Testimony of
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Before the United States Senate Committee on the Judiciary
on the Nomination of Elena Kagan
to the United States Supreme Court

Thank you Chairman Leahy, Ranking Member Sessions, and members of the Committee for inviting me to testify on behalf of Americans United for Life (AUL), the oldest national pro-life public-interest law and policy nonprofit organization. Our vision at AUL is a nation where everyone is welcomed in life and protected by law. We have been committed to defending human life through vigorous judicial, legislative, and educational efforts since 1971, and have been involved in every abortion-related case before the United States Supreme Court including *Roe v. Wade*.[1] In fact, yesterday was a special anniversary for AUL and the defense of the unborn. Thirty years ago, AUL successfully defended the constitutionality of the Hyde Amendment before the United States Supreme Court in the landmark case, *Harris v. McRae*.[2]

I am here to express AUL's opposition to the nomination of Solicitor General Elena Kagan to the United States Supreme Court. Based on our research, we believe that Solicitor General Kagan will be an agenda-driven judge on the Court, and that she will strongly oppose even the most widely-accepted protections for unborn human life.

There are four primary points that I want to leave with you today. First, we at Americans United for Life, like most Americans, believe that a nominee's judicial philosophy goes to the heart of his or her qualifications to serve on the United States Supreme Court. Second, we believe that Solicitor General Kagan's agenda-driven judicial philosophy makes her unqualified to serve on the Court. Third, Solicitor General Kagan has an extensive record that demonstrates her

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[1] 410 U.S. 113 (1973).
[2] 448 U.S. 297 (1980).

hostility to regulations of abortion and any protections for the unborn. Fourth, based on Solicitor General Kagan's agenda-driven judicial philosophy and her hostility towards the unborn, we believe that a Justice Kagan would undermine any efforts by our elected representatives to pass or defend even the most widely-accepted common sense regulations of abortion.

I. The Importance of Judicial Philosophy

A United States Supreme Court nominee's judicial philosophy, i.e. the methodology that she would use to decide a case, is as relevant to whether she is qualified to serve on the Court as her intellectual ability, education, and professional experience. Kagan previously acknowledged it is necessary and appropriate to question a Supreme Court nominee about her judicial philosophy: "A nominee, as I have indicated before, usually can comment on judicial methodology, on prior case law, on hypothetical cases, on general issues like . . . abortion."[3] A key component of a nominee's judicial philosophy includes whether she will respect the right of the people to determine the content of abortion-related laws through the democratic process.

a. The role of the Justice is not to make policy.

Supreme Court justices should exercise restraint by applying our laws, not directing policy, or pursuing their own agendas. When judges fail to respect their limited role under our Constitution, their decisions reflect their personal preferences regarding public policy. They engage in agenda-driven judging.

Agenda-driven judging entails deciding cases based on one's own political and social ideology rather than the Constitution. One need only look at how a judge decides a case to determine if she is an agenda-driven judge: is she making a reasonable inference based on the text and structure of the Constitution or statute? Or, is she deciding based on what she "believes" "justice" requires? If the latter, she is an agenda-driven judge. As Justice Thurgood Marshall (an ardent and unabashed agenda-driven judge and one of Elena Kagan's mentors) described his judicial philosophy, "You do what you think is right and let the law catch up."[4]

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[3] Elena Kagan, *Confirmation Messes, Old and New*, 62 U. CHI. L. REV. 919, 920 (1995) (reviewing STEPHEN L. CARTER, THE CONFIRMATION MESS (1995)).
[4] Deborah L. Rhode, *Letting the Law Catch Up*, 44 STAN. L. REV. 1259, 1259 (1992).

That philosophy is simply lawlessness, substituting one's personal preferences for a written rule of law.

In 1973, the Supreme Court substituted personal preferences for the written law when it purported to find a right to abortion in the Constitution in *Roe v. Wade*,[5] and virtually eliminated the ability of states to regulate this new "fundamental right" with the notoriously broad definition of health in *Doe v. Bolton*.[6] Since that day, the Supreme Court has permitted some regulation of abortion,[7] but far less than before *Roe.* Elected legislative bodies constantly struggle to determine what language will pass the current "test"[8] used by the Supreme Court in abortion jurisprudence.[9] This confusion is the direct result of judicial interference in a matter that should be handled by the legislative process. A simple ideological shift in the Court that favors its policy preferences over the political process will completely undermine abortion regulations across the country – even those regulations that have the most widespread support among Americans, like parental notification statutes, informed consent laws, partial-birth abortion bans, and limits on public funding for elective abortions.

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[5] 410 U.S. 113 (1973).

[6] 410 U.S. 179 (1973).

[7] *See, e.g.,* Maher v. Roe, 432 U.S. 464 (1977) (upholding a Connecticut prohibition on the use of public funds for abortions, except those that are "medically necessary"); Harris v. McRae, 448 U.S. 297 (1980) (upholding the Hyde Amendment which restricts federal funding of Medicaid abortions only to cases of life endangerment); Webster v. Reproductive Health Services, 492 U.S. 490 (1989) (upholding Missouri statute that (1) prohibited the use of public facilities and personnel to perform abortions and (2) in pregnancies of 20 weeks or more, required ultrasound tests to determine viability of the unborn child); Ohio v. Akron Center for Reproductive Health, 497 U.S. 502 (1990) (upholding an Ohio statute requiring a minor to notify one parent or obtain a judicial waiver); Rust v. Sullivan, 500 U.S. 173 (1991) (upholding federal regulation prohibiting personnel at family planning clinics that receive Title X funds from counseling or referring women regarding abortion); Planned Parenthood v. Casey, 505 U.S. 833 (1992) (upholding provisions of a Pennsylvania statute that required informed consent, a waiting period, reporting requirements, and parental consent with a judicial bypass); Gonzales v. Carhart, 550 U.S. 124 (2007) (upholding the "Federal Partial-Birth Abortion Ban of 2003").

[8] Clarke D. Forsythe, *Who Will Fix the Supreme Court's Mess? A history of United States Supreme Court abortion decisions and how they have shaped abortion law*, *in Defending Life 2009: Proven Strategies for a Pro-Life America, in* DEFENDING LIFE 2009 47 (Denise M. Burke et al. eds., 2009) (discussing how the Supreme Court has changed the standard of review for abortion legislation at least four times).

[9] *Id.* at 47-49 (discussing the challenges that legislative bodies face when writing abortion-related laws).

Recent polling data confirms that Americans want judges who follow the law and are not driven by their own agendas. Majorities of self-identified Republicans, Independents, and Democrats agreed that "[w]hen considering a new Justice for the United States Supreme Court, I would prefer that my United States Senators look for a man or woman who will interpret the law as it is written and not take into account his or her personal viewpoints and experiences." (Agreement: 87% Total, 84% of Democrats, 86% of Independents, 92% of Republicans, 80% of liberals, 85% of moderates, 91% of conservatives).[10] Also, Americans strongly opposed a nominee who "believes that the Courts, and not the voters or elected officials, should make policies on abortion in the United States." (70% Total, 69% of Democrats, 65% of Independents, 78% of Republicans, 65% of liberals, 71% of moderates, 75% of conservatives).[11]

Americans across the political spectrum recognize that it is not the role of judges to substitute their policy preferences for the deliberations of legislatures.

b. Justices must respect precedent, but may overturn it.

Supreme Court Justices must have a respect for prior Supreme Court decisions, but also recognize that following precedent is "not an inexorable command."[12] In his hearing before this Committee, Chief Justice Roberts explained factors to consider under the principle of *stare decisis*: "[1] [s]ettled expectations . . . [2] [w]hether or not particular precedents have proven to be unworkable . . . [3] whether the doctrinal bases of a decision have been eroded by subsequent developments. . . ."[13] In fact, the Court enhances its legitimacy when it reverses a decision after overstepping its bounds into policymaking. Furthermore, the Supreme Court should never affirm a decision at odds with the Constitution.[14]

Under the principles of *stare decisis*, *Roe* is a prime example of precedent on shaky ground. First, any argument that settled expectations and reliance[15] should prohibit the overturning of *Roe* reflects unawareness of the state of the law; in fact,

[10]The Polling Company, Inc. / WomanTrend. "Americans United for Life." Survey. 17-18 May 2009.
[11] *Id.*
[12] Payne v. Tennessee, 501 U.S. 808, 828 (1991).
[13] *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Supreme Court*, 109th Cong. 142 (2005).
[14] *See* Brown v. Board of Education, 347 U.S. 483 (1954).
[15] *See* Planned Parenthood v. Casey, 505 U.S. 833, 855-56 (1992) (discussing "reliance" on the availability of abortion).

if *Roe* were overturned, abortion would still be legal in at least 42 or 43 states.[16] Second, *Roe* and its progeny have clearly proven to be unworkable. For over 30 years, state legislatures and federal courts have struggled to understand what regulations of abortion are permissible, and legislatures often resort to copying the language found in laws previously deemed constitutional by the Court.[17] Third, the purported justifications of *Roe*, flimsy as they were, have dramatically eroded with further in-depth scientific information about when life begins and prenatal development, as well as public health data showing the substantial and negative physical and psychological impact of abortion on women.[18] Finally, people who favor[19] and people who oppose abortion rights agree that *Roe* is fundamentally a policy decision, without Constitutional language to support it. In fact, the Supreme Court has substantially modified the doctrine announced in *Roe* in subsequent cases.[20]

As then-Chairman Specter stated in Chief Justice Roberts' hearing, *Roe* is "the central issue which perhaps concerns most Americans."[21] AUL agrees, and we believe that Americans should know whether Kagan is able to recognize the problems with *Roe* and its progeny.

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[16]Clarke D. Forsythe & Stephen B. Presser, *Restoring Self-Government on Abortion: A Federalism Amendment*, 10 Tex. Rev. of Law & Politics 301, 343-354 (2006) (Appendix 1: "The Legal Status of Abortion Laws in the Fifty States and the District of Columbia if Roe v. Wade is Overturned (as of April 2006)).

[17] *See supra* note 8.

[18] *See generally* John M. Thorp, Jr., MD, Katherine E. Hartmann, MD & Elizabeth Shadigian, MD*, Long-Term Physical and Psychological Health Consequences of Induced Abortion: Review of the Evidence*, 58 OBST. & GYN. SURVEY 67 (2003) (finding an increased risk for placenta previa, subsequent preterm delivery, and "mood disorders substantial enough to provoke attempts of self-harm" following an induced abortion).

[19] *See, e.g.*, 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) (stating "[o]ne 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."); Benjamin Wittes, *Letting Go of Roe*, THE ATLANTIC MONTHLY, Jan/Feb 2005 (stating *Roe* "is a lousy opinion that disenfranchised millions of conservatives on an issue about which they care deeply."); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 935-37 (1973) (stating "[w]hat 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 . . . ").

[20] *Casey*, 505 U.S. at 869-79 (discussing the cases that have modified the holding in *Roe*).

[21] *See supra* note 13 at 141.

II. Elena Kagan's Judicial Philosophy

Elena Kagan has never been a judge. However, there are several aspects of her record that strongly indicate that she will be an agenda-driven justice on the Court. Piecing these aspects together is much like constructing a jigsaw puzzle, and for those who do not want another agenda-driven justice on the Court, the resulting picture is not reassuring.

First, in 2006, Kagan called former Israeli Supreme Court Judge Aharon Barak her "judicial hero." She stated that "he is the judge who has best advanced democracy, human rights, the rule of law, and justice." She also stated that there have been many "famous and great judges Harvard Law School [has been] associated with . . . but the Harvard Law School association of which [she is] *most proud* is the one with President Aharon Barak."[22] The Honorable Justice Richard Goldstone, a former justice of the Constitutional Court of South Africa and chief prosecutor of the United Nations International Criminal Tribunals for Rwanda and the former Yugoslavia stated, "[Aharon Barak] is unashamedly what, in U.S. terms, would be regarded as an 'activist judge.'"[23]

Second, Kagan served as a clerk for two agenda-driven judges: former D.C. Circuit Court Judge Abner Mikva and former Supreme Court Justice Thurgood Marshall.

Finally, Kagan has written admiringly about the agenda-driven Warren Court (the Supreme Court when Earl Warren was Chief Justice from 1953-1969), the study and application of international and comparative law, and the use of the government motive doctrine. I will address each of these in turn.

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a. Kagan's Judicial Hero: Israeli Judge Aharon Barak

Kagan's "judicial hero," former Israeli Supreme Court Judge Aharon Barak, has stated that a judge "should adapt the law to life's changing needs" using "the tools that the law provides (such as interpretation, developing the common law,

[22] "Israel's Aharon Barak Receives 2006 Gruber Justice Prize," http://www.gruberprizes.org/PressReleases/PressRelease_2006_Justice.php

[23] Richard Goldstone, *The Jurisprudential Legacy of Justice Aharon Barak,* 48 HARV. INT'L L.J. ONLINE 54 (2007).

balancing, the use of comparative law)." To interpret law, "The judge may give a statute a new meaning, a dynamic meaning, that seeks to bridge the gap between law and life's changing reality . . . the court has given [the statute] a new meaning that suits new social needs."[24]

In other words, Barak believes that judges may impose their personal agendas – that is, what *they* believe is needed to respond to "life's changing reality" – without any deference to elected legislatures. In fact, Barak expects that "the need to bridge law and society will become more pressing. Social changes are becoming more and more intensive. . . . *The legislature cannot always keep pace with these changes*. Society will need courts more than ever to bridge the gaps between law and life. . . ."[25]

Barak's system of government by the judiciary—which he believes is necessary because "the legislature cannot always keep pace"—is one which our Founding Fathers never embraced and is fundamentally undemocratic. Barak's other troubling views include:

- He believes the judiciary is tasked with the protection of a democracy and only it can act as final arbiter of whether a government action will be deemed lawful.[26]

- Barak claims the judiciary has the right to overrule executive and legislative actions that breach his expansive definition of human dignity (including the death penalty, life imprisonment with no chance of parole, and cuts to welfare aid). Barak thinks U.S. courts should follow his view, and he would "locate" this power in our Constitution under the concept of equality and the penumbras of our rights under *Griswold v. Connecticut.*[27]

[24] AHARON BARAK, THE JUDGE IN A DEMOCRACY 306-7, 4 (Princeton: Princeton University Press. 2006).
[25] *Id.* at 310-11 (emphasis added).
[26] *See id.* at 226-240; 241-260.
[27] *See id.* at 86-88.

- Barak thinks that in a constitutional democracy the people can enact "unconstitutional" constitutional amendments. Whether or not a constitutional amendment is "unconstitutional" is up to the judiciary.[28]

- Barak claims to give the executive deference in military matters; however, in reality his view of the law's reach is so expansive that his court has countermanded military orders, decided whether to release terrorists within the framework of a political "package deal," and has directed the government as to where it can put up a security fence to keep suicide bombers from entering Israel from the West Bank.[29]

- Barak believes the powers of judicial review are so expansive that decisions by military commanders over which enemy combatants can be detained for interrogation first need to go through the judiciary.[30]

- Barak believes the judge is a "partner to the authors of the constitution. The authors establish the text; the judge determines its meaning."[31] Barak laments the use of "originalism" by the American Supreme Court, which means simply trying to understand a text as the authors intended it, stating "[w]hy can some enlightened democratic legal systems . . .extricate themselves from the heavy hands of intentionalism and originalism in interpreting the constitution, while constitutional law in the United States remains mired in these difficulties?"[32]

- Barak rejects the American Constitutional law principle of non-justiciability of political questions, stating: "According to my outlook, law fills the whole world. There is no sphere containing no law and no legal criteria. Every human act is encompassed in the world of law. . . . Even actions of a clearly political nature, such as waging war, can be examined with legal criteria."[33] There is no sphere of personal freedom in Barak's vision of the world.

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[28] Aharan Barak, *Address at Round Table: Unconstitutional Constitutional Amendments – Session Two, Part I,* Talk delivered at The Hebrew University of Jerusalem April 25-6, 2010, http://www.youtube.com/watch?v=w2sf8PzSpgg.
[29] *See* BARAK, *supra* note 24 at 180; 289.
[30] HCJ 3239/02 Iad Ashak Mahmud Marab v. IDF Commander in West Bank [2002] (available at http://elyon1.court.gov.il/Files_ENG/02/390/032/A04/02032390.A04.HTM).
[31] BARAK, *supra* note 24.
[32] *Id*. at 133.
[33] *Id.* at 179.

- Barak advocates expanding rules of standing, stating: "I believe my role as a judge is to bridge the gap between law and society and to protect democracy. It follows that I also favor expanding the rules of standing and releasing them from the requirement of an injury in fact. The Supreme Court of Israel has adopted this approach."[34] In Israel, anyone can bring a case before the Supreme Court, expanding the judiciary's role in a manner alien to U.S. Constitutional law.

These and other views demonstrate how deeply troubling Kagan's characterization of Barak as her "*judicial* hero" truly is. This characterization raises important questions about her philosophy, particularly: does she believe that as a justice she will have the right to overrule executive and legislative actions that breach *her* characterization of human dignity? Also, does she believe that as a justice, she has the right to "adapt the law to [*her* view of] life's changing needs?" If so, what role does that leave for elected legislatures?

b. Kagan's Mentors: Judge Abner Mikva and Justice Thurgood Marshall

Following graduation from law school, Kagan clerked for Judge Abner Mikva on the United States Circuit Court for the District of Columbia. During an interview, Mikva stated: "I think judges tend to be too separate from the political process and the body politic. I support the result of *Roe v. Wade*. When I was a member of the state legislature, I was introducing proposals to make Illinois law approximate what *Roe v. Wade* later on did . . . And then, to my pleasant surprise, the Supreme Court came down with [a decision that] preempted the whole political process."[35]

Judge Mikva's statement is a striking example of an agenda-driven philosophy. As explained in part (I)(a) above, *Roe*, along with its companion case *Doe*, created a virtually unrestricted "right" to abortion and stripped legislatures of the ability to enact meaningful abortion restrictions (meaningful abortion regulations have only become law since *Roe* because the Supreme Court has modified abortion jurisprudence). The fact that Judge Mikva found the Court's

[34] *Id.* at 193.
[35] *See* Interview by Harry Kreisler with Abern Jak Mikna. (Apr. 12, 1999), http://globetrotter.berkeley.edu/people/Mikva/mikva-con4.html.

actions to be a "pleasant surprise" shows that he supports agenda-driven judging. He thought that it was legitimate for the Supreme Court to "preempt [] the whole political process." This raises the critical question: Does Elena Kagan agree?

Kagan's statements regarding her mentor, Justice Thurgood Marshall, indicate that she does. Kagan described Thurgood Marshall's constitutional interpretation as "a thing of glory"[36] because he thought the role of the court was to "show a special solicitude for the despised and disadvantaged."[37] While that may be admirable in the abstract, the reality of Justice Marshall's opinions concerning abortion shows little concern for the most vulnerable people in our country – unborn human life. Instead, Justice Marshall's arguments personified a method of constitutional interpretation that was not a "thing of glory" but rather a means to push an abortion agenda through the courts.

For example, in the companion cases of *Beal v. Doe*[38] and *Maher v. Roe,*[39] the Supreme Court held that state funding restrictions on the use of Medicaid funds for non-therapeutic abortions was constitutional. Justice Marshall, on the other hand, dissented because he felt the denial of funds for abortions amounted to a violation of Equal Protection under the Fourteenth Amendment.[40] Justice Marshall not only believed that legalized abortion was constitutionally required, but also that the Fourteenth Amendment mandated that states pay for abortions.

Similarly, in the 1980 case *Harris v. McRae*[41] Justice Marshall argued that the Hyde Amendment—which restricts the use of certain federal funds for abortions—was unconstitutional under the Fourteenth Amendment's Equal Protection Clause.[42] Marshall stated that "denial of a Medicaid-funded abortion is equivalent to denial of a legal abortion altogether."[43]

Marshall also dissented in cases where the Court upheld parental involvement statutes. In *H.L. v. Matheson*,[44] Marshall argued that parental

[36] Elena Kagan, *For Justice Marshall*, 71TEX L. REV. 1125, 1130, (1993).
[37] *Id*. at 1129.
[38] 432 U.S. 438 (1977).
[39] 432 U.S. 464 (1977).
[40] *Beal*, 432 U.S. at 454; *Maher*, 432 U.S. at 337.
[41] 448 U.S. 297 (1980).
[42] *Id.* at 341.
[43] *Id.* at 338.
[44] 450 U.S. 398 (1981).

notification laws did not pass even "rational basis" scrutiny.[45] Marshall believed "The State cannot have a *legitimate interest* in adding to this scheme mandatory parental notice of the minor's abortion decision."[46] Similarly, in *Hodgson v. Minnesota*,[47] Marshall dissented in a parental notification case in which the Court approved a "judicial bypass option" as well as a 48-hour delay requirement. Marshall argued, contrary to the Court, that no part of the Minnesota parental notification requirement was "even reasonably related to a legitimate state interest."[48] Even Justice John Paul Stevens acknowledged that notification of only one parent and a 48-hour waiting period were reasonable restrictions on abortion.[49]

Justice Marshall believed he had the power to "correct" society's ills by granting rights that had never existed before, even if he had to overturn the will of the people. Marshall's "special solicitude for the despised and disadvantaged" included telling Americans their tax dollars were to be used to abort society's most vulnerable members under a concept of Equal Protection the Court has never embraced to this day. This begs the question: does Elena Kagan still believe Marshall's judicial philosophy is a "thing of glory" that she would follow as a Justice? We believe she does, as is further explained in Part III below.

c. Kagan's Statements and Writings

i. The Warren Court

In her graduate thesis,[50] Kagan wrote favorably about the Warren Court's judicial philosophy. She described the Warren Court as "a court with a mission… to correct the social injustices and inequalities of American life … [and] to transform the nation."[51] Kagan stated that "the Warren Court justices set themselves a goal…and they steered by this goal when resolving individual

[45] *Id.* at 445, 453-4 ("The State cannot have a legitimate interest in adding to this scheme mandatory parental notice of the minor's abortion decision.")
[46] *Id.* at 453 (emphasis added).
[47] 497 U.S. 417 (1990).
[48] *Id.* at 462.
[49] *Id.* at 449.
[50] Elena Kagan, *The Development and Erosion of the American Exclusionary Rule: A Study in Judicial Method*, (Jun. 27, 1983) (thesis, Oxford University) (available at http://judiciary.senate.gov/nominations/SupremeCourt/upload/ElenaKagan-OxfordThesis.pdf.)
[51] *Id*. at 40.

cases."[52] According to Kagan, the "rectification of social injustice" was the Warren Court's standard of constitutional decision-making.[53]

This "steering" by the Court is the essence of agenda-driven judging. Kagan did not criticize the Warren Court's vision of a "just and fair society informing almost the whole of the Court's constitutional analysis."[54] Kagan only critiqued the Warren Court because it failed to write "a tenable legal argument" for its decisions regarding the exclusionary rule, leaving them vulnerable to reversal or modification by future Courts.

Kagan stated: "U.S. Supreme Court justices live in the knowledge that they have the authority to command or to block great social, political and economic change. At times, the temptation to wield this power becomes irresistible. The justices, at such times, will attempt to steer the law in order to achieve certain ends and advance certain values."[55] Again, Kagan is not critical of this "irresistible temptation," and gives no indication that judges should avoid "steering the law" to achieve certain ends.

Kagan further stated that "of course, the most meticulously crafted and closely analyzed opinion may not endure the test of time: a future court may overturn such an opinion on the ground that new times and circumstances demand a different interpretation of the Constitution."[56] Kagan failed to acknowledge that if judges interpret the Constitution based on the text rather than subjective ideas about what constitutes a "just society," their opinions would have a better chance of surviving subsequent reviews.

Kagan's favorable view of the Warren Court's philosophy is clear. She wrote: "Judges are judges, but they are also men…As men and as participants in American life, judges will have opinions, prejudices, values. Perhaps, most important, judges will have goals. And because this is so, judges will often try to mold and steer the law in order to promote certain ethical values and achieve certain social ends. *Such activity is not necessarily wrong or invalid*."[57]

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[52] *Id.* at 40.
[53] *Id*. at 40.
[54] *Id.* at 41.
[55] *Id*. at 6.
[56] *Id.* at 41.
[57] *Id.* at 119-20 (emphasis added).

Elena Kagan's support for the Warren Court's vision of how the Supreme Court is to transform society, even at the expense of the will of democratically-elected legislatures, is deeply concerning as it indicates that she will choose to "mold and steer the law" to promote her own agenda.

ii. International and Comparative Law

Kagan has expressed a profound affection for the study and application of international and comparative law. Under Kagan's leadership as Dean of Harvard Law School, the school's curriculum was changed to require the study of comparative or international law. Strikingly, the curriculum was *not* changed to require the study of American Constitutional law. [58]

Further, in 2004, Elena Kagan spoke at a conference where she emphasized the importance of international and comparative law in the curriculum of law schools, and recommended that law schools bring more visiting foreign professors to their faculty.[59] "They will help to make American students aware that there are *many different ways of solving legal problems and of using law to shape public life*," she said.[60]

While increasing law students' awareness of the laws of other countries is not wrong, favoring international law as a means to "shape" American jurisprudence is problematic. Strikingly, this appears to be Kagan's intent—in her responses to follow-up questions from Senator Arlen Specter after her confirmation hearing for the office of Solicitor General, Kagan stated that "There are some circumstances in which it may be proper for judges to consider foreign law sources in ruling on constitutional questions."[61]

Kagan's emphasis on international and comparative law presents yet another similarity to her "judicial hero," Judge Aharon Barak. In his book, *The Judge in a Democracy*, Barak dedicates an entire chapter to discussing the significance of comparative law. There, Barak states that comparative law is an "important tool"

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[58] *See* Elena Kagan, John W. King Memorial Lecture, New Hampshire Supreme Court (October 6, 2008), http://www.courts.state.nh.us/.
[59] Elena Kagan, Address at Lex Mundi Annual North American Meeting 13 (May 15, 2004), http://judiciary.senate.gov/nominations/SupremeCourt/upload/12D-Part3.pdf.
[60] *Id.* at 13 (emphasis added).
[61] Letter from Elena Kagan to Senator Arlen Specter (Mar. 18, 2009).

to enable judges to "fulfill their role in democracy."[62] Barak goes so far as to say that even in the absence of a direct influence of one constitutional text upon another, there still exists "a basis for interpretive inspiration."[63] He gives an example of where this interpretation would be proper: to determine "the scope of human rights, resolving particularly difficult issues such as *abortion* and the death penalty, and determining constitutional remedies."[64] In other words, Barak is arguing that judges should look to *foreign countries' constitutions* to determine how to rule on important issues, like abortion, under their own constitutions.

Barak's views are stunning, and completely contrary to the legal structure of the United States. Kagan's admiration for Barak as a judge and the importance she placed on incorporating international and comparative law into Harvard Law School's curriculum suggest that Kagan may discount the principal role our Constitution holds in American jurisprudence.

iii. Government Motive

Kagan has written favorably about the application of the "government motive" doctrine in the context of First Amendment law. She argued that first amendment doctrine is focused not on the effects of a legislative enactment, but on the *motive* of the government actor.[65] Looking for governmental motive invariably involves looking for *bad motives*, i.e. reasons to strike down an enactment by legislatures.

Pro-abortion academics and judges have long sought to impose an "anti-abortion motive" analysis to invalidate state abortion regulations. For example, Supreme Court Justice Harry Blackmun applied a motive analysis to strike down abortion health regulations in 1986 in *Thornburgh v. American College of Obstetricians & Gynecologists*.[66] A slight tilt in the Court could again lead to the application of this doctrine to state abortion regulations.

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[62] BARAK, *supra* note 24 at 197.
[63] *Id.* at 201.
[64] *Id.* at 201.
[65] Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L.REV. 413 (1996).

[66] 476 U.S. 747 (1986) (While Pennsylvania sought to require that women be informed of any "detrimental physical and psychological effects" of abortion and of the "particular medical risks" from abortion, Blackmun struck down the statute with this sneering line: "That the

The search for legislative "motive" has many problems. It is often a pretext for finding a reason to strike down legislation which has been passed by accountable, elected representatives. Such disdain for legislative intent ultimately undermines self-government. If there is no such thing as legislative intent, then a law, upon passage, does not convey the will of elected representatives but is simply a malleable device for judicial reconstruction. The will of the people, expressed through the representative branches of government, is rendered irrelevant upon passage of a law. That has great implications for judicial power when it comes to interpreting the Constitution, and raises grave concerns about Kagan's judicial philosophy.

III. Elena Kagan's Abortion Record

The pieces that make up Kagan's abortion record create the picture of a stanchly pro-abortion ideologue who has devoted her life to serving pro-abortion political candidates, judges, and office-holders. Further, on multiple occasions she has used her positions to voice opposition to the most widely accepted regulations of abortion. Her position is so clear, that Senator Barbara Boxer (D-CA), a staunch abortion advocate, voiced support for Kagan: "I have no reason to think anything else except that [Kagan] would be a very strong supporter of privacy rights because everyone she worked for held that view."[67]("Privacy rights" is the euphemism under which Justice Blackmun imposed a right to abortion on America in *Roe v. Wade*.)

a. The Early Years

As an undergraduate at Princeton University, Kagan devoted "14 hours a day, six days of a week" during one of her summer breaks to working for United States Senate candidate, Elizabeth Holtzman.[68] Kagan admired Holtzman's

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Commonwealth does not, and surely would not, compel similar disclosure of every possible peril of necessary surgery or of simple vaccination, reveals the anti-abortion character of the statute and its real purpose." Justice O'Connor, dissenting, rightly skewered Blackmun's illogic, noting that it had long been recognized to be within a state legislature's constitutional authority to regulate the medical profession in this way (*Id.* at 829)).

[67] Manu Raju, *In Kagan, 'a Democrat's Democrat,'* POLITICO, May 11, 2010, http://dyn.politico.com/printstory.cfm?uuid=89929ECB-18FE-70B2-A8FB1FF13112D311.

[68] Elena Kagan, *Nov. 10, 1989: Fear and Loathing in Brooklyn,* THE DAILY PRINCETONIAN, May 3, 2010, http://www.dailyprincetonian.com/2010/05/03/26082.

"intelligence, her integrity, her ideals."[69] Among Holtzman's core ideals were "abortion rights."[70] Following Holtzman's defeat, Kagan wrote about her devastation over the loss and stated that she was surprised by the election winners: "I found it hard to conceive of the victories of these anonymous but Moral Majority-backed [candidates] . . . these "*avengers of 'innocent life'*."[71] This statement raises the question of why "innocent life" is in quotation marks. Did Kagan contest the scientific fact that unborn human beings are alive, or was her statement expressing doubt of their innocence? Either way, it communicates hostility to unborn human life and to those who promote protection of unborn human life.

As previously discussed, Kagan also clerked for pro-abortion Judge Abner Mikva and pro-abortion Justice Thurgood Marshall. In 1988, Kagan worked as a Researcher for Michael Dukakis' presidential campaign. Three years before *Roe v. Wade*, Dukakis introduced a bill in the Massachusetts House to repeal that state`s then strongly pro-life laws.[72] In the summer of 1993, Kagan worked as special counsel to then-Senator Joe Biden on the Senate Judiciary Committee. Biden believes the Constitution offers an "inherent right to privacy" and "strongly supports *Roe v. Wade*."[73] During a 2007 Democratic primary debate, when asked whether he would have a specific litmus test question on *Roe* for Supreme Court nominees, Biden stated: "I would make sure that the people I sent to be nominated for the Supreme Court shared my values; and understood that there is a right to privacy in the United States Constitution. That's why I led the fight to defeat Bork, Roberts, Alito, and Thomas."[74]

From 1995-1999, Kagan worked for President Bill Clinton as Associate Counsel to the President, and then as Deputy Assistant to the President for Domestic Policy and Deputy Director of the Domestic Policy Council. Clinton's anti-life actions included vetoing the Partial-Birth Abortion Ban passed by

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[69] *Id*.
[70] Michael Specter, *Feminists Painfully Watching Holtzman and Ferraro Battle*, N.Y. TIMES, Mar. 14, 1992, http://www.nytimes.com/1992/03/14/nyregion/feminists-painfully-watching-holtzman-and-ferraro-battle.html?sec=&spon=&pagewanted=all.
[71] Kagan, *supra* note 68 (emphasis added).
[72] *See* James P. Finnegan, *Dukakis, Abortion*, CHICAGO TRIBUNE, Aug. 13, 1988, http://articles.chicagotribune.com/1988-08-13/news/8801230321_1_abortion-unborn-dukakis.
[73] *See* OnTheIssues.com, Joe Biden on Abortion, http://www.ontheissues.org/Social/Joe_Biden_Abortion.htm (last visited Jun. 28, 2010).
[74] *Id.*

Congress twice;[75] reversing the *Mexico City Policy*, allowing federal funding to go to groups that perform or promote abortion;[76] and supporting the Freedom of Choice Act (which would have codified into federal statutory law a more expansive "right" to abortion than even was provided by *Roe* and *Doe*).[77]

President Obama, one of the most pro-abortion presidents in our nation's history,[78] picked Kagan to be the Solicitor General in 2009, and has now nominated her to the U.S. Supreme Court. In Obama's statement on the 35th Anniversary of *Roe v. Wade* during his presidential campaign, he noted that *Roe v. Wade* would be at stake depending on who was elected as the next President.[79]

Kagan has worked for, and is close friends with, two of the most pro-abortion presidents in American history, as well as other pro-abortion politicians. As Senator Boxer stated, we *do* have every reason to believe Kagan will bring the same radical pro-abortion worldview to the Supreme Court.

b. Clerkship for Justice Marshall

During her clerkship for Justice Marshall, Kagan wrote two memoranda that shed light on how she would treat cases pertaining to unborn human life as a Supreme Court Justice.

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[75] *See* AbortionFacts.com, Partial Birth Abortion Bans, http://www.abortionfacts.com/partial_birth/congressional_bans.asp (last visited Jun. 28, 2010).

[76] *See* Jake Tapper et al., *Obama Overturns 'Mexico City Policy' Implemented by Reagan*, ABCNEWS, Jan. 23, 2009, http://abcnews.go.com/Politics/International/story?id=6716958&page=1.

[77] *See* http://www.clintonmemoriallibrary.com/clint_abort.html.

[78] Within three days of President Obama taking office, he overturned the *Mexico City Policy*, which forbade federal funding of groups that provide or promote abortion. For other instances, *see* http://www.aul.org/2008/06/what-did-barack-obama-promise-planned-parenthood.

[79] *See* President Barack Obama, Statement on 35th Anniversary of Roe v. Wade Decision (Jan. 22, 2010), http://www.barackobama.com/2008/01/22/obama_statement_on_35th_annive.php (emphasis added).

i. Funding for Pregnancy Care Centers

While serving as a clerk for Justice Thurgood Marshall on the United States Supreme Court in October 1987, Elena Kagan wrote a memo arguing that "all religious organizations should be off limits" from receiving federal funding to support projects authorized by the Adolescent Family Life Act (including pregnancy testing, adoption counseling and referral services, prenatal and postnatal care, etc.) because those projects are "so close to the central concerns of religion."[80]

In her memo, Kagan made clear her view that the AFLA violated the Establishment Clause: "I think the [district court] got the case right."[81] While Kagan has since backpedaled from her position, her subsequent attribution[82] of the views expressed in her memo to Justice Marshall directly contradicts her statement that she thought the district court "got the case right." Further, she does not argue in the memo that, based on Marshall's past opinions, he should support the lower court's decisions.

In response to follow-up questions from Ranking Member Jeff Session, Kagan wrote that "the use of a grant in a particular way by a particular religious organization might constitute a violation of the Establishment Clause – for example, if the organization used the grant to fund what the Court called 'specifically religious activity.'. . ."[83]

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[80] Elena Kagan, *Memo to Justice Thurgood Marshall on* Bowen v. Kendrick (1987) (Reproduced from the Collections of the Manuscript Division, Library of Congress) (hereinafter, "Marshall Memo") (The Supreme Court rejected Kagan's position in Bowen v. Kendrick, 487 U.S. 589 (1988), reversing the district court's ruling that federal grants to religious organizations under the Adolescent Family Life Act (AFLA) violated the Establishment Clause of the First Amendment. Notably, Justice Marshall dissented).

[81] *Id.* at 3.

[82] *Confirmation Hearing on the Nomination of Thomas Perrelli to be Associate Attorney General; The Nomination of Elena Kagan to be Solicitor General of the United States*, 111th Cong. 10 (2009), 11.

[83] *Questions for the Record for Elena Kagan Submitted by Senator Jeff Sessions*, 111th Cong. (2009).

In light of this statement, and Kagan's hostility towards preferential treatment by the government of childbirth over abortion (see Section (III)(c) below), it is questionable how Kagan would treat a case involving the funding of pregnancy care centers should it come before the Court.

ii. Funding for Prisoners' Abortions

On the other hand, Kagan looks favorably upon funding for elective abortions. In April of 1988, Elena Kagan wrote to Justice Thurgood Marshall that a Circuit Court decision mandating taxpayer funding for the elective abortions of inmates was "well-intentioned," but poorly reasoned.[84] However, despite Kagan's belief that the decision was "quite ludicrous" [85] in part, she recommended Marshall vote against reviewing the case because "this case is likely to become the vehicle that this Court uses to create some very bad law on abortion."[86]

Again, Kagan's memo is deeply opinionated. It clearly expresses *her* thoughts on the Circuit Court decision and the action that Justice Marshall should take. The logical explanation for Kagan's concern that this case could be a "vehicle … to create very bad law on abortion" is that Kagan did not want the Court to reinforce or extend its holdings in *Beal v. Doe,*[87] *Maher v. Roe,*[88] and *Harris v. McRae*[89] that the State (i.e., the taxpayer) is not required to pay for elective abortions.

c. Academic Writings: Abortion Funding Restrictions

Elena Kagan has extensively criticized the Supreme Court decision in *Rust v. Sullivan*,[90] where the Court upheld the constitutionality of Department of Health and Human Services' regulations that enforce Title X's statutory prohibition against family planning funds being "used in programs where abortion is a method of family planning." To ensure compliance with the statute, the regulations

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[84] Elena Kagan, *Memo to Justice Thurgood Marshall on* Lanzaro v. Monmouth County (1988) (Reproduced from the Collections of the Manuscript Division, Library of Congress) (hereinafter, "Marshall Memo II").
[85] *Id.* at 2.
[86] *Id.* at 2.
[87] 432 U.S. 438 (1977).
[88] 432 U.S. 464 (1977).
[89] 448 U.S. 297 (1980).
[90] 500 U.S. 173 (1991).

prohibited promoting and counseling on abortion. Kagan argued that the Title X regulations amount to unconstitutional viewpoint discrimination.[91]

In an article, Kagan wrote: **"***Rust* illustrates the way in which government funding may have both more potent and more disruptive effects than direct government speech" and that selective government funding **"**wreaks havoc on the ability of those private parties in the best position to challenge the message to provide a counterweight to government authority." She stated that "a refusal to fund any speech relating to abortion would have been constitutionally preferable to the funding scheme that the regulations established."[92] She also wrote that in *Rust*, "the Court, *to its discredit*, announced that because the selectivity occurred in the context of a governmental funding program, the presumption against viewpoint discrimination was suspended."[93]

In other words, Kagan believes that it is unconstitutional for the federal government to fund speech that promotes childbirth while prohibiting funding for speech that promotes abortion. In contrast, the United States Supreme Court held that the government may "make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds."[94] The Court stated that by funding one program and not another, "the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other."[95]

Elena Kagan has argued that the use of government funds to promote life over abortion is unconstitutional. However, the Supreme Court has repeatedly affirmed Congress' determination that the state has an interest in protecting unborn human life.

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[91] *See* Elena Kagan, *The Changing Faces of First Amendment Neutrality:* R.A.V. v. St. Paul*,* Rust v. Sullivan*, and the Problem of Content-Based Underinclusion*,1992 SUP. CT. REV. 29 (1992).
[92] *Id*. at 56.
[93] Elena Kagan, *Regulation of Hate Speech and Pornography after* R.A.V., 60 U. CHI. L. REV. 873 (1993) (emphasis added).
[94] 500 U.S. 173, 192-3 (citing *Maher* v. *Roe,* 432 U.S. 464, 474 (1977)). See also *Harris v. McRae,* 448 U.S. 297(1980).
[95] *Id*. at 193.

d. White House: Abortion

While working in the Clinton White House, Kagan was heavily involved in advising the President on life issues and crafting his related policy positions. In fact, she was specifically assigned "abortion" in the White House Counsel's Office[96] and "choice" while serving on the Domestic Policy Council.[97] When she moved over to the Domestic Policy Council, she wrote: "Bruce – if it's ok with you, I'll keep up with this issue," referring to abortion. Bruce responded: "Elena – you're perfect for the job."[98] During this time, Kagan consistently promoted anti-life positions that at times extended beyond what President Clinton was inclined to do.

Of particular note is Kagan's work on the President's policy regarding a ban on partial-birth abortions. In January of 1996, Kagan drafted a memo advising Clinton to oppose the Partial-Birth Abortion Ban of 1995 (the memo was signed by Jack Quinn).[99] The following month, when President Clinton decided to adopt a policy position supporting a weaker "ban" on partial-birth abortion, Kagan viewed his position as "a problem."[100]

Kagan promptly drafted a memo arguing that the President's approach "*is unconstitutional*, because it prohibits the use of the partial birth procedure in any pre-viability case in which the woman desires the abortion for non-health reasons. . . ."[101] In other words, she believed that any ban that extended to pre-viability abortions for any reason was unconstitutional. She also argued that "the

[96] NLWJC – Kagan; Counsel, http://www.clintonlibrary.gov/KAGAN%20COUNSEL/KAGAN%20Counsel%20-%20Box%20001%20-%20010.pdf, 3236.
[97] NLWJC – Kagan; Emails Created, http://www.clintonlibrary.gov/KAGAN%20E-Mail%20SENT/KAGAN-ARMS%20SENT%20Boxes%2001-10.pdf, 1220.
[98] E-mail from Tracey E. Thornton to Elena Kagan (and others) (January 6, 1997) (handwritten notes).
[99] Memorandum from Jack Quinn to President of the United States (Jan. 22, 1996), http://www.clintonlibrary.gov/KAGAN%20DPC%201/DOMESTIC%20POLICY%20COUNCIL%20BOXES%2069-70.pdf, p. 173.
[100] Note from Elena Kagan to Jack Quinn (April 1996), http://www.clintonlibrary.gov/KAGAN%20DPC%201/DOMESTIC%20POLICY%20COUNCIL%20BOXES%2069-70.pdf, 182.
[101] Memorandum from Elena Kagan to Jack Quinn (February 15, 1996), http://www.clintonlibrary.gov/KAGAN%20DPC%201/DOMESTIC%20POLICY%20COUNCIL%20BOXES%2069-70.pdf, 178-9.

[proabortion] groups will go crazy, exactly because the approach effects this broadscale pre-viability prohibition."[102]

Critically, in 2007 the Supreme Court upheld the Partial Birth Abortion Ban of 2003 (which does not include an exception for "health" and applies to the entire pregnancy) in *Gonzales v. Carhart*,[103] over ten years after Kagan advised President Clinton that his much weaker "ban" was unconstitutional because it applied to the entire pregnancy.

She recommended instead that President Clinton support an approach that would allow a woman to have a partial-birth abortion under a "health exception" that extended beyond what the Court required in *Roe* and *Doe*.[104] Under her "health exception," a woman could have a partial-birth abortion simply because an abortionist thought it was the preferable type of abortion for her health, regardless of whether she actually "needed" an abortion for health reasons at all. In other words, her "ban" was not really a ban at all.[105]

Kagan succeeded in changing President Clinton's position.[106] With Kagan's guidance, President Clinton's policy on partial-birth abortion went from bad to worse. Congress did not amend the bill, and President Clinton vetoed it on April 10, 1996. In subsequent talking points that Kagan drafted on partial-birth abortion, she stated that "A ban of this kind, aside from violating the Constitution, would be the true inhumanity."[107] Her words are ironic, given the inhumane nature of the procedure she was so bent on defending.

In a June 22, 1996 memo, Kagan wrote that a meeting with the American College of Obstetricians and Gynecologists (ACOG) was "something of a

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[102] *Id*.
[103] *Gonzales v. Carhart*, 550 U.S. 124 (2007).
[104] *See* Memorandum from Elena Kagan to Jack Quinn (Feb. 15, 1996), http://www.clintonlibrary.gov/KAGAN%20DPC%201/DOMESTIC%20POLICY%20COUNCIL%20BOXES%2069-70.pdf, 179-180.
[105] *See id.*
[106] Letter from President Clinton to Congressman Conyers (Feb. 28, 1996), http://www.clintonlibrary.gov/KAGAN%20DPC%201/DOMESTIC%20POLICY%20COUNCIL%20BOXES%2069-70.pdf, 1100-11.
[107] Talking Points on H.R. 1833, http://www.clintonlibrary.gov/KAGAN%20DPC%201/DOMESTIC%20POLICY%20COUNCIL%20BOXES%2069-70.pdf, 447.

revelation."[108] Based on the meeting, she acknowledged that "an exceedingly small number of partial-birth abortions [] could meet the standard the President has articulated. In the vast majority of cases, selection of the partial birth procedure is not necessary to avert serious adverse consequences to a woman's health."[109]

Further, in a December 14, 1996 memo, Kagan wrote in response to a proposed statement by ACOG that partial-birth abortion is never medically necessary that "This [the release of the statement], of course, would be disaster -- not the less so (in fact, the more so) because ACOG continues to oppose the legislation."[110] Also, when discussing whether the American Medical Association (AMA) could reverse its policy at its convention that there is not an identified situation in which partial-birth abortion is the only appropriate method of abortion, ethical concerns surround it, and that it should not be used unless it is absolutely necessary, she stated

> We agreed to do a bit of thinking about whether we (in truth, HHS) could contribute to that effort. Chuck and I are meeting with the AG on Tuesday; Donna offered to send over some doctors this week (though we don't know who or when) to give a medical briefing.[111]

In other words, Kagan was so opposed to the passage of a ban on partial-birth abortion that she advocated for ACOG and the AMA to suppress or modify their view.

Kagan also recommended that President Clinton support a phony late term abortion ban sponsored by Senator Daschle.[112] She stated that Daschle's proposal

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[108] Memorandum from Elena Kagan to Jack Quinn & Kathy Wallman (June 22, 1996), http://www.clintonlibrary.gov/KAGAN%20DPC%201/DOMESTIC%20POLICY%20COUNCIL%20BOXES%2069-70.pdf, 146.

[109] *Id.*

[110] Memorandum from Elena Kagan to Jack Quinn & Kathy Wallman (December 14, 1996), http://www.clintonlibrary.gov/KAGAN%20DPC%201/DOMESTIC%20POLICY%20COUNCIL%20BOXES%2069-70.pdf, 1336.

[111] E-mail from Elena Kagan to Sylvia M. Mathews (Jun. 1, 1997), http://clintonlibrary.gov/KAGAN%20E-Mail%20SENT/KAGAN-ARMS%20SENT%20Boxes%2001-10.pdf, 1759.

[112] Memorandum, *supra* note 110. While the amendment was promoted as going further than a partial-birth abortion ban in that it would ban any abortion after "viability," it was rendered meaningless by its exceptions. No single abortion, partial-birth or otherwise, would have been prohibited by the amendment. Under the Daschle proposal, the abortionist would be the sole

would "provide cover for pro-choice Senators (who can be expected to support it) and that it will refocus the debate from the partial-birth procedure to late-term abortions generally."[113] Kagan recommended that the President endorse the Daschle amendment "in order to sustain [his] credibility on [the partial-birth abortion ban] and prevent Congress from overriding [his] veto."[114] Kagan knew this recommendation was not a risk, because the Daschle amendment was not truly a procedural ban on abortion at all.

Kagan also advised the President on the progress of other abortion-related bills. In a series of memos in 1997 and 1998, Kagan addressed the progress of other abortion-related proposals on Capitol Hill, and described how the White House was concerned about or was trying to block pro-life legislation. In a June 8, 1998 memo addressing Medicare funding for abortion, Kagan wrote "We are very concerned that Senator Nickles will soon highlight this issue, adding it to the growing list of abortion proposals Congress will take up this year."[115] On July 7 1998, Kagan wrote that the White House was trying to prevent the Senate from stopping RU-486 development.[116]

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judge of the viability of the unborn child and would decide when (and to what child) the bill applies. Such a law would be impossible for an abortionist to violate, as its terms would be left to his subjective judgment. Second, even if the child were determined to be viable, the Daschle amendment would have allowed abortion if an abortionist determined that "continuation of the pregnancy" would "risk grievous injury" to the mother. The Daschle amendment defined "grievous injury" to include (a) any condition that is medically diagnosable and (b) any condition for which termination of pregnancy is "medically indicated." Federal courts have interpreted "medically necessary" to mean the same things as "health" within Doe v. Bolton, 410 U.S. 179 (1973). The Court in *Doe*, decided the same day as Roe v. Wade, created an unlimited definition of maternal "health." The Court wrote, "[T]he medical judgment may be exercised in the light of all factors- physical, emotional, physiological, familial, and the woman's age – relevant to the well being of the patient. All these factors may relate to health." The Court held that the abortionist was allowed to make that judgment.

[113] *Id.*

[114] Memorandum from Bruce Reed & Elena Kagan to President of the United States (May 13, 1997), http://www.clintonlibrary.gov/Documents/Kagan%20-%20Bruce%20Reed/Kagan%20-%20Bruce%20Reed%20-%20Subject%20File%20Series/Box%2097%20Abortion%20Doc%203.pdf, 2.

[115] Memorandum from Bruce Reed and Elena Kagan to President of the United States (June 4, 1998), *available at* http://www.clintonlibrary.gov/KAGAN%20WHORM/WHORM.pdf, 697.

[116] Memorandum from Bruce Reed and Elena Kagan to President of the United States (July 2, 1998), http://www.clintonlibrary.gov/KAGAN%20WHORM/WHORM.pdf, 725.

Documents from Elena Kagan's record continue to show that she is a partisan who has strong pro-abortion sentiments. It is difficult to conceive how she could be impartial in cases that come before the Court on the issue. It is critical that Senators on the Judiciary Committee extensively question Kagan on her recommendations that she made during her time in the White House. Particularly, in light of her previous statement that a partial-birth abortion ban that lacks a health of the mother exception and that extends to pre-viability abortions would be unconstitutional, would she respect the Court's decision to uphold just such a ban in *Gonzales v. Carhart*?[117]

e. White House: Other Life Issues

i. Physician Assisted Suicide

Kagan has expressed a disregard for the sanctity of human life in other contexts as well. In 1997, following the State of Oregon's failure to repeal its law legalizing physician assisted suicide, some members of Congress responded by supporting a federal ban on the practice. In a hand-written note at the top of a Department of Justice memorandum, Kagan wrote that she thought a federal ban on physician assisted suicide was "a fairly terrible idea."[118]

ii. Cloning

Kagan also played a key role in shaping and executing the President's response to the development of new cloning technology. In a May 29, 1997 memo to the President, Kagan and Jack Gibbons (Assistant to the President for Science and Technology) recommended that Clinton support domestic legislation banning human cloning.[119] However, as the memo explains, Kagan's "ban" on cloning only banned the use of cloning aimed at the live-birth of a baby, not at cloning that takes human life.

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[117] 550 U.S. 124 (2007).

[118] Memorandum from Dawn E. Johnsen, John C. Keeney, & Frank W. Hunger to the Attorney General (January 16, 1998), 31 (handwritten note).

[119] Memorandum from Jack Gibbons, Assistant to President for Science and Technology, and Elena Kagan, Deputy Assistant to President for Science and Technology, to President of the United States (May 29, 1997), http://www.clintonlibrary.gov/KAGAN%20DPC/DPC%205-17/DOMESTIC%20POLICY%20COUNCIL%20BOXES%205-30_Part35.pdf, 46.

The cloning of human embryos creates living human beings in the earliest stage of development. "Using them for research" means they will be "disaggregated" and killed as part of the research. By endorsing such practices, Kagan demonstrated her disrespect for unborn human life. Kagan's involvement in cloning policy was not limited to writing memos. Over the course of several months, she was in frequent dialogue with other administration officials about the content of Clinton's legislative language, which Congressional proposals they should support or oppose, and how much they could work with Senate Republicans.

Kagan and Gibbons stated in a memo that they saw "no moral rationale for treating embryos created through cloning differently from embryos developed through other means (e.g. in vitro fertilization) when embryos are used solely for research."[120] While the life-affirming response to this would be to ban the destruction of all human embryos for research, they worry instead that halting such destruction might inhibit research.[121] In other words, they put pragmatism over ethics, willing to sacrifice human life in the pursuit of other goals.

IV. How Kagan's Philosophy and Abortion Record Could Affect Meaningful Protections for the Unborn

Solicitor General Kagan's record is a jigsaw puzzle. However, when the pieces come together, the picture is bleak for the Constitution and protections for innocent life. Our concern is not simply that Kagan will be another judge who supports upholding *Roe v. Wade*. Rather, we are concerned that even the most widely-accepted regulations on abortion will not withstand her review.

Since 1973, states have enacted hundreds of carefully written laws to regulate abortion and to protect women's lives and health. These laws – addressing parental involvement, informed consent, abortion funding, fetal pain, late-term procedures, abortion clinic regulations and more could all be in jeopardy if the Court becomes more agenda-driven. Kagan has expressed hostility towards restrictions on abortion funding, bans on abortion procedures (even in the third trimester of pregnancy), and other regulations.

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[120] Memorandum from Jack Gibbons and Elena Kagan to President of the United States (June 8, 1997), http://www.clintonlibrary.gov/KAGAN%20DPC/DPC%205-17/DOMESTIC%20POLICY%20COUNCIL%20BOXES%205-30_Part35.pdf, 51.
[121] *Id.*

Our concerns extend to the end of life as well. If physician assisted suicide becomes legal in more states, legislatively or through state courts, activist U.S. Supreme Court justices might determine that "societal changes" or a new "social consensus" require revisiting the Court's decisions in *Washington v. Glucksberg*[122] and *Vacco v. Quill*,[123] which held that there was no right under the US Constitution to assisted suicide.

Kagan's disregard for the value of human life at its most vulnerable stage creates concerns about how she will consider common sense abortion regulations and other cases that will come before the Court. She is deeply hostile to protecting the unborn, even when abortion is not an issue. When combined with other statements and writings that reveal her judicial philosophy it is clear that a Justice Kagan would use the Constitution and other sources of law to force a right to abortion on our country broader than the one created in *Roe v. Wade*.

[122] 521 U.S. 702 (1997).
[123] 521 U.S. 793 (1997).