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## Casey Reflections

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# CASEY REFLECTIONS

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The status of abortion rights nearly ten years after the Supreme Court issued its landmark ruling in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (“Casey”) is indeed imperiled.<sup>1</sup> We, in the United States, where the nation’s collective autobiography is one of unfolding and expanding rights, have suffered a remarkable diminution of rights and freedoms. Women in the United States today have fewer reproductive rights than their mothers had in 1973, and the status of those rights has only become more imperiled since *Casey*.

## ABORTION RIGHTS – THE HIGH WATER MARK

In 1973, the Court held in *Roe v. Wade* that the right to choose an abortion is fundamental, and that restrictions upon it were subject to strict scrutiny.<sup>2</sup> At the outset, *Roe*’s strict scrutiny standard undid numerous pre-*Roe* abortion restrictions, and the first cases after *Roe* to address restrictions on the right to choose demonstrated the potency of “strict scrutiny” in invalidating these laws. In 1976, 1983, and 1986, the Court struck down various state barriers to women’s access to abortions.<sup>3</sup> In *Planned Parenthood of Central Missouri v. Danforth*, the Court invalidated a statute requiring a woman to obtain her husband’s consent before having an abortion.<sup>4</sup> The Court also struck down a blanket consent requirement for unmarried minors.<sup>5</sup> In

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1. See 505 U.S. 833 (1992) (examining provisions of the Pennsylvania Abortion Control Act of 1992, as amended in 1988 and 1989).

2. See 410 U.S. 113, 163-64 (1973) (discussing the right of privacy as encompassing a woman’s right to choose an abortion).

3. See *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986).

4. 428 U.S. 52, 67-69 (1976).

5. See *id.* at 72-74 (stating there is no significant state interest that would justify

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*Danforth* as well as subsequent cases, the Court's rulings affirmed that the fundamental question of "Who Decides?" should be resolved squarely in favor of the woman. No one—neither a politician, nor a family member—could exercise a veto over a woman's right to choose.

In 1983, the Court in *City of Akron v. Akron Center for Reproductive Health*, struck down a local ordinance that compelled doctors to give patients seeking abortions biased counseling, imposed a 24-hour waiting period, required abortions after the first trimester to be performed in a hospital, necessitated parental consent without a waiver provision, and mandated that the aborted fetus be disposed of in a "humane" manner.<sup>6</sup> Three years later, the Court applied strict scrutiny forcefully in *Thornburgh v. American College of Obstetricians and Gynecologists*.<sup>7</sup> By an ominously slim five to four margin, the Court invalidated a set of Pennsylvania restrictions, the most significant of which was the requirement that physicians give patients biased counseling.<sup>8</sup>

The actual outlines of the right to choose (as well as the Supreme Court vote in its favor) were eroding before *Casey*, particularly for minors and the indigent. Prior to *Casey*, the High Court upheld restrictions on minors' access<sup>9</sup> and the carving out of abortion services from the otherwise comprehensive services afforded under Medicaid and state systems for funding medical care for the indigent.<sup>10</sup> By 1989, the Court in *Webster v. Reproductive Health Services*,<sup>11</sup> did not even have five votes to uphold *Roe* and its fractured decision upholding certain restrictions portended the likely overturn of *Roe*. However, Justice O'Connor's crafting of a compromise three years later both saved *Roe* and altered the political and legal

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such a requirement).

6. 462 U.S. 416 (1983).

7. 476 U.S. 747 (1986).

8. See *id.* at 760-64 (finding mandated descriptions of fetal development not always relevant to a woman's decision – in many cases confusing and punishing the woman and heightening her anxiety).

9. See *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990).

10. See *Maier v. Roe*, 432 U.S. 464 (1977); *Beal v. Doe*, 432 U.S. 438, 448 (1977) (upholding *state* bans on the use of public funds for abortions that were not deemed "medically necessary"). The notion that certain actions by the state represented mere policy preferences, and not abridgments of individual rights, would reverberate in the years to come. See also *Harris v. McRae*, 448 U.S. 297, 297 (1980) (upholding the Hyde Amendment, which prohibited federal Medicaid funds from being used to pay for abortion except when necessary to preserve a woman's life).

11. 492 U.S. 490 (1989).

landscape for the subsequent decade.<sup>12</sup>

#### THE CASEY DECISION

In 1992, the Court rendered its most important decision regarding abortion since *Roe*.<sup>13</sup> In *Casey*, five justices voted to reaffirm some interpretation of *Roe*, while at the same time sharply restricting its protections.<sup>14</sup> The controlling opinion in *Casey* was co-authored by Justices O'Connor, Kennedy and Souter, each appointed by a Republican president seeking to overturn *Roe*.<sup>15</sup> Although the joint opinion reaffirms the Court's role in protecting the right to privacy, as a practical matter it has been read by anti-choice legislators as an open invitation to enact restrictive legislation. The joint opinion articulated the *undue burden standard*, which replaced *Roe*'s strict scrutiny standard.<sup>16</sup> An "undue burden" is a "substantial obstacle" to a woman's ability to obtain an abortion.<sup>17</sup> Within this framework, the Court struck down Pennsylvania's spousal notification provisions, but upheld the requirement that doctors furnish biased counseling information, the 24-hour waiting period, the filing of reports on abortions performed, and the parental consent/judicial bypass requirement.<sup>18</sup> In upholding these provisions, the authors of the joint opinion, despite their reaffirmation of *Roe*, explicitly overruled parts of *Akron* and *Thornburgh*.<sup>19</sup>

Indeed, *Roe*'s 7-2 majority in favor of reproductive rights had become so eroded that *Casey* can be seen on the one hand as a victory because it had been widely anticipated – and feared – that the Court would rescind the right entirely. On the other hand, *Casey*'s political

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12. See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

13. See *id.*

14. See *id.* at 846 (reexamining principles regarding women's rights and the State's authority regarding those rights, while reaffirming the "essential holding" of *Roe*).

15. Justices O'Connor and Kennedy were appointed by President Reagan in 1981 and 1988, respectively. See *Members of the Supreme Court of the United States*, at <http://a257.g.akamaitech.net/7/257/2422/14mar20010800/www.supremecourtus.gov/about/members.pdf> (last visited Feb. 11, 2002). Justice Souter was appointed by President George Bush in 1990. *Id.*

16. See *Casey*, 505 U.S. at 874-78 (recognizing that the undue burden standard balances the state's interest in a woman's right to an abortion with a woman's right to make this decision free from "unduly burdensome interference" by the state).

17. *Id.* at 877.

18. See *id.* at 879-901.

19. See *id.* at 870, 882 (finding these cases inconsistent with *Roe* to the extent they find a constitutional violation where the government requires the giving of information about the nature of the procedure, the health risks involved, and the probable gestational age of the fetus).

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and legal effects have been so dire for the right to choose that it was, in an important sense, a loss.

CASEY'S EFFECTS: CONTINUING POLITICAL AND LEGAL RAMIFICATIONS

*A. Political*

The American public was on high alert between the *Webster* decision in 1989 and the *Casey* decision in 1992. Hundreds of thousands demonstrated on the Washington Mall and joined feminist organizations dedicated to protecting the right to choose, such as the National Abortion Rights Action League ("NARAL").<sup>20</sup> At the same time, anti-choice forces eagerly anticipated the victory they had been seeking. They surely thought that soon they would taste the fruits of the Presidency and the judicial nomination process that had resulted in the appointments of Antonin Scalia, Clarence Thomas, David Souter, Anthony Kennedy, and Sandra Day O'Connor. Gone were stalwart friends of choice like Thurgood Marshall and William Brennan. Not since 1967 had a Democratic President made an appointment to the Supreme Court.<sup>21</sup> Anti-choice forces thought they had both the Court they wanted and the vehicle they wanted – a case presenting restrictions along the lines of those previously struck down.

But to everyone's surprise, *Casey* itself was a legal compromise, one that can be seen as reflecting the political landscape at that time. This landscape appeared to tolerate more restrictions on abortion, but also found abolition of the right abhorrent and incompatible with the progress made towards women's equality. Such progress, the Court itself recognized, hinged importantly on reproductive rights: "The 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."<sup>22</sup> However, there is no legal explanation for why waiting periods and biased consent rules previously found

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20. The name has since been changed to the National Abortion and Reproductive Rights Action League, though the acronym, NARAL, remains unchanged. See NARAL, *The NARAL Mission* ("NARAL's mission is to protect and preserve the right to choose while promoting policies and programs that improve women's health and make abortion less necessary."), at <http://www.naral.org/about/mission.html> (last visited Feb. 11, 2002).

21. OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 970 (Kermit L. Hall ed., Oxford University Press 1992). See generally NARAL Legal Department, *The Presidency and Supreme Court Justices* (Feb. 22, 2000) (listing the number of Supreme Court justices each president has nominated), at <http://www.naral.org/mediaresources/fact/presidency.html>.

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

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unconstitutional would suddenly be legitimate in 1992. Some rough political accounting must be responsible, at least in part, for the decision.

Pro-choice forces dodged the threat of a total loss of the legality of abortion. That, coupled with the relief that someone willing to veto anti-choice legislation assumed control of the White House in January 1993, caused widespread complacency among pro-choice voters and activists. Membership in pro-choice organizations that sought to protect a woman's right to choose plummeted, leaving the organizations under-resourced and therefore unable to fully defend against anti-choice organizing and political and legal action. Instead, many progressives turned their attention to other issues, while the drive to prohibit abortion retained high salience among "pro-life" forces, who saw the issue as the central, politically-defining issue of our era.

Casey prompted a patient and strategic approach on the part of anti-choice forces, whose ultimate goal remains the overturn of *Roe* and the elevation of fetal rights to the status of personhood.<sup>23</sup> Casey underscored the necessity on their part to attain intermediate goals, goals that involve a chipping away of the right to choose at the state and federal level, political recapture of the White House, which has already been achieved, and eroding the legal foundations of *Roe*.<sup>24</sup>

Accordingly, the anti-choice movement deliberately shifted the dialogue away from a woman's right to choose, and whether abortion should be legal, to debating sub-issues that exploit Americans' ambivalence about the issue.<sup>25</sup> This calculated maneuver helped anti-choice groups garner political leverage through the offices of the President, the Attorney General, the Secretary of the Department of Health and Human Services, representatives of both federal and state legislative bodies, and Governors. Complacent friends of choice may be surprised to learn that the Senate currently consists of forty-seven anti-choice Senators, eighteen mixed-choice and only thirty-five pro-choice Senators. Two hundred and nineteen House members are anti-choice, seventy-five are mixed, and only 141 Representatives are

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23. See, e.g., NARAL, *Access to Abortion and Reproductive Rights* (noting that anti-choice forces "have come at *Roe* from the fringes" using tactics such as pushing for state restrictions on a woman's right to choose), at [http://www.naral.org/issues/issues\\_access.html](http://www.naral.org/issues/issues_access.html) (last visited Feb. 11, 2002).

24. See generally *id.*

25. See Symposium, *A Celebration of Reproductive Rights: Twenty-Five Years of Roe v. Wade*, 19 WOMEN'S RTS. L. REP. 247, 253-54 (1998) [hereinafter *A Celebration of Reproductive Rights*] (arguing that the ban on Medicaid funding for abortions for low-income women was a "stealth" tactic by anti-choice activists to restrict women's access to abortions).

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pro-choice. Eighty-one of ninety-nine state legislative bodies most likely would pass some legislation to restrict women's access to abortion. Of governors, twenty-one are firmly anti-choice, twelve are mixed choice and only seventeen governors are pro-choice.<sup>26</sup>

### B. Legal/Policy

State legislatures have accepted Casey's invitation to restrict abortion and reproductive rights with zeal. In 2001, twenty-five states enacted thirty-nine anti-choice legislative measures.<sup>27</sup> Every state but one considered anti-choice legislation, and at least 398 anti-choice measures were introduced.<sup>28</sup> Since 1995, states have enacted at least 301 anti-choice measures.<sup>29</sup> The leaders of the anti-choice movement have developed some realism by focusing on keeping and gaining power, even if it means submerging their ultimate goals of overturning *Roe* and securing a Human Life Amendment to the Constitution.<sup>30</sup> In part as a response to Casey, anti-choice groups made concessions by using alternative approaches to pursue their long-term goals. In other words, the Bob Dornan/Henry Hyde types, the fire-breathing dragons, have temporarily given way to the piece-mealists.<sup>31</sup> However, when the Court changes we can anticipate a

26. See NARAL, *Positions of Governors and State Legislatures on Choice*, in WHO DECIDES? A STATE-BY-STATE REVIEW OF ABORTION AND REPRODUCTIVE RIGHTS 260-61 (10th ed. 2001), at <http://www.naral.org/mediareources/publications/2001/governors.pdf> [hereinafter 2001 STATE-BY-STATE REVIEW]. These figures include changes since that publication; there have been orderly transitions to pro-choice governors in Virginia and New Jersey, and Pennsylvania has moved from mixed-choice to anti-choice.

27. See NARAL, WHO DECIDES? A STATE-BY-STATE REVIEW OF ABORTION AND REPRODUCTIVE RIGHTS 1 (11th ed. 2002), at <http://www.naral.org/mediareources/publications/2002/whod.html> [hereinafter 2002 STATE-BY-STATE REVIEW].

28. See *id.*

29. See *id.*

30. See, e.g., The March For Life Fund, at <http://www.marchforlife.org> (last visited Jan. 15, 2002); *Activism: Human life Amendment* (advocating the passage of a Human Life Amendment), at <http://www.all.org/activism/hla.htm> (last visited Jan. 15, 2002).

31. See generally Robert K. Dornan, *Abortion* (stating that former U.S. Representative Dornan will work to prohibit the federal government from funding abortions with taxpayer money), at <http://www.bobdornan.com/abortion.html> (updated Feb. 9, 2000); Scott Shepard, *House Backs Ban on Abortion Aid to Some*, ATLANTA J. CONST., May 17, 2001, at A12 (describing the introduction of the latest anti-abortion amendment by the former Chairman of the House Judiciary Committee Henry Hyde, who remains a senior member of the same committee). When introducing this amendment, which would ban "financial aid to international organizations that discuss or advocate abortion rights abroad," Hyde stated, "Taxpayer dollars should not be used to export abortion." *Id.* In addition, Hyde has stated:

Every abortion by definition and intention occurs over someone's dead body. The mortality rate for abortions is 100%. The semantic gymnastics indulged

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return to the go-for-broke, abolitionist strategies of the 70s and 80s.<sup>32</sup>

Much of this anti-choice activity is below the political radar screen, which tends to focus on the simple question of whether or not abortion should be legal. Post-Casey restrictions on abortion and reproductive rights take many forms: some are “traditional” restrictions such as biased counseling laws, waiting periods, and parental involvement laws. Other restrictions include banning non-physicians from performing abortions, bans on abortion counseling, broad “denial clauses” that allow institutions to opt out of providing needed services, and carve-outs denying public funding for abortion.<sup>33</sup>

Another, less “traditional” approach used by anti-choice legislators is to place heavy regulations on abortion providers, thus putting them out of business. This is done through Targeted Regulation of Abortion Providers laws (“TRAP laws”), which drive up the cost of abortion and subject abortion providers to unnecessary and burdensome regulations not imposed on providers of comparable medical services.<sup>34</sup> At least thirty such bills were introduced in 2001.<sup>35</sup> Other anti-choice legislation seeks to build up a provider network of crisis pregnancy centers (CPCs).<sup>36</sup> CPCs are the “home base” from which the anti-choice movement may provide services, disseminate propaganda, and cultivate more grassroots support. Efforts are

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in by pro-abortionists would be amusing if they weren't such deadly weapons in the struggle to protect the defenseless unborn. Take the term 'pro-choice' – meant to convey that a woman ought to be able to choose whether or not to have a baby. The problem is, once you are pregnant, you already have a baby, so the only choice is how to kill the unborn – by curette, by the suction machine or perhaps the salting out method. That's some choice for the unborn! Abortion is the ultimate in child abuse. The term 'terminate a pregnancy' is another case in point. Do you 'terminate' crabgrass or a misquito or a cockroach? No, you kill them.

See Testimony to Senate Judiciary Subcommittee on the Separation of Powers (Jul. 18, 1981).

32. See *A Celebration of Reproductive Rights*, *supra* note 25, at 253 (explaining that in the 1970s “anti-choice strategies centered around a flat ban on . . . all abortions” and that in the 1980s “[y]ou had to be anti-abortion in order to get endorsed for public office or nominated for judicial appointment”).

33. See 2002 STATE-BY-STATE REVIEW, *supra* note 27, at 10-13 (listing by state various waiting periods, restrictions on minors' access to abortions, reductions in public funding, and other anti-choice legislative measures that have been enacted).

34. See *id.* at 3, 13.

35. See *id.* at 3.

36. See generally 2002 STATE-BY-STATE REVIEW, *supra* note 27, at 2; see e.g., H.R. 179, 145th Gen. Assem., Reg. Sess. (Ga. 1999) (commending a Crisis Pregnancy Center for having “ministered to more than 12,000 women in the past 13 years, [having] seen over 650 women choose life over abortion, and has played a role in the births of over 2,700 babies . . .”).



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underway to secure ever-increasing amounts of state funding for CPCs, whether through anti-trust settlements, "Choose Life" license plate revenue streams, tapping into abstinence-only education funds, or other "alternative-to-abortion" funds.

Still other legislation enconces the notion of "fetal personhood" in the law.<sup>37</sup> Such legislation seeks to punish pregnant women for harms they cause, or allegedly cause, to their pregnancies.<sup>38</sup> Other legislation attempts to establish the fetus as a separate victim of a crime, rebuffing any notion that such crimes are especially egregious harms to the woman herself.<sup>39</sup>

#### THE FUTURE FOR CHOICE

*Casey*, and a woman's right to choose, will likely be revisited in the relatively near future, and the clock could be turned back on women's rights and freedoms. *Casey* is an unstable opinion, one that in all likelihood will not be defended by the current Administration.

George W. Bush ran an anti-choice campaign for the Presidency, and he is haunted by the idea that his father's failure to deliver the decisive blow to abortion rights accounted, in part, for his inability to rally his base in his re-election bid. President Bush has stated that his model Justices are Scalia and Thomas, two of the most vigorous opponents of *Roe*.<sup>40</sup> He says he will appoint "strict constructionists," code for "I don't see abortion rights in my constitution."<sup>41</sup> Bush maintains that he is in favor of a constitutional amendment to ban abortion and he will appoint only justices who share his judicial philosophy. Finally, President Bush has stated that he will do everything in his power to restrict abortions.<sup>42</sup>

In making cabinet and judicial appointments thus far, President Bush has demonstrated a willingness to make good on his anti-choice campaign promises. He quickly appointed the virulently anti-choice John Ashcroft to the key position of Attorney General, and many of

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37. See Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 ALB. L. REV. 999 (1999); 2002 STATE-BY-STATE REVIEW, *supra* note 27, at 3-4.

38. See *id.* at 648 (arguing that a statute criminalizing maternal substance abuse would be unconstitutional).

39. See, e.g., Unborn Victims of Violence Act of 2001, H.R. 503, 107th Cong. (1st Sess. 2001); 2002 STATE-BY-STATE REVIEW, *supra* note 27, at 4.

40. See NARAL, THE POWERS OF THE PRESIDENT: REPRODUCTIVE FREEDOM AND CHOICE 5-6 (2000) (noting that Bush campaigned to fill any Court vacancies with "strict constructionists", like Justices Scalia and Thomas, who support the view that *Roe* should be overturned), at <http://www.naral.org/mediaresources/publications/president/index.html>.

41. *Id.*

42. See *id.* at 1.

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his early nominations to the lower courts are distinctly anti-choice.<sup>43</sup>

President Bush will likely have an opportunity to change the composition of the Court. Presidents appoint, on average, 2.5 Supreme Court justices.<sup>44</sup> Three of the four oldest members of the Court – Justices Stevens, O'Connor, and Ginsburg – recognize that the Constitution protects the right to choose an abortion under either *Roe* or *Casey*. If any one of these justices retires or dies, President Bush will have the opportunity to secure the critical vote to eviscerate a woman's right to choose.

The most recent decision regarding a woman's right to choose, *Stenberg v. Carhart*, struck down Nebraska's restriction on so-called "partial-birth" abortions by only a five-four margin.<sup>45</sup> The ban was so sweeping that it forbade almost all second trimester surgical abortions, and it contained no protection for women's health.<sup>46</sup> Justice Kennedy's dissent indicated that bans on safe and common abortion procedures are in his judgment constitutional under *Casey*.<sup>47</sup> This interpretation renders *Casey* toothless, as states would be free to eliminate abortion procedure by procedure. Justice Kennedy is explicit in subordinating women's health to legislative fiat and answers the question "Who Decides?" resoundingly in favor of the government, not the woman. Accordingly, it would take just one new anti-choice justice to undermine *Roe* (assuming he or she joined Rehnquist, Scalia, Thomas and Kennedy), and two justices to overturn *Roe* entirely.

Consequently, if President Bush has the opportunity to appoint an anti-choice justice, the battle will move to the closely divided Senate for confirmation, and it will continue to brew in the states. In twelve states, the majority of the representatives in both houses, as well as the governor, are firmly anti-choice.<sup>48</sup> In these states, a ban on

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43. For instance, Carolyn Kuhl, Michael McConnell, Charles Pickering and John Roberts all have records of statements and actions opposed to reproductive freedom. See NARAL, FACT SHEETS ON BUSH NOMINEES (listing Bush nominees and providing a history of their anti-choice activities and decisions), at [http://www.naral.org/mediareources/fact\\_sheet.html](http://www.naral.org/mediareources/fact_sheet.html) (last visited Feb. 11, 2002).

44. There have been 110 justices appointed by forty-two Presidents. See *The Presidency and Supreme Court Justices*, *supra* note 21. Even after the Twenty-second Amendment was ratified in 1951, which limited a President to two terms, a President on average appointed 2.5 justices (twenty-five justices divided by ten Presidents). See *id.*

45. See 530 U.S. 914 (2000).

46. See *id.* at 921-22 (holding that the ban on "partial-birth" abortion is unconstitutional under *Casey*). Justice Breyer delivered the opinion and Justices Stevens, O'Connor, Souter and Ginsburg joined. *Id.* at 918.

47. See *id.* at 957 (Kennedy, J., dissenting).

48. See 2001 STATE-BY-STATE REVIEW, *supra* note 26.

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abortion in all or most circumstances would most likely pass if *Roe v. Wade* were overturned by the Supreme Court. Meanwhile, women in twenty-eight states (including the twelve firmly anti-choice states) are at risk of having their reproductive rights restricted, because both the legislatures and the governors in these states would likely support such restrictions.<sup>49</sup>

In sum, choice is in grave peril as we reflect on ten years under *Casey*. Zealous and patient anti-choice forces have legally eroded abortion rights and secured the political power they need to end a woman's right to choose. It will be up to pro-choice forces to regroup and demonstrate their political power. Pro-choice Americans must shake any complacency and tell President Bush and Congress, that America does not want to turn the clock back on women's equality, and that those who revoke reproductive rights will be rebuked at the polls.

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49. *See id.*