

THE DAY AFTER ROE

If the Supreme Court overturns Roe v. Wade, it will set off tectonic shifts in the American political landscape not seen since the civil-rights movement—or perhaps even the Civil War

BY JEFFREY ROSEN

With the recent appointment by President Bush of two Supreme Court justices, John G. Roberts Jr. and Samuel A. Alito Jr., interest groups on the left and the right are preparing for the end of *Roe v. Wade*. Leaders in both camps believe that the demise of *Roe* may occur sooner rather than later, and they have different scenarios for how the coup de grace might be delivered. Imagine, for example, that Justice John Paul Stevens, having just turned eighty-six, decides to retire from the Supreme Court in July. President Bush, under pressure to appoint a reliable conservative to mobilize his base for the midterm elections, nominates Judge Edith Jones of Texas, a fire-breathing social conservative who has written that "one may fervently hope" courts will reconsider *Roe v. Wade*. Outraged Senate Democrats then mount a filibuster, and the Republicans respond with the so-called nuclear option, eliminating the filibuster for judicial nominations by a simple majority vote. Jones is then confirmed along party lines, fifty-five to forty-five. She joins the Court in October, just in time to hear a constitutional challenge to the federal ban on "partial-birth" abortions that the justices have already agreed to review. In June of next year, the Supreme Court hands down its decision. By a 5—4 vote, the justices not only uphold the right of Congress and the states to ban partial-birth abortions, which often occur late in pregnancy, but also overturn *Roe v. Wade*, thus allowing the states to ban or restrict abortions from the very beginning of pregnancy.

No one except Justice Stevens, of course, knows whether he is inclined to retire, and even if he did, no one knows whether the five votes would emerge to overturn *Roe* cleanly. (For what it's worth, I wouldn't bet on Chief Justice Roberts's siding unequivocally with the *anti-Roe* forces.) But serious people on both sides of the abortion divide are girding themselves for the fights in Congress and the state legislatures that they believe will erupt once *Roe* is finally uprooted. And states like South Dakota are so convinced that *Roe's* demise is imminent that they are racing to pass sweeping bans on abortion designed to encourage the Supreme Court to administer the last rites. So let's assume, for the sake of argument, that the activists are correct and the long-anticipated moment has finally come to pass: *Roe v. Wade* is no longer on the books. What happens next?

The results might not be what you expect. The day after *Roe* fell, of course, abortion would be neither legal nor illegal throughout the United States. Instead, the states and Congress would be free to ban, protect, or regulate abortion as they saw fit. But in many of the fifty states, and ultimately in Congress, the overturning of *Roe* would probably ignite one of the most explosive political battles since the civil-rights movement, if not the Civil War. A careful look at how the pieces of the Rubik's Cube might begin to turn the day after

Roe suggests that access to abortion wouldn't necessarily become less widely available than it is now; that the Democrats could gain politically, perhaps even seizing the White House and both chambers of Congress; and that, when the dust settles, in five or ten or thirty years, early-term abortions would be protected and late-term ones restricted.

Throughout American history, the Supreme Court, often derided as the least democratic branch of the federal government, has, paradoxically, best maintained its legitimacy when it has functioned as the most democratic branch—that is, when it has deferred to the constitutional views of Congress, the president, and the country as a whole. For all the invective initially generated by *Brown v. Board of Education*, which outlawed school segregation, the decision was supported by more than half of the country when it was handed down in 1954, a time when southern minorities were blocking Congress from enacting the civil-rights legislation that the public supported. Many of the most famous decisions by the Warren, Burger, and Rehnquist Courts similarly reflected the popular will: a survey of eighty-eight civil-rights and civil-liberties cases between 1953 and 1994 found that, in most instances, the Supreme Court was generally in sync with public opinion. When public opinion opposed a particular rights claim, so, by and large, did the Supreme Court.

Roe v. Wade was an entirely different matter. The Court's decision, in 1973, to strike down abortion laws in forty-six states and the District of Columbia was high-handed, and represents one of the few times in history that the Court leaped ahead of a national consensus. In every Gallup Poll since soon after *Roe* was decided, small minorities of Americans—in the 20 percent range on each side—have said that abortion should be always illegal or always legal, while a large majority has said it should be legal under some circumstances and especially at the beginning of pregnancy. Later, the Court continued to ignore popular opinion when it struck down, in the name of *Roe*, many practices enthusiastically supported by the public, including spousal-notification laws, parental-consent laws, and informed-consent requirements. Critics of *Roe v. Wade* often compare it to the *Dred Scott* decision on slavery before the Civil War. In both cases, the Supreme Court overturned political compromises that national majorities supported, provoking dramatic political backlashes.

The Court seemed to align itself better with public opinion when it reaffirmed *Roe* in the 1992 *Planned Parenthood v. Casey* decision: abortions that take place before fetal viability (about twenty-four weeks) had to be protected, the Court declared, but those after viability could be restricted. And yet the Court departed from this moderate and widely accepted compromise eight years later, in *Stenberg v. Carhart*, when it struck down laws in thirty-one states banning partial-birth abortion—laws that are currently supported, according to a recent Gallup Poll, by 70 percent of the American people. If the Court decides to reverse *Stenberg* next year and to uphold the federal law banning partial-birth abortions, it might still preserve the core protections of *Roe v. Wade* for choice early in pregnancy. If so, it would express the sentiments of the majority of Americans on abortion far more faithfully than the current White House and Congress are likely to do.

If, on the other hand, the Court does seize the opportunity to overturn *Roe*, it would at least allow national majorities to eventually make their constitutional views about abortion clear. The Court has served itself well in the past by upholding state and federal laws in the face of uncertainty about the constitutional views of the American people, and by deferring to those of the other branches of government, rather than blindly following the polls. Still, if a national referendum were held the day after *Roe* fell, there's little doubt that early-term abortions would be protected and that later-term abortions would be restricted. But the U.S. Constitution doesn't provide for government by referendum. Because of the intricacies of American federalism, and the polarization of American politics exacerbated by *Roe* itself, the moderate national

consensus about abortion might not be reflected in law for years to come, and the political landscape could be transformed beyond recognition. What follows is a guide to the battles that might break out in Congress, the states, the White House, and the courts after *Roe* falls.

I: THE STATES

The day after *Roe*, the handful of state abortion bans that were passed before *Roe* but never formally repealed would arguably spring back to life. According to Clarke Forsythe, of Americans United for Life, there are eleven state laws already on the books that would ban abortion throughout pregnancy without making exceptions for threats to a woman's health. (Most have narrow exceptions allowing abortion in cases where the life of the mother is seriously threatened; some also include exceptions for rape or incest.) In at least seven of these eleven states (Arkansas, Louisiana, Michigan, Oklahoma, South Dakota, Texas, and Wisconsin), the draconian abortion bans have never been blocked by state courts as violations of state constitutional rights, and therefore could, in theory, be immediately enforced. If the governor or attorney general in any of these states announced an intention to support these miraculously rejuvenated abortion bans, and if state courts agreed that the bans hadn't been implicitly repealed, abortions might indeed be outlawed in most circumstances.

Even in the most conservative states, however, the overturning of *Roe* would put any pro-life governor or attorney general in a tight spot. For the truth is that draconian state bans on abortion that failed to provide widely supported exceptions would likely be unpopular with majorities in all the states in question. According to Clyde Wilcox, a Georgetown University professor who has studied public opinion on abortion, there would be majority opposition to any law that failed to include these exceptions, even in the most conservative states. "My guess is that any state that has a total prohibition on abortion—that can't stand," Wilcox told me. "If you look at the polls, you'll never get more than 15 or 20 percent that would ban all abortions. Across the board, around 75 percent are in favor of exceptions for rape, incest, and fetal defect, as well as the life and health of the mother. Even in the most conservative states, that will be over 50 percent." In other words, there's less variation among states when it comes to public attitudes about abortion than you might expect. In national Gallup Polls over the last thirty years, two-thirds of Americans have consistently said that abortion should be legal in the first trimester of pregnancy, although in the second trimester, the number plummets to 25 percent, and in the third trimester it falls further, to 10 percent. And since 1973, according to polls conducted by the National Opinion Research Center, overwhelming majorities—between 80 and 90 percent—have said that abortion should be available to a woman if her health is seriously endangered by the pregnancy, or in cases of rape or risk of serious fetal defects. Whether in conservative states like Texas, swing states like Ohio and Pennsylvania, or liberal states like California, public support for access to abortion in cases of rape, fetal defect, and threats to a woman's health, as well as for restrictions on abortion generally, is overwhelming.

The current abortion drama in South Dakota provides the best predictor of what might happen if a handful of other states try to resurrect old abortion bans, or pass new ones, that fail to include exceptions for rape, incest, and serious threats to a woman's health. In March, South Dakota became the first state since *Roe* was decided to pass a law that bans all abortions except when a woman's life is seriously threatened. The law, which contains no other exceptions, was opposed by many national pro-life organizations, which contended that it went too far. And their misgivings proved to be prescient. As soon as the ink was dry on the South Dakota law, a backlash started to develop. A group called Focus South Dakota began collecting signatures for a recall referendum that seeks to place the abortion ban on the ballot in November, giving the citizens of the state an opportunity to repeal it. That group's own statewide polls, at least, suggest that the recall referendum has a good chance of succeeding. In its survey of registered South Dakota voters, taken a

week after the abortion ban passed, 57 percent said they would vote to repeal the ban, and 33 percent said they would vote to uphold it. According to Jim Robinson, who conducted the poll for Focus South Dakota, these results are entirely consistent with the responses of South Dakota voters over the past two decades. "The number of voters who say abortion shouldn't be legal under any circumstances has stayed pretty much the same for years, at about 15 percent," Robinson told me. "You can add another 20 percent who think there should only be an exception for the life of the mother. We've known for some time that this sort of ban would be opposed in the state two to one, which is pretty much the same as the national numbers. But because one party is in control here, you have an extreme minority who came to dominate the legislature and drank their own Kool-Aid."

Since the South Dakota ban passed, the approval rating of the governor, Mike Rounds, has dropped by 12 percentage points, and several state legislators have announced their intention to switch parties from Republican to Democrat. Legislators who voted for the ban, including a few Democrats, already face primary challenges from abortion moderates. Robert Burns, a political-science professor at South Dakota State University, thinks the backlash against the South Dakota law could precipitate a political realignment in the state, helping Democrats in state senate elections as well as influencing the gubernatorial and congressional elections. Burns suggests that Republican pro-choice voters, who had been willing to support pro-life legislators as long as the disagreement seemed symbolic, may desert the party. And if South Dakota—style bans on abortion were imposed in other states, the evidence is that they would be equally unpopular. Polls taken in March by organizations ranging from Pew to Fox News produced similar findings: by about a 59 to 36 percent margin, voters oppose a South Dakota—style ban in their own state. And 62 percent in the Fox News poll said that they supported the right to choose if the pregnancy "risks the mother's mental health."

The day after *Roe v. Wade* falls, members of the pro-life movement will face a choice: Will they heed the lessons of South Dakota and include at least a physical-health exception in any abortion law, or will they doom themselves to political defeat? This choice could split the movement in two, and legislatures in some pro-life states might prefer principled failure to pragmatic accommodation. Not all of the seven states where the *pre-Roe* abortion bans are lurking have a popular-recall procedure. This means there might be some states where most citizens would oppose the rejuvenated abortion ban but a defiant state legislature would refuse to repeal it. This is a recipe for voter revolt. In other states—such as Michigan and Arkansas—pro-life legislators could try to head off a recall referendum by modifying the resurrected abortion bans to reflect the will of the voters. In the end, few of the seven states that reconsidered their old abortion bans would be likely to settle on laws as extreme as South Dakota's. After the Supreme Court seemed to be on the verge of overturning *Roe*, in 1989, in *Webster v. Reproductive Health Services*, Louisiana introduced a bill that would ban abortion with exceptions for threats to the woman's life but not for rape or incest. The governor vetoed the bill, and rape and incest exceptions were finally added. But even rape and incest exceptions are too narrow to satisfy voters in most states, who support some kind of health exception as well.

The day after *Roe*, a handful of states would try not only to revive old abortion bans but also to pass new ones. "The real battles will occur in the red states, and they will be knock-down, drag-out battles," says the Republican consultant Whit Ayres. In the wake of the South Dakota law, a number of state legislatures (including those in Alabama, Indiana, Georgia, Kentucky, Missouri, Mississippi, Ohio, Oklahoma, Tennessee, and West Virginia) are now considering extreme bills that would make it a crime for doctors to perform abortions unless the life of the mother is threatened, with no other exceptions. The Mississippi ban has already passed the state house of representatives, which added exceptions for rape and incest, and

Governor Haley Barbour has pledged to sign it if it passes the state senate. And yet, the day after *Roe*, even pro-life legislators would have to think twice about passing abortion bans without the health exceptions that a majority of the public clearly favors. These representatives, unable to depend on the bans being struck down by the courts, would face the certainty of a voter rebellion if they defied public sentiment.

In short, the overturning of *Roe* would put pro-life legislators in an agonizing position: many are inalterably opposed to including an exception for threats to women's health; they argue that these exceptions have been broadly interpreted by doctors and courts in the past to include psychological as well as physical health, in effect subverting the bans and making abortions available throughout pregnancy. "People in the pro-life movement are opposed to health exceptions in any form," the pro-life scholar Paul Linton told me. "On the other hand, people will have to consider whether a narrow physical health exception might be a political necessity." If any of these states now pondering extreme bills did, in fact, pass broad bans without a health exception, they should expect voter insurrections similar to the one now taking shape in South Dakota. By contrast, if health exceptions were included, although abortions might be formally restricted in some states from the beginning of pregnancy—a significant change in the law—elective abortions might, in practice, remain widely available for those who were willing to negotiate the procedural hurdles involved in proving a threat to their mental or physical health.

The day after *Roe*, of course, there would be just as much mobilization in blue states to protect abortion as there would be in red states to restrict it. Even without *Roe v. Wade*, according to the Center for Reproductive Rights, a woman's right to choose would be secure in about twenty-three states. Six of these (California, Connecticut, Maine, Maryland, Nevada, and Washington) already have laws on the books protecting choice throughout pregnancy. In ten others (Alaska, California, Florida, Massachusetts, Minnesota, Montana, New Jersey, New Mexico, Tennessee, and West Virginia), state courts have ruled that their state constitutions protect abortion rights broadly throughout pregnancy. And in seven more (Hawaii, Iowa, New Hampshire, New York, Oregon, Vermont, and Wyoming), the political climate is sympathetic to choice, and citizens are likely to demand strong new laws protecting abortion.

The day after *Roe*, pro-choice activists in the most liberal states would have to be careful not to overreach, to avoid duplicating the errors of their pro-life counterparts in the most conservative states. If, for example, pro-choice activists make clear to state legislators in Iowa that they won't accept any state law that imposes restrictions on late-term, partial-birth abortions, which are intensely unpopular throughout the country, they may alienate the moderate middle of the electorate. But regardless of potential self-inflicted wounds by Democratic activists, the right to choose in the twenty-three bedrock pro-choice states is likely to remain broadly available throughout pregnancy.

It's conceivable that a year or two after *Roe*, as many as a dozen red states would adopt draconian restrictions on abortions throughout pregnancy, while a larger group of more populous blue states would offer the same access to abortion as they do now. What effect would this have on the national abortion rate? "My guess is that no more than a dozen states could sustain a total abortion ban, and these are principally states where virtually no legal abortions are performed today," says Gerald Rosenberg, a University of Chicago professor who has studied the effects of *Roe* on abortion rates. "That doesn't mean that individual lives wouldn't be severely impacted, but in terms of national numbers, the effect would be small." For example, if the South Dakota ban survived the overturning of *Roe*, the national impact would be negligible. In 2000, fewer than 1,000 women obtained abortions in South Dakota, representing one-tenth of 1 percent of all the abortions performed in the United States. That year, there were only two abortion providers in the state, and about 30 percent of South Dakota residents who sought abortions traveled to other states, such as Colorado and Nebraska. If the South Dakota abortion ban took effect, that percentage would certainly rise.

But while women in the most conservative states would increasingly travel for abortions in a post-Roe world, the fact is they have been traveling for abortions throughout the three decades *Roe* has been on the books. In 2000, according to a report by the Guttmacher Institute, a pro-choice research organization, 87 percent of all counties in the United States had no abortion providers, one-third of all American women lived in these counties, and 25 percent of all the women who obtained abortions traveled at least fifty miles to do so. "In the past, the impact of some state restrictions that tried to limit access to abortion was primarily to delay rather than prevent abortions, because women can travel to another state," Lawrence B. Finer of the Guttmacher Institute told me. "But if more and more states pass such restrictions, it becomes harder to travel, which could have a disproportionate impact on poorer women."

A dozen state abortion bans might not dramatically change the national abortion rate, but they would dramatically change state and national politics. After *Roe*, women with disposable incomes would still be able to travel to have an abortion. Poor women, on the other hand, might be forced to seek abortions from illegal local providers. If television footage began to show arrests of illegal abortion doctors, the political framework for the abortion debate would almost certainly be transformed. "With *Roe* on the books, the focus of the abortion debate has tended to be on issues like partial-birth abortion, which is a huge political winner for Republicans," says Michael Klarman of the University of Virginia, a scholar of the Court and public opinion. "If you take *Roe* off the books, the focus will be on poor women in a handful of states trying to get illegal abortions, and these highly salient examples are going to benefit the other side."

A year or so after *Roe*, state legislators in a large group of swing states would probably remain undecided about precisely which abortion regulations to adopt. This can only mean they would be consumed by the abortion debate. The extraordinary spectacle of fifty state legislatures fighting over the question of when life begins would rivet the nation and overwhelm the state legislators themselves, many of whom are part-time representatives with little aptitude or inclination for debating the finer points of ontology. "My single biggest concern is that abortion politics will simply dominate state legislatures in many states, even those in which there's no majority for a criminalization strategy, in ways that will be very unpredictable and will distract policy makers from almost everything else," says Ed Kilgore of the moderate Democratic Leadership Council. "In swing states, Democrats would be under pressure to sponsor state legislation re-establishing the right to choose, and they'd have to make some hard choices about how extensive to make that. I've talked to a few state legislators, and everyone has expressed a sense of horror."

Indeed, many Democrats would be forced to decide whether to ignore the demands of their pro-choice base and to support the kind of restrictions that both local and national majorities overwhelmingly endorse—such as twenty-four-hour waiting periods and parental- and even spousal- notification provisions. Bills such as the one recently debated in Mississippi requiring that women seeking abortions be offered an opportunity to view a sonogram are also likely to be popular: the pro-life movement has discovered that viewing an ultrasound of the fetus early in pregnancy may change the way some parents think about abortion. (My wife and I are expecting, and having viewed a sonogram of our twin babies at only twelve weeks I can attest to the emotional power of the experience.)

But the moment that voters in swing states began to think that their own right to choose early-term abortions was threatened, state politics could tip decisively in the pro-choice direction. In Virginia, for example, after the U.S. Supreme Court, in 1989, handed down *Webster*, a decision that suggested *Roe v. Wade* was within one vote of falling, voters in the next election chose as governor a Democrat, Doug Wilder, because he was pro-choice. In the aftermath of *Roe*, there might be even more dramatic backlashes in battleground states like Pennsylvania and Ohio, especially if their state legislatures passed more

conservative restrictions than the political center supports. In the current U.S. Senate race in Pennsylvania, a pro-life Democrat and a pro-life Republican, Bob Casey and Rick Santorum, are running against each other; in a *post-Roe* world, however, pro-choice voters who tend to hold their noses and vote for social conservatives might look for pro-choice alternatives. But because of the pressures on both parties to pander to extremists in their bases, exacerbated by the polarizing effects of the Internet, one can envision a scenario in which neither Democrats nor Republicans would prove deft enough, in swing states, to capture the moderate center. In that case, third parties might emerge to step into the centrist void.

As the state electoral maps were thrown into chaos, Congress would come under increasing pressure to intervene. In the late 1960s, as Bill Stuntz of Harvard Law School notes, national opinion shifted after sensationalistic articles appeared in *Newsweek* and *The Saturday Evening Post* exaggerating, by at least a factor of ten, the number of deaths from botched illegal abortions. A year or two after *Roe*, a similarly galvanizing television image might mobilize women in swing states to take to the streets on behalf of the right to choose. "If a young woman who is raped gets pregnant and goes to a downscale abortion provider and dies from the infection, that becomes a huge story," says Stuntz.

It's hard to know precisely how soon after the fall of *Roe* a story about a botched abortion might capture the national imagination. But the moment pro-choice and swing voters perceived that their own right to choose was threatened, there would be increasingly urgent demands for a federal bill protecting the early-term choice that two-thirds of the country supports. If congressional Republicans failed to respond, or insisted on trying to ban early-term abortions instead, their intransigence could set in motion a national backlash that would make the response to *Roe v. Wade* itself look tame.

II. CONGRESS

If *Roe* falls next June, the House and Senate majority leaders will presumably be called to the White House the next day to discuss ways of preventing pro-life representatives and senators from introducing a draconian federal bill to ban abortions in nearly all circumstances. Given the tepid national support for a near or total ban, even among Republicans (only a narrow majority of whom believe that abortion should be illegal in most or all cases), the party leadership understands that an extreme federal ban has the potential to split the Republican coalition at the seams. "Many moderates within the Republican Party, and even some conservatives, bought into the pro-life position when there was no threat *Roe* would actually be overturned," says Marshall Wittmann of the Democratic Leadership Council. "I think there are a lot of Republican moderate women and men—especially exurban and suburban women—who would be very queasy about this issue. GOP leaders would fear that they couldn't hold the coalition together if abortion rights were truly threatened."

Whether the majority leaders would be inclined or able to enforce party discipline and prevent a sweeping pro-life abortion bill from reaching the Senate and House floors in 2007 is anyone's guess. As the Terri Schiavo debacle shows, both of the current leaders, Bill Frist and Dennis Hastert, are more concerned with mollifying their base than courting the center, and both have been willing to support socially conservative legislation that a majority of the public opposes. (Last year, in a CBS News poll, 82 percent of Americans said they disapproved of the decision by Congress and the president to intervene in the Schiavo case.) In the Senate, ardent pro-life Republicans, like Sam Brownback of Kansas, might well introduce a sweeping abortion ban, but pro-choice Republicans, like Arlen Specter, the chair of the Senate Judiciary Committee, would presumably prevent the bill from reaching the Senate floor.

If a draconian abortion ban did, however, make it out of the Judiciary Committee, there are a handful of

other moderately pro-choice Republicans, such as Olympia Snowe and Lincoln Chafee, who would presumably break ranks to vote against it. Other pragmatic Republicans might try to coalesce around a less extreme abortion restriction that a majority of the Senate and the country could support, such as the Child Custody Protection Act, which has already passed the House and would criminalize the act of helping minors cross state lines to obtain an abortion without first complying with their home states' mandatory notification law. Other moderately pro-life measures might include expanding the federal law that allows health-care companies to opt out, in certain circumstances, of Medicaid contracts that cover abortion services. Pro-life activists, of course, would be furious at a compromise like the Child Custody Protection Act, but the pragmatists might try to appease them by waving the banner of federalism and claiming that the abortion issue should ultimately be settled in the states. "It's hard to imagine Congress moving very quickly or reaching a broad consensus on abortion policy," says Whit Ayres, the Republican consultant. "I think the ultimate decision will be pushed away from the extremes."

If efforts at compromise failed, however, and a sweeping abortion ban somehow made it to the Senate floor, the Democrats might mount a filibuster (assuming it was still available for ordinary legislation). But whether or not the federal abortion ban progresses very far, the mere threat of its passage might be enough to push the Democrats over the edge in the 2008 elections, helping them to recapture at least the Senate and perhaps even the House. Pro-life voters are currently better mobilized than their pro-choice opponents; surveys have shown that pro-life voters rank a candidate's position on abortion among their top three concerns, as opposed to pro-choice voters, who rank it substantially lower. But the day after *Roe*, those priorities would undoubtedly change. Suburban Republican women, a number of whom are fiscally conservative and socially liberal, might switch parties in many states, giving Democrats the margin of victory they need to win the Senate in a country virtually at parity. Virginia, for example, currently has two Republican senators, John Warner and George Allen, but it's not clear how either would do in a race where swing voters were energized by the issue of choice. (Even the ardently pro-life Allen told *Newsweek* that he would have vetoed a South Dakota-style law if he were still governor of Virginia, and declared on *Meet the Press* that the federal government shouldn't be in the business of passing abortion laws, but should instead leave the issue to the states.) Throughout the South, moderate Democrats in the mode of John Edwards might beat conservative pro-life Republicans in enough states to shift the Senate.

Even in the House, where there are fewer competitive seats due to gerrymandering, the rise of abortion moderates could give the Democrats a fighting chance to gain the seventeen seats necessary to win a majority. "Gerrymandering depends on existing voting patterns holding, and this would change existing voting patterns," says Bill Stuntz of Harvard Law School. "You have a lot of sixty-four districts, but if national public opinion on abortion shifted, at some point Democrats would win a lot of seats that Republicans have been winning by more than ten points, just as Republicans did when they took the House in 1994."

It's entirely possible, therefore, that if *Roe* were overturned, both the House and the Senate would be Democratic after the 2008 elections. What would happen next? The moment the new Congress was sworn in after a national election dominated by abortion, Democrats in both chambers would introduce a federal bill to codify the protections of *Roe v. Wade*. It might look very much like the Freedom of Choice Act, which has languished in Congress for the past decade. That act would protect a woman's right to choose before fetal viability and allow states to ban abortion after fetal viability, unless the life or health of the mother is threatened. The Freedom of Choice Act was introduced in the Democratic Congress that followed Bill Clinton's election in 1992 and was defeated in part because pro-choice extremists insisted that it didn't go far enough in protecting late-term abortions. The more moderate Democrats elected after the overturning

of *Roe*, one hopes, would not make the same mistake. If a Democratic Congress proposed the Freedom of Choice Act, moderate pro-choice Republicans in swing states, like Specter in Pennsylvania, would face tremendous pressure to support it. But even with some Republican support, it's not certain that a Democratic Congress could muster the sixty votes necessary in the Senate to defeat a Republican filibuster (assuming, once again, that it still exists). NARAL Pro-Choice America estimates that in the current Congress, there are about fifty potentially pro-choice senators, thirty-three of them reliable and seventeen swing votes. Unless the election of 2008 were a Democratic sweep, a Republican minority might still be able to block a federal law protecting early-term abortion, even if a majority of the Senate and the country supported it. Or a Republican president could threaten to veto the Freedom of Choice Act. But if *Roe* is overturned, there may not be a Republican president.

III. THE WHITE HOUSE

If *Roe* falls in June 2007, abortion will almost certainly become the central issue in the 2008 presidential election. And Republicans are already worrying about the political fallout. "We'd be blown away in the suburbs, and you wouldn't see another Republican president for twenty years," a pro-choice Republican congressman recently told *Roll Call*. Karl Rove has long dodged questions about whether he thinks *Roe* should be overturned, and Ken Mehlman, the head of the Republican National Committee, has refused to comment on the South Dakota law, making it clear that he'd rather talk about anything else. The fact that Electoral College battleground states, such as Ohio and Pennsylvania, are likely to be facing the fiercest state fights over abortion can't be good news for the GOP.

Imagine what the effect of *Roe*'s demise might be on John McCain, the Republican senator who, although undeclared as a presidential candidate, seems, at the moment, to have the best chance of winning a general election. A recent bipartisan national poll found that McCain had a favorable rating from 65 percent of the respondents, as opposed to 46 percent for the Democratic front-runner, Hillary Clinton. Those who positively rated McCain crossed party lines and political ideologies, including 64 percent of conservatives, 67 percent of independents, and 67 percent of liberals. These impressive numbers could evaporate in an instant if *Roe* is overturned, because McCain is strongly pro-life, and he would have to tack even further to the right to win the Republican primaries in a *post-Roe* world. The GOP base is already wary of his stand on taxes and campaign finance. He would stick with the pro-life part of the party, and it would hurt his chances of being elected," says a former McCain aide. When asked by *Newsweek* whether he supported the South Dakota ban, McCain was palpably uncomfortable, saying he would support it if it were consistent with his long-standing position that abortion should be banned except in cases of rape and incest and to protect the mother's life. But this position could cause swing voters, most of whom favor an exception for the mother's health, to desert McCain in droves: suddenly he would look like a radical conservative rather than a moderate maverick. Without a reliable constituency on the right or the left, McCain's candidacy might collapse.

Hillary Clinton, on the other hand, would benefit greatly from the demise of *Roe*. Her liberal credentials on social issues would reassure the Democratic base, which would demand pro-choice orthodoxy in the primaries, but looking toward the general election, Clinton has already begun to position herself as an abortion moderate. In a speech on *Roe*'s anniversary, last year, she emphasized that abortion is a "sad, even tragic choice to many, many women," adding that government should "do more to educate and inform and provide assistance so that the choice guaranteed under our Constitution either does not ever have to be exercised or only in very rare circumstances." (Her husband's mantra on abortion—"safe, legal, and rare"—was more concise but similarly finessed.) Among Clinton's potential Democratic primary opponents, perhaps Governor Mark Warner of Virginia would be even better equipped to capture the median voter's

position on abortion in a general election. But except for Rudolph Giuliani, no Republican candidate could plausibly impersonate an abortion centrist, and if *Roe* fell, Giuliani might have an even harder time than McCain satisfying the base in the Republican primaries.

So there's a good chance, assuming *Roe* falls, that there will be a Democrat in the White House by 2009. If Congress, at that point, passed a Freedom of Choice Bill protecting early-term abortions, the president would sign it. And if Republicans attempted a filibuster, they might marginalize their party for decades to come. It's possible for the president and Congress to resist the wishes of national majorities for a while, but not forever. For nearly forty years, a small group of southern Democratic senators prevented Congress from enacting civil-rights legislation, including anti-lynching laws. Similarly, although there have long been national majorities in favor of gun control, Congress has refused to pass stricter gun-control legislation because the National Rifle Association is better organized and more intensely mobilized than the diffuse, less committed anti-gun majority.

If *Roe* is overturned, by contrast, the national majority for early-term choice would resolve to vanquish any minority that tried to block its will. Republicans who tried to obstruct a pro-choice federal law supported by Congress, the president, and the public might consign themselves to electoral oblivion, much as the Democrats did before the Civil War. In 1856, after winning the presidency and both chambers of Congress, the pro-slavery majority wing of the Democratic Party destroyed the more moderate minority wing and, ultimately, the party itself, by demanding increasingly sweeping protections for slavery. The moderates, led by Illinois Senator Stephen Douglas, insisted that each state or territory should decide for itself whether to protect slavery or ban it, while the extremists held that the rights of slaveholders had to be preserved, regardless of what local and national majorities wanted. In the *Dred Scott* case, in 1857, the Supreme Court imposed the views of pro-slavery Southern extremists on the entire country and helped to precipitate a historic political realignment. As a result, Northern Democrats switched parties and became Republicans, and the Democrats failed to win the presidency and Congress again for nearly forty years.

W . THE COURTS

Once *Roe* is gone, one argument goes, each state would be free to reflect the wishes of local majorities, and the country would quickly reach a democratic equilibrium. But that assumption, as we've seen, may be too optimistic. Since the abortion battle will be fought out in the states and in Congress, rather than settled by a national referendum, it's possible that pro-life and pro-choice extremists could thwart the moderate compromises that national majorities have long supported.

The courts might further complicate the political dynamic in unexpected ways. The day after *Roe*, activists on both sides would rush to court to challenge state abortion laws, claiming that they violated the state and federal constitutions. It's not hard to imagine that a rogue judge (in the spirit of Roy Moore, who was unseated as chief justice of Alabama after he defied a federal court order and refused to remove a monument to the Ten Commandments he had installed in the rotunda of the state judicial building) might overturn a state law protecting abortion. A battleground state like Illinois might provide the stage for a memorable act of pro-life judicial activism. The Illinois state legislature declared in 1975 that an "unborn child is a human being from the time of conception," and it's easy to envision a conservative Illinois judge invoking this pronouncement as he overthrows an Illinois law protecting early-term abortions.

If a Democratic Congress managed to pass a federal law guaranteeing early-term abortions, and a President Hillary Clinton signed it, it's possible that conservative activists on the Supreme Court might further inflame national opinion by striking the law down. Those justices who are most intensely committed to

federalism believe that Congress, under the Constitution, has limited authority to regulate interstate commerce; they might decide that because abortion is a medical activity rather than a commercial one, Congress has no authority to prevent states from banning it. This would be a brazen act of judicial activism —no less anti-democratic than *Roe* itself. But the only way to reverse a Supreme Court decision like this would be to ratify a federal constitutional amendment protecting abortion. If the House and Senate were Democratic, it would be very difficult, but perhaps not impossible, to get two-thirds of each chamber to propose a pro-choice constitutional amendment. But persuading three-fourths of the state legislatures to ratify the amendment could take years. As time passed, the frustration of a highly mobilized, pro-choice majority would dramatically increase as it found itself repeatedly thwarted from enacting its wishes into law. "I can imagine a fifty-front war going on for the next thirty years," says Nancy Northup of the Center for Reproductive Rights. "Be careful what you wish for."

Nevertheless, at some point after *Roe* fell, the country would reach some kind of political equipoise on abortion. It's difficult, in America, to deny the wishes of majorities for too long, and whether it takes years or decades, the state legislatures and Congress will eventually come to reflect the popular will. When the dust settles, most of the state laws may look a lot like the compromise that the Supreme Court finally settled on in the 1992 *Casey* decision: protecting early-term abortions and restricting late-term ones. If *Roe v. Wade* hadn't short-circuited the national political debate about abortion, the state legislatures might have arrived at this compromise on their own more than a decade earlier. But in light of the polarizing backlash that *Roe* provoked, the Supreme Court today might well move more quickly than our elected representatives to mirror the constitutional views of the moderate majority of Americans. If the Court remains sensitive to the people's constitutional views, as it has been for most of its history, it may be more than a little hesitant to overturn the core of *Roe* in the first place.

In the twentieth century, judicial encounters with laws concerning mandatory sterilization and contraception have confirmed the limited ability of courts to challenge deeply felt currents of public opinion. During the first half of the twentieth century, compulsory sterilization of the "mentally defective" was extremely popular, encouraged by the Progressive political and religious leaders of the American eugenics movement. In response to this public enthusiasm, legislatures in sixteen states passed laws, between 1907 and 1913, authorizing the sterilization of "idiots" and "imbeciles." When lower courts struck down seven of these laws, their decisions had little practical impact, and states passed even more sterilization laws. The Supreme Court upheld these laws in a notorious 1927 opinion by the enthusiastic eugenicist Justice Oliver Wendell Holmes Jr. Despite a 1942 Supreme Court opinion questioning mandatory sterilization, sterilization laws remained on the books through the 1960s, and as recently as 1985 the sterilization of the mentally retarded was allowed in at least nineteen states. In the end, American support for sterilization cooled not because of the courts but because of public antipathy to Hitler's eugenics policies and, later, accusations during the civil-rights movement that blacks were disproportionately targets of mandatory sterilization. The judicial response to laws restricting contraception followed a similar pattern. In 1965, the Supreme Court, in *Griswold v. Connecticut*, forced the last holdout state to comply with an overwhelming national consensus when it struck down Connecticut's law banning the use of contraceptives by married couples, the only law of its kind in the nation still on the books. Because popular support for banning contraception had eroded, the *Griswold* decision was embraced by Congress, the White House, and the country as a whole.

The great question of American politics is whether this historical pattern of judicial sensitivity to the constitutional views of majorities will continue to hold in the future. In the 1980s and 1990s, partly in response to *Roe v. Wade*, interest groups arose on the right and left that urged judges to ignore the views of

national majorities as a sign of their constitutional virtue. For more than two decades, Republican presidents have looked for Supreme Court nominees who appeared to be pro-life—and then have prayed that they wouldn't actually overturn *Roe*. But at some point, it's possible that the GOP's luck might run out: Republicans might get too many Court appointment opportunities to prolong this exquisite balancing act, and *Roe* could indeed fall. At that point, it's not clear who would represent the views of the moderate majority that the Supreme Court has tried—and often failed—to capture in its abortion cases. But whatever party or movement managed to seize the vital center in a *post-Roe* world would be likely to dominate American politics for a generation to come.

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