Downside UP

A Voice of Contemporary Political Economy, Volume V, Issue 10: December, 2005
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***Note**: The following article is the first of two on abortion and the social, political, and cultural firestorm surrounding it. Next month will be the usual two-month issue coming out around the middle of January.*

Roe v. Wade:
The Decision That Never Was

Abortion: No issue focuses so much attention on Supreme Court nominees. No issue so dramatically demonstrates the role which religious belief has assumed in public life – and the divisiveness which differences about it enkindle. Only conflict over evolution and Creation inspires more disregard of fact and science. No struggle demonstrates more obviously the importance of "framing" ideological issues to attract and consolidate political support.(1) No issue reveals more starkly the dark side of misogyny and discrimination lying behind the façade of "pro-life" doctrine and coursing through American culture. No issue more seriously undermines the common ground of values most Americans share.

This issue of Downside Up and the one to follow represent an attempt to shed new light on the abortion controversy in which the United States has been embroiled for the past 30 years. Next month's will lay out some ideas about how we as a country might work our way through to a broad consensus acceptable to a large majority of Americans. This month's takes us from the landmark Supreme Court decisions of *Griswold v. Connecticut* and *Roe v. Wade* through the ever more apocalyptic divisiveness infecting our culture and our politics. It suggests first a way of looking at *Roe* I have not seen talked about anywhere in the media, and secondly how common ground has been lost as a result of the most radical pro- and anti-choice sides each benefiting from making of *Roe* something it never was.

The Republican Right, urged on by its so-called Christian "Fundamentalist"(2) wing, has "framed" abortion as murder and themselves as "pro-life." Barely concealing their underlying hostility to women's sexual freedom, they have ratcheted up their anti-*Roe* rhetoric from "unborn child" to "pre-born person" and from anti-abortion to anti-contraception. On the other side, the pro-choice left has similarly turned *Roe* into the Holy Grail of "reproductive freedom" and a "women's right to choose," neither of which is well evidenced in the actual *Roe* decision. Each side's pointing to the evil other has been great for fund-raising but left the rest of the political spectrum, namely pro-choice moderates representing the vast majority of Americans, with no place to go.

Griswold and *Roe* (3)

While the Supreme Court's 1973 decision in *Roe v. Wade* stands out as one of the most significant, and transformative, events in American history, and it did break

sharply with the immediate past, it was neither unprecedented nor as sharp a break with the past as commonly assumed. Abortion and contraception were legal in most states until the second half of the 19th century. The Court's 1965 decision in *Griswold v*. *Connecticut*, overturning a Connecticut law against contraception, restored a past condition in which the State (4) stayed largely out of the business of regulating family life. In so deciding, the Court propounded what it called a "right of privacy" "unenumerated" in the Constitution but implicit in the Bill of Rights and the Fourteenth Amendment granting due process of law to all citizens ("…nor shall any State deprive any person of life, liberty, or property, without due process of law"). (en.wikipedia.org, World Book, full text at www.tourolaw.edu,)

It is almost universally assumed among the general public, regardless of political persuasion, that *Roe* established "unfettered" access to abortion, or, as it is often termed, "abortion on demand." To the contrary, drawing on law, history, culture, and philosophy, the Court carefully drew a line between *Griswold*'s right of privacy and the legitimate interests of the State. Overturning a Texas law against abortion,(5) the Court found that,

"'[T]he State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman ... and … it has still another important and legitimate interest in protecting the potentiality of human life.'" "'The right of personal privacy includes the abortion decision, but … this right is not unqualified and must be considered against important state interests in regulation.'" (en.wikipedia.org, World Book, full text at www.tourolaw.edu,)

Based on the assumed viability of the embryo/fetus(6) during each three months of a nine month pregnancy,

"The decision established a system of trimesters that attempted to balance the State's legitimate interests with the individual's constitutional rights…The court defined, within each of the three stages of pregnancy, the reciprocal limits of state power and individual freedom: (a) During the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician. (b) After the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure 'in ways that are reasonably related to maternal health.'(c) For the stage subsequent to viability, the State, in promoting its interest in the potentiality of human life may, if it chooses, regulate and even proscribe abortion, except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."

An Ironic Victory

Given the actual wording of *Roe v. Wade*, the case is an ironic rock upon which to build a pro-choice church. I see seven striking problems with the decision for pro-choice forces, even granting, which I do, a right of privacy implicit in the rights enumerated in the Constitution: (1) Far from a ringing endorsement of "unfettered" abortion, *Roe* affirms for "the State" an "important and legitimate interest in protecting the potentiality of human life." (2) Even where abortion is to be allowed, "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician," not the woman herself. (3) The State may, in the third trimester, proscribe abortion entirely, except where "in appropriate medical judgment," it is necessary for "the preservation of the life or health of the mother." (4) The right of privacy so much the basis of the decision "is not unqualified and must be considered against important state interest in regulation." (5) The whole structure of viability based on trimesters is a house of cards subject to changing technology. (6) The Court's basing *Roe*, like *Griswold*, on an alleged right of privacy in the Constitution is certainly controversial and subjects the decision,

however hypocritically, to attack from the so-called "strict constructionist" Right.(7) And (7), by intervening in a matter previously the object of state legislation, the decision subjects the Court to the related – and not-completely-illegitimate accusation – of judicial activism which prevented the states from working out a complex issue clearly within their legislative purview and with yet no definitive resolution.

Roe v. Wade is no ringing defense of reproductive freedom, autonomy, or feminism. It is no clarion call for "a women's right to choose." The Court is entirely made up of men, all of whom were born in the first quarter of the twentieth century (or earlier). The actual wording of *Roe* never gives the pregnant woman the right to decide. Her rights, interests, and desires are always subject to the medical profession and her (at that time most likely male) doctor. The interests of "the State" are paramount even when they yield to the merit of allowing an abortion. The fetus, at least after the first trimester, even if without rights or personhood, seems to have at least equal standing with the pregnant woman, though also subject to "State interest." The notion of viability in *Roe* was bound to change with technology until the day comes when we really have "test tube babies," the interests of the "human potentiality" outweigh those of the mother, and abortion may be "proscribed" altogether. The ideology behind *Roe* comes off to me as distinctly top-down, authoritarian, paternalistic, and male.

What remain the strongest parts of the decision for pro-choice advocates are the Court's holdings that (1) there is no basis in the Constitution for considering the fetus a "person," (2) the health of the mother is an essential exception to any proscription of abortion, and (3) in almost (more on this later) all cases, the State is barred from restricting abortion during the first three months of pregnancy. With respect to the Constitutional status of the zygote/embryo/fetus, the Court placed special significance on the fact that abortion had only been criminalized starting in the second half of the 19th century and therefore the writers of the Constitution and the first 14 amendments could not have had in mind a right to life for the "unborn."

Eating Away at Choice

I have understood for a long time, maybe since the decision itself, that *Roe v. Wade* granted no unrestricted right to abortion but tied potential restrictions on abortion to the viability of a fetus during the second two trimesters of a pregnancy. Both sides of the issue have, however, for so long talked about abortion in such extremist terms, as all or nothing, "a women's right to choose" or "pro-life," that I, like most Americans, have by default accepted this radical dichotomy as if it actually reflected *Roe*. Certainly, *Roe* was path-breaking and, over time, the medical profession, and most states, largely adopted the practice of allowing a woman to choose pretty freely whether to have an abortion or not. As the *Roe* decision itself noted, the American Medical Association had already changed its position on abortion. Also, in the real world, the "health of the mother" was pretty broadly interpreted to justify abortion. Correctly or not, as The St. Augustine Record recently stated, California allows "unfettered" access to abortion. (11/5/2005, p. 4A)

In striking contrast to this evolving practice of abortion, there arose at the same time, a firestorm of hostility and protest with *Roe* at its center. *Roe* touched off direct citizen action from letter-writing and picketing of abortion clinics to handing out photos of aborted fetuses. In the extreme, it provided a psychological justification for people to murder doctors in the name of "life."

Since *Roe* was a compromise between a women's right to abortion and the State's (and the states') "legitimate interest" in protecting the life and health of the mother as well as the "potentiality of human life," the decision invited regulation and controversy. The basis of much of the legislation which ensued has been, on its face, to protect mother and child, but the real purpose has in fact almost always been to prevent or reduce abortions.(8) These laws have included requirements for women to read certain materials about alleged risks and effects of abortion, waiting periods, parental consent for minors, parental notification, spousal consent and notification, requirements that abortions be performed in hospitals not just clinics, bans on intact dilation and extraction (dubbed by anti-choice advocates, "partial birth abortion"), and prohibition of state funding. The Hyde Amendment in the 1970's banned federal funding of abortions. Abortions in overseas military hospitals are banned under George W. Bush. Aid to international family planning organizations which might advise (not just perform) abortions have been off, on, and off again from Reagan-Bush I to Clinton to Bush II.

While the Supreme Court overturned many restrictions on abortion in the 70's and 80's, in 1980 it upheld the Hyde Amendment in *Harris v. McRae*, and has ever since consistently upheld restrictions on state and federal funding of abortions. Not until 1989, however, in *Webster v. Reproductive Health Services*, did the surge of Reagan-Bush appointees begin to break the dam protecting abortion "rights," and, with this change, Sandra Day O'Connor assume her role as swing voter on a closely divided court.

What *Webster* breached, *Planned Parenthood v. Casey* broke in 1992.(9) While affirming the "essential holding" of *Roe*, it overturned *Roe*'s trimester formula for fetus viability, lowered the standard by which restrictions would be measured, and upheld three out of four major restrictions long-sought by anti-abortion advocates. It found the right to abortion "'grounded in the general sense of liberty' under the Fourteenth Amendment rather than recognizing a general right to privacy that had been implied in previous cases." The case recognized that by 1992 a fetus could be considered viable at 22 or 23 rather than the 28 weeks assumed in 1973, and that viability is "the point at which the State interest in the life of the fetus outweighs the rights of the woman and abortion may be banned entirely." (en.wikipedia.org; text at www.law.cornell.edu)

Different justices voted differently for different opinions and dissents, no opinion received a majority, Justice Anthony Kennedy changed his mind at the last moment to uphold *Roe* partially in a 5-4 vote, and only three justices supported the plurality opinion in its entirety. In the plurality opinion, the Court lowered its standard for fundamental rights from "heightened scrutiny" to "'undue burden'" defined as having "'the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." It then struck down the spousal notification requirement, but upheld Pennsylvania's requirements for "informed consent" through unbiased information given the patient, a 24-hour waiting period, and parental notification.

The Bell for Round Two Has Rung

Round one in the battle against abortion rights began in 1973 in opposition to the decision of a Court dominated by Democratic and liberal Republican appointees. For abortion opponents, round one ended successfully in 1990 when a Court dominated by Reagan-Bush I appointees decided *Planned Parenthood v. Casey*. Round two began in 1990 as the push for further restrictions ran up against the roadblock

created by Clinton appointees. We can now expect that, with Bush II appointing two or more justices, restrictions on abortion by women carrying viable babies will grow massively, and restrictions on women carrying non-viable babies will now come into play. Among the questions to be answered are these: (1) Will the very principle of abortion in *Roe* be overturned? (2) Will individual states be allowed to ban abortions of viable babies, even in cases of rape and incest or when the life of the mother is endangered? (3) Will the federal government pass national anti-abortion laws? (4) Will bans on abortion of embryos materialize and be extended to unfertilized eggs and unimplanted fertilized eggs – zygotes? (5) Does the hostility to abortion extend to the whole idea of a "right of privacy" as promulgated in *Griswold v. Connecticut* and thus encompass artificial contraception?

The attack on abortion is surely growing. As I started writing this article, it came out that Food and Drug Administration political higher-ups in the Bush Government ignored scientific evidence (again) and intervened to prevent approval of over-the-counter Plan B "morning after" emergency contraception for women 16 and older. The US Conference of Catholic Bishops opposes *in vitro* fertilization. The Christians Answers Network equates taking multiple contraceptive pills to prevent implantation of a fertilized egg with abortion and murder. Pharmacists for Life are insisting on the right of pharmacists to refuse to fill legal contraceptive prescriptions because they consider such contraceptives abortion pills -- abortifacients. The Bush Government has adopted regulations allowing states to classify a zygote as an "unborn child" eligible for coverage under the State Children's Health Insurance Program – meaning pregnant women will get health care only because they are pregnant.

In 2004, Congress passed the Unborn Victims of Violence Act (UVVA) which defines "unborn child" and "child in utero" as "'a member of the species homo sapiens at any stage of development, who is carried in the womb.'" (news.findlaw.com) This law establishes a fetus, embryo, and fertilized egg as a possible crime "victim," independent of the pregnant woman who suffers a physical injury. The next step will be to prosecute a pregnant woman for endangering her "child in utero" if she goes skiing and, to be sure, prosecuting her for taking drugs or aborting the "child in utero." Congress also passed the Weldon Amendment – formerly known as the Abortion Nondiscrimination Act. Under this bill, state and local governments can lose federal funding if they attempt to require health care institutions to provide, pay for, or make referrals for abortions.

American Girl dolls are now under attack because they support Girls Inc., what used to be called Girls Clubs. The problem with Girls Inc. is that they run after-school programs for underprivileged girls covering not only substance abuse but pregnancy prevention. Girls Inc. supports not only girl "empowerment" but girls who question their sexuality. That Girls Inc. also supports those who question a woman's right to an abortion carries no weight: a "balanced" perspective doesn't hack it on the misogynist right. (Susannah Meadows, "The Politics of Playtime," Newsweek, 11/14/05, p. 32)

Mississippi has begun to take advantage of what was previously perceived as a technical matter: *Roe* allows states to require that all abortions, including first-trimester abortions, be performed by a state-licensed doctor. In Mississippi, abortion clinics – or clinic, since the state is now down to only one, in Jackson – are staffed entirely by doctors from out of state. The understanding of the state licensing requirement has up to now emphasized the licensing. If the doctor has to be

licensed in the state where she or he performs abortions, it ups the anti on the doctor in a state whose culture is notably hostile to abortion.

Here in Florida, under the President's even further-out brother, Governor Jeb's Department of Children & Families has recently intervened to stop an abortion for one of its 13-year old charges. DCF claims that she is not mature enough to decide on an abortion -- though apparently she is mature enough to care for a newborn infant. She has been raised for years under DCF's "care" and became pregnant while in a DCF group home. The girl's attorney told DCF that the girl wanted an abortion but, as in other cases, DCF's plan is evidently to keep the case tied up so long in court that eventually it won't be possible to have the abortion performed safely before viability of the fetus. (Carl Hiaasen, "DCF policy: Forcing babies to have babies," St. Augustine Record, 5/7/05, p. 4)

On the legislative front, Jeb recently signed a bill increasing state "oversight" of clinics performing second trimester abortions, including a provision requiring a clinic's medical director to have privileges at a nearby hospital. The whole legislative rationale is cast in the language of caring for the health of the mother and child – to "improve the treatment of women seeking abortions" -- but the real purpose is to restrict abortions. "Past attempts by the state to impose detailed regulations have been blocked by the federal courts, [but] past regulations covered both first- and second-trimester abortions; the bills now under consideration focus on second-trimester abortions." Bush "said the new law wasn't related to his anti-abortion views but he later added that he was motivated, in part, by his desire 'to create a culture of life in our state.'" (Jackie Hallifax, "Senate refuses to add alternative to abortion clinic legislation," staugustine.com, 05/04/05; "Bush signs bill increasing regulation of abortion clinics," St. Augustine Record, 6/1/05, p. 2A)

Losing Common Ground

Roe v. Wade is not the clarion call for "women's reproductive freedom" that both extremes of the abortion issue have led us to believe. Rather, *Roe* attempted to balance the "right of privacy" for the woman to get an abortion against a "legitimate State interest" in the "potentiality of human life." In the real world of abortion politics, however, *Roe*'s nuances have been lost.

Actual practice in many states, especially the "blue" states, has been to give the medical profession considerable leeway with regard to the "health of the mother" and, overall, to expand a woman's right to choose. Pro-choice groups have supported this trend and pointed to *Roe* as the beacon of reproductive freedom. Out on the edge of pro-choice, NARAL (the National Abortion Rights Action League), supported by more broad-based organizations like NOW (the National Organization for Women) and the ACLU (the American Civil Liberties Union), has staked out a position which advocates what amounts to an "unfettered" right to choose based on *Roe v. Wade*.

At the same time, anti-abortion forces on the political and religious right have "framed" the issue on their own terms as "pro-life," denounced abortion as murder, and blamed *Roe v. Wade* for protecting "abortion on demand." By also identifying *Roe* with unfettered abortion, they have gained overwhelming political leverage over pro-choice forces, including people who might actually support a more moderate stance. Since 1973, the Supreme Court has opened the door to more restrictions on abortion and, with two more Bush appointees on the Court, may soon overturn protections for first trimester abortions.

There is good reason why pro-choice as well as anti-choice forces have portrayed *Roe v. Wade* as more definitive and more radical than it actually is: the pro-choice extreme fears that any crack in the façade of absolute choice will cause the whole structure to implode. The anti-choice extreme finds a radical *Roe* very useful for inciting their troops. Both have a vested interest in using *Roe* to raise money.

Together, both extremes have cut out the middle, common ground where the vast majority of Americans actually live as abortion rights moderates. Any Republican who supports Plan B contraception or suggests that it might not be so criminal to abort a zygote or an embryo smaller than one's thumbnail, faces denunciation for supporting murder. Any Democrat who suggests that there might be some circumstances in which abortion should be restricted, faces denunciation for undermining a woman's right to choose.

This bitterly divisive context has left pro-choice moderates -- perhaps 70 to 80% of the American people -- with no place to go. They're either "with us or against us." It's either "pro-life" or no-life.

Next Month

Next month, I will explore possibilities for framing the issue in line with progressive values, draw a line on pro-choice as well as anti-abortion extremism, and make a case for common ground based on a comprehensive national program of education, contraception, abstinence, respect for women and men, universal health care, and economically and psychologically strong families.

Footnotes:

1. For a discussion of framing, see George Lakoff, Don't Think of the Elephant, and the November issue of Downside Up, "Speaking Truth to Ourselves."
2. The common term for religious extremists today is "Fundamentalist" or "Fundamentalism" but, to religious historians, this term refers to a specific, highly rationalist, Protestant movement of the late nineteenth and early twentieth centuries in the United States. In the past I have deferred to my colleagues' perspective and used the term "Evangelical" or "Evangelicals" as my catch-all for right wing so-called Christianity. Yet far from all Christians who claim the evangelical tradition share the right wing view of abortion or politics. Again the word has been captured by the right. The root meaning of "evangelical" represents a focus on the four Gospels telling of the Good News of Jesus, an emphasis on salvation by faith, and preaching over ritual. Jim Wallis of the social justice magazine, Sojourners, considers himself an evangelical. For the political context in which I write, I will probably continue to use "Fundamentalist."
3. Before going further, readers need to understand that while the US Supreme Court is the focus of decisions about the legality of abortions and restrictions on abortion, almost all cases up to now have been about state laws restricting abortion, not federal laws. The three most important cases discussed in this article have to do with laws passed in Connecticut, Texas, and Pennsylvania. While another case mentioned has to do with federal law on funding abortions and Congress has tried to ban intact dilation and extraction (dubbed "partial birth abortions"), federal laws on abortion are at this time and place, the exception. This means that to the extent restrictions on abortion, including outright bans, have been, or are, legitimized by the Supreme Court, they will still vary widely from state to state.
4. As I have noted in previous issues of Downside Up, social scientists use "the State" with a capital "S" to denote the whole apparatus and body of government. With a lower case "s," we are usually referring to one of the 50 US states, although they, as well as the federal government, are sometimes also included in a reference to "the State."
5. Not incidentally, the Texas law exempted cases in which pregnancy threatened the life of the mother.
6. Biologically, a fertilized egg is a zygote. Once implanted, it is an embryo through the first three months, and is a fetus from there to birth.
7. I resist the temptation to a long discourse on "strict interpretations" of the Constitution and "activist" courts. Let me only point out that the same 14th amendment used to justify the right of privacy has

long been interpreted by pro-business courts – and not overruled by even the Warren Court – to define corporations as "persons" and "citizens," conferring on these artificially created financial organizations rights that no Founder of the Republic could ever have imagined.

8. A favorite Reagan-Bush device: death by regulation. Reagan first tried it on the Aid to Dependent Children program, called "welfare." The Medicare drug bill is a recent example of the same tactic.
9. The Casey in this case is former Pennsylvania Governor Robert P. Casey, father of Robert P. Casey, Jr., running as a "pro-life" Democrat in Pennsylvania's 2006 US Senate election.

Web Site: Downside Up has had a web site, and will have one again, but since I changed internet service providers, I have not set up a web site on the new server. When set up, once again all previous articles will be there and can be read and printed out with a few clicks of your computer. In the meantime, if you need a back issue, email me at downsideup2@bellsouth.net.

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Ronald Woodbury is the publisher, editor, and general flunkey for all of Downside Up. While publication benefits from the editorial advice of one of his daughters, a friend, and occasional other pre-publication readers, they will, for their own privacy and sanity, remain anonymous. The web spinner's name is also best left anonymous.

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