Testimony of

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"The Consequences of Roe v. Wade and Doe v. Bolton"
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Good afternoon, Chairman Brownback and Senator Feingold, and thank you very much for inviting me to testify before you and your subcommittee on this important subject. Introduction I am Edward Whelan, president of the Ethics and Public Policy Center. The Ethics and Public Policy Center is a think tank that for three decades has been dedicated to exploring and explaining how the Judeo-Christian moral tradition and this country's foundational principles ought to inform and shape public policy on critical issues. The Ethics and Public Policy Center's program on The Constitution, the Courts, and the Culture, which I direct, explores the competing conceptions of the role of the courts in our political system. This program focuses, in particular, on what is at stake for American culture writ large--for the ability of the American people to function fully as citizens, to engage in responsible self-government, and to maintain the "indispensable supports" of "political prosperity" that George Washington (and other Founders) understood "religion and morality" to be. 1. Why re-examine Roe v. Wade? Why are we here today addressing a case that the Supreme Court decided 32 years ago, that it ratified 13 years ago, and that America's cultural elites overwhelmingly embrace? The answer, I would submit, is twofold. First, Roe v. Wade marks the second time in American history that the Supreme Court has invoked "substantive due process" to deny American citizens the authority to protect the basic rights of an entire class of human beings. The first time, of course, was the Court's infamous 1857 decision in
the Dred Scott case (Dred Scott v. Sandford, 60 U.S. 393 (1857)). There, the Court held that the Missouri Compromise of 1820, which prohibited slavery in the northern portion of the Louisiana Territories, could not constitutionally be applied to persons who brought their slaves into free territory. Such a prohibition, the Court nakedly asserted, "could hardly be dignified with the name of due process." Id. at 450. Thus were discarded the efforts of the people, through their representatives, to resolve politically and peacefully the greatest moral issue of their age. Chief Justice Taney and his concurring colleagues thought that they were conclusively resolving the issue of slavery. Instead, they only made all the more inevitable the Civil War that erupted four years later. Roe is the Dred Scott of our age. Like few other Supreme Court cases in our nation's history, Roe is not merely patently wrong but also fundamentally hostile to core precepts of American government and citizenship. Roe is a lawless power grab by the Supreme Court, an unconstitutional act of aggression by the Court against the political branches and the American people. Roe prevents all Americans from working together, through an ongoing process of peaceful and vigorous persuasion, to establish and revise the policies on abortion governing our respective states. Roe imposes on all Americans a radical regime of unrestricted abortion for any reason all the way up to viability--and, under the predominant reading of sloppy language in Roe's companion case, Doe v. Bolton, essentially unrestricted even in the period from viability until birth. Roe fuels endless litigation in which pro-abortion extremists challenge modest abortion-related measures that state legislators have enacted and that are overwhelmingly favored by the public--provisions, for example, seeking to ensure informed consent and parental involvement for minors and barring atrocities like partial-birth abortion. Roe disenfranchises the millions and millions of patriotic American citizens who believe that the self-evident truth proclaimed in the Declaration of Independence--that all men are created equal and are endowed by

their Creator with an unalienable right to life--warrants significant governmental protection of the lives of unborn human beings. So long as Americans remain Americans--so long, that is, as they remain faithful to the foundational principles of this country--I believe that the American body politic will never accept Roe. The second reason to examine Roe is the ongoing confusion that somehow surrounds the decision. Leading political and media figures,

deliberately or otherwise, routinely misrepresent and understate the radical nature of the abortion regime that the Court imposed in Roe. And, conversely, they distort and exaggerate the consequences of reversing Roe and of restoring to the American people the power to determine abortion policy in their respective States. The more that Americans understand Roe, the more they regard it as illegitimate. Reasonable people of good will with differing values or with varying prudential assessments of the practical effect of protective abortion laws may come to a variety of conclusions on what abortion policy ought to be in the many diverse states of this great nation. But, I respectfully submit, it is well past time for all Americans, no matter what their views on abortion, to recognize that the Court-imposed abortion regime should be dismantled and the issue of abortion should be returned to its rightful place in the democratic political process. 2. Roe v. Wade In Roe v. Wade, 410 U.S. 113 (1973), the Court addressed the constitutionality of a Texas statute, "typical of those that have been in effect in many States for approximately a century," that made abortion a crime except where "procured or attempted by medical advice for the purpose of saving the life of the mother." Id. at 116, 118. The seven-Justice majority, in an opinion by Justice Blackmun, ruled that the Texas statute violated the Due Process Clause of the Fourteenth Amendment (which provides that no state shall "deprive any person of life, liberty, or property, without due process of



law"). The Court ruled that the Due Process Clause requires an abortion regime that comports with these requirements that the Court composed: "(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician. "(b) For the stage subsequent to approximately the end of 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." Id. at 164-165. Merely describing Roe virtually suffices to refute its legitimacy. One of the two dissenters, Justice Byron White--who was appointed by President Kennedy--accurately observed that Blackmun's opinion was "an exercise of raw judicial power" and "an improvident and extravagant exercise of the power of judicial review." 410 U.S. at 222 (combined dissent from Roe and Doe v. Bolton). Here are typical criticisms of Roe--from liberals who support a right to abortion: ? "What is frightening about Roe is that this super-protected right is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure. Nor is it explainable in terms of the unusual political impotence of the group judicially protected vis-à-vis the interest that legislatively prevailed over it.... At times the inferences the Court has drawn from the values the Constitution marks for special protection have been controversial, even shaky, but never before has its sense of an obligation to draw one been so



obviously lacking." John Hart Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L.J. 920, 935-937 (1973). ? "One of the most curious things about Roe is that, behind its own verbal smokescreen, the substantive judgment on which it rests is nowhere to be found." Laurence H. Tribe, The Supreme Court, 1972 Term--Foreword: Toward a Model of Roles in the Due Process of Life and Law, 87 Harv. L. Rev. 1, 7 (1973). ? "As a matter of constitutional interpretation and judicial method, Roe borders on the indefensible." "Justice Blackmun's opinion provides essentially no reasoning in support of its holding. And in the almost 30 years since Roe's announcement, no one has produced a convincing defense of Roe on its own terms." Edward Lazarus, The Lingering Problems with Roe v. Wade, and Why the Recent Senate Hearings on Michael McConnell's Nomination Only Underlined Them, Oct. 3, 2002 (at http://writ.corporate.findlaw.com/lazarus/20021003.html). (Mr. Lazarus was a law clerk to Blackmun and describes himself as "someone utterly committed to the right to choose [abortion]" and as "someone who loved Roe's author like a grandfather.") ? "[Roe's] failure to confront the issue in principled terms leaves the opinion to read like a set of hospital rules and regulations.... Neither historian, nor layman, nor lawyer will be persuaded that all the prescriptions of Justice Blackmun are part of the Constitution." Archibald Cox, The Role of the Supreme Court in American Government 113-114 (1976). ? "Blackmun's [Supreme Court] papers vindicate every indictment of Roe: invention, overreach, arbitrariness, textual indifference." William Saletan, Unbecoming Justice Blackmun, Legal Affairs, May/June 2005 (at http://www.legalaffairs.org/issues/May-June-2005/feature_saleton_mayjun05.msp). 5 ? Roe "is a lousy opinion that disenfranchised millions of conservatives on an issue about which they care deeply." Benjamin Wittes, Letting Go of Roe, The Atlantic Monthly, Jan/Feb 2005. The defects of Justice Blackmun's majority opinion in Roe are manifest and legion. A brief review of lowlights is nonetheless warranted: ? Blackmun's rambling world-history tour of "man's attitudes toward the abortion procedure over the centuries," 410 U.S. at 117, wanders from the ancient Persian Empire to the position of the American Public Health Association in 1970 and of the American Bar Association in 1972. Yet, even apart from how unreliable and misleading Blackmun's tour has been shown to be, it fails to address squarely the most relevant history--the state of abortion regulation at the time of the

adoption of the Fourteenth Amendment in 1868. As then-Justice Rehnquist's dissent points out, as of 1868 "there were at least 36 laws enacted by state or territorial legislatures limiting abortion," including the Texas statute the Court struck down in Roe. See 410 U.S. at 174-175 & n. 1. ? Blackmun's opinion modestly states: "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." 410 U.S. at 159. But while feigning not to decide the question of when a human life begins--a question that is in fact rather simple as a matter of biology--the Court in essence ruled illegitimate any legislative determination that unborn human beings are deserving of protection from abortion.
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? A critical step in Roe is the bare assertion, unsupported by any argument or authority, that the "right of privacy" protected by the Fourteenth Amendment "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153. ? In explaining the abortion regime that he was inventing, Blackmun stated: "This holding, we feel, is consistent with the relative weights of the respective interests involved, with the lessons and examples of medical and legal history, with the lenity of the common law, and with the demands of the profound problems of the present day." 410 U.S. at 165. This language openly reveals that Roe is a policymaker's balancing of considerations, not an authentic judicial interpretation of the Constitution. 3. Doe v. Bolton The same day that the Court decided Roe, it rendered its decision in Doe v. Bolton, 410 U.S. 179 (1973). As the Court said in Roe, Roe and Doe "are to be read together." Roe, 410 U.S. at 165. Doe presented the question whether Georgia's abortion legislation, patterned on the American Law Institute's model legislation, was constitutional. 410 U.S. at 181-182. Among other things, the Georgia statute provided that an abortion shall not be criminal when performed by a physician "based upon his best clinical judgment that an abortion is necessary because [a] continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health." Id. at 183. In the course of upholding this provision against a challenge that it was unconstitutionally vague, Justice Blackmun's majority opinion determined that the "medical judgment [as to health] may be exercised in the light of all factors--physical, emotional, psychological, familial, and the woman's age--relevant to the wellbeing of the
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patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment." Id. at 192. It is not entirely clear what Blackmun's garbled discussion is intended to mean. The predominant assumption appears to be that Blackmun was construing the Georgia statute's health exception in accord with what he regarded as its natural legal meaning (or, alternatively, in a way that he thought necessary to salvage it from invalidation on vagueness grounds). Under this reading, the authority that Roe purports to confer on states to "regulate, and even proscribe, abortion" after viability is subject to the loophole of Doe's health exception. See, e.g., Women's Medical Professional Corp. v. Voinovich, 130 F.3d 187, 209 (6th Cir. 1997) ("Roe's prohibition on state regulation when an abortion is necessary for the 'preservation of the life or health of the mother' must be read in the context of the concept of health discussed in Doe" (internal citation omitted)). Because the practical meaning of this loophole would appear to be entirely at the discretion of the abortionist, it would swallow any general post-viability prohibition against abortion. Under an alternative reading, Blackmun's language should be understood merely as construing the Georgia statute and not as speaking, directly or indirectly, to the meaning of the post-viability health exception in Roe. See, e.g., Voinovich v. Women's Medical Professional Corp., 523 U.S. 1036, 1039 (1998) (opinion of Thomas, joined by Rehnquist and Scalia, dissenting from the denial of certiorari) ("Our conclusion that the statutory phrase in Doe was not vague because it included emotional and psychological considerations in no way supports the proposition that, after viability, a mental health exception is required as a matter of federal constitutional law. Doe simply did not address that question." (emphasis in original)). 8
4. Myths about Roe Myths about Roe abound, and I will not strive to dispel all of them here. One set of myths dramatically understates the radical nature of the abortion regime that Roe invented and imposed on the entire country. Roe is often said, for example, merely to have created a constitutional right to abortion during the first three months of pregnancy (or the first trimester). Nothing in Roe remotely supports such a characterization. A more elementary confusion is reflected in the commonplace assertion that Roe "legalized" abortion. At one level, this proposition is true, but it completely obscures the fact that the Court did not merely legalize abortion--it constitutionalized abortion. In other words, the American people, acting through their state legislators, had the constitutional authority before Roe to make abortion policy. (Some States had legalized abortion, and others were in the process of liberalizing their abortion laws.) Roe deprived the American people of this authority. The assertion that Roe "legalized" abortion also bears on a surprisingly widespread misunderstanding of the effect of a Supreme Court reversal of Roe. Many otherwise well-informed people seem to think that a reversal of Roe would mean that abortion would thereby be illegal nationwide. But of course a reversal of Roe would merely restore to the people of the States their constitutional authority to establish--and to revise over time--the abortion laws and policies for their respective

States. This confusion about what reversing Roe means is also closely related to confusion, or deliberate obfuscation, over what it means for a Supreme Court Justice to be opposed to Roe. In particular, such a Justice is often mislabeled "pro-life." But Justices like Rehnquist, White, Scalia, and Thomas who have recognized that the Constitution does not speak to the question of abortion take a position that is entirely neutral on the substance of America's abortion laws. Their modest point concerns process: abortion
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policy is to be made through the political processes, not by the courts. These Justices do not adopt a "pro-life" reading of the Due Process Clause under which permissive abortion laws would themselves be unconstitutional. 5. Planned Parenthood v. Casey In 1992, the Supreme Court seemed ready to reverse Roe and to end its unconstitutional usurpation of the political processes on the abortion question. Instead, in Planned Parenthood v. Casey, 505 U.S. 833 (1992), Justices O'Connor, Kennedy, and Souter combined to produce a joint majority opinion so breathtaking in its grandiose misunderstanding of the Supreme Court's role that it makes one long for the sterile incoherence of Blackmun's opinion in Roe. In Casey, the Court relied on the combined force of (a) its "explication of individual liberty" protected by the Due Process Clause and (b) stare decisis to reaffirm what it described as (c) the "central holding" of Roe. 505 U.S. at 853. Each of these elements warrants scrutiny. The core of the Court's explanation of the liberty interests protected by the Due Process Clause is its declaration, "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." 505 U.S. at 851. This lofty New Age rhetoric should not conceal the shell game that the Court is playing. What the Court's declaration really means is that the Court is claiming the unconstrained power to define for all Americans which particular interests it thinks should be beyond the bounds of citizens to address through legislation. Even with this infinitely elastic standard, the authors of the joint opinion are not ready to assert that Roe was correctly decided. Instead, they rest their reaffirmation of Roe on an understanding of stare decisis, and of the role of the Court generally, that betrays a remarkably profound confusion. I cannot quote the full discussion, but these passages are all too typical:
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? "Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in Roe and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution." 505 U.S. at 866-867. ? "To all those who will be so tested by following [the Court], the Court implicitly undertakes to remain steadfast, lest in the end a price be paid for nothing. The promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives and the understanding of the issue has not changed so fundamentally as to render the commitment obsolete." 505 U.S. at 868. ? "Like the character of an individual, the legitimacy of the Court must be earned over time. So, indeed, must be the character of a Nation of people who aspire to live according to the rule of law. Their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals. The Court's concern with legitimacy is not for the sake of the Court but for the sake of the Nation to which it is responsible." 505 U.S. at 868. It is probably not possible to improve on Justice Scalia's devastating responses to the joint opinion's bizarre assertions: ? "The Court's description of the place of Roe in the social history of the United States is unrecognizable. Not only did Roe not, as the Court suggests, resolve the deeply divisive issue of
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abortion; it did more than anything else to nourish it, by elevating it to the national level where it is infinitely more difficult to resolve. National politics were not plagued by abortion protests, national abortion lobbying, or abortion marches on Congress, before Roe v. Wade was decided. Profound disagreement existed among our citizens over the issue--as it does over other issues, such as the death penalty--but that disagreement was being worked out at the state level." 505 U.S. at 995. ? "Roe fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the selection of Justices to this Court in particular, ever since. And by keeping us in the abortion umpiring business, it is the perpetuation of that disruption, rather than of any pax Roeana, that the Court's new majority decrees." 505 U.S. at 995-996. ? "The Imperial Judiciary lives. It is instructive to compare this Nietzschean vision of us unelected, life tenured judges--leading a Volk who will be 'tested by following,' and whose very 'belief in themselves' is mystically bound up in their 'understanding' of a Court that 'speak[s] before all others for their constitutional ideals'--with the somewhat more modest role envisioned for these lawyers by the Founders. 'The judiciary . . . has . . . no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will but merely judgment . . . .' The Federalist No. 78. "Or, again, to compare this ecstasy of a Supreme Court in which there is, especially on controversial matters, no

shadow of change or hint of alteration ... with the more democratic views of a more humble man: '[T]he candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the
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Supreme Court, . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.' A. Lincoln, First Inaugural Address (Mar. 4, 1861)." 505 U.S. at 996-997. While abandoning Roe's trimester framework, the Casey joint opinion then reaffirmed what it characterized as Roe's central holding: "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." 505 U.S. at 879. It also stated that it reaffirmed Roe's holding (which, as discussed above, apparently was to be read with Doe's malleable definition of health) that even after viability abortion must be available "where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." Id. In addition, it adopted a subjective and amorphous "undue burden" standard for assessing incidential abortion regulations before viability. Id. at 878. 6. Stenberg v. Carhart The Supreme Court's decision in 2000 in Stenberg v. Carhart, 530 U.S. 914, provides special insight into the Court's abortion regime. That case presented the question of the constitutionality of Nebraska's ban on partial-birth abortion. This case crossed my mind five months ago as my daughter was being born and her head was first starting to emerge. Pardon me as I briefly describe what partial-birth abortion is: It's a method of late-term abortion in which the abortionist dilates the mother's cervix, extracts the baby's body by the feet until all but the head has emerged, stabs a pair of scissors into the head, sucks out the baby's brains, collapses the skull, and delivers the dead baby. According to estimates cited by the Court, up to 5000 partial-birth abortions are done every year in this much-blessed country.
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In the face of a division of opinion among doctors over whether partial-birth abortion is sometimes safer than other methods of abortion, the Court, by a 5-4 vote, deferred to the view of those who maintained that it sometimes is and invalidated the Nebraska statute banning it. I don't have much else to say about this case. I don't dispute at all that its result can reasonably be thought to be dictated by Roe and Casey. And I certainly don't contend that what partial-birth abortion yields--a dead baby--is any different from what other methods of abortion yield. I would instead merely submit that this case ought to make manifest to any but the most jaded conscience the sheer barbarity being done in the name of the Constitution in a country dedicated--at its founding, at least--to the self-evident truth that all human beings "are endowed by their Creator" with an unalienable right to life. 7. Conclusion Despite the fact that the abortion issue was being worked out state-by-state, the Supreme Court purported to resolve the abortion issue, once and for all and on a nationwide basis, in its 1973 decision in Roe. Instead, as Justice Scalia has correctly observed, the Court "fanned into life an issue that has inflamed our national politics" ever since. In 1992, the five-Justice majority in Casey "call[ed] the contending sides [on abortion] to end their national division by accepting" what it implausibly claimed was "a common mandate rooted in the Constitution." Thirteen years later, the abortion issue remains as contentious and divisive as ever. As Justice Scalia suggested in his dissent in Casey, Chief Justice Taney surely believed that his Dred Scott opinion would resolve, once and for all, the slavery question. But, Scalia continued: "It is no more realistic for us in this case, than it was for him in that, to think that an issue of the sort they both involved--an issue involving life and death, freedom and subjugation--can be 'speedily and finally settled' by the Supreme Court, as President James Buchanan in his
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inaugural address said the issue of slavery in the territories would be.... Quite to the contrary, by foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish. "We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining." 505 U.S. at 1002. As increasing numbers of observers across the political spectrum are coming to recognize, Justice Scalia's prescription in Casey remains entirely sound, both as a matter of constitutional law and of judicial statesmanship. If the American people are going to be permitted to exercise their authority as citizens, then all Americans, whatever their views on abortion, should recognize that the Supreme Court's unconstitutional power grab on this issue must end and that the political issue of whether and how to regulate abortions should be returned where it belongs--to the people and to the political processes in the states. 15