her client the pseudonym Jane Roe and naming as the defendant the district attorney of Dallas County, Henry Wade.

At the time, feminists and their allies were encouraging state legislatures to liberalize their abortion laws. Lawsuits such as Roe v. Wade represented an alternative strategy for achieving that goal; victories in court ultimately made battles in state capitols moot, and some abortion-rights supporters argue that political triumphs might have proved to be more enduring than legal ones. Ruth Bader Ginsburg, who was then a prominent feminist attorney in New York, later said that lawsuits like Roe had "halted a political process that was moving in a reform direction."

In the early nineteen-seventies, some states had begun to rewrite their laws to reflect public opinion on abortion, which has remained remarkably stable over the years. (Roughly sixty per cent of Americans say that they support women's right to abortion; an even larger majority supports some limitations on that right, such as laws mandating parental consent for minors and those restricting late-term abortions.) But changes in state law were unpredictable. Although New York liberalized its abortion laws in 1970, the State Legislature voted to reinstate restrictions two years later, a move that was stopped by the veto of Governor Nelson Rockefeller.

Only a ruling by the Supreme Court could establish a nationwide right to choose abortion, and at the time it was clear that several Justices wanted to protect abortion rights. In 1965, the Court had voted, seven to two, to strike down a ban in Connecticut on the use of contraceptives, even by married people. The decision, in Griswold v. Connecticut, has widespread support, but the reasoning in Justice William O. Douglas's opinion has remained controversial. The case was decided during a period of expansive jurisprudence in the Court, when liberal Justices were identifying new rights for individuals under the Constitution. Douglas cited some of these rulings involving such rights as the "freedom to associate"—which is not mentioned in the Constitution—and went on to introduce another: the right to privacy. These rights exist in the Constitution, Douglas wrote, because the "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."

"Penumbras" and "emanations" are vague concepts on which to base an interpretation of the Constitution, and Douglas's opinion has been persistently criticized by conservatives. Nevertheless, by the early seventies a majority of the Court had endorsed the right to privacy. In 1972, Justice William J. Brennan, a consistently farsighted judicial tactician, wrote an opinion for the Court in Eisenstadt v. Baird that extended Griswold's ruling to include the right of unmarried people to obtain birth control. "If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwanted governmental intrusions into matters so fundamentally affecting a

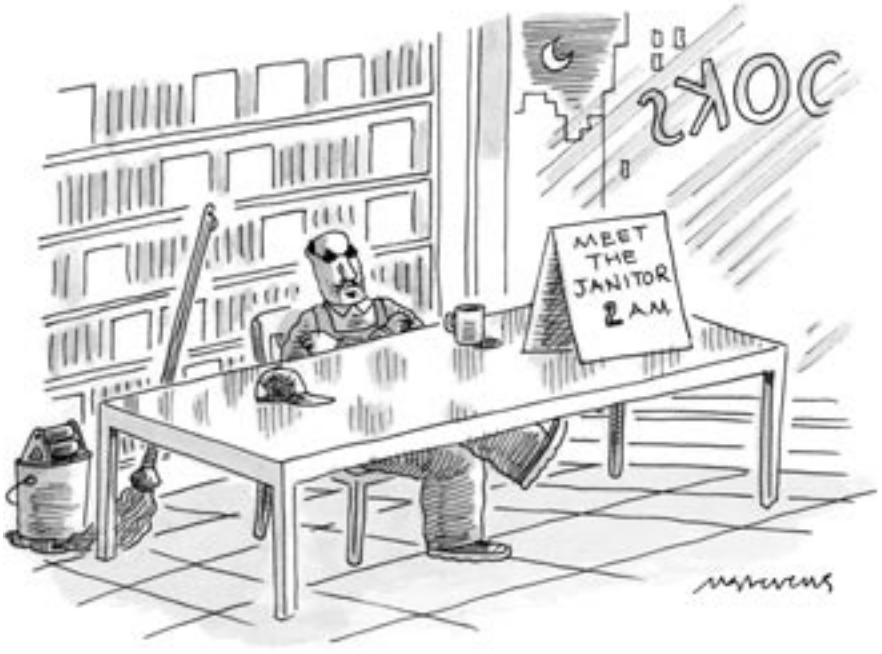
person as the decision whether to bear or beget a child," Brennan wrote. The phrase "bear or beget" all but announced a constitutional right to abortion.

The ruling in Roe, the next year, was hardly a surprise. Chief Justice Warren E. Burger, who was part of the seven-to-two majority in the case, assigned the decision to his childhood friend Harry A. Blackmun, who had joined the Court in 1970. Blackmun drafted some of the opinion in the library of the Mayo Clinic, the famous hospital complex in Rochester, Minnesota, where he had served as general counsel before becoming a judge. As Linda Greenhouse writes in her recent biography, "Becoming Justice Blackmun," "The staff had set aside a place for him to work and compiled a stack of books and articles on the history and practice of abortion."

In his opinion, Blackmun wrote that the "fundamental" right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy," but, unlike decisions regarding birth control, the right was not absolute. Where a state could show that there was a "compelling state interest" in limiting the right to choose abortion, the Court would approve the restriction.

To discern the state's interest in regulating abortion, Blackmun devised a framework that relied on pregnancy's trimester calendar. The Justice canvassed the medical literature and determined that in the first trimester the prospect of carrying a pregnancy through to childbirth was clearly more risky for a woman than an early-term abortion. Thus, he wrote, the state could not restrict abortion during this period, and the decision "must be left to the medical judgment of the pregnant woman's attending physician." (Much of the opinion is expressed in terms of the rights of the physician, rather than those of the woman—a reflection of Blackmun's high regard for the medical profession.) But as the pregnancy continued, Blackmun wrote, laws could start to reflect the government's interest in protecting the fetus, not just the woman's rights. After the first trimester, the state could regulate abortions, but only in "ways that are reasonably related to maternal health." Finally, "subsequent to viability," the state could restrict or even ban abortion, except when it is necessary "for the preservation of the life or health of the mother."

Blackmun's accomplishment was to establish a woman's right to abortion as well as a state's capacity to restrict it, and to place both on a foundation of solid medical science. In essence, Roe introduced a sliding scale, in which a woman's right to abortion was greatest early in her pregnancy and could be limited as the fetus grew. Even so, Blackmun insisted, any law restricting abortion, even late in a pregnancy, would have to insure protection of not only a woman's life but also her health. Blackmun elaborated on this point in his opinion in Doe v. Bolton, a challenge to Georgia's abortion law, which was decided by the Court on the same day as Roe. Again expressing the right to abortion as a doctor's choice, Blackmun wrote that the decision to perform the procedure "may be exercised in the light of all the factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient." In other words, when a woman's health was at stake, at whatever stage of the pregnancy, she and her doctor should be able to choose an abortion.



Roe declared that a state could no longer ban abortion, but the decision did not describe what kinds of restrictions would still be allowed. "You went from a standpoint that abortion was illegal in many states to a rather complex regulatory scheme outlined in Roe that involved three different points in pregnancy where the interests were different," James Bopp, Jr., the general counsel for the National Right to Life Committee, told me. In 1976, Congress passed the Hyde Amendment, which sought to prohibit the use of federal funds to pay for abortions, and the following year the Court voted, six to three, that women did not have a right to government-funded abortions.

The most important development with respect to abortion law, however, may have been O'Connor's appointment to the Court, in 1981. O'Connor's views on abortion were ambiguous. As Joan Biskupic writes in her new biography of O'Connor, her record as an Arizona state senator made "her appear more sympathetic to abortion-rights proponents than opponents but far from a major player on the issue, in any event." In her confirmation hearings, O'Connor, the first woman appointed to the Court, testified to an "abhorrence" of abortion but made no promises about how she would vote on the issue. On the Court, she voted independently from the beginning, surprising partisans on both sides. In her first important case on abortion law, in 1983, the majority struck down a set of rules in Akron, Ohio, that were clearly designed to discourage women from having abortions, including a regulation requiring that all abortions occurring after the first trimester take place in hospitals, and another calling for a twenty-four-hour waiting period for

women seeking abortions. O'Connor wrote a dissenting opinion, in which she defended the regulations and attacked Blackmun's logic in Roe v. Wade.

Improvements in medical technology, O'Connor declared, would render the trimester analysis obsolete. Increasing numbers of premature infants would be able to survive birth at ever earlier stages of pregnancy, she argued, and women would be able to have safer abortions later in pregnancy. Thus, O'Connor wrote, in what became her most famous sentence as a Justice, "The Roe framework . . . is clearly on a collision course with itself. As the medical risks of various abortion procedures decrease, the point at which the state may regulate for reasons of maternal health is moved further forward to actual childbirth. As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception."

O'Connor proposed a new legal framework to replace Roe. Adopting a phrase contained in a brief filed in the case by President Reagan's Justice Department, she wrote that abortion regulations should be upheld unless they created an "undue burden" on a woman seeking to have the procedure. O'Connor didn't define exactly what she meant, but she argued that, according to that standard, the Akron restrictions should have been upheld. In fact, O'Connor overestimated the degree to which science would advance. She was right in saying that more premature infants would survive, but she was wrong to conclude that the point of viability would shift in any meaningful way. In Roe, Blackmun had written, "Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." Today, thirty-two years after Roe, it is rare for a fetus younger than twenty-three or twenty-four weeks to survive. (The term of a normal pregnancy is thirty-eight to forty weeks.)

O'Connor did not call for Roe to be overturned, but she did suggest that the legality of abortion should be settled primarily by state legislatures, not by the courts. Quoting an opinion by Justice Oliver Wendell Holmes, Jr., from 1904, she wrote, "In determining whether the State imposes an 'undue burden,' we must keep in mind that, when we are concerned with extremely sensitive issues, such as the one involved here, 'the appropriate forum for their resolution in a democracy is the legislature.' " In 1987, four years after the Akron case, Robert Bork's nomination to the Supreme Court failed largely because he declined to endorse Roe, Griswold, or even the existence of a right to privacy in the Constitution. By 1991, when Clarence Thomas replaced Thurgood Marshall, the Court had four votes to overturn Roe: William H. Rehnquist, Byron White, Antonin Scalia, and Thomas. But O'Connor, whose political instincts were acute, never joined them. As she wrote in Webster v. Reproductive Health Services, in 1989, which upheld a Missouri law prohibiting most abortions in public hospitals, "When the constitutional invalidity of a State's abortion statute actually turns upon the constitutional validity of Roe, there will be time enough to reexamine Roe. And to do so carefully."

In the late eighties, Pennsylvania passed a series of laws, known as the Abortion Control Act, that were among the most restrictive abortion laws in the country. The legal fight over the laws, which featured both O'Connor and Alito in prominent roles, continues to shape the abortion debate today. The act called for the notification of parents of minors, a twenty-four-hour waiting period (the same restriction that the Supreme Court had rejected in the Akron case), a ban on "gender-selection" abortions, and a ban on abortions after twenty-four weeks except in cases of risk to the mother's life. The most controversial provision of the laws also required married women seeking abortions to notify their husbands first.

Planned Parenthood of Southeastern Pennsylvania challenged several provisions of the act, and in 1991 the case, Planned Parenthood v. Casey, went before the United States Court of Appeals for the Third Circuit, which Alito had joined the previous year. The three judges on the panel of the Third Circuit agreed that most of the provisions being disputed were constitutional, but two of them thought that the spousal-

SPOTS BY SAUL STEINBERG, FROM THE NOVEMBER 29, 1976, COVER

notification provision interfered too much with a woman's rights. Alito disagreed, and wrote a partial dissenting opinion in which, invoking O'Connor's logic, he argued that the regulation did not amount to an "undue burden" on women. Spousal notification would affect very few women in Pennsylvania, Alito said. The evidence in the case showed that between seventy and eighty per cent of women who seek abortions are unmarried, he noted, and ninety-five per cent of married women who seek abortions do tell their husbands. "Thus, it is immediately apparent," Alito wrote, that the law "cannot affect more than about five per cent of married women seeking abortions or an even smaller percentage of all women desiring abortions." In light of these small numbers, there was no "broad practical impact needed to establish an 'undue burden.' "

The following year, in the midst of the 1992 Presidential campaign, the Supreme Court agreed to hear an appeal of the Casey decision, and the sixty-eight days during which the Justices considered the case were some of the most charged in the Court's history. Six Justices—Rehnquist, White, O'Connor, Scalia, Anthony Kennedy, and Thomas—had expressed reservations about Roe, and lawyers for the first Bush Administration called on the Justices to use the case to overturn the decision. Kathryn Kolbert, the attorney representing Planned Parenthood, warned the Justices during her oral argument that upholding the Pennsylvania law was tantamount to nullifying the two-decade-old landmark. The Court responded carefully. In a rare joint opinion for a five-to-four majority, issued on June 29, 1992, O'Connor, Kennedy, and David Souter reaffirmed what they called "Roe's essential holding," which included "a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State," and "a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger a woman's life or health."

Then, in a victory for O'Connor, the joint opinion of the Court officially embraced the "undue burden" standard. The new rule meant that there was no longer a "fundamental" right to abortion, as Roe had posited, and that the Court would no longer use the trimester framework. Applying the "undue burden" standard to the Pennsylvania law, the Justices upheld all of its provisions with the exception of spousal notification. They dismissed Alito's claim that the law affected few women, noting icily that "the proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." The Pennsylvania law, they wrote, had overlooked the problem of abortion and domestic violence: "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 decision in Casey represented a more definitive vindication of Roe than at first appeared to be the case. The Court stated more clearly than ever that the right to choose early-term abortions was protected by the Constitution, and although the Justices rejected Roe's trimester analysis, they asserted that the key moment in pregnancy, from a legal perspective, was when the fetus became viable—as Blackmun had done two decades earlier. Though the decision placed "substantial obstacles" in the way of women seeking abortions, said Louise Melling, the director of the Reproductive Freedom Project of the American Civil Liberties Union, "Casey has a fuller discussion than even Roe of why reproductive rights matter to women. And the spousal-notice decision is very clear about what it would mean for women if you gave men that kind of power."

Some opponents of Alito's nomination to the Supreme Court have suggested that his opinion in Casey means that, as a Justice, he will vote to overturn Roe. Citing the decision in an analysis of Alito's record, published just after his nomination, the liberal group People for the American Way asserted that he is "hostile to basic reproductive privacy rights," and his mother, Rose Alito, told reporters, "Of course he's against abortion." But Leonard I. Garth, the judge for whom Alito clerked from 1976 to 1977, and who is now his colleague on the Third Circuit, told the Washington *Post*, "If what you're thinking is 'Would Sam overrule Roe?'—he would not. He might have restrictions and limitations, but it is a precedent he'd honor. As a previous mentor and as a present colleague, I don't think he'll overrule it."

In three cases after Casey, Alito reached conclusions that protected abortion rights. In 1995, he upheld a challenge to a Pennsylvania law stipulating that women who wanted to use Medicaid funds to abort a pregnancy resulting from rape or incest must report the incident to the police. In 1997, he upheld a New Jersey law that prevented parents from suing on behalf of a fetus in a wrongful-death action. The parents had argued that fetuses were individuals who could be plaintiffs in lawsuits; in his opinion Alito wrote, "The Supreme Court has held that a fetus is not a 'person' within the meaning of the Fourteenth Amendment." Finally, in 2000, he struck down a New Jersey ban on so-called partial-birth abortion. In each of these cases, the judge followed Supreme Court precedent; on the whole, his record does not suggest that he is an ideologue bent on overturning Roe.

The New Hampshire parental-notification case will be heard on November 30th, before Alito's confirmation hearings begin. But Justices' votes are not official until decisions have been handed down, usually several months after oral arguments. With the Senate vote on Alito's nomination tentatively scheduled for January 20th, he could end up voting in the case, which involves one of the oldest and most controversial aspects of abortion law—the exception for a woman's health.

In 2003, New Hampshire passed a law prohibiting physicians from performing an abortion on a minor without giving one of the minor's parents at least forty-eight hours' notice. Physicians can dispense with the notification if they can certify that the "abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice." The main issue in the case is whether the state must also establish an exception to the notification require-

"Dead ... Dead ... Dead ... Dead ... You're talking to Edward the Younger."

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ment if the minor's health is at risk.

Starting with Roe v. Wade and Doe v. Bolton, in 1973, the Court has consistently maintained that abortion laws must protect the "health" of women, a term that has been regarded as a loophole by the pro-life movement. "A 'health' exception just renders every other regulation on abortion a nullity," James Bopp, of the National Right to Life Committee, says. "Abortionists believe that every abortion is good for a woman's health. And the general statistics do say that there is a statistically greater risk to the woman's health by having normal-term childbirth than by having an abortion. So now that most aborting physicians make a living doing abortions, they will always find that a health exception applies, especially when you can talk about psychological or emotional health." On the other side of the debate, abortion-rights advocates argue that the absence of a health exception could place women in great danger. "The forty-eight-hour delay could result in permanent and serious health consequences. The state hasn't disputed that there are conditions short of death, like infertility, liver damage, and blindness, that could occur if abortions are delayed," Louise Melling, of the A.C.L.U., says.

Ruling in the state's favor in the New Hampshire case would not require the Justices to overturn Roe or Casey, but it would be a signal that the post-O'Connor Court is receptive to tighter restrictions on abortion. "Under current doctrine, the Supreme Court has said a woman's health is paramount, even after fetal viability; that's been true since Doe, and even Casey reaffirms it," said Dawn Johnsen, a professor at the Indiana University School of Law, in Bloomington, and a former legal director of the National Abortion Rights Action League. (The group is now called NARAL Pro-Choice America.) "We'll see if that's still true after this case."

The health exception also figures prominently in another abortion controversy that the Supreme Court is likely to address this term. More than ninety per cent of abortions in the United States take place in the first trimester—before the twelfth week of pregnancy—and most of the rest take place before the twentieth week, but in recent years abortion-rights opponents have been fighting to ban what they call partial-birth, or late-term, abortions. These involve a procedure known as "intact dilation and extraction," or D & X, and are gruesome. As the Justice Department described the practice, in a recent brief to the Supreme Court, "a physician partially delivers the fetus intact (i.e., without first dismembering it)"—pulling it out by the feet—"and then kills the fetus, typically by puncturing its skull and vacuuming out its brain." The late Senator Daniel Patrick Moynihan, an abortion-rights supporter, opposed D & X abortions, saying, "I think this is just too close to infanticide. A child has been born and it has exited the uterus and what on Earth is this procedure?" Few D & X procedures are performed—while there are no reliable data, estimates range from six hundred to five thousand a year—and these include severe cases of hydrocephalus in which the fetus's head is too large to pass through the birth canal and its chances of survival would be low.

In 2000, in Stenberg v. Carhart, the Supreme Court ruled, five to four, with O'Connor in the majority, that Nebraska's ban on partial-birth abortion was unconstitutional. Justice Stephen G. Breyer, in his opinion in the case, wrote that the law, which subjected doctors to prison terms of up to twenty years, could not stand because it "lacks any exception for 'the preservation of the . . . health of the mother.' " The law also represented an "undue burden," under the Casey precedent, he argued, because it was so vaguely worded that it would have banned not only D & X abortions but also the much more common "dilation and evacuation" (D & E) procedure, which is used in ninety-five per cent of abortions performed between thirteen and twenty weeks. "People talk about 'late term' abortions, but these laws ban some very common kinds of situations," Melling says. "We're talking about what happens when there's a bad result from an amnio and people decide to end their pregnancies. That's what these laws want to stop."

Congress responded to the Stenberg decision by passing a law that was nearly identical to the one the Court had just voided. The Partial-Birth Abortion Ban Act, which President Bush signed in 2003, has been declared unconstitutional in three separate cases, one of which has reached a federal appeals court. On September 23rd, the Justice Department asked the Supreme Court to overturn the

first of those rulings and reinstate the federal ban. The brief, by Paul D. Clement, the Solicitor General, was filed shortly before Bush announced Alito's nomination and resurrects Alito's reasoning in his Casey opinion on spousal notification. According to the brief, the federal appeals court had "failed to show that the Act's prohibition of partial-birth abortion would affect the health of the mother in more than a small fraction of the cases to which the Act applies." Thus it is possible that in the case from New Hampshire and the one regarding the federal law, Alito, as part of a new majority on the Court, may yet see his interpretation of the maternal health exception upheld.

The reappraisal of Roe ultimately came to include the original plaintiff herself. In the nineteen-eighties, McCorvey publicly revealed her identity, and for several years served as a spokeswoman for abortion rights. But in 1995 she had a religious awakening and became committed to fighting the cause that she once embodied. In 2003, McCorvey filed a federal lawsuit asking the Supreme Court to overturn Roe v. Wade "on the basis of changed factual and legal conditions." She lost the case, but in 2004 Judge Edith H. Jones, of the Fifth Circuit Court of Appeals, who is frequently mentioned as a candidate for the Supreme Court, wrote a concurring opinion in the case, in which she declared, "Hard and social science will of course progress even though the Supreme Court averts its eyes. One may fervently hope that the Court will someday acknowledge such developments and reevaluate Roe and Casey accordingly." Earlier this year, the Supreme Court declined to hear McCorvey's appeal.

There is substantial agreement among partisans on both sides of the abortion debate about what would happen if the Court decided to reëvaluate Roe. In 2004, the Center for Reproductive Rights published a study called "What If Roe Fell?," in which it predicted that abortion rights would probably remain protected in twenty states, including New York and California, if Roe was overturned. At the same time, the study's authors reported that abortion would probably be banned in at least twenty-one states, including much of the South, and would become subject to greater restrictions in many others.

Still, overturning Roe does not seem imminent, even if Alito joins the Court. Once O'Connor retires, three Justices in the Casey majority will remain; Ginsburg, who joined in 1993, and Breyer, who was appointed a year later, support abortion rights; and the new Chief Justice, John G. Roberts, Jr., has made respect for precedent a touchstone of his judicial philosophy. In his testimony before the Senate Judiciary Committee, Roberts said that "the Casey decision itself, which applies the principles of stare decisis to Roe v. Wade, is itself a precedent of the Court entitled to respect under principles of stare decisis. And that would be the body of law that any judge confronting an issue in this area would begin with; not simply the decision in Roe v. Wade, but its reaffirmation in the Casey decision." Alito used similar formulations in meetings with senators before his hearings, telling Joseph Lieberman, of Connecticut, that, as the Senator recounted it, "Roe was precedent on which people—a lot of people—relied, and had been precedent now for decades and therefore deserved great respect."

The abortion-rights movement has lived on the edge of calamity for so long that a measure of fatalism has come to be second nature. "Currently, O'Connor provides the fifth vote for meaningful protection of the right," Dawn Johnsen, of Indiana University, says. "But, even with O'Connor on the Court, the standard the Court has adopted has allowed states to approve restrictions that make abortions far more expensive, and that discourage doctors from offering abortions in large parts of the country. Soon, you could have a standard that said anything short of a criminal ban is not an 'undue burden.' The Court has upheld one-day waiting periods, so maybe they'll approve one week. They could say that women do have to notify their husbands, after all. They could say that all abortions have to be done in hospitals. It's already hard to get an abortion in many states, and these are rules that could make it impossible." But the fact remains that through thirty-two years, and the appointment of seven Justices by Republican Presidents, Roe has endured. ♦