

## U.S. SEN. SAM BROWNBACK

June 23, 2005

### Senate Judiciary Constitution Subcommittee Hearing “The Consequences of *Roe v. Wade* & *Doe v. Bolton*”

#### Opening Statement

I am pleased to call to order this Constitution Subcommittee hearing on the consequences of *Roe v. Wade* and *Doe v. Bolton*, and thank Ranking Member Feingold, the witnesses, and those in attendance for their participation.

America was founded upon the “self-evident truth” that all humans are endowed with the unalienable right to life.

Yet the wisdom that flowed in 1776 from Jefferson’s pen was rejected almost two centuries later, when a divided Supreme Court found a constitutional right to abortion. In *Roe v. Wade*, the Court shaped this right around the three trimesters of pregnancy, even prohibiting the states from regulating post-viability abortions if the “health” of the mother was involved. In *Doe v. Bolton*, the Court expounded on the meaning of “health,” describing the term so broadly that several scholars believe this exception to state authority to regulate abortion actually is the rule.

In the years since *Roe v. Wade* and *Doe v. Bolton* were decided, it is estimated that around 40 million abortions have taken place in the United States. The legally-sanctioned extinguishing of these millions of innocent lives is a gross injustice in itself.

Not long after the Supreme Court handed down *Roe* and *Doe*, former Supreme Court Justice Harry Blackmun, the author of the those opinions, himself cast in doubt the wisdom of the Supreme Court’s sudden and decisive role in the abortion debate.

For instance, in 1978, as the Supreme Court was considering yet another abortion-related case from a lower court, Justice Blackmun noted in private correspondence, “More a[bortion]. I grow weary of these. . . . [I] wish we had not taken the case.”

Justice Blackmun’s surprisingly candid private sentiments match the unsurprising and overwhelming public criticism that the Supreme Court’s abortion jurisprudence has inspired. The contentious debate since 1973 over the culture of life has proven that the American people, the democratic process, and ultimately even the federal judiciary have been ill-served by the Supreme Court’s breathtaking intervention into, and circumvention of, the public debate about abortion.

What is striking about the criticism of these decisions is that it has come from across the political spectrum. Indeed, the Supreme Court decisions have been widely condemned by both the right and the left.

Liberal legal scholars in particular have attacked the abortion decisions' utter lack of pedigree in either constitutional text or American tradition. For instance:

- John Hart Ely, one of the leading constitutional scholars of his generation, stated that *Roe v. Wade* "is bad because it is bad constitutional law, or rather because it is not constitutional law and gives almost no sense of an obligation to try to be."
- One of the most thorough explanations of the constitutional quicksand upon which the right to an abortion rested after *Roe* comes from Edward Lazarus, himself a former clerk to Justice Blackmun. Lazarus has stated as follows:

"As a matter of constitutional interpretation and judicial method, *Roe* borders on the indefensible. I say this as someone utterly committed to the right to choose, as someone who believes such a right has grounding elsewhere in the Constitution instead of where *Roe* placed it, and as someone who loved *Roe*'s author like a grandfather. . . .

What, exactly, is the problem with *Roe*? The problem, I believe, is that it has little connection to the Constitutional right it purportedly interpreted. A constitutional right to privacy broad enough to include abortion has no meaningful foundation in constitutional text, history, or precedent. . . .

The proof of *Roe*'s failings comes not from the writings of those unsympathetic to women's rights, but from the decision itself and the friends who have tried to sustain it. Justice Blackmun's opinion provides essentially no reasoning in support of its holding. And in the almost 30 years since *Roe*'s announcement, no one has produced a convincing defense of *Roe* on its own terms."

But the left's strong criticism of *Roe* and *Doe* does not stop with the fact that the decisions smacked of political judgment more than constitutional principle. Rather, it also extends to the fact that the Supreme Court unilaterally ended the democratic process by which the People and the states were making their own judgments about the appropriate governmental role in protecting unborn life.

- For example, none other than Justice Ginsburg has said that at the time of the decisions, "The law was changing. . . . Women were lobbying around that issue. . . . The Supreme Court stopped all that by deeming every law – even the most liberal – as unconstitutional. That seemed to me not [to be] the way courts generally work."
- Similarly, Jeffrey Rosen, a liberal law professor and noted privacy expert at George Washington University Law School, recently stated that "*Roe v. Wade* was bad for liberals. . . . *Roe* has cast a shadow over our judicial politics for the past thirty years. . . . *Roe* is an important cautionary tale about how the judiciary, when it attempts to thwart the determined wishes of a national majority . . . may be responsible for a self-inflicted wound."

These powerful objections to *Roe* and *Doe* from the left beg the question of what would happen were those objections to be sustained, and the cases to be overturned. The answer is not, as some

have claimed, the nationwide prohibition of abortion. Rather, as the Constitution contemplates, the decision of whether and how to regulate abortion would return once again to the states. This is far preferable to the status quo, as Justice Scalia explained in his dissent in *Planned Parenthood v. Casey*:

“[B]y foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair and honest fight, . . . the [Supreme] Court merely prolongs and intensifies the anguish.”

Justice Blackmun won applause from some for stating in the 1994 case of *Callins v. Collins* that he would vote against the death penalty in all future cases, and would “no longer . . . tinker with the machinery of death.”

Yet Blackmun’s firm position in the *Callins* case stands in stark contrast with the opinions he authored in *Roe* and *Doe*, which allowed the premature ending of 40 million lives. Indeed, in his memoranda to other Justices before the cases were decided, Justice Blackmun observed that “I have concluded that the end of the first trimester [of pregnancy] is critical,” and then explicitly conceded, “this is arbitrary.” Geoffrey Stone, a law clerk to Justice Brennan when *Roe* was decided, has confirmed this, stating that “Everyone in the Supreme Court, all the justices, all the law clerks knew it was ‘legislative’ or ‘arbitrary.’”

To put it simply, *Roe* was a mistake. A very, very costly one.

The admittedly arbitrary decisions in *Roe v. Wade* and *Doe v. Bolton* have had deliberate and severe real-life consequences for women, unborn children, and the body politic.

Here to discuss those consequences in more detail are two distinguished panels of witnesses. On the first panel, we will hear personal perspectives from Norma McCorvey, who was the plaintiff Jane Roe in *Roe v. Wade*, and Sandra Cano, the plaintiff in *Doe v. Bolton*. These witnesses will describe their journey from being litigants in the most controversial cases of our time to becoming dedicated advocates for a culture of life. We also will hear from Dr. Ken Edelin, Associate Dean at the Boston University School of Medicine.

The second panel of witnesses will discuss the legal and institutional aspects of the abortion decisions. In particular, they will both examine the constitutional foundation for the right to abortion, and explore the effects of the Supreme Court’s permanent short-circuiting of the democratic process with respect to this important issue. The witnesses on this panel will include Teresa Collett, Professor of Law at the University of St. Thomas Law School; M. Edward Whelan, President of the Ethics and Public Policy Center and a former clerk on the Supreme Court; Alta Charo, Professor of Law and Bioethics, and Associate Dean for Research and Faculty Development at the University of Wisconsin Law School; and Karen O’Connor, Professor of Government at American University. I thank all of the witnesses for attending, and with unanimous consent will enter each of your written statements into the record.