Reflections on the Twentieth Anniversary of *Planned Parenthood v. Casey*[*]

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ABSTRACT: Regarded by Michael Paulsen as the worst constitutional decision of all time, *Planned Parenthood v. Casey* (1992) was a momentous decision. The Court seemed poised to overrule *Roe v. Wade*. In the end, Justice Kennedy joined with Justices O'Connor and Souter to author the (in)famous joint opinion that upheld the essence of *Roe v. Wade* while abandoning some of *Roe*'s key features. *Casey* has generated a great deal of commentary and been influential in certain respects. On the twentieth anniversary of the decision, this paper examines the *Casey* decision and assesses its impact on the law of abortion, on the law of substantive due process, and on the role of *stare decisis* in constitutional litigation.

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[*] This paper was presented at UFL's twenty-second conference. It reflects my views as of 2012. I have, however, updated a few of the notes to take account of recent developments. In certain places, I have drawn from my earlier writings. See, e.g., my "The Supreme Court and Abortion: The Implications of *Gonzales v. Carhart* (2007)" in *Life and Learning XVII: The Proceedings of the Seventeenth University Faculty for Life Conference*, ed. Joseph W. Koterski (Washington, D.C.: UFL, 2008), pp. 103-28; Richard S. Myers, "Pope John Paul II, Freedom, and Constitutional Law," *Ave Maria Law Review* 6 (2007): 61. To avoid excessively multiplying the notes in this paper, I will not indicate here every instance when I have drawn from my prior work.

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I. Introduction

2012 marks the twentieth anniversary of the Supreme Court's decision in *Planned Parenthood v. Casey*.[1] In *Casey* the Court re-affirmed the right to an abortion while modifying the trimester framework set forth in *Roe v. Wade*.[2] The Court also waxed eloquent about the value of autonomy and self-definition and emphasized the importance *of stare decisis* in constitutional adjudication. *Casey* is, by all accounts, one of the most important and influential Supreme Court decisions in recent memory. The case has been much discussed by commentators. One academic labeled the decision as "the worst constitutional decision of all time."[3] I largely agree with that assessment, but for the most part I will avoid direct commentary on *Casey*. My intent, rather, on the twentieth anniversary of the decision, is to assess *Casey*'s impact. Twenty years provides a distance and affords an opportunity for an assessment informed by twenty years of judicial interpretation.

II. *Planned Parenthood v. Casey*

In order to understand the decision, it is necessary to provide a brief description of the abortion cases that preceded *Casey*. In *Roe v. Wade*, the Court, in the course of invalidating Texas's ban on abortion, set forth the trimester framework. The Court did acknowledge that the state had an important interest in the health of the pregnant woman and "another important and legitimate interest in protecting the potentiality of human life"[4] and that at some point during pregnancy "each becomes 'compelling'."[5] Perhaps these statements and Chief Justice Burger's comment in his concurring opinion that "the Court today rejects any claim that the Constitution requires abortions on demand"[6] created some confusion on this score. It was, however, clear to Justice White that the Court had basically accepted the claim that "for any one

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[1] 505 U.S. 833 (1992).

[2] 410 U.S. 113 (1973). For a relatively recent commentary on *Roe v. Wade*, see Richard S. Myers, "Re-Reading *Roe v. Wade*," *Washington & Lee Law Review* 71 (2014); 1025.

[3] Michael Stokes Paulsen, "The Worst Constitutional Decision of All Time," *Notre Dame Law Review* 78 (2003): 995.

[4] *Roe v. Wade,* 410 U.S. at 162.

[5] Ibid. at 163.

[6] *Doe v. Bolton,* 410 U.S. 179, 208 (1973), (Burger, C.J., concurring).

or more of a variety of reasons – convenience, family planning, economics, dislike of children, the embarrassment of illegitimacy, etc...or for no reason at all, and without asserting or claiming any threat to life or health, any woman is entitled to an abortion at her request if she is able to find a medical doctor willing to undertake the procedure."[7] This seems clear from a close reading of *Roe v. Wade and Doe v. Bolton*.[8]

Roe's trimester framework gave states the ability to regulate abortion after the first trimester "in ways that are reasonably related to maternal health."[9] Under *Roe*, the state had the ability to proscribe abortion after viability, but the Court added the proviso "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[10] In discussing the physician's medical judgment, the Court in *Doe* explained that this would be "exercised in the light of factors – physical, emotional, psychological, familial, and the woman's age – relevant to the well-being of the patient. [The Court noted that a]ll of these factors relate to health."[11] The conclusion seemed inescapable that the Court thought these factors would inform the interpretation of the "health" exception that *Roe* stated to be required by the Constitution.

This broad reading of the right to abortion as set forth in *Roe* and *Doe* was made plain in cases decided from 1973 up until and including the Court's 1986 decision in *Thornburgh v. American College of Obstetricians and Gynecologists*.[12] In *Thornburgh* the Court invalidated a variety of abortion regulations, including an informed consent provision that required that certain information be provided to the woman seeking an abortion. This decision finally drove Chief Justice Burger to realize that his 1973 assessment that *Roe* did not endorse abortion on demand had been undermined by the Court's post-*Roe* decisions. In a dissent that called for the re-examination of *Roe*, he stated: "We have apparently already passed the point at which abortion is available merely on demand. If the statute at issue here is to be invalidated, the 'demand' will

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[7] *Doe*, 410 U.S. at 221 (White, J., dissenting).
[8] 410 U.S. 179 (1973).
[9] *Roe*, 410 U.S. at 164.
[10] 410 U.S. at 165.
[11] *Doe*, 410 U.S. at 192.
[12] 476 U.S. 747 (1986).

not even have to be the result of an informed choice."[13]

The Court did begin to move away from these more extreme readings, primarily in the 1989 decision in *Webster v. Reproductive Health Services*[14] and in the 1992 decision in *Planned Parenthood v. Casey*.[15] In *Webster* the Court upheld the constitutionality of several sections of Missouri's abortion statute, including a provision that required that physicians conduct viability tests before performing abortions. The Court seemed on the verge of overruling *Roe v. Wade*. Chief Justice Rehnquist's opinion upholding the Missouri statute rejected the view that there was a "fundamental right" to an abortion and adopted a rational basis test that would have effectively overruled *Roe*.[16] But Chief Justice Rehnquist's opinion was not for a majority of the Court and Justice O'Connor, who had been a critic of *Roe's* trimester approach, refused to join in Rehnquist's opinion and cautiously noted that "[w]hen the constitutional validity of a State's abortion statute actually turns on the constitutional validity of *Roe v. Wade*, there will be time enough to reexamine *Roe*. And to do so carefully."[17] Her opinion and avoidance of the status of *Roe* prompted a sharp rejoinder from Justice Scalia.[18] Some thought that *Webster* spelled the end of *Roe v. Wade*,[19] although Justice O'Connor's caution and her opinion to invalidate a Minnesota law restricting abortion in 1990[20] seemed to

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[13] 476 U.S. at 783-784 (Burger, C.J., dissenting).

[14] 492 U.S. 490 (1989).

[15] 505 U.S. 833 (1992).

[16] In *Webster* Chief Justice Rehnquist stated that "[t]his case...affords us no occasion to revisit the holding of *Roe*, ...and we leave it undisturbed" (492 U.S. at 521). But as Justice Scalia pointed out in *Webster*, 492 U.S. at 532 (Scalia, J., concurring in part and concurring in the judgment), Chief Rehnquist's approach would effectively have overruled *Roe v. Wade*. Justice Blackmun's dissent made the same point. 492 U.S. at 537 (Blakmun, J., concurring in part and dissenting in part). See Edward Lazurus, *Closed Chambers: The First Eyewitness Account of the Epic Struggles inside the Supreme Court* (New York: Times Books,1998), pp. 404-19 (discussed *Webster*).

[17] *Webster*, 492 U.S. at 526 (O'Connor, J., concurring in part and concurring in the judgment).

[18] *Webster*, 492 U.S. at 532-37 (Scalia, J., concurring in part and concurring in the judgment).

[19] See, e.g., James Bopp, Jr. & Richard E. Coleson, "What Does *Webster* Mean?" *University of Pennsylvania Law Review* 138 (1989): 157.

[20] *Hodgson v. Minnesota*, 497 U.S. 417, 458-61 (O'Connor, J., concurring in part and concurring in the judgment in part).See Lazurus, supra n17 at pp. 430-36 (discussing Justice O'Connor's views in *Hodgson*).

indicate that she would never take the fateful step of overruling *Roe*.

The Court was, however, clearly cutting back on the scope of *Roe*. By 1992, given the changes in Court personnel, it seemed that Justice O'Connor's vote wouldn't matter. Chief Justice Rehnquist and Justice White (who had both dissented in *Roe*) and Justice Scalia seemed certain to overrule *Roe*. Most thought that they would be joined by Justice Thomas, who had replaced Justice Marshall. Justice Kennedy had joined Chief Justice Rehnquist's opinion in Webster, which was a *de facto* overruling of *Roe*. There was, then, at the time of the *Casey* decision, much speculation that the Court would finally overrule *Roe* explicitly. Apparently, a majority of the *Casey* Court initially voted to do just that.[21] But Justice Kennedy changed his vote and the constitutional right to abortion survived.[22] The Court did abandon the trimester framework in favor of the undue burden approach.[23] This approach explicitly acknowledged that prior decisions had not given sufficient weight to the state's "interest in protecting fetal life or potential life."[24]

As the joint opinion described its approach, "[a]n undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[25] Under the undue burden approach, a state had more freedom to regulate the process of abortion to advance its interests in "potential life"[26] and in "the health or safety of a woman seeking an abortion."[27] The Court reaffirmed what it termed "the central holding of *Roe v. Wade*"[28] and concluded that "a State may not prohibit any woman from making the ultimate decision

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[21] See Richard S. Myers, "The Supreme Court and Abortion: The Implications of *Gonzales v. Carhart* (2007)" in *Life and Learning XVII: The Proceedings of the Seventeenth University Faculty for Life Conference*, ed. Joseph W. Koterski (Washington, D.C.: UFL, 2008), pp. 103-28 at pl. 114 (discussing the voting in *Casey*).

[22] The joint opinion in *Casey* stated : "After considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, and the rule of *stare decisis*, we are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed." *Casey*, 505 U.S. at 845-46.

[23] *Casey*, 505 U.S. at 878.

[24] 505 U.S. at 876.

[25] 505 U.S. at 878.

[26] Ibid.

[27] Ibid.

[28] Ibid. at 879.

to terminate her pregnancy before viability."[29] The Court also "reaffirm[ed] *Roe*'s holding that '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 judgment, for the preservation of the life or health of the mother.'"[30]

The Court in *Casey* accepted certain regulations (such as provisions requiring informed consent and a 24-hour waiting period) that it would have invalidated under its past decisions. The Court invalidated Pennsylvania's requirement that a married woman sign a statement indicating that she has notified her husband of her intended abortion because it concluded that that requirement placed an undue burden on the mother's choice.[31]

The other significant aspects of *Casey* that I will discuss in this paper are the joint opinion's treatment of substantive due process and its treatment of *stare decisis*. The doctrine of substantive due process has long been controversial.[32] The Court has used this doctrine to protect individual rights, such as the right of privacy, that lack a clear foundation in the text of the Constitution.[33] The major debate in this area has been over how to define the "fundamental rights" or "liberty interests" that deserve heightened constitutional protection.[34] The joint opinion affirmed a broad conception of substantive due process. The Court's understanding of the liberty protected by the due process clause would not, the Court insisted, be limited to rights explicitly set forth in the Constitution or rights that had been traditionally recognized.[35] The Court strongly emphasized ideas of individual autonomy and self-determination in matters of morality. As the Court stated: "Our obligation is to define the liberty of all, not to mandate our own moral code."[36] The Court summarized its view of liberty in this fashion: "Our law affords constitutional

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[29] Ibid.

[30] Ibid. (quoting *Roe v. Wade*, 410 U.S. at 164-65).

[31] *Casey*, 505 U.S. at 887-898.

[32] See Richard S. Myers, "Pope John Paul II, Freedom, and Constitutional Law," *Ave Maria Law Review* 6 (2007): 63, noting the controversy about the doctrine of substantive due process.

[33] See Richard S. Myers, "The End of Substantive Due Process?" *Washington & Lee Law Review* 45 (1988): 557.

[34] Myers, supra note 33, at 63.

[35] *Casey*, 505 U.S. at 847.

[36] Ibid. at 850.

protection to personal decisions relating to marriage, procreation, contraception, family relations, child rearing, and education.... These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. 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. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."[37]

The Court also discoursed expansively on the importance of *stare decisis*.[38] The role of precedent in constitutional law is a complex topic that has been much discussed in the scholarly literature.[39] The Court did admit that *stare decisis* is not an "'inexorable command.'"[40] The joint opinion concluded, though, that adherence to precedent was appropriate in this instance because it didn't think that the normal prudential factors the Court typically considers (e.g. workability, reliance, changes in the law or facts, etc.) argued against adhering to *Roe* (or at least its central holding).[41] Moreover, the joint opinion thought that *Roe* (or at least its central holding) had "rare precedential force."[42] This was so, the Court thought, because when 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."[43] A decision to overrule such a case, the Court stated, would be "at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law."[44]

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[37] Ibid. at 851.

[38] Ibid. at 854-69.

[39] See, e.g., Michael J. Gerhardt, *The Power of Precedent* (New York NY: Oxford Univ. Press, 2008); Lee J. Strang, "An Originalist Theory of Precedent: The Privileged Place of Originalist Precedent," *Brigham Young University Law Review* (2010): 1729; Lee J. Strang, "An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good," *New Mexico Law Review* 36 (2006): 419; "Symposium: Originalism and Precedent," *Ave Maria Law Review* 5 (2007): 1.

[40] *Casey*, 505 U.S. at 854 (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405 (1932), (Brandeis, J., dissenting)).

[41] *Casey*, 505 U.S. at 854-64.

[42] Ibid. at 867.

[43] Ibid. at 866-67.

[44] Ibid. at 869.

III. Impact of *Casey*

In this section I will consider the impact of *Casey* in three areas – on the law of abortion, on the doctrine of substantive due process, and on the role of *stare decisis* in constitutional adjudication.

A. *Casey*'s Impact on the Constitutional Law of Abortion

Casey abandoned *Roe*'s trimester framework. The controlling opinion in *Casey* was the joint opinion, which set forth the undue burden approach. That approach is now the governing standard. There is, however, considerable confusion as to the meaning of the undue burden standard. In *Webster* and in *Casey* the Court clearly had moved away from the more extreme results that it had reached through 1986. After *Casey* states had more freedom to regulate in the area of abortion. It was this modification that led one prominent scholar to describe *Casey* as a "compromise...that has allegedly confined the right to abortion to 'a minimal existence, protected only against the most overwhelming of state incursions."[45]

This reading is not, however, very persuasive.[46] The joint opinion in *Casey* itself noted that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability."[47] And, even after viability, the *Roe* "exceptions" were explicitly retained: "We also affirm *Roe*'s holding that '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 the health of the mother.'"[48]

Under the undue burden standard a State may regulate but it seems clear that it may never actually prohibit an abortion. This undue burden standard does not eviscerate the right to abortion, as some contend. As Justice Scalia

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[45] Chris Whitman, "Looking Back on *Planned Parenthood v. Casey*," *Michigan Law Review* 100 (2002): 1980-81.

[46] For a critique of this view, with a particular focus on Professor Whitman's article, see Richard S. Myers, "Reflections on 'Looking Back on *Planned Parenthood v. Casey*'" in *Life and Learning XIII: The Proceedings of the Thirteenth University Faculty for Life Conference*, ed. Joseph W. Koterski (Washington, D.C.: UFL, 2004), pp. 3-19.

[47] *Casey*, 505 U.S. at 879.

[48] *Casey*, 505 U.S. at 879 (quoting *Roe v. Wade*, 410 U.S. at 164-65).

noted in his opinion in *Casey*, "in the 'undue burden' standard as applied in the joint opinion, it appears to be that a State may not regulate abortion in such a way as to reduce significantly its incidence."[49] As Justice Scalia stated, "despite flowery rhetoric about the State's 'substantial' and 'profound' interest in 'potential human life' and criticism of *Roe* for undervaluing that interest, the joint opinion permits the State to pursue that interest only so long as it is not too successful."[50]

Justice Scalia's reading seems borne out by the Court's subsequent abortion cases. After striking down Nebraska's ban on partial-birth abortions in the 2000 decision in *Stenberg v. Carhart*,[51] the Court did uphold the federal Partial-Birth Abortion Act of 2003 in its 2007 decision in *Gonzales v. Carhart*.[52] I have explored the implications of *Gonzales v. Carhart* in an earlier paper.[53] Despite its potential significance, it is important to understand that *Gonzales v. Carhart* did not afford the states the power to prohibit abortion at any time during pregnancy.[54] *Gonzales v. Carhart* left the *Casey/*undue burden approach as the governing law and it is that standard that has been applied in subsequent lower court cases[55] and in discussion about the constitutionality of proposed legislation limiting abortion.[56]

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[49] *Casey*, 505 U.S. at 992 (Scalia, J., concurring in the judgment in part and dissenting in part).

[50] Ibid.

[51] 530 U.S. 914 (2000).

[52] 550 U.S. 124 (2007).

[53] See Myers, supra n22.

[54] See Myers, supra n22 at 107-10.

[55] See e.g., *Planned Parenthood Minnesota v. Rounds*, 686 F. 3d 889 (8th Cir. 2012)(en banc), (applying the undue burden test in assessing the constitutionality of a South Dakota law requiring that women seeking an abortion be provided information about an increased risk of suicide); *Isaacson v. Horne*, 2012 U.S. Dist. *Lexis* 105825 (D. Ariz. July 30, 2012), (applying the undue burden test in assessing the constitutionality of an Arizona law limiting abortion after 20 weeks to prevent fetal pain), enjoined, 2012 U.S. App. *Lexis* 16390 (9th Cir. Aug. 1, 2012).

[56] See, for example, this exchange on the constitutionality of Pain-Capable Unborn Child Protection Acts, Teresa S. Collett, "Protecting Unborn Children from Pain," April 17, 2012, http://www.thepublicdiscourse.com/2012/04/5176; Paul Benjamin Linton, "The Pain-Capable Unborn Child Protection Act: Unconstitutional and Unwise," May 16, 2012, http://www.thepublicdiscourse.com/2012/05/5309; Teresa S. Collett, "A Constitutional and Wise Way to Protect the Unborn: A Response to Paul Linton," May 17, 2012, http://www.thepublicdiscourse.com/2012/05/5437. In *Whole Woman's Health*

Casey has certainly been an important decision. Although apparently poised to overrule *Roe v. Wade*, the *Casey* Court actually entrenched the right to an abortion.[57] This has remained in place for two decades. Although the meaning of *Casey*'s undue burden approach is not entirely clear (there has been debate, for example, about how the framework applies in the context of fetal pain legislation),[58] *Casey* has left the basic right to abortion secure. The notion that the right to abortion has been dramatically limited is not plausible. States have somewhat greater freedom to regulate abortion and this has indeed led to pro-life gains.[59] But, under *Casey*, states do not have any greater freedom to actually prohibit abortion (as opposed to particular abortion procedures).

Justice Kennedy is still the controlling vote on this question.[60] I do not think that it is likely that he will abandon his opinion in *Casey*. As a result, the *Casey*/undue burden standard will likely control for the foreseeable future.

B. *Casey*'s Impact on the Doctrine of Substantive Due Process

The joint opinion in *Casey* strongly re-affirmed the doctrine of substantive due process. The Court gave an expansive reading to the scope of liberty protected by the due process clause, most notably in *Casey*'s mystery passage.

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v. Hellerstedt, U.S. *Lexis* 4063 (June 27, 2016), the Supreme Court made it clear that the undue burden standard is still the governing standard to address state restrictions on abortion.

[57] Paulsen, supra n4 at 998.

[58] See n 57 supra.

[59] See Clarke D. Forsythe, "Progress after Casey," June 29, 2012, http://www.nationalreview.com/corner/304416/progress-after-casey-clarke-d-forsythe; Michael J. New, "*Casey* at Twenty: Pro-Life Progress Despite a Judicial Setback," July 17, 2012, http://www.thepublicdiscourse.com/2012/07/5918 .

[60] See Myers, supra n22 at 117 (discussing Justice Kennedy's role). Justice Kennedy was the decisive vote in *Whole Woman's Health v. Hellerstedt*, 2016 U.S. *Lexis* 4063 (June 27, 2016). Since the death of Justice Scalia, there is some additional uncertainty. Excluding Justice Kennedy, the Court is split 4-3 on abortion, with the three dissenters in *Whole Woman's Health* (Chief Justice Roberts and Justices Thomas and Alito) far more willing to uphold state restrictions on abortion than the other four Justices (Justices Ginsburg, Breyer, Sotomayor, and Kagan). Justice Kennedy has moved between these two camps. If Justice Scalia's successor were in favor of abortion rights, then Justice Kennedy would no longer be the swing vote on this issue. If Justice Scalia's successor shared his views, however, then Justice Kennedy would still remain the swing vote.

Some viewed this opinion as a landmark. One commentator argued that the Court had adopted the view that moral relativism was a constitutional command.[61] As this commentator stated: "[T]he typical focus on the mechanics of *Casey* and *Roe* has unfortunately overshadowed the fact that a very conservative Supreme Court has strongly reaffirmed the principle that moral autonomy is the philosophical basis for the constitutional privacy right."[62] In the mid-1990s some courts read *Casey* expansively.[63] This was particularly true in a series of cases involving assisted suicide.[64]

The Supreme Court seemed to abandon this approach in 1997 in *Washington v. Glucksberg*.[65] In *Glucksberg*, in rejecting constitutional challenges to laws banning assisted suicide, the Court rejected the idea that there is a fundamental right to assisted suicide. The Court, in an opinion by Chief Justice Rehnquist, largely ignored *Casey's* broad, abstract language.[66] The Court instead asked whether the right to assisted suicide was deeply rooted in our Nation's history and tradition. The Court carefully reviewed the relevant history and stated: "we are confronted with a consistent and almost universal tradition that has long rejected the asserted right, and continues explicitly to reject it today, even for terminally ill, mentally competent adults. To hold for respondents, we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State."[67] In *Glucksberg* (unlike in *Roe*), the Court was unwilling to take that step. The Court adopted a posture of caution and restraint and seemed disinclined to constitutionalize another area of social life.

Glucksberg seemed to change the Court's approach to these issues. The most noteworthy exception is the Court's 2003 decision in *Lawrence v.*

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[61] Steven Gey, "Is Moral Relativism a Constitutional Command?" *Indiana Law Journal* 70 (1995): 331.

[62] Ibid. at 363.

[63] See Myers, supra n33 at 69-70 (discussing these cases).

[64] See Richard S. Myers, "Physician-Assisted Suicide and Euthanasia: A Current Legal Perspective" in *Life and Learning XI: Proceedings of the Eleventh University Faculty for Life Conference*, ed. Joseph W. Koterski (Washington, D.C.: UFL, 2002), pp. 4-5.

[65] 521 U.S. 702 (1997).

[66] See Myers, supra n33 at 66-67 (discussing *Glucksberg*).

[67] *Glucksberg*, 521 U.S. at 723.

Texas.[68] In *Lawrence* the Court, in an opinion by Justice Kennedy, invalidated a Texas law proscribing "deviate sexual intercourse" between persons of the same sex. Justice Kennedy revived *Casey*'s mystery passage and extolled the extreme moral autonomy approach.[69] The Court expressed an expansive understanding of liberty (unmoored from traditional practice, which had been the focus under *Glucksberg*'s approach) and concluded that Texas could not condemn homosexual conduct on moral grounds.[70]

This approach could have far-reaching implications. Justice Scalia's dissent argued that the Court's view "effectively decrees the end of all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a legitimate state interest, [laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity] can[not] survive rational-basis review."[71]

Casey and *Lawrence*, though, have had limited impact.[72] Some courts have read *Casey* (and *Lawrence*) expansively. One decision in 2005 held the federal obscenity statute unconstitutional on substantive due process grounds[73] by finding that the promotion of morality was not a legitimate governmental interest.[74] That decision was, though, reversed on appeal[75] and most courts have

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[68] 539 U.S. 558 (2003).

[69] See Myers, supra n33 at 70-71.

[70] See Myers, supra n33 at 71.

[71] 539 U.S. at 599 (Scalia, J., dissenting).

[72] See Myers, supra n33 at 75. The Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) changes this to a significant degree. In *Obergefell*, the Court held unconstitutional state laws that defined marriage as the union between one man and one woman. The Court principally relied on the doctrine of substantive due process. Although the meaning of *Obergefell* is uncertain, I think that the decision makes it clear that a majority of the Court has rejected the *Glucksberg* Court's approach to substantive due process. I explore the implications of this development in two more recent papers. See Richard S. Myers, "*Obergefell* and the Future of Substantive Due Process," *Ave Maria Law Review* 14/1 (2016): 54-70; Richard S. Myers, "*Obergefell*, Substantive Due Process, and the Constitutionality of Laws Banning Assisted Suicide" in *Life and Learning XXVI: The Proceedings of the Twenty-Sixth University Faculty for Life Conference*, ed. Joseph W. Koterski, S.J. (Bronx NY: UFL, 2016), pp. 75-93.

[73] *United States v. Extreme Associates, Inc*., 352 F. Supp. 2d 578 (W.D.Pa.), rev'd, 431 F. 3d 150 (3d Cir. 2005).

[74] *Extreme Associates*, 352 F. Supp. 2d at 591.

[75] *United States v. Extreme Associates, Inc*. 431 F. 3d 150 (3d Cir. 2005).

restricted *Casey* and *Lawrence*.[76] The major impact of *Casey* (and then *Lawrence*) has been in cases involving gay rights.[77] The expansion of gay rights, though, seems in part driven by equality concerns. Most lower courts have been cautious about extending the reach of substantive due process, and in fact these lower court decisions frequently cite *Glucksberg*'s "history and tradition" approach and refuse to rely on the broad language in *Casey* and *Lawrence*.[78] Examples include cases rejecting constitutional challenges to laws prohibiting bigamy,[79] adult incest,[80] and adultery.[81] And in its 2010 decision in *McDonald v. City of Chicago*,[82] a majority of the Supreme Court focused more on history and tradition than on expansive, modern notions of liberty.

C. *Casey*'s Impact on the Court's Use of *Stare Decisis*

Casey's discussion of *stare decisis* has engendered much commentary.[83] It does not seem, however, that the joint opinion's discussion has had much impact on the Court's practice. The Court continues to overrule significant constitutional decisions with some frequency. *Casey*'s emphasis on the role of precedent, especially its discussion of super-precedents, seems to have been largely ignored. I will mention two examples – one "liberal" decision and one "conservative" decision.

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[76] See Myers, supra n33 at 74-77.

[77] See Trent L. Pepper, "The 'Mystery of Life' in the Lower Courts: The Influence of the Mystery Passage on American Jurisprudence," *Howard Law Journal* 51 (2008): 358-60 (making this point).

[78] See Myers, supra n33 at 75-77 (discussing examples).

[79] *State v. Holm*, 137 P. 3d 726 (Utah 2006), cert. denied, 549 U.S. 1252 (2007).

[80] *Lowe v. Swanson*, 663 F. 3d 258 (6th Cir. 2011), cert. denied, 132 S. Ct. 2383 (2012).

[81] *Marcum v. McWhorter,* 308 F. 3d 635 (6th Cir. 2002), (adultery was not constitutionally protected); see *Beecham v. Henderson County*, 422 F. 3d 372, 376 (6th Cir. 2005): "[W]e are doubtful...that our decision in *Marcum* was overruled by *Lawrence*."

[82] 130 S. Ct. 3020 (2010).

[83] See, e.g., Earl M. Maltz, "Abortion, Precedent, and the Constitution: A Comment on *Planned Parenthood of Southeastern Pennsylvania v. Casey*," *Notre Dame Law Review* 68 (1992): 11; Michael Stokes Paulsen, "Abrogating *Stare Decisis* by Statute: May Congress Remove the Precedential Effect of *Roe* and *Casey*?" *Yale Law Journal* 109 (2000): 1535.

In *Lawrence v. Texas*[84] the Supreme Court overruled its 1986 decision in *Bowers v. Hardwick*. As Justice Scalia noted in his dissent in *Lawrence*, "[t]oday's opinions in support of reversal do not bother to distinguish – or indeed, even bother to mention – the paean to *stare decisis* coauthored by three members of today's majority in *Planned Parenthood v. Casey*."[85] He concluded his discussion of *stare decisis* in his dissent by stating: "To tell the truth, it does not surprise me, and should surprise no one, that the Court has chosen today to revise the standards of *stare decisis* set forth in *Casey*. It has thereby exposed *Casey*'s extraordinary deference to precedent for the result-oriented expedient that it is."[86]

In *Citizens United v. Federal Election Commission*,[87] the Court in 2010 overruled its 1990 decision in *Austin v. Michigan Chamber of Commerce*,[88] which had permitted Congress to regulate political speech based on the speaker's corporate identity. In so doing, Justice Kennedy's opinion relied on traditional prudential factors (workability, reliance interests, changes in facts, etc.) in deciding whether to adhere to an earlier decision.[89] The Court did not mention *Casey*'s "rare precedential force" notion.

I think it is unlikely that that approach will resurface. The Court will instead continue its long-standing practice of recognizing that precedent is not an "'inexorable command'"[90] or a "'mechanical formula.'"[91] It is, rather a "'principle of policy'"[92] that involves considering a familiar set of factors to determine whether the Court ought to adhere to a previously decided case.

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[84] 539 U.S. 558 (2003).

[85] Ibid. at 587 (Scalia, J., dissenting).

[86] Ibid. at 592 (Scalia, J., dissenting).

[87] 130 S.Ct. 876 (2010).

[88] 494 U.S. 652 (1990).

[89] *Citizens United,* 130 S. Ct. at 911-913.

[90] *Casey*, 505 U.S. at 854 (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405 (1932)(Brandeis, J., dissenting)).

[91] *Citizens United*, 130 S. Ct. at 920 (Roberts, C..J., concurring)(quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)).

[92] Ibid.

IV. Conclusion

Casey was and is an important decision. *Casey* narrowed the abortion right a bit and gave states greater freedom to enact certain regulations. This has led to some pro-life gains. But, most significantly, *Casey* re-affirmed the right to abortion in strong terms and prevented states from prohibiting abortion at any time during pregnancy. *Casey* has kept this regime in place for two decades. *Casey*'s undue burden approach is still the governing standard and likely will be for some time. The continuing legal criticism of the right to abortion and of *Casey* itself[93] and growing pro-life sentiment,[94] offer hope that *Casey* will eventually be overruled.

In the other areas discussed in this paper (the doctrine of substantive due process and the role of precedent in constitutional law), *Casey* has had very little impact. With regard to substantive due process, the most that can be said is that *Casey*'s impact has been modest. *Casey*'s mystery passage and radical skepticism have largely been replaced by *Glucksberg*'s emphasis on history and tradition and on judicial restraint. The Court, perhaps as a result of the continuing reaction to its abortion decisions, has seemed for the most part eager to avoid extending the reach of substantive due process.[95] With regard to *stare decisis*, I think it is fair to say that *Casey*'s treatment of that topic has not had any discernible impact.[96] In subsequent cases, the Court has largely ignored the "rare precedential force"[97] discussion and returned to a largely *ad hoc* approach. The Court continues to rely on a traditional list of prudential factors in deciding whether to adhere to prior cases.[98]

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[93] "AUL Presents Legal Experts Detailing the 'Judicial Violence' of *Planned Parenthood v. Casey*," May 31, 2012, http://www.aul.org/2012/05/aul-presents-legal-experts-detailing-the-%e2%80%9cjudicial-violence%e2%80%9d-of-planned-parenthood-v-casey/

[94] Michael New, "Additional Gallup Data Proves America Trending Strongly Pro-Life," June 14, 2012, http://www.lifenews.com/2012/06/14/additional-gallup-data-proves-america-trending-strongly-pro-life/

[95] This assessment was made in 2012. Since the Court's decision in *Obergefell v. Hodges*, I have revised my views on this point. See n73.

[96] See Michael Stokes Paulsen, "Does the Supreme Court's Current Doctrine of *Stare Decisis* Require Adherence to the Supreme Court's Current Doctrine of *Stare Decisis*?" *North Carolina Law Review* 86 (2008): 1165.

[97] *Casey*, 505 U.S. at 867.

[98] I do not mean to suggest that the Court uses *stare decisis* in a coherent fashion. I agree with Professor Paulsen who concluded that "the doctrine serves poorly, if at all,

the supposed rule-of-law values of promoting efficiency and stability, protecting reasonable reliance, and enhancing judicial credibility – the values asserted to justify the doctrine." Paulsen, supra n97 at 1167.