

# A Draft Opinion Overruling *Roe v. Wade*\*

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ABSTRACT: *Roe v. Wade* has been subject to substantial judicial and scholarly criticism over the past forty-five years, but without an attempt specifically to explore how it might be overruled in a majority opinion. This article attempts to remedy that, by drafting a model opinion that could be used to overrule *Roe*. The predicate for this article’s proposed decision is a state’s twenty-week limit on abortion, which (as of 2018) has been enacted by twenty-one states. All of the six primary factors of *stare decisis* are applied to *Roe*. Although judges and scholars might disagree whether all six factors are relevant to an overruling decision, each factor illuminates specific defects in *Roe*. Much of the significant scholarly criticism of the past forty-five years is compiled and cited here. Much of the judicial criticism of *Roe* and its workability is likewise compiled and cited. The opinion overrules the first holding in *Roe*, that there is a federal constitutional right to “terminate pregnancy.” This “draft” invites alternative formulations.

THIS COURT HELD in *Roe v. Wade* that a woman has a federal constitutional right to abortion before fetal viability, and that the states must allow abortion thereafter for any “health” reason as determined by the provider.<sup>1</sup> We have consistently defined the right created in *Roe* specifically

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<sup>1</sup> 410 U.S. 113, 164-65 (1973). See *Colautti v. Franklin*, 439 U.S. 379, 386-87 (1979): “[A]fter viability, the State, if it chooses, may regulate or even prohibit abortion except where necessary, in appropriate medical judgment, to preserve the life or health of the pregnant woman.” Citing *Roe*, 410 U.S. at 163-64); *ibid.* at 394, noting that statutes withstand void-for-vagueness challenges when the statutes allowed “physician to make his determination in the light of all attendant circumstances – psychological and emotional as well as physical – that might be relevant to the well-being of the patient”; *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 61 (1976):

and narrowly as the right to “terminate pregnancy.”<sup>2</sup> Our companion decision in *Doe v. Bolton* defined “health” as “all factors – physical, emotional, psychological, familial, and the woman’s age – relevant to the well-being of the patient,”<sup>3</sup> and *Doe* has been applied by the federal courts as holding that the states must allow abortion after fetal viability for any “health” reason related to the emotional well-being of the woman.<sup>4</sup>

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“[V]iability [is] a point purposefully left flexible for professional determination...”

<sup>2</sup> *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) (“to terminate her pregnancy”), quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846, 850, 852–53, 859, 869, 870, 876, 887 (1992) (“terminate her pregnancy”); *City of Akron v. Akron Center Reprod. Health*, 462 U.S. 416, 420 n.1 (1983) (“terminate her pregnancy”); *Harris v. McRae*, 448 U.S. 298, 312, 316 (1980), noting “the freedom of a woman to decide whether to terminate her pregnancy”; *Maher v. Roe*, 432 U.S. 464, 473-74 (1977): “her freedom to decide whether to terminate her pregnancy”; *Roe*, 410 U.S. at 153, 163: “a woman’s decision whether or not to terminate her pregnancy.”

<sup>3</sup> 410 U.S. 179, 192 (1973).

<sup>4</sup> See *Am. Coll. of Obstetricians & Gynecologists v. Thornburgh*, 737 F.2d 283, 299 (3d Cir. 1984): “It is clear from the Supreme Court cases that ‘health’ is to be broadly defined. As the Court stated in *Doe v. Bolton*, the factors relating to health include those that are ‘physical, emotional, psychological, familial, [as well as] the woman’s age.’” Quoting 410 U.S. at 192, *aff’d*, *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986); *Women’s Med. Prof’l Corp. v. Voinovich*, 130 F.3d 187, 209 (6th Cir. 1997): “*Doe* and *Vuitch* – which both involved regulations essentially prohibiting, as opposed to delaying, abortions – strongly suggest that a State must provide a maternal health exception to an abortion ban that encompasses situations where a woman would suffer severe mental or emotional harm if she were unable to obtain an abortion. Moreover, *Roe* and *Doe* were decided on the same day and ‘are to be read together.’ Therefore, *Roe*’s prohibition on state regulation when an abortion is necessary for the ‘preservation of the life or health of the mother’ must be read in the context of the concept of health discussed in *Doe*...” (quoting *Roe*, 410 U.S. at 165, 191–92), *cert. denied*, 523 U.S. 1036 (1998); *Schulte v. Douglas*, 567 F. Supp. 522 (D. Neb. 1981), applying broad definition of “health” to strike down post-viability limits, *aff’d sub. nom.*, *Women’s Servs., P.C. v. Douglas*, 710 F.2d 465 (8th Cir. 1983) (per curiam); *Margaret S. v. Edwards*, 488 F. Supp. 181, 196-97 (E.D. La. 1980), applying broad definition of “health” to invalidate post-viability limits, *aff’d on other grounds*, 794 F.2d 994 (5th Cir. 1986). To put it another way, the Court has stated that the States must give doctors discretion to use their medical judgment to determine whether an abortion is “necessary” to preserve the mother’s “health.” *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 327-28 (2006): “[O]ur precedents hold, that a State may not restrict access to abortions that are ‘necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.’” Citing *Casey*, 505 U.S. at 879; *Thornburgh*, 476 U.S. at 768-69 (facially invalidating post-viability limit); *Casey*, 505 U.S. at 872, 879 (reaffirming *Roe*’s holding that states may prohibit

In this case, as in several prior cases, we have been asked to overrule *Roe v. Wade* after forty-five years.<sup>5</sup> After due consideration explained in detail below, we conclude that *Roe v. Wade*'s specific holding, that there is a federal constitutional right to "terminate pregnancy," is hereby overruled.<sup>6</sup> Because *Doe* was premised on that specific holding in *Roe*, and because the Court specifically said that *Roe* and *Doe* "are to be read together,"<sup>7</sup> *Doe v. Bolton* is also hereby overruled.<sup>8</sup>

After our decision in *Gonzales v. Carhart*,<sup>9</sup> the Petitioner, along with twenty-one other states, enacted a law limiting abortions after twenty weeks of pregnancy.<sup>10</sup> Two of these laws have been invalidated for violating *Roe*,<sup>11</sup> but the others have been in effect for years. In this case, Petitioner's law was challenged as facially unconstitutional.

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abortion after viability "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother").

<sup>5</sup> *Casey*, 505 U.S. at 844 (citing five other cases where United States asked Court to overrule *Roe*).

<sup>6</sup> We express no opinion today on the second holding of *Roe*, that the protection of "persons" under the Fourteenth Amendment does not include the unborn. 410 U.S. at 158. Cf. Michael Stokes Paulsen, "The Plausibility of Personhood," 74 *Ohio State Law Journal* 13, 68 (2013): "Text, structure, history, precedent, and policy do not point to an absolutely clear, unambiguous, indisputable answer to the question of whether the Fifth and Fourteenth Amendments' protections of the rights of persons extend to the unborn."

<sup>7</sup> *Doe*, 410 U.S. at 165.

<sup>8</sup> *Ibid.* at 189.

<sup>9</sup> 550 U.S. 124 (2007).

<sup>10</sup> By year enacted: Nebraska (2010), Alabama (2011), Idaho (2011), Kansas (2011), Oklahoma (2011), Arizona (2012), Georgia (2012), Louisiana (2012), Arkansas (2013), Indiana (2013), North Carolina (2013), North Dakota (2013), Texas (2013), Mississippi (2014), West Virginia (2015), Wisconsin (2015), Ohio (2016), South Carolina (2016), South Dakota (2016), Kentucky (2017), Iowa (2017). Randy Beck, "Twenty-Week Abortion Statutes: Four Arguments," 43 *Hastings Constitutional Law Quarterly* 187, 187, 187 n.1 (2016) (collecting 16 states plus Utah (enacted 1991)). The U.S. House approved a similar 20-week limit by a vote of 242 to 184 on May 13, 2015. *Ibid.* Since 2015, five more states have adopted similar legislation. Ohio Rev. Code Ann. § 2919.203 (2016); S.C. Code Ann. 44-41-450 (2016); S.D. Codified Laws § 34-23A-70 (2016); Ky. Rev. Stat. Ann. § 311.782 (2017); Iowa Code Ann. § 146B.2 (2017).

<sup>11</sup> *Horne v. Isaacson*, 716 F.3d 1213 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 905 (2014); *McCormack v. Hiedeman*, 900 F. Supp. 2d 1128 (D. Idaho 2013), *aff'd*, *McCormack v. Herzog*, 788 F.3d 1017 (9th Cir. 2015).

Because the State’s law arguably conflicts with *Roe* and *Doe*, we have to decide whether to apply the standard created in *Roe v. Wade*, or that created in *Planned Parenthood v. Casey*, or that created in *Fargo Women’s Health Organization v. Schafer*,<sup>12</sup> or some other standard.<sup>13</sup> In *Webster v. Reproductive Health Services*,<sup>14</sup> and in *Casey*, we reconsidered *Roe*, though neither case involved a prohibition bill.<sup>15</sup> Therefore, we consider whether *Roe* is the correct standard to be applied in this case. The Petitioner has asked that *Roe* be overruled,<sup>16</sup> and we asked for supplemental briefing to address that question.<sup>17</sup>

### I. *Stare Decisis* & the Re-Examination of Precedent

In more than 230 cases throughout this Court’s history, we have applied the judicially-created doctrine of *stare decisis* and overruled prior decisions. Three-fourths of these have been constitutional overrulings.<sup>18</sup> Generally, we have noted that “*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.”<sup>19</sup>

As we have consistently emphasized, however, *stare decisis* is not an “inexorable command,” much less a constitutional principle.<sup>20</sup> In *Casey*, we noted that *stare decisis* is a pragmatic judgment.<sup>21</sup> It is a policy judgment, a

<sup>12</sup> 507 U.S. 1013, 1014 (1993) (O’Connor, J., concurring).

<sup>13</sup> Cf. *Webster v. Reprod. Health Services*, 492 U.S. 490, 533 (1989) (Scalia, J., concurring in part and concurring in the judgment): “The only choice available is whether, in deciding that constitutional question, we should use *Roe v. Wade* as the benchmark, or something else.”

<sup>14</sup> 492 U.S. 490 (1989).

<sup>15</sup> *Gonzales v. Carhart*, 550 U.S. 124, 145 (2007): “*Casey* involved a challenge to *Roe v. Wade*....”

<sup>16</sup> *Carlsbad Tech. Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 638 n.\* (2009).

<sup>17</sup> *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009); *Pearson v. Callahan*, 555 U.S. 223, 227 (2009).

<sup>18</sup> Cong. Research Serv., “The Constitution of the United States: Analysis and Interpretation: Analysis of Cases Decided by the Supreme Court of the United States to June 26, 2013,” S. Doc. No. 112-9, at 2573–85 (2d Sess. 2013).

<sup>19</sup> *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

<sup>20</sup> *Burnet v. Colorado Oil & Gas Co.*, 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting).

<sup>21</sup> *Casey*, 505 U.S. at 854: “[W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic

prudential judgment, based on weighing several factors.<sup>22</sup>

This Court and its justices have often reiterated that *stare decisis* “applies less rigidly in constitutional cases.”<sup>23</sup> This is so for at least three reasons. First, when the Court applies the Constitution to strike down a legislative act, there can be no legislative remedy, either from Congress or the states.

*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled, than that it be settled right. This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions.<sup>24</sup>

Second, we remember “above all else that it is the Constitution which [we]

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considerations” designed to “gauge the respective costs of reaffirming and overruling a prior case.”

<sup>22</sup>*Agostini v. Felton*, 521 U.S. 203, 235–36 (1997) (citing cases); Michael Stokes Paulsen, “Abrogating *Stare Decisis* by Statute: May Congress Remove the Precedential Effect of *Roe* and *Casey*?”, 109 *Yale Law Journal* 1535 (2000) (citing cases).

<sup>23</sup>*Arizona v. Gant*, 556 U.S. 332, 358 (2009) (Alito, J., dissenting); *Vieth v. Jubelirer*, 541 U.S. 267, 305 (2004) (plurality opinion of Scalia, J.); *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 (1990) (Scalia, J., dissenting), noting that “in the field of constitutional adjudication...the pull of *stare decisis* is at its weakest”; *Agostini*, 521 U.S. at 235 (opinion of O’Connor, J.); *Seminole Tribe v. Florida*, 517 U.S. 44, 63 (1996); *Payne v. Tennessee*, 501 U.S. 808, 828-30 n.1 (1991) (opinion of Rehnquist, CJ); *United States v. Scott*, 437 U.S. 82, 101 (1978); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 627-28 (1974) (Powell, J., concurring): “[T]hat doctrine has never been thought to stand as an absolute bar to reconsideration of a prior decision, especially with respect to matters of constitutional interpretation.... Revision of a constitutional interpretation, on the other hand, is often impossible as a practical matter, for it requires the cumbersome route of constitutional amendment. It is thus not only our prerogative but also our duty to re-examine a precedent where its reasoning or understanding of the Constitution is fairly called into question. And if the precedent or its rationale is of doubtful validity, then it should not stand”; *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962) (Harlan, J.): “[T]his Court’s considered practice not to apply *stare decisis* as rigidly in constitutional as in nonconstitutional cases”; *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 94 (1936) (Stone, J., joined by Cardozo): “The doctrine of *stare decisis*, however appropriate and even necessary at times, has only a limited application in the field of constitutional law”; *Burnet*, 285 U.S. at 406-08 (opinion of Brandeis, dissenting); Bryan A. Garner, et al., “The Law of Judicial Precedent” 352 (2016).

<sup>24</sup>*Burnet*, 285 U.S. at 406-10 (Brandeis, J., dissenting).

swore to support and defend, not the gloss which [our] predecessors may have put on it.”<sup>25</sup> Third, only this Court can reconsider a precedent, because lower federal courts are obliged to scrupulously follow this Court’s decisions “which directly control.”<sup>26</sup>

When we consider departing from precedent, we have consistently examined whether: (1) the precedent is settled;<sup>27</sup> (2) the original decision was “wrongly decided” or “well-reasoned”;<sup>28</sup> (3) the prior case is workable;<sup>29</sup> (4) factual changes have eroded the original decision;<sup>30</sup> (5) legal changes have eroded the original decision;<sup>31</sup> and (6) reliance interests are substantial. We examine each of these factors in turn.

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<sup>25</sup> *South Carolina v. Gathers*, 490 U.S. 805, 825 (1989) (Scalia, J., dissenting) (citation omitted).

<sup>26</sup> *Agostini v. Felton*, 521 U.S. 203, 237 (1997). See also *Dickerson v. United States*, 530 U.S. 428, 437 (2000): “Congress may not legislatively supercede our decisions interpreting and applying the Constitution.”

<sup>27</sup> *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017); *Murr v. Wisconsin*, 137 S. Ct. 1933, 1950 (2017) (Roberts, C.J., dissenting) (“settled principles”); *Boumediene v. Bush*, 553 U.S. 723, 828 (2008) (Scalia, J., dissenting) (“settled precedent”).

<sup>28</sup> *Montejo v. Louisiana*, 556 U.S. 778 (2009); *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004); *Seminole Tribe v. Florida*, 517 U.S. 44, 65 (1996); *Casey*, 505 U.S. at 863: “*Plessy* was wrong the day it was decided...”; *Payne*, 501 U.S. at 832 (O’Connor, J., concurring); *Passenger Cases*, 48 U.S. (7 How.) 283, 470 (1849) (Taney, C.J., dissenting), the Court’s “judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported.”

<sup>29</sup> *Montejo*, 556 U.S. at 792; *Randall*, 548 U.S. at 272; *Vieth*, 541 U.S. at 306; *Seminole Tribe v. Florida*, 517 U.S. 44, 64 (1996), noting “confusion among the lower courts that have sought to understand and apply the deeply fractured decision”; *Payne*, 501 U.S. at 827; *Rutan*, 497 U.S. at 111 (Scalia, J., dissenting); *Swift v. Wickham*, 382 U.S. 111, 116 (1965) (Harlan).

<sup>30</sup> *Direct Marketing Association v. Brohl*, 135 S. Ct. 1124 (2015); *Arizona v. Gant*, 556 U.S. 332, 358 (2009) (Alito, J., dissenting), considering “whether there has been an important change in circumstances in the outside world”; *Casey*, 505 U.S. at 865; *Randall v. Sorrell*, 548 U.S. 230 (2006); *Burnet v. Colorado Oil & Gas Co.*, 285 U.S. 393, 412-13 (1932) (Brandeis, J., dissenting): “[T]his Court must, in order to reach sound conclusions, feel free to bring its opinions into agreement with experience and with facts newly ascertained, so that its judicial authority may, as Mr. Chief Justice Taney said, ‘depend altogether on the force of the reasoning by which it is supported.’”

<sup>31</sup> *Casey*, 505 U.S. at 865; *Agostini*, 521 U.S. at 235-36 (citing cases).

## II. Whether *Roe v. Wade* Is Settled Precedent

### A. The Inconsistent Application of *Roe v. Wade*.

*Roe v. Wade* is forty-five years old, but we have overruled decisions of much longer duration. We overruled *Plessy v. Ferguson*<sup>32</sup> after fifty-eight years in *Brown v. Board of Education*.<sup>33</sup> After seventy-five years, we invalidated *Paul v. Virginia*<sup>34</sup> in *United States v. South-Eastern Underwriters Assn.*<sup>35</sup> We overturned *Swift v. Tyson*<sup>36</sup> after ninety-six years in *Erie Railroad Co. v. Tompkins*<sup>37</sup> by a 5-4 vote. Most recently, in *Obergefell v. Hodges*,<sup>38</sup> we overruled *Baker v. Nelson*<sup>39</sup> after forty-three years, by a 5-4 vote.

Despite forty-five years, *Roe* has never become settled. There has never been consistency in this Court's application of *Roe* or *Casey*.<sup>40</sup> Two of the justices who originally joined *Roe* subsequently recanted in whole or in part<sup>41</sup> and virtually every abortion decision since *Harris v. McRae*<sup>42</sup> has been closely divided.

The development of our abortion law doctrine has been haphazard from the beginning, starting with *Roe*.<sup>43</sup> This Court did not actually hold in *Roe* that abortion was a “fundamental” constitutional right, but instead stated: “Where certain ‘fundamental rights’ are involved, the Court has held that regulation limiting these rights may be justified only by a ‘compelling state interest’ and

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<sup>32</sup> 163 U.S. 537 (1896).

<sup>33</sup> 347 U.S. 483 (1954).

<sup>34</sup> 75 U.S. 168 (1869).

<sup>35</sup> 322 U.S. 533 (1944).

<sup>36</sup> 41 U.S. (1 Pet.) 1 (1842).

<sup>37</sup> 304 U.S. 64 (1938).

<sup>38</sup> 135 S. Ct. 2584 (2015).

<sup>39</sup> 409 U.S. 810 (1972).

<sup>40</sup> See, e.g., *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2321 (2016) (Thomas, J., dissenting); *Janklow v. Planned Parenthood*, 517 U.S. 1174 (1996) (disputing the applicable standard of review); *City of Akron v. Akron Center Reprod. Health*, 462 U.S. 416, 461 & n.8 (1983) (O'Connor, J., dissenting) (noting the inconsistencies between *Roe* and *Akron*).

<sup>41</sup> *Thornburgh v. ACOG*, 476 U.S. 747, 782-85 (1986) (Burger, J., dissenting); John C. Jeffries, Jr., “Justice Lewis F. Powell Jr.: A Biography,” 341 (1994) (referring to *Roe* and *Doe* as “the worst opinions I ever joined”).

<sup>42</sup> 448 U.S. 297 (1980).

<sup>43</sup> See *Sendak v. Arnold*, 429 U.S. 968, 972 (1976) (White, J., dissenting): “Normal principles of constitutional adjudication apply even in cases dealing with abortion.”

that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.”<sup>44</sup> This ambiguity is compounded in the Court’s concluding “summary” in section XI of the *Roe* opinion.<sup>45</sup> That summary nowhere mentions abortion as a fundamental right, or strict scrutiny analysis, or the need to “narrowly tailor” regulations. Instead, the Court only required that regulations be “reasonably relate[d]” to the state interest and be “tailored to the recognized state interests.”<sup>46</sup>

In the cases decided between *Roe* and *Webster*, this Court did not consistently treat abortion as a “fundamental right” and did not consistently apply strict scrutiny. In 1983, Justice Powell stated, in a footnote in *City of Akron v. Akron Center*, that “the Court repeatedly and consistently has accepted and applied the basic principle that a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy.”<sup>47</sup> But this overstatement is contradicted by examination of the specific decisions cited, and by Justice Powell’s own observations in *Carey v. Population Services International*,<sup>48</sup> that “neither of those cases [*Planned Parenthood v. Danforth* and *Doe v. Bolton*] refers to the ‘compelling state interest’ test” and that the Court in *Doe v. Bolton* used the “reasonably related” test.<sup>49</sup>

Justice Powell cited nine abortion decisions in *Akron*. An examination of those nine confirms that virtually none *held* abortion to be a “fundamental right.”<sup>50</sup> Instead, the Supreme Court’s abortion decisions between *Roe* and

<sup>44</sup> *Roe v. Wade*, 410 U.S. 113, 155 (1973).

<sup>45</sup> *Ibid.* at 164.

<sup>46</sup> *Ibid.* at 164–65.

<sup>47</sup> *City of Akron v. Akron Center Reprod. Health, Inc.*, 462 U.S. 416, 420 n.1 (1983).

<sup>48</sup> *Carey v. Population Servs., Int’l*, 431 U.S. 678 (1977).

<sup>49</sup> *Ibid.* at 704.

<sup>50</sup> *Connecticut v. Menillo*, 423 U.S. 9 (1975) (no reference to any “fundamental right” or “strict scrutiny” in the *per curiam* opinion); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976) (failing to use *any* particular level of scrutiny); *ibid.* at 71 (noting “inconsisten[cy] with the standards enunciated in *Roe v. Wade*”); *Bellotti v. Baird*, 428 U.S. 132 (1976) (*Bellotti I*) (using an “unduly burdensome” standard); *ibid.* at 147 (characterizing *Danforth* (decided the same day) as holding that the requirement of written consent “is not unconstitutional unless it unduly burdens the right to seek an abortion”); *Beal v. Doe*, 432 U.S. 438, 466 (1977) (invoking the “unduly burdensome” standard); *Maher v. Roe*, 432 U.S. 464 (1977): The Court referred only indirectly to “a fundamental right” but then proceeded to hold that “the District Court misconceived the nature and scope of ‘the fundamental right recognized in *Roe*’”; *ibid.* at 470-71 (stating that “the right protects the woman from



*Casey* often involved the Court reining in overbroad decisions by the lower federal courts to uphold regulations that had been struck down by the lower federal courts. The Supreme Court cases between *Roe* and *Akron* did not refer to abortion as a fundamental right. Nor did we consistently apply strict scrutiny analysis, nor require that the statutes be “narrowly tailored” nor require the “least restrictive means.” In *Doe*, the Court applied a “legitimately related” test<sup>51</sup> and an “unduly restrictive” standard.<sup>52</sup>

Besides the *dictum* in *Maher v. Roe*,<sup>53</sup> there are only two instances in the two decades between *Roe* and *Casey* in which a majority of the Court referred to abortion as a “fundamental right,” but without actually applying the strict scrutiny that accompanies a fundamental right: (1) Justice Powell’s opinion in *City of Akron v. Akron Center for Reproductive Health*,<sup>54</sup> and (2) *Thornburgh v. ACOG*,<sup>55</sup> where the Court stated, “A woman’s right to make that choice freely is fundamental.”<sup>56</sup> But even in *Akron* and *Thornburgh*, the Court never expressly applied the “strict scrutiny-narrowly tailored” analysis. *Thornburgh* in 1986 is the last time that a majority of the Court – and only in passing – has referred to abortion as a “fundamental right.” In any case, these decisions were overruled by *Casey*.<sup>57</sup>

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unduly burdensome interference with her freedom”); *ibid.* at 473-74, (concluding that the regulation “does not impinge upon the fundamental right recognized in *Roe*”); *Colautti v. Franklin*, 439 U.S. 379, 396–97 (1979) (applying an “unduly limit” standard); *Bellotti v. Baird*, 443 U.S. 622, 640 (1979) (*Bellotti II*) (employing an “undue burden” standard without referencing a “fundamental right”); *Harris v. McRae*, 448 U.S. 297, 324–26 (1980) (applying a rational basis test for the Hyde Amendment); *H.L. v. Matheson*, 450 U.S. 398 (1981) (upholding the Utah parental notice law against a facial challenge, without reference to abortion as a “fundamental” right).

<sup>51</sup> *Doe v. Bolton*, 410 U.S. 179, 195 (1973).

<sup>52</sup> *Ibid.* at 198.

<sup>53</sup> *Maher*, 432 U.S. at 464 (1977).

<sup>54</sup> *City of Akron v. Akron Center Reprod. Health, Inc.*, 462 U.S. 416 (1983).

<sup>55</sup> *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 763-69 (1986).

<sup>56</sup> *Ibid.* at 772. The standard of review applied in *Thornburgh* to the six parts of the Pennsylvania statute was haphazard, conclusory, and did not apply the elements of strict scrutiny. *Ibid.* at 747, 763, 765 (1986) (assessing the law in terms of “legitimate state interest”); *ibid.* at 767: “[T]he ‘impermissible limits’ that *Danforth* mentioned... have been exceeded here...”; *ibid.* at 767-68, concluding that laws “pos[ing] an unacceptable danger of deterring the exercise” of the abortion right “must be invalidated.”

<sup>57</sup> 505 U.S. at 882.

Since *Thornburgh*, the Court has never referred to abortion as a fundamental right, not even in *Stenberg v. Carhart*,<sup>58</sup> which struck down the partial-birth abortion prohibitions of Nebraska and twenty-nine other states. *Stenberg* was overruled *sub silentio* by *Gonzales*.<sup>59</sup>

It was perhaps Justice O'Connor who first observed the inconsistency in the Court's application of *Roe* in her dissent in *City of Akron v. Akron Center for Reproductive Rights*,<sup>60</sup> noting that, in *Roe*, "the Court mentioned 'narrowly drawn' legislative enactments, but the Court never actually adopted this standard in the *Roe* analysis."<sup>61</sup> Justice O'Connor provided a detailed analysis that the Court between *Roe* and *Akron* had not treated abortion as a "fundamental right" nor consistently applied the strict scrutiny that accompanies a fundamental right. She pointed out that "[t]he Court and its individual Justices have repeatedly utilized the 'unduly burdensome' standard in abortion cases" between *Roe* and *Akron*.<sup>62</sup> She noted that "the Court subsequent to *Doe* [*v. Bolton*] has expressly rejected the view that differential treatment of abortion requires invalidation of regulations"<sup>63</sup> and that "[t]he Court has never required that state regulation that burdens the abortion decision be 'narrowly drawn' to express only the relevant state interest."<sup>64</sup>

#### B. The Inconsistent Application of *Planned Parenthood v. Casey*.

Finally, in 1992, after two decades of inconsistency, this Court in *Casey* officially disavowed fundamental rights status for abortion, and disavowed the strict scrutiny standard, and adopted an "undue burden" test.<sup>65</sup>

*Casey* adopted but did not settle the clarity of the "undue burden" standard. Consistency and predictability have been undermined by federal court

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<sup>58</sup> *Stenberg v. Carhart*, 530 U.S. 914 (2000).

<sup>59</sup> Cong. Res. Serv., "The Constitution of the United States: Analysis and Interpretation" 2584 (cent. ed. 2016); Barry Friedman, "The Wages of Stealth Overruling," 99 *Georgetown Law Journal* 1, 6 (2010); L.A. Powe, Jr., "Intergenerational Constitutional Overruling," 89 *Notre Dame Law Review* 2093, 2100 (2014).

<sup>60</sup> *City of Akron v. Akron Ctr. Reprod. Health, Inc.*, 462 U.S. 416, 461 (1983).

<sup>61</sup> *Ibid.* at 467-68 n.11.

<sup>62</sup> *Ibid.* at 461 & n.8.

<sup>63</sup> *Ibid.* at 465 n.9.

<sup>64</sup> *Ibid.* at 467 n.11.

<sup>65</sup> 505 U.S. at 871, 874-76. Stephen Gilles, "Why the Right to Elective Abortion Fails *Casey*'s Own Interest-Balancing Methodology – and Why It Matters," 91 *Notre Dame Law Review* 691 (2015).

application of the standard created in *Roe* and the standard created in *Casey*. Federal courts have struggled with the application of the standards.<sup>66</sup> “The soundness of our holdings must be tested by the decisions that purport to follow them.”<sup>67</sup>

Immediately after *Casey*, the Court again changed the applicable standard and adopted a “large fraction” test.<sup>68</sup> The lower federal courts struggled for fifteen years between *Fargo* and *Gonzales v. Carhart*,<sup>69</sup> to decide what was a “large fraction” of “relevant cases.”<sup>70</sup> The “large fraction” test was effectively

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<sup>66</sup> See, e.g., *Planned Parenthood v. Minnesota*, 910 F.2d 479 (8th Cir. 1990) (trying to determine standard of review after *Webster*); Paul Quast, “Note, Respecting Legislators and Rejecting Baselines: Rebalancing *Casey*,” 90 *Notre Dame Law Review* 913 (2014) (citing cases); Note, Ruth Burdick, “The *Casey* Undue Burden Standard: Problems Predicted and Encountered, and the Split Over the Salerno Test,” 23 *Hastings Constitutional Law Quarterly* 825 (1996) (citing cases); Sandra L. Tholen & Lisa Baird, “Con Law is as Con Law Does: A Survey of *Planned Parenthood v. Casey* in the State and Federal Courts,” 28 *Loyola Law Review* 971 (1995) (citing cases).

<sup>67</sup> *Thornburgh v. ACOG*, 476 U.S. 747, 785 (1986) (Burger, J., dissenting).

<sup>68</sup> *Fargo Women’s Health Organization v. Schafer*, 507 U.S. 1013, 1014 (1993) (O’Connor, J., concurring): “[W]e made clear that a law restricting abortions constitutes an undue burden, and hence is invalid, if, ‘in a large fraction of the cases in which (the law) is relevant, it will operate as a substantial obstacle to a woman’s choice to undergo an abortion.’”

<sup>69</sup> 550 U.S. 124 (2007).

<sup>70</sup> Kevin Martin, “Stranger in a Strange Land: The Use of Overbreadth in Abortion Jurisprudence,” 99 *Colorado Law Review* 173 (1999); *Janklow v. Planned Parenthood*, 517 U.S. 1174 (1996) (opinions expressing confusion about *Salerno* and *Fargo*); *National Abortion Federation v. Gonzales*, 437 F.3d 278, 294 (2d Cir. 2006) (Walker, J.): “As it stands now, however, the Supreme Court appears to have adopted the ‘large fraction’ standard (perhaps modified by *Stenberg* to mean a ‘not-so-large-fraction’ standard)...”; *Planned Parenthood v. Wasden*, 376 F.3d 908, 920 n.9 (9th Cir. 2004) (noting that the “large fraction” standard has been labeled “unique”); cert denied, 544 U.S. 948 (2005); *A Woman’s Choice-East Side Women’s Clinic v. Newman*, 305 F.3d 684, 687 (7th Cir. 2002): “When the Justices themselves disregard rather than overrule a decision – as the majority did in *Stenberg*, and the plurality did in *Casey* – they put courts of appeals in a pickle” (opinion of *Easterbrook*); *Greenville Women’s Clinic v. Bryant*, 222 F.3d 157, 164-65 (4th Cir. 2000) (noting “considerable debate among the circuits”); *Manning v. Hunt*, 119 F.3d 254, 268 n.4 (4th Cir. 1997) (stating that the circuits are divided in the application of *Salerno*); *Jane L. v. Bangertter*, 102 F.3d 1112, 1116 (10th Cir. 1996) (noting that the standard applicable to pre-viability abortion regulations after *Casey* is a matter of some dispute); *Planned Parenthood v. Miller*, 63 F.3d 1452, 1457 (8th Cir. 1995) (stating that the circuits are split regarding whether the Supreme Court has overruled *Salerno* for abortion cases); *Barnes v. Mississippi*, 992

jettisoned in *Gonzales*. It was then resurrected, but applied incoherently, in *Whole Woman's Health v. Hellerstedt*, in a way that would always result in invalidation of the state's interest and the state statute.<sup>71</sup>

For decades, the Court has also left lower federal courts in confusion as to whether the *Salerno* facial challenge standard (“no set of circumstances”) applied to the issue of abortion, even though it otherwise has general application.<sup>72</sup> The Court applied the *Salerno* standard in *Rust v. Sullivan*<sup>73</sup> and *Ohio v. Akron Center for Reproductive Health*,<sup>74</sup> but not in *Casey*,<sup>75</sup> or *Fargo*. For twenty-five years, the Court has left the applicable standard unclarified in *Stenberg*,<sup>76</sup> in *Gonzales*,<sup>77</sup> and in *Hellerstedt*.<sup>78</sup>

As predicted, *Casey* sowed the seeds for endless confusion about the undue burden standard by using “undue burden” and “substantial obstacle” in the definition of the required standard of review. An “undue” burden would seem to require a comparison between the burden and the reasons or justification for any burden. What is “undue”? But the “substantial obstacle” definition seemingly eliminates the comparison and focuses simply on the *degree* of the burden without regard to the *justification*.

*Gonzales v. Carhart*<sup>79</sup> did not settle the clarity of the undue burden standard. Confusion ensued as to whether *Gonzales* required a one-part inquiry or a two-part inquiry. Was finding a “rational basis” bound up in the “undue burden” inquiry or a first step before the undue burden inquiry?<sup>80</sup> Twenty-three

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F.2d 1335, 1337 (5th Cir. 1993): “[P]assing on the constitutionality of state statutes regulating abortion after *Casey* has become neither less difficult nor more closely anchored to the Constitution.”

<sup>71</sup> *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2343 n.11 (2016) (Alito, J., dissenting).

<sup>72</sup> See *Whole Woman's Health v. Lakey*, 769 F.3d 285, 296 (5th Cir. 2014): “[I]t is not clear whether the Supreme Court applies this general rule in abortion cases.”

<sup>73</sup> 500 U.S. 173, 183 (1991).

<sup>74</sup> 497 U.S. 502, 514 (1990). See also *Webster v. Reprod. Health Services*, 492 U.S. 490, 524 (1989) (O'Connor, J., concurring) (invoking *Salerno*).

<sup>75</sup> 505 U.S. at 905.

<sup>76</sup> 530 U.S. at 1019 (Thomas, J., dissenting): “None of the opinions supporting the majority so much as mentions the large fraction standard....”

<sup>77</sup> 550 U.S. at 167-68: “We need not resolve that debate.”

<sup>78</sup> *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2343 n.11 (2016) (Alito, J., dissenting).

<sup>79</sup> 550 U.S. 124 (2007).

<sup>80</sup> Compare *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 454 (5th Cir.

years after *Casey*, the federal courts were still confused.<sup>81</sup>

In 2016, the Court in *Hellerstedt* once again modified *Casey*'s "undue burden" test by adopting a "benefits-and-burdens balancing test," by which federal judges were required to assess the "medical justification" of abortion regulations.<sup>82</sup> *Hellerstedt* may have overturned *sub silentio* *Casey*, *Gonzales*, and *Mazurek v. Armstrong*,<sup>83</sup> once again sowing confusion for federal courts.<sup>84</sup> *Hellerstedt* substantially changed the undue burden test of *Casey*.<sup>85</sup>

We struck down regulations in *Akron* that we approved in *Casey*. We struck down regulations in *Thornburgh* that we approved in *Casey*. In 1989, at the time of *Webster*, and in 1992, at the time of *Casey*, the Court seemed on the verge of overruling *Roe*, and it was widely assumed that *Roe* would be overturned.<sup>86</sup> We struck down limits on partial birth abortion in *Stenberg* that we approved in *Gonzales*. We rejected facial challenges in *Gonzales*<sup>87</sup> that we resurrected in *Whole Woman's Health v. Hellerstedt*, without the request of the petitioners.<sup>88</sup> In *Roe*, the Court identified two primary state interests; in *Gonzales*, the Court recognized more.<sup>89</sup> Dissenting Justices in *Gonzales*

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2014) ("[W]e do not need to decide this dispute....") with *Planned Parenthood v. Van Hollen*, 738 F.3d 786, 799 (7th Cir. 2013) ("two-part test") (Manion, J., concurring).

<sup>81</sup> John Robertson, "Science Disputes in Abortion Law," 93 *Texas Law Review* 1849, 1853 (2015): "A division now exists among circuits about how to interpret and apply that standard when there is no illegitimate purpose and a rational basis for the legislation exists."

<sup>82</sup> *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2324 (2016) (Thomas, J., dissenting).

<sup>83</sup> 520 U.S. 968 (1997).

<sup>84</sup> See 136 S. Ct. at 2324–25 (Thomas, J., dissenting). See also Laura Wolk & O. Carter Snead, "Irreconcilable Differences? *Whole Woman's Health*, *Gonzales*, and Justice Kennedy's Vision of American Abortion Jurisprudence," 41 *Harvard Journal of Law and Public Policy* 719 (2018).

<sup>85</sup> Stephen G. Gilles, "Restoring *Casey*'s Undue-Burden Standard After *Whole Woman's Health v. Hellerstedt*," 35 *Quinnipiac Law Review* 701, 710-12 (2017).

<sup>86</sup> *Casey*, 505 U.S. at 922–23 (op. of Blackmun, J.); *Webster v. Reprod. Health Services*, 492 U.S. 490, 557 (1989) (Blackmun, J., dissenting).

<sup>87</sup> 550 U.S. at 167: "[T]hese facial attacks should not have been entertained in the first instance...."

<sup>88</sup> 136 S. Ct. at 2340 (2016) (Alito, J., dissenting): "No court would even think of reviving such a claim on its own."

<sup>89</sup> 550 U.S. at 157 (protecting the "reputation" of the medical community); *ibid.* at 159: "ensuring so grave a choice is well informed."

mentioned the unsettled status of *Roe*.<sup>90</sup>

The Court, in other contexts, has questioned precedents that lack clear standards. In *Vieth v. Jubelirer*<sup>91</sup> we reviewed the standard for determining the existence of an unconstitutional political gerrymander amidst the uncertainty of a “judicially discernable standard.”<sup>92</sup> The federal courts were confused for eighteen years, because *Davis v. Bandemer*<sup>93</sup> failed to articulate manageable standards. In *Vieth*, a plurality noted: “to think that this lower-court jurisprudence [since *Bandemer*] has brought forth ‘judicially discernible and manageable standards’ would be fantasy.”<sup>94</sup> Because “no judicially discernible and manageable standards for adjudicating political gerrymander claims have emerged,” the plurality concluded that “*Bandemer* was wrongly decided.” Furthermore, the plurality concluded: “because this standard was misguided when proposed, has not been improved in subsequent application, and is not even defended before us today by the appellants, we decline to affirm it as a constitutional requirement.”<sup>95</sup> Although the petitioners in *Vieth* proposed a variation of the original standard from *Bandemer* and tried to refine it, the plurality rejected it.

Much the same describes *Roe* and forty-five years of experience with it.<sup>96</sup> *Roe* and *Casey* have “defied consistent application by the lower federal courts.”<sup>97</sup> Our abortion doctrine has not “develop[ed] in a principled and intelligible fashion”<sup>98</sup> and has never become settled.

In effect, this Court has retreated from *Roe* in at least four cases: *Harris*, *Webster*, *Casey*, and *Gonzales*. The Court relaxed the standard of review in *Webster*, *Casey*, and *Gonzales*, and thereby gave more deference to the states to enact regulations and partial prohibitions. As this Court retreated from *Roe*

<sup>90</sup> 550 U.S. at 186 (Ginsburg, J., dissenting) (referring to “the Court’s hostility to the right *Roe* and *Casey* secured”); *ibid.* at 187: “Casey’s principles...are merely ‘assumed’...rather than ‘retained’ or ‘reaffirmed.’”

<sup>91</sup> 541 U.S. 267 (2004).

<sup>92</sup> *Ibid.* at 278.

<sup>93</sup> 478 U.S. 109 (1986).

<sup>94</sup> *Ibid.* at 281.

<sup>95</sup> *Ibid.* at 283-84.

<sup>96</sup> *Thornburg*, 476 U.S. at 814 (O’Connor, J., dissenting) (noting the “institutionally debilitating effects” of *Roe*).

<sup>97</sup> *Pearson v. Callahan*, 555 U.S. 223, 235 (2009); *Payne v. Tennessee*, 501 U.S. 808, 830 (1991).

<sup>98</sup> *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986).

in those decisions, many states have moved forward to regulate abortion to the greatest extent allowed in protecting the “state interests” that *Roe* said the states could protect. These retreats indicate that *Roe* has been undermined by subsequent authority, which we have traditionally treated as a major factor in favor of overruling.<sup>99</sup> This kind of jurisprudential inconsistency and confusion has always been considered a factor within our doctrine of stare decisis that makes a precedent susceptible to overruling.<sup>100</sup>

In sharp contrast, the Court in *Dickerson v. United States* declined to overrule the thirty-four-year-old decision in *Miranda v. Arizona*, because we concluded that *Miranda* “has become embedded in routine police practice to the point where the warnings have become part of our national culture.”<sup>101</sup> That has not happened with *Roe*.

Legal and scholarly commentary has expressed similar expectations about *Roe*’s instability or demise since *Gonzales*.<sup>102</sup> Numerous scholars, lawyers, and legislators have predicted the overruling of *Roe*, or discussed alternative measures and scenarios if *Roe* is overturned, including Justices of this Court and former Solicitors General of the United States. In November 2016, the Republican presidential and vice-presidential candidates were elected on a party platform that opposed *Roe* and after the candidates publicly declared they would “overturn *Roe v. Wade*.”<sup>103</sup> In fact, even before the 2016 election, legal commentators wrote as though *Roe* had already been overturned.<sup>104</sup>

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<sup>99</sup> *Citizens United v. Federal Election Commission*, 558 U.S. 310, 379 (2010) (Roberts, C.J., concurring).

<sup>100</sup> *Gant*, 556 U.S. 332, 358 (Alito, J., dissenting); *Randall*, 548 U.S. at 266 (Thomas, J., concurring in the judgment).

<sup>101</sup> 530 U.S. 428, 443 (2000).

<sup>102</sup> Mary Ziegler, “Substantial Uncertainty: *Whole Woman’s Health v. Hellerstedt* and the Future of Abortion Law,” 2016 *Supreme Court Review* 77 (2017); Mark Strasser, “The Next Battleground: Personhood, Privacy and Assisted Reproductive Technologies,” 65 *Oklahoma Law Review* 177, 193 & n.120 (2013): “Some commentators do not seem to appreciate the instability of current abortion jurisprudence...”; David Garrow, “Significant Risks: *Gonzales v. Carhart* and the Future of Abortion,” 2007 *Supreme Court Review* 1; Note, Morgen Arnett, “Phasing Out Abortion: One Step Closer to Terminating a Woman’s Constitutional Right in *Gonzales v. Carhart*,” 24 *Thomas Cooley Law Review* 597 (2007).

<sup>103</sup> Republican Party Platform, 2016, 10 (2016), <https://www.gop.com/the-2016-republican-party-platform> [[https:// perma.cc/8XQC-MRKQ](https://perma.cc/8XQC-MRKQ)].

<sup>104</sup> “Whereas to read the pro-choice daily press is to experience *Roe* as a memory that is rapidly vanishing in the rearview mirror, a case that lives on in name only as it is hollowed out to become the law in name only... its supporters almost find themselves

Among other points, *Roe*'s viability rule is an enduring point of conflict. *Roe* created a right to abortion up to fetal viability and *Casey* reaffirmed that, while both emphasized that the states must allow abortion after fetal viability for "health" reasons. The federal courts continue to impose the viability rule by striking down even twenty-week limits on abortion. Yet, four decades of polling data shows that "a supermajority of Americans believe second trimester abortions should be presumptively illegal."<sup>105</sup>

In addition, consistency, stability, and predictability have also been undermined by the congressional and state legislative responses to the *Roe*, *Doe*, *Casey*, and *Gonzales* decisions. Congress has legislated at the limits of *Roe*'s contours, with votes on the Partial Birth Abortion Ban Act (PBABA) and the Born Alive Infants Protection Act (BAIPA). The U.S. House, however, voted for a twenty-week limit in 2015, thereby challenging the viability rule. Year after year, numerous states have enacted hundreds of abortion laws that have been challenged as inconsistent with *Roe*.<sup>106</sup> Every time that the Court has retreated from *Roe*, many states have pushed ahead with the strongest possible legislative limits.<sup>107</sup> This demonstrates that *Roe* "obstructed the normal democratic process"<sup>108</sup> and will continue to do so. All these legal, legislative, political, medical, and jurisprudential changes and developments have kept *Roe* unsettled and unstable since it was decided.<sup>109</sup>

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longing for 1973 when, in their view, it briefly carried the force of law." Dahlia Lithwick, "Foreword: *Roe v. Wade* at Forty," 74 *Ohio State Law Journal* 5, 5–6 (2013).

<sup>105</sup> Randy Beck, "Fueling Controversy," 95 *Marquette Law Review* 735, 737 (*Roe* "created a structural misalignment between constitutional law and popular sentiment"); 746–47, nn.61–64 (2012) (reviewing data).

<sup>106</sup> Cf. *Atkins v. Virginia*, 536 U.S. 304, 314–16 (2002) (noting that states had, in the years after *Penry v. Lynaugh*, 492 U.S. 302 (1989), legislated to change the law).

<sup>107</sup> See, e.g., *Edwards v. Beck*, 2014 U.S. Dist. Lexis 33399 (E.D. Ark. March 14, 2014) (striking Arkansas' 12-week prohibition), aff'd, 786 F.3d 1113 (8th Cir. 2015), cert. denied, 136 S. Ct. 895 (2016); *MKB Mgmt. Corp. v. Burdick*, 2014 U.S. Dist. Lexis 60152 (D.N.D. Apr. 16, 2014) (striking North Dakota's six-week limit), aff'd, *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768 (8th Cir. 2015), cert. denied, 136 S. Ct. 981 (2016).

<sup>108</sup> *Citizens United*, 558 U.S. at 414 n.28 (Stevens, J., dissenting).

<sup>109</sup> *Payne v. Tennessee*, 501 U.S. 808, 828–30 (1991), explaining that cases "decided by the narrowest margins, over spirited dissents challenging the basic underpinnings of those decisions" are unsettled; Ruth Bader Ginsburg, "Speaking in a Judicial Voice," 67 *NYU Law Review* 1185, 1198 (1992): "Doctrinal limbs too swiftly shaped, experience teaches, may prove unstable. The most prominent example in recent decades is *Roe v. Wade*."



If judicial integrity and the rule of law are important factors in *stare decisis*, then this doctrinal incoherence weighs in favor of overruling *Roe* and allowing the American people to decide this issue through the democratic process. In the public arena, abortion policy and public opinion could become better aligned, producing a policy that is more coherent, consistent, and stable, state by state. Retaining *Roe* cannot promote stability – a value of *stare decisis*, according to *Payne* – unless *Roe* is currently stable, and the evidence is clear that *Roe* remains deeply unsettled forty-five years after it was decided.<sup>110</sup>

*Roe*, *Doe*, and *Casey* have therefore failed one fundamental test of an authoritative Supreme Court decision: They have failed to settle the issue of abortion. Justice Brandeis’s famous statement on *stare decisis* in *Burnet v. Coronado Oil & Gas Co.* – “in most matters it is more important that the applicable rule of law be settled than that it be settled right”<sup>111</sup> – weighs in favor of overruling these failed decisions, because *Roe* violates both prongs: it has never become settled law, and as described below, it was wrongly decided.

### III. Whether *Roe v. Wade* Was Well-Reasoned or Rightly Decided

*Roe* is undoubtedly the most controversial decision of the modern era, perhaps since *Dred Scott*. Dissenting Justices in subsequent years recognized that “[t]his Court’s abortion decisions have already worked a major distortion in this Court’s constitutional jurisprudence.”<sup>112</sup> Over the past forty-five years, *Roe* has been subjected to regular, severe, and continuing criticism that it was wrongly decided.<sup>113</sup> “Many renowned constitutional scholars – including

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<sup>110</sup> See also Mary Ziegler, “Substantial Uncertainty: *Whole Woman’s Health v. Hellerstedt* and the Future of Abortion Law,” 2016 *Supreme Court Review* 77; Pamela S. Karlan, “The Law of Small Numbers,” 86 *North Carolina Law Review* 1369, 1378 (2008) (arguing *Gonzales* “unsettled preexisting doctrine”); *What Roe v. Wade Should Have Said*, ed. Jack M. Balkin (2005); David D. Meyer, “*Gonzales v. Carhart* and the Hazards of Muddled Scrutiny,” 17 *Journal of Law & Policy* 57 (2008); Erwin Chemerinsky, “Rationalizing the Abortion Debate: Legal Rhetoric and the Abortion Controversy,” 31 *Buffalo Law Review* 107, 107 (1983): “*Roe v. Wade* is a unique decision in the 180-year history of judicial review. No other case, not even *Brown v. Board of Education*, caused such a loud and sustained public outcry. Even now, a decade after the decision, the abortion controversy shows no signs of abating.”

<sup>111</sup> 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

<sup>112</sup> *Thornburgh*, 476 U.S. at 814 (O’Connor, J., dissenting).

<sup>113</sup> *Payne*, 501 U.S. at 827. See also Joseph W. Dellapenna, *Dispelling the Myths of Abortion History* (2006), p. 687 n.433 (collecting sources); Gilles, *supra* note 65, p.

Alexander Bickel, Archibald Cox, John Hart Ely, Philip Kurland, Richard Epstein, Mary Ann Glendon, Gerald Gunther, Robert Nagel, Michael Perry, and Harry Wellington – have recognized the lack of any constitutional foundation for *Roe*.<sup>114</sup> That criticism continued on *Roe*'s fortieth anniversary.<sup>115</sup>

#### A. Lack of An Evidentiary Record in *Roe* and *Doe*

The unsettled status of *Roe*'s doctrine can be traced back to its creation. Contrary to the claims made by this Court in *Akron* and *Casey*, *Roe* was not “well-considered.” *Roe* and *Doe* were originally accepted for review by this Court not to address the abortion issue but to decide the application of *Younger v. Harris*.<sup>116</sup> *Roe* and *Doe* were decided by three-judge federal district courts existing at the time<sup>117</sup> on motions to dismiss or for summary judgment, without any trial or evidentiary record on abortion, its risks, or its implications. Those cases were directly appealed to this Court, without any intermediate appellate review.<sup>118</sup>

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691; Richard S. Myers, “Re-reading *Roe v. Wade*,” 71 *Washington & Lee Law Review* 1025 (2014); John M. Breen, “Modesty and Moralism: Justice, Prudence and Abortion,” 31 *Harvard Journal of Law & Public Policy* 219, 260 n.172 (2008) (citing sources); Richard Gregory Morgan, “*Roe v. Wade* and the Lesson of the Pre-*Roe* Case Law,” 77 *Michigan Law Review* 1724 (1979); Clarke Forsythe & Stephen Presser, “The Tragic Failure of *Roe v. Wade*: Why Abortion Should Be Returned to the States,” 10 *Texas Review of Law & Policy* (2005) (collecting sources); Arnold H. Loewy, “Why *Roe v. Wade* Should Be Overruled,” 67 *North Carolina Law Review*. 939 (1989); Horan, Grant & Forsythe, “Two Ships Passing in the Night: The White-Stevens Colloquy on *Roe v. Wade*,” 6 *St. Louis University Public Law Review*. 229, 230 n.8 (1987) (collecting sources).

<sup>114</sup> Clarke Forsythe & Stephen Presser, “Restoring Self-Government on Abortion: A Federalism Amendment,” 10 *Texas Review of Law & Policy* 301, 313–16 nn.62–72 (2005) (citing sources).

<sup>115</sup> Beck, *supra* n.10, at 194 n.42 (citing symposia); Colloquium, “The Fortieth Anniversary: *Roe v. Wade* in the Wild of Politics,” 74 *Ohio State Law Journal* 1 (2013); Symposium, “*Roe v. Wade* at 40,” 24 *Stanford Law & Policy Review* (2013); Symposium, “*Roe* at 40: The Controversy Continues,” 71 *Washington & Lee Law Review* 817 (2014). Cf. *Lawrence v. Texas*, 539 U.S. 558, 576 (2005): “[C]riticism of *Bowers* has been substantial and continuing....”

<sup>116</sup> 401 U.S. 37 (1971) (addressing the suitability of federal court litigation of pending state criminal proceedings).

<sup>117</sup> See *Shapiro v. McManus*, 136 S. Ct. 450 (2015).

<sup>118</sup> See Clarke D. Forsythe, *Abuse of Discretion: The Inside Story of Roe v. Wade* (2013), pp. 17-24.

Consequently, all the sociological, medical, and historical premises cited in the Court's opinions in *Roe* and *Doe* were assumptions, mostly derived from interest group briefs filed for the first time in this Court. None of the premises in the majority opinions in *Roe* and *Doe* was tested by the adversarial process.<sup>119</sup>

This approach contradicted a long line of precedents, before and since *Roe*, that this Court will not decide a constitutional claim without an "adequate, full-bodied record."<sup>120</sup> It was criticized by Chief Justice Burger at the time.<sup>121</sup> Judge Henry Friendly also criticized the *Roe* Court for this serious mistake.<sup>122</sup> As Justice Stevens explained in *New York v. Ferber*, courts need concrete facts when deciding *any* constitutional issue:

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<sup>119</sup> Cf. *NASA v. Nelson*, 562 U.S. 134, 147 n.10 (2011): "The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them" (quoting *Carducci v. Regan*, 714 F.2d 171 (DC Cir. 1983) (opinion for the court by Scalia, J.)); Neil M. Gorsuch, "Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia," 66 *Case Western Law Review* 905, 910 (2016), noting that the judicial power is "constrained by its dependence on the adversarial system to identify the issues and arguments for decision."

<sup>120</sup> *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481, 486 n.3 (1986): "Nor is it appropriate...for us to consider claims that have not been the subject of factual development in earlier proceedings"; *New Haven Inclusion Cases*, 399 U.S. 392, 450 n.66 (1970): "None of this is record evidence, and we do not consider it." See, e.g., *Renne v. Geary*, 501 U.S. 312, 321-22 (1991): "We possess no factual record of an actual or imminent application of [the statute] sufficient to present the constitutional issues in 'clean-cut and concrete form'" (citations omitted); *Kleppe v. New Mexico*, 426 U.S. 529, 546 (1976): "We have often declined to decide important questions regarding 'the scope and constitutionality of legislation' in the absence of 'an adequate and full-bodied record'" (citations omitted); *Public Affairs Associates. v. Rickover*, 369 U.S. 111, 113 (1962) (per curiam): "Adjudication of such problems, certainly by way of resort to a discretionary declaratory judgment, should rest on an adequate and full bodied record. The record before us is woefully lacking in these requirements"; *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937): "Courts deal with cases upon the basis of the facts disclosed, never with nonexistent and assumed circumstances"; *City of Hammond v. Schappi Bus Line*, 275 U.S. 164, 171-72 (1927): "Before any of the questions suggested, which are both novel and of far reaching importance, are passed upon by this Court, the facts essential to their decision should be definitely found by the lower courts upon adequate evidence."

<sup>121</sup> *Doe*, 410 U.S. at 208 (Burger, C.J., concurring).

<sup>122</sup> Henry J. Friendly, "The Courts and Social Policy: Substance and Procedure," 33 *University of Miami Law Review* 21 (1978).

When we follow our traditional practice of adjudicating difficult and novel constitutional questions only in concrete factual situations, the adjudications tend to be crafted with greater wisdom. Hypothetical rulings are inherently treacherous and prone to lead us into unforeseen errors; they are qualitatively less reliable than the products of case-by-case adjudication.<sup>123</sup>

This mistake – deciding *Roe* and *Doe* with no evidentiary record – led to serious problems in fashioning judicial rules and applying them in subsequent cases. Two of those problems, which directly bear on the consideration of the 20-week limit in this case, are the viability rule and the factual assumption that “abortion is safer than childbirth,” which we address below.

#### B. No Historical Foundation for a Right to Abortion

Without any support in an evidentiary record, *Roe* adopted a historical rationale for a substantive due process right to abortion that has been subjected to intense, exhaustive, and sustained criticism.<sup>124</sup> Like the rest of *Roe*, that historical rationale was not based on record evidence or subjected to the adversarial process.

This Court did not justify abortion as a fundamental right in *Roe* or in *Casey*. Abortion would not have qualified as a fundamental constitutional right if the *Roe* Court had applied the proper analysis for a fundamental constitutional right, because there is no evidence that any right to abortion was “deeply rooted in this Nation’s history and tradition.”<sup>125</sup>

<sup>123</sup> *New York v. Ferber*, 458 U.S. 747, 780–81 (1982).

<sup>124</sup> See, e.g., Dellapenna, *supra* n.113 at 15, & n.71-72 (citing sources), 97-110, 125-84, 687-95 (2006); John Keown, “Back to the Future of Abortion Law: *Roe*’s Rejection of America’s History and Traditions,” 22 *Issues in Law & Medicine* 3 (2006); Paul Benjamin Linton, “*Planned Parenthood v. Casey*: The Flight from Reason in the Supreme Court,” 13 *St. Louis University Public Law Review* 15, 38 (1992); Dennis J. Horan, et al., “Two Ships Passing in the Night: An Interpretivist Review of the White-Stevens Colloquy on *Roe v. Wade*,” 6 *St. Louis University Public Law Review* 229, 272-73 (1987) (compiling existing scholarly criticism).

<sup>125</sup> *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010); *Glucksberg v. Washington*, 521 U.S. 702, 721 (1997). See also *Duncan v. Louisiana*, 391 U.S. 145, 148-49 (1968): “[W]hether a right is among those ‘fundamental principles of liberty and justice which lie at the base of all our civil and political institutions....’”; *Griswold v. Connecticut*, 381 U.S. 479, 487 (1965) (Goldberg, J., concurring): “Due Process Clause protects those liberties that are ‘so rooted in the traditions and conscience of our people as to be ranked as fundamental’”; *Palko v. Connecticut*, 302 U.S. 319, 328 (1937): “Does it violate those ‘fundamental principles of liberty and justice which lie

The Court abandoned the original, historical rationale for *Roe* at least by the time the Court decided *Webster v. Reproductive Health Services*.<sup>126</sup> The Court in *Casey* did not attempt to justify or defend that historical rationale or defend abortion as a constitutional right, let alone a fundamental right. In fact, at the time of *Casey*, only two justices, at most, contended that *Roe* had been correctly decided as an original matter.<sup>127</sup>

Historically, the common law treated human life as special and protected it extensively. One of the first Supreme Court Justices appointed by President George Washington, James Wilson, a signer of both the Declaration of Independence and of the Constitution, noted:

With consistency, beautiful and undeviating, human life, from its commencement to its close, is protected by the common law. In the contemplation of law, life begins when the infant is first able to stir in the womb. By the law, life is protected not only from immediate destruction, but from every degree of actual violence, and, in some cases, from every degree of danger.<sup>128</sup>

The best available evidence – and the evidence of the history of Anglo-American law prohibiting abortion has grown considerably since *Roe* – indicates that abortion could not qualify as a constitutional right at any point in Anglo-American history. *Roe*'s historical account was criticized at the time;<sup>129</sup> it has been criticized since.<sup>130</sup> Legal and historical criticisms of the *Roe*

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at the base of all our civil and political institutions'?" *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934): "[T]he Due Process Clause protects those liberties that are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental'"; *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting): "I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."

<sup>126</sup> 492 U.S. 490 (1989).

<sup>127</sup> 505 U.S. at 911 (Stevens, concurring and dissenting in part); *id.* at 922 (Blackmun, J., concurring and dissenting in part).

<sup>128</sup> James Wilson, *The Works of James Wilson*, vol.2, ed. R.G. McCloskey 1967), pp. 596-97.

<sup>129</sup> See *Roe*, 410 U.S. 113, 174–77 (Rehnquist, J., dissenting); Robert A. Destro, "Abortion and the Constitution: The Need for A Life-Protective Amendment," 63 *California Law Review* 1250 (1975); Robert Byrn, "An American Tragedy: The Supreme Court on Abortion," 41 *Fordham Law Review* 807 (1973).

<sup>130</sup> See, e.g., Dellapenna, *supra* n.113 at 125-34; John Keown, *Abortion, Doctors*

decision have provided considerable data that the English common law prohibited abortion at the earliest point that the law could detect that a developing human was alive pre-natally. Numerous English common law cases treated abortion as a crime before the crime was first codified in the English abortion statute of 1803 (Lord Ellenborough's Law).<sup>131</sup> As one scholar has noted, "the authors of the [nineteenth] century's two leading American treatises on the law of crimes (Joel Prentiss Bishop and Francis Wharton) both concluded that abortion at any stage of pregnancy was a common law crime."<sup>132</sup>

In *Roe*, the Court pointed to two common law rules – the quickening rule and the born alive rule – as though they were limitations on the common law's protection of human life, but the Court took those rules out of their contemporary medical context.<sup>133</sup> The quickening rule (prohibiting abortion after the first fetal movements) and the born alive rule (preventing a charge of homicide unless the child was first born alive and died thereafter) were *evidentiary* rules, not substantive rules, necessitated by the primitive state of contemporary medical science.<sup>134</sup>

The law progressively prohibited abortion as medical understanding allowed more comprehensive legal protection, culminating in the English statutory prohibition of 1803.<sup>135</sup> Whether abortion was a misdemeanor or a

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*and the Law: Some Aspects of the Regulation of Abortion in England from 1803 to 1982* (1988); Gilles, *supra* n.65 at 737-53 (criticizing the historical account in *Roe*); Philip Rafferty, *Roe v. Wade: The Birth of a Constitutional Right* (1993); Anthony M. Joseph, "The 'Pennsylvania Model': The Judicial Criminalization of Abortion in Pennsylvania, 1838-1850," 49 *American Journal of Legal History* 284 (2007); John Keown, "Back to the Future of Abortion Law: *Roe*'s Rejection of America's History and Traditions," 22 *Issues in Law & Medicine* 3 (2006); James S. Witherspoon, "Reexamining *Roe*: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment," 17 *St. Mary's Law Journal* 29 (1985).

<sup>131</sup> See Dellapenna, *supra* n.113 at 127-49, & n.18; John Keown, *Abortion, Doctors and the Law: Some Aspects of the Regulation of Abortion in England from 1803 to 1982* (1988); Eugene Quay, "Justifiable Abortion – Medical and Legal Foundations," 49 *Georgetown Law Journal* 395 (1961).

<sup>132</sup> Dellapenna, *supra* n.113 at 425.

<sup>133</sup> See 410 U.S. at 132-36, 161-62.

<sup>134</sup> See Dellapenna, *supra* n.113 at 260, 298, 464; Clarke D. Forsythe, "Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms," 21 *Valparaiso University Law Review* 562 (1987).

<sup>135</sup> See John Keown, *Abortion, Doctors and the Law: Some Aspects of the Regulation of Abortion in England from 1803 to 1982* (1988).

felony, it was a *crime* and not a right at any time of Anglo-American legal history. There is no legal evidence that common law indictments were dismissed prior to quickening due to any existing right to abortion.<sup>136</sup> There may be anecdotes of attempted abortion during the time of the common law, but anecdotes do not make law or create rights. The best evidence of the common law is that abortion was a crime at least after quickening, and quickening was significant as the first legal evidence of life.<sup>137</sup>

Viability was never considered significant by the common law or statute law.<sup>138</sup> Viability only began to surface as a rationale in judge-made tort law, but has since declined in significance.<sup>139</sup>

Several American colonies adopted the English prohibition of abortion.<sup>140</sup> Some states adopted the prohibition after quickening.<sup>141</sup> Other states held that the common law prohibition existed throughout pregnancy.<sup>142</sup> The purpose of

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<sup>136</sup> See *Regina v. Webb* (1602) (indictment for self-abortion, later pardoned), cited in Dellapenna, supra n.123, at 188, 193.

<sup>137</sup> See Dellapenna, supra n.113 at 125-228.

<sup>138</sup> See *ibid.* at 593 & n.185; David Kader, “The Law of Tortious Prenatal Death since *Roe v. Wade*,” 45 *Missouri Law Review* 639 (1980); Cyril C. Means, Jr., “The Law of New York concerning Abortion and the Status of the Foetus: A Case of Cessation of Constitutionality, 1664-1968,” 14 *New York Law Forum* 411, 423-24 (1968): “[V]iability was never mentioned by common-law judges or treatise writers.”

<sup>139</sup> See *Hamilton v. Scott*, 97 So. 3d 728 (Ala. 2012) (Parker, J., compiling criticism of the viability rule).

<sup>140</sup> See Dellapenna, supra n.113 at 211-28; Bryan A. Garner, et al., *The Law of Judicial Precedent* (2016), pp. 737-38, describing American reception of the English common law generally.

<sup>141</sup> See Dellapenna, supra n.113 at 268-88, 315-21 (identifying and citing states); *New Jersey v. Cooper*, 22 *New Jersey Law Review* 52 (N.J. 1849) (stating that quickening was necessary under common law for indictment); *Massachusetts v. Parker*, 50 Mass. 263, 266 (Mass. 1845) (stating that indictment must allege that the woman was “quick with child”).

<sup>142</sup> See *Peoples v. Commonwealth*, 9 S.W. 810, 811 (Ky. 1888): “As already stated by the common law, if life be destroyed in the commission of an abortion, whether the woman be quick with child or not, it is murder, or at least manslaughter, in the destroyer.” “By 1841, ten states and one territory had enacted statutes prohibiting abortions. These statutes codified the common law of abortion with only minor refinements and clarifications. These statutes carried forward a distinction based upon quickening, and sometimes covered only certain abortion techniques. Maine, in 1840, became the first state to outlaw all abortions by any means at any point in gestation....With these enactments, we enter the second phase of American legislative activity directed at abortion. The nineteenth century saw a steady broadening of

anti-abortion laws was to protect the life of the unborn child.<sup>143</sup>

Hence, the English statutory prohibition of 1803 *extended* existing legal protection,<sup>144</sup> and the American state legislative developments of the nineteenth century abandoned the quickening rule and extended legal protection for prenatal human life throughout pregnancy.<sup>145</sup>

With the born alive rule, the common law applied another evidentiary rule to protect people from being punished for a capital crime (homicide) in a time of uncertain evidence.<sup>146</sup> However, the practical application of the born alive rule demonstrates that the common law recognized that the prenatal fetus was a human being at the earliest point that it could be determined to be alive: If the child was injured at any point in pregnancy and died after live birth from those injuries, the law treated that as a homicide.<sup>147</sup> It was a gross misunderstanding of the born alive rule to say, as the *Roe* Court did, that “the law has been reluctant to endorse any theory that life...begins before live birth....”<sup>148</sup> To the contrary, if the child was injured at *any* point of gestation, and born alive (instead of stillborn), and died thereafter, a homicide charge could be brought for the injury in the womb at any time of fetal development. The born alive rule was about the location of the death (inside or outside), not gestation, and confirms the congruence between the entity in the womb (when the injury occurred) and outside the womb (when the death occurred) that was necessary for the *corpus delicti* of homicide.

At least by 1821, the states, beginning with Connecticut, started to supersede the common law by codifying a prohibition on abortion and, when they did, many deleted the common law quickening distinction and prohibited

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abortion statutes to reach all abortions regardless of technique or stage of pregnancy.... By 1868, when the Fourteenth Amendment was ratified, thirty of the thirty-seven states had abortion statutes on the books. Just three of these states prohibited abortion only after quickening. Twenty states punished all abortion equally regardless the stage of pregnancy.” Dellapenna, *supra* n.113 at 315-16.

<sup>143</sup> See Dellapenna, *supra* n.113 at xiii, 313, 321.

<sup>144</sup> See Keown, *Abortion, Doctors, and the Law*, *supra* n.135; Dellapenna, *supra* n.113 at 229-62.

<sup>145</sup> See Dellapenna, *supra* n.113 at 263-320; Witherspoon, *supra* n.130.

<sup>146</sup> See Dellapenna, *supra* n.113 at 185-203, 464 (explaining born alive rule).

<sup>147</sup> See e.g., *Morgan v. State*, 148 Tenn. 417, 421, 256 S.W. 433, 434 (1923) (injury to pre-natal child while pre-viable that resulted in death after birth was a homicide); *Regina v. West*, 175 Eng. Rep. 329 (N.P. 1848) (injury to pre-viable child in the womb that resulted in death after live birth was a homicide).

<sup>148</sup> 410 U.S. at 161.



abortion at any stage of pregnancy.<sup>149</sup>

There is no reliable historical evidence that abortion was ever considered a right – in contrast to a crime progressively prohibited as medical knowledge allowed – at common law, or at the time of the U.S. Constitution in 1787, or at the time of the debate and adoption of the Fourteenth Amendment. To the contrary, the states had progressively extended legal protection for the unborn child in the decades *preceding* the adoption of the Fourteenth Amendment, as well as in the 1860s.<sup>150</sup>

Other historical and legal premises of *Roe* have also been refuted.<sup>151</sup> For instance, the Court’s comments on ancient Greek and Roman attitudes were erroneous. Abortion was not commonplace because no effective or reliable technique existed until the nineteenth century.<sup>152</sup> Infanticide, not abortion, was the method of choice to dispose of an unwanted child.<sup>153</sup> The Court’s claim that abortion was never “established as a common law crime” was also wrong.<sup>154</sup> What is more, the *Roe* Court overlooked the many state protections provided to prenatal life in tort, criminal, property, and equity law.<sup>155</sup> These numerous problems explain why this Court abandoned any historical justification for *Roe* by the time of its decision in *Webster*.

### C. The Medical Assumption of *Roe* and Its Implications

Without any support in any evidentiary record, the *Roe* Court rested several elements of the superstructure of *Roe* on the assumption that “abortion is safer than childbirth.”<sup>156</sup> In *Akron*, the Court referred to this as “*Roe*’s factual assumption” and held that the states retained an interest in verifying its

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<sup>149</sup> Dellapenna, *supra* n.113 at 268, 315; Witherspoon, *supra* n.130.

<sup>150</sup> Dellapenna, *supra* n.113 at 315-21; Witherspoon, *supra* n.130. Some of these historical data were highlighted by a dissent in *Roe*. See 410 U.S. at 174–77 (Rehnquist, J., dissenting).

<sup>151</sup> Dellapenna, *supra* n.113 at 126.

<sup>152</sup> See, e.g., *State v. Gedicke*, 43 N.J.L. 86, 96 (1881): Abortion “in almost every case endangers the life and health of the woman....”

<sup>153</sup> Dellapenna *supra* n.113 at 108.

<sup>154</sup> See *Roe*, 410 U.S. at 136; Dellapenna, *supra* n.113 at 689 n.451.

<sup>155</sup> Gregory Roden, “Prenatal Tort Law and the Personhood of the Unborn Child: A Separate Legal Existence,” 16 *St. Thomas Law Review* 207 (2003); James Bopp & Richard Coleson, “The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal,” 3 *BYU Journal of Public Law* 181 (1989); David Kader, “The Law of Tortious Prenatal Death since *Roe v. Wade*,” 45 *Missouri Law Review* 639 (1980).

<sup>156</sup> See 410 U.S. at 149.

continued validity.<sup>157</sup> As with all the other sociological and medical premises of the Court in *Roe*, there was no record evidence on this point. And the *Roe* Court did not cite reliable data that verified that factual assumption; there was no evidence in the record in either case. It was a factual assumption that the Court adopted on appeal. The seven sources that the Court cited in the opinions in *Roe* were not part of the record.<sup>158</sup> They were derived from the Court's own research or from interest group briefs.<sup>159</sup> In any case, there is little reliable medical evidence that abortion is safer than childbirth.<sup>160</sup> That assumption collapses certainly with late term abortions.<sup>161</sup>

The Court has never explained or justified its "health" exception after viability, and that too rested on the factual assumption that "abortion was safer than childbirth." A number of past decisions have skirted a rationale for the health exception. The Court has never explained whether the health exception is based on the balance of harms or relative safety or a self-defense rationale.<sup>162</sup>

Consequently, *Roe*'s major premises – the historical assumptions about abortion, the prohibition of health and safety regulations in the first trimester, the deference to "medical judgment," the strength of the state interests, the viability rule, the health exception after viability – were based on an unreliable

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<sup>157</sup> See *Akron*, 462 U.S. at 430 n.12; see also *Casey*, 505 U.S. at 860 (joint opinion referring to "*Roe*'s factual assumptions").

<sup>158</sup> See Henry J. Friendly, "The Courts and Social Policy: Substance and Procedure," 33 *University of Miami Law Review* 21 (1978).

<sup>159</sup> See Clarke D. Forsythe, "The Medical Assumption at the Foundation of *Roe v. Wade* and Its Implications for Women's Health," 71 *Washington & Lee Law Review* 827 (2014).

<sup>160</sup> See David Reardon & John Thorp, M.D., "Pregnancy Associated Death in Record Linkage Studies Relative to Delivery, Termination of Pregnancy, and Natural Losses: A Systematic Review with a Narrative Synthesis and Meta-analysis," 5 *Sage Open Medicine* 1 (2017); Byron Calhoun, M.D., "The Maternal Mortality Myth in the Context of Legalized Abortion," 80 *Linacre Quarterly* 264 (2013); John Thorp, M.D., "Public Health Impact of Legal Termination of Pregnancy In the U.S.: 40 Years Later," *Scientifica* (2013), <http://dx.doi.org/10.6064/2012/980812> [<https://perma.cc/G3DN-DWED>].

<sup>161</sup> See Linda Bartlett, et al., "Risk Factors for Legal Induced Abortion-Related Mortality in the United States," 103 *Obstetrics & Gynecology* 729, 729 (2004): "Compared with women whose abortions were performed at or before 8 weeks of gestation, women whose abortions were performed in the second trimester were significantly more likely to die of abortion-related causes."

<sup>162</sup> See Stephen G. Gilles, "*Roe*'s Life-or-Health Exception: Self-Defense or Relative-Safety?," 85 *Notre Dame Law Review* 525 (2010).

medical assumption. Unlike state legislators, we are not well-positioned to verify the continued validity of these factual assumption.<sup>163</sup> State legislatures are the proper forum to consider such medical issues in formulating policy on abortion.

#### D. Lack of Precedential Foundation

*Roe* also lacked any support in precedent. Cases preceding *Roe* did not establish a right to abortion. The *Roe* Court strung together a group of cases and called them “privacy” cases, even though “privacy” was not the rationale relied upon in those decisions. In fact, the Court in *Maher v. Roe* frankly referred to them as “a group of disparate cases restricting governmental intrusion, physical coercion, and criminal prohibition of certain activities....”<sup>164</sup> The language in *Eisenstadt v. Baird*,<sup>165</sup> cited in *Roe*, about a “right to bear or beget a child” was dictum. Besides, *Eisenstadt* was an equal protection case, not a privacy case.

The *Roe* Court itself acknowledged that these decisions were not precedent for *Roe*’s holding. The Court in *Roe* cited *Botsford*, *Stanley*, *Griswold*, *Meyer*, *Loving*, *Skinner* and other cases for the *ipse dixit* that the “right of privacy” is “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”<sup>166</sup> But then the Court acknowledged that a woman “carries an embryo and, later, a fetus” and that “[t]he situation therefore is *inherently different* from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt* and *Griswold*, *Stanley*, *Loving*, *Skinner*, and *Pierce* and *Meyer* were respectively concerned.”<sup>167</sup> The *Roe* Court thereby expressly admitted that abortion was inherently different from any of those prior cases. Nothing before *Roe*

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<sup>163</sup> *Akron*, 462 U.S. at 430 n.12: “Of course, the State retains an interest in ensuring the validity of *Roe*’s factual assumption....”.

<sup>164</sup> 432 U.S. at 471. See also Michael J. Gerhardt, *The Power of Precedent* (2008), pp. 86-87: “The path of the Court’s privacy decisions, to the extent there has been a discernible one, is far from clear and highly contentious. While some scholars might claim the path begins with the Court’s 1920s decisions in *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, the connections between those cases and *Roe* are dubious because they did not directly involve a person’s autonomy over his or her body, much less procreative or sexual activity.”

<sup>165</sup> 405 U.S. 438 (1972).

<sup>166</sup> 410 U.S. at 152-53.

<sup>167</sup> 410 U.S. at 159 (emphasis added).

established any right to “terminate pregnancy.”<sup>168</sup>

#### E. The Viability Rule

Without any support in an evidentiary record, the Court in *Roe* held that a woman has a right to terminate her pregnancy up to fetal viability and a right to terminate a pregnancy after fetal viability for any “health” reason as determined by her provider.<sup>169</sup> Neither the Texas statute in *Roe* nor the Georgia statute in *Doe* was limited by gestational age. And in neither case had the lower courts ruled on viability. No party or amicus in *Roe* or *Doe* urged the Court to adopt a viability rule or extend the right to viability.<sup>170</sup> Creating the viability rule violated our practice “never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.”<sup>171</sup> The viability rule was “self-conscious dictum” – unnecessary to the decision in *Roe* and *Doe* – and the *Roe* Court knew it.<sup>172</sup>

This Court has never justified our viability rule.<sup>173</sup> As Justice O’Connor noted in *Akron*: “The choice of viability as the point at which the state interest in *potential* life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward.”<sup>174</sup> When Justice O’Connor criticized the viability rule, the *Akron* Court failed to respond, merely stating that her dissent was incompatible with *stare decisis*.<sup>175</sup> The *Thornburgh* Court also ignored the criticism of the viability rule.<sup>176</sup> The plurality’s defense of

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<sup>168</sup> Cf. *Adarand Constructors Inc v. Pena*, 515 U.S. 200, 232 (1995), noting that *Grady v. Corbin*, 495 U.S. 508 (1990) “lacked constitutional roots” and was “wholly inconsistent with earlier Supreme Court precedent.”

<sup>169</sup> *Roe*, 410 U.S. at 164–65; *Doe*, 410 U.S. at 192; *Thornburgh*, 476 U.S. at 769 (deferring to doctor on “health” reasons).

<sup>170</sup> Dellapenna, *supra* n.113 at 594; Randy Beck, “Gonzales, Casey and the Viability Rule,” 103 *Northwestern University Law Review* 249 (2009); Randy Beck, “The Essential Holding of Casey: Rethinking Viability,” 75 *University of Missouri Kansas City Law Review* 713 (2007)

<sup>171</sup> *United States v. Raines*, 362 U.S. 17, 21 (1960) (quoting *Liverpool, New York & Philadelphia S.S. Co v. Comm’rs v. Emigration*, 113 U.S. 33, 39 (1885)).

<sup>172</sup> Randy Beck, “Self-Conscious Dicta: The Origins of *Roe v. Wade*’s Trimester Framework,” 51 *American Journal of Legal History* 505 (2011).

<sup>173</sup> Beck, *supra* n.10 at 199; Linton, *supra* n.124; John Hart Ely, “The Wages of Crying Wolf: A Comment on *Roe v. Wade*,” 82 *Yale Law Journal* 920, 924 (1973).

<sup>174</sup> *Akron*, 462 U.S. at 461 (O’Connor, J., dissenting).

<sup>175</sup> *Akron*, 462 U.S. at 420 & n.1.

<sup>176</sup> 476 U.S. at 768-70.

viability in *Casey* was similar to the *ipse dixit* in *Roe* – merely conclusory, mistaking, as Professor Ely said, a definition for a syllogism.<sup>177</sup> The *Casey* Court declared that “a decision without principled justification would be no judicial act at all.”<sup>178</sup> The viability rule has always failed this test. The scholarly consensus is that *Roe* did not adequately defend or justify the viability rule.<sup>179</sup>

The viability rule is increasingly incoherent. The Court tied the viability line to the state’s interest in fetal life. The *Roe* Court, however, gave virtually no consideration to the relationship between viability and the state’s interest in *maternal health*. The *Roe* Court never considered the implications for maternal health of extending the abortion “right” to viability and had no record evidence to consider those medical implications. Indeed, it now seems clear that permitting abortion until viability extends the right beyond the point where abortion is more dangerous than childbirth.<sup>180</sup> The viability rule and the state’s interest in maternal health have thus proved difficult to reconcile. This has created further incoherence and helps explain why twenty-one states have enacted twenty-week limits.

This viability rule has become increasingly isolated in American law. It has been rejected by a majority of states in the law of prenatal injuries.<sup>181</sup> It is

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<sup>177</sup> Ely, *supra* n.174 at 924: “the Court’s defense [of viability] seems to mistake a definition for a syllogism.”

<sup>178</sup> 505 U.S. at 865.

<sup>179</sup> See, e.g., Beck, *supra* n.10 at 203-04 (2016) (citing sources); Beck, *supra* n.105 at 741 n.39 (2012) (citing sources); Mark Tushnet, “Two Notes on the Jurisprudence of Privacy,” 8 *Constitutional Comment.* 75, 80-85 (1991); Mark Beutler, “Abortion and the Viability Standard – Toward a More Reasoned Determination of the State’s Countervailing Interest in Protecting Prenatal Life,” 21 *Seton Hall Law Review* 347 (1991). Cf. *Adarand Constructors Inc. v. Pena*, 515 U.S. 200, 232 (1995) (noting scholarly criticism of *Metro Broadcasting*). See also *MKB Mgmt Corp. v. Stenehjem*, 795 F.3d 768, 774-75 (8th Cir. 2015) (criticizing the viability rule); *Isacson v. Horne*, 716 F.3d 1213, 12331 (9th Cir. 2013) (Kleinfeld, J., concurring) (pointing out problems with the viability rule), cert. denied, 134 S. Ct. 905 (2014); *MKB Management Corporation v. Stenehjem*, 795 F.3d 768, 774 (8th Cir. 2015) (criticizing the viability rule); *Hamilton v. Scott*, 97 So. 3d 728, 737-47 (Ala. 2012) (Parker, J., concurring specially) (compiling criticism of the viability rule). Cf. *Adarand Constructors Inc. v. Pena*, 515 U.S. 200, 232 (1995) (noting scholarly criticism of *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990)).

<sup>180</sup> See Bartlett, *supra* n.161.

<sup>181</sup> Paul Benjamin Linton, “The Legal Status of the Unborn Child under State Law,” 6 *University of St. Thomas Journal of Law & Public Policy* 141, 146-48 (2012).

not followed in the law of wrongful death<sup>182</sup> and has not been for decades.<sup>183</sup> Eventually, courts have applied prenatal injury torts throughout pregnancy and have extended wrongful death causes of action earlier in pregnancy.<sup>184</sup> It is not followed in the law of fetal homicide.<sup>185</sup> The Court’s “viability” doctrine in abortion law has been virtually abandoned in property, tort, and criminal law. This is one example of how *Roe*’s viability rule – the essence of *Roe* – has become a doctrinal anachronism.

#### F. The Changed Rationale for *Roe* in *Planned Parenthood v. Casey*

After two decades of controversy and confusion, the *Casey* Court recognized serious problems with *Roe* and attempted to fix them by expressly rejecting the notion that abortion was a fundamental constitutional right and adopting, instead, an “undue burden” standard for assessing state legislation. *Casey* substantially overhauled *Roe*.<sup>186</sup>

The *Casey* Court did not defend *Roe* as originally decided. Instead, the Court relied almost exclusively on *stare decisis* for its reaffirmation of *Roe*, hoping that *Roe* could be fixed, as substantially modified.<sup>187</sup> The Court created a new rationale for *Roe*, switching from history to sociology and the claim of reliance interests,<sup>188</sup> a “newly minted version of *Roe*.”<sup>189</sup> But the new rationale is no more rooted in the Constitution than the original rationale in *Roe*.

*Casey*’s failure to justify *Roe* as an original matter and its reliance on *stare decisis* was severely criticized by numerous scholars.<sup>190</sup> The rationale for *stare*

<sup>182</sup> See, e.g., *Hamilton v. Scott*, 97 So.3d 728 (Ala. 2012).

<sup>183</sup> *Hudak v. Georgy*, 634 A.2d 600, 602 (Pa. 1993): “[N]o jurisdiction accepts the...assertion that a child must be viable at the time of birth in order to maintain an action in wrongful death.”

<sup>184</sup> See Kader, *supra* n.155.

<sup>185</sup> Linton, *supra* n.182 at 143-46.

<sup>186</sup> See Linton, *supra* n.124 at 34-37 (detailing the differences between *Roe* and *Casey*); Gilles, *supra* n.65, 91 *Notre Dame Law Review* at 701: “It is not generally appreciated that *Casey* reinvented the doctrinal foundation of the right to elective abortion....”

<sup>187</sup> See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. at 833, 854–69 (1992).

<sup>188</sup> See *Casey*, 505 U.S. at 855.

<sup>189</sup> Powe, *supra* n.59 at 2094.

<sup>190</sup> Dellapenna, *supra* n.113 at 856 (referring to *Casey*’s “utter intellectual incoherence”), 856-85; Mary Ann Glendon, *A Nation Under Lawyers* (1994), pp. 114-15; Robert F. Nagel, *The Implosion of American Federalism* (2001), pp. 99-113; Powe, *supra* n.59 at 2094-99, 2112 (2014): “*Casey*’s intentional failure to mention what

*decisis* that the Court created in *Casey* was largely *ad hoc* and has not been followed in subsequent cases.<sup>191</sup>

The *Casey* Court emphasized only some of the *stare decisis* factors and examined those in a cursory and conclusory manner:

So in this case we may enquire whether *Roe*'s central rule has been found unworkable; whether the rule's limitation on state power could be removed without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it; whether the law's growth in the intervening years has left *Roe*'s central rule a doctrinal anachronism discounted by society; and whether *Roe*'s premises of fact have so far changed in the ensuing two decades as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed.<sup>192</sup>

*Casey* is remarkable for essentially avoiding close examination of these factors and mischaracterizing *Roe* as merely creating a right to "early" abortion.<sup>193</sup> Perhaps the Court's consideration of these factors in *Casey* was abbreviated because the Court specifically limited the grant of certiorari to the constitutionality of the Pennsylvania statute itself.<sup>194</sup> The *Casey* Court did not scrupulously examine the six traditional factors of *stare decisis*. The Court did not expressly examine whether *Roe* was unsettled or why, though it implicitly admitted that

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appears to be the principal factor in overruling seriously undermines the credibility of its treatment of *stare decisis*"; Steven G. Calabresi, "Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling *Planned Parenthood of Southeastern Pennsylvania v. Casey*," 22 *Constitutional Commentary* 311 (2005); Morton J. Horowitz, "Forward: The Constitution of Change, Legal Fundamentality without Fundamentalism," 107 *Harvard Law Review* 30, 71 (1993) (criticizing the plurality's characterization of *Lochner v. New York*, 198 U.S. 45 (1905) and *Plessy v. Ferguson*, 163 U.S. 537 (1896)); Linton, *supra* n.124; Earl M. Maltz, "Abortion, Precedent, and the Constitution: A Comment on *Planned Parenthood of Southeastern Pennsylvania v. Casey*," 68 *Notre Dame Law Review* 11 (1992); Michael Stokes Paulsen, "The Worst Constitutional Decision of All Time," 78 *Notre Dame Law Review* 995 (2003); David M. Smolin, "The Jurisprudence of Privacy in a Splintered Supreme Court," 75 *Marquette Law Review* 975 (1992).

<sup>191</sup> 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*?", 86 *North Carolina Law Review* 1165 (2008).

<sup>192</sup> 505 U.S. at 855.

<sup>193</sup> 505 U.S. at 844 (joint opinion), 923 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

<sup>194</sup> *Planned Parenthood of Se. Pa. v. Casey*, 502 U.S. 1056, at 1056-57 (1992), granting cert.

it was unsettled.<sup>195</sup> The Court ignored the scholarly criticism of *Roe*. The Court brushed aside “workability” as though *Roe* could be reduced to the viability rule, and effectively ignored the experience of *Roe* in the courts and legislatures and in American political life between 1973 and 1992. The Court concluded that *Roe* was “workable” because it was “a simple limitation beyond which a state law is unenforceable.”<sup>196</sup> But the application of the standard created in *Roe* and the undue burden standard created in *Casey* have, in reality, been anything but simple.

The *Casey* Court also brushed aside changes in fact and changes in law – perhaps because *Roe* itself rested on no record evidence – and emphasized “reliance interests” as the one reason to reaffirm *Roe*. But, as in *Roe*, the Court in *Casey* had no record evidence by which to assess “reliance” and spurned the overruling question at the time the Court granted review.<sup>197</sup> The Court ended up citing two pages from one book, Rosalind Petchesky’s *Abortion and Woman’s Choice*, to support “reliance.”<sup>198</sup>

The essential problem with *Casey* is that the Court emphasized “legitimacy” without ever defending why *Roe* was legitimately derived from the Constitution.<sup>199</sup> In *Vasquez v. Hillery*, the Court observed that *stare decisis* “contributes to the integrity of our constitutional system of government, both in appearance and in fact,” by preserving the presumption “that bedrock principles are founded in the law rather than in the proclivities of individuals.”<sup>200</sup> Yet, the *Casey* Court spurned the task of showing how *Roe* was “rooted” in the Constitution.<sup>201</sup>

#### G. The Continuing Search for a New Rationale for *Roe*

Ever since *Roe*, scholars and academics have been looking for an alternative rationale. Very few, if any, scholars will defend *Roe* as originally decided.<sup>202</sup>

<sup>195</sup> 505 U.S. at 844: “[T]hat definition of liberty is still questioned.”

<sup>196</sup> *Ibid.* 505 U.S. at 855.

<sup>197</sup> 502 U.S. at 1056-57.

<sup>198</sup> 505 U.S. at 856.

<sup>199</sup> See, e.g., *ibid.* at 853, 860-61, 867, 871.

<sup>200</sup> 474 U.S. 254, 265-66 (1986).

<sup>201</sup> 505 U.S. at 867.

<sup>202</sup> See, e.g., “*What Roe v. Wade Should Have Said*,” *supra* n.110; Dellapenna, *supra* n.113 at 687-88 nn.433-34 (collecting sources); Lithwick, *supra* n.104 at 6: “[B]oth sides tend to agree secretly that the original *Roe* opinion rested on rather shaky



Various scholars have proposed the Eighth Amendment, the Ninth Amendment, the Nineteenth Amendment, or the First Amendment's Free Exercise Clause. None of these alternative sources for a right to abortion is any more rooted in the Constitution than the rationale offered in *Roe*.<sup>203</sup>

In *Gonzales*, several justices suggested that *Roe* be premised upon yet another rationale, the Equal Protection Clause.<sup>204</sup> The Court has previously held that opposition to abortion is not gender-based discriminatory animus.<sup>205</sup> As Justice O'Connor pointed out in *Akron*, "the Court subsequent to *Doe* has expressly rejected the view that differential treatment of abortion requires invalidation of regulations."<sup>206</sup>

In addition, the equal protection claim simply assumes one particular view

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constitutional grounds"; Donald H. Regan, *Rewriting Roe v. Wade*, 77 *Michigan Law Review* 1569, 1569 n.1 (1979) (citing earlier attempts to re-write *Roe*).

<sup>203</sup> See, e.g., Richard Posner, "Legal Reasoning from the Top Down and from the Bottom Up: The Question of Unenumerated Rights," 59 *University of Chicago Law Review* 433, 441-42 (1992): "*Roe v. Wade* is the Wandering Jew of constitutional law. It started life in the Due Process Clause, but that made it a substantive due process case and invited a rain of arrows. Laurence Tribe first moved it to the Establishment Clause of the First Amendment, then recanted. Dworkin now picks up the torch but moves the case into the Free Exercise Clause, where he finds a right to autonomy over essentially religious decisions. Feminists have tried to squeeze *Roe v. Wade* into the Equal Protection Clause. Others have tried to move it inside the Ninth Amendment...still others (including Tribe) inside the Thirteenth Amendment... It is not, as Dworkin suggests, a matter of the more the merrier; it is a desperate search for an adequate textual home, and it has failed" (footnotes omitted); James Bopp, Jr., "Will There Be a Constitutional Right to Abortion after the Reconsideration of *Roe v. Wade*?", 15 *Journal of Contemporary Law* 131 (1989) (rebutting many alternative rationales for *Roe v. Wade*); Michael Stokes Paulsen, "The Text, the Whole Text, and Nothing but the Text, So Help Me God: Un-Writing Amar's Unwritten Constitution," 81 *University of Chicago Law Review* 1385, 1420-25 (2014) (disputing the Nineteenth Amendment rationale).

<sup>204</sup> See *Gonzales v. Carhart*, 550 U.S. 124, 171-72 (2007) 124, 169 (Ginsburg, J., dissenting).

<sup>205</sup> See, e.g., *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 269-70 (1993); see also *Harris v. McRae*, 448 U.S. 297, 324-25 (1980), holding that states can prefer childbirth over abortion without violating Equal Protection; *Maher v. Roe*, 432 U.S. 464, 474 (1977), affirming "authority of a State to make a value judgment favoring childbirth over abortion"; *Geduldig v. Aiello*, 417 U.S. 484, 494-95 (1974), holding that state insurance that denied coverage for disabilities resulting from pregnancy was not a violation of Equal Protection.

<sup>206</sup> *City of Akron v. Akron Center Reprod. Health*, 462 U.S. 416, 464 n.9 (1983) (O'Connor, J., dissenting).

of women's interests, and apparently a minority view.<sup>207</sup> Without guidance from the text, structure, or history of the Constitution, differing legal means to protect those interests are left to the democratic processes in the states in our system of dual sovereignty.

The equal protection claim also ignores the fact that anti-abortion laws are not aimed at regulating the behavior of one sex but are aimed at protecting the lives of unborn children, one of two major state interests that *Roe* said the states have. The protection of fetal life – which was protected by the common law from the earliest moment that evidence of prenatal life could be determined and has been increasingly protected by the states through wrongful death laws, prenatal injury laws, and homicide laws as medical evidence and technology have allowed – can never be an invidious purpose. Abortion laws were never “part of a scheme of gender discrimination.”<sup>208</sup> This new rationale for *Roe* would, in any case, gut every aspect of the framework and rationale of *Roe* and effectively overrule it, thereby confirming that *Roe* was wrongly decided. The equal protection rationale is simply result-oriented jurisprudence.

Alternative legal theories to support *Roe* fail for several reasons. They cannot identify any alternative rationale that is justified by text, structure, or the history of the Constitution.<sup>209</sup> No alternative theory can demonstrate an historical basis for a right to abortion.<sup>210</sup> There is, for example, no evidence of nineteenth century feminist support for abortion.<sup>211</sup> No alternative theory can

<sup>207</sup> See also, e.g., James Bopp, Jr., “Is Equal Protection a Shelter for the Right to Abortion?” in *Abortion, Medicine, and the Law*, ed. J. Douglas Butler & David F. Walbert, 4th ed. (1992), p. 160; Erika Bachiochi, “A Putative Right in Search of a Constitutional Justification: Understanding *Planned Parenthood v. Casey*’s Equality Rationale and How it Undermines Women’s Equality,” 35 *Quinnipiac Law Review* 593 (2017); Erika Bachiochi, “Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights,” 34 *Harvard Journal of Law & Public Policy* 889, 897 (2011); David M. Smolin, “Why Abortion Rights Are Not Justified by Reference to Gender Equality: A Response to Professor Tribe,” 23 *John Marshall Law Review* 621 (1990); Mary Catherine Wilcox, “Why the Equal Protection Clause Cannot ‘Fix’ Abortion Law,” 7 *Ave Maria Law Review* 307 (2008).

<sup>208</sup> Dellapenna, supra n.113 at Ch.8, pp. 371-409, 853. In addition, supreme courts in states with Equal Rights Amendment-type language in their constitutions “generally recognize that a classification based upon the unique physical characteristics of a particular sex does not deny either sex equal rights under the law.” Paul Benjamin Linton, *Abortion under State Constitutions* (2008), pp. 607-08.

<sup>209</sup> Dellapenna, supra n.113 at 78, 261, 387-98, 840-44, 1053-56.

<sup>210</sup> *Ibid.* at 78, 261.

<sup>211</sup> *Ibid.* at 387-98.

resolve the deep-seated conflict between prenatal injury, wrongful death, fetal homicide and a judicially-created right to abortion. And no alternative theory holds any hope of settling the abortion issue any better than *Roe*, *Casey* or *Hellerstedt*. Any alternative theory would simply prolong this Court's failed role as the national abortion control board. This constant search for a new rationale is yet another reason that makes *Roe v. Wade* properly subject to correction and overruling.<sup>212</sup>

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All of these factors demonstrate that *Roe* was not derived from text, history, tradition, structure, or precedent, which is the only source of constitutional legitimacy that might authorize this Court to impose *Roe* on the nation. Since abortion is not a right derived from the federal constitution, it is a matter for the people to decide through the democratic process in the states.<sup>213</sup>

#### IV. Workability & Judicial Administration

*Roe* is a unique precedent. *Roe* (and *Doe*) did not merely invalidate the laws of Texas and Georgia, *Roe* also prescribed, in great detail, a national rule that states must follow.<sup>214</sup> And, in doing so, the *Roe* Court recognized that what it was doing was *dictum*.<sup>215</sup> We have consistently accorded less precedential

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<sup>212</sup> Cf. *Citizens United*, 558 U.S. at 379 (Roberts, C.J., concurring): “[W]hen the precedent’s underlying reasoning has become so discredited that the Court cannot keep the precedent alive without jury-rigging new and different justifications to shore up the original mistake...”; *Montejo v. Louisiana*, 556 U.S. 778, 788, 792 (2009): “[W]e do not think that *stare decisis* requires us to expand significantly the holding of a prior decision – fundamentally revising its theoretical basis in the process – in order to cure its practical deficiencies.”

<sup>213</sup> See *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *Glucksberg v. Washington*, 521 U.S. 702 (1997).

<sup>214</sup> See *Roe*, 410 U.S. at 163-65. Cf. *Webster v. Reprod. Health Services*, 492 U.S. 490, 518-21 (1989) (Rehnquist, J., White, J., & Kennedy, J., plurality opinion) (criticizing rule); Ronald Dworkin, “Unenumerated Rights: Whether and How *Roe* Should Be Overruled,” 59 *University of Chicago Law Review* 381, 427 (1992) (criticizing *Roe*’s “detailed regime”). See also Ruth Bader Ginsburg, “Speaking in a Judicial Voice,” 67 *New York University Law Review* 1185, 1199 (1992): “Suppose the Court...had not gone on, as the Court did in *Roe*, to fashion a regime blanketing the subject, a set of rules that displaced virtually every state law then in force.”

<sup>215</sup> See Randy Beck, “Self-Conscious Dicta: The Origins of *Roe v. Wade*’s

weight to *dictum*.<sup>216</sup>

By prescribing a national rule, this Court assumed a unique role of judicial administration over one medical procedure – which it has never exercised before or since – “as the nation’s ‘ex officio medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States.’”<sup>217</sup> One of the most important questions, for purposes of *stare decisis*, is whether this Court should continue that self-appointed role.

Medicine has been a profession regulated by the states since they were colonies.<sup>218</sup> Abortion is the only medical procedure that has been declared to be a constitutional right, making it uniquely immune from state oversight that applies to every other medical procedure.

The *Roe* Court announced that there were two major state interests in regulating abortion: fetal life and maternal health.<sup>219</sup> But there was no evidentiary record to guide the Court’s recognition or understanding or definition of these state interests, or the value to be given to them, or whether any other state interests existed.

The application of *Roe* to state regulations of abortion to protect the state interests in fetal life and maternal health has been difficult and haphazard. The fact that *Roe* has been unworkable was immediately demonstrated in *Doe v. Bolton*, the companion case to *Roe*, where the Court did not apply the same standards as the Court purported to apply in *Roe*, as Justice Powell pointed out in his concurring opinion in *Carey v. Population Services International*.<sup>220</sup>

We have repeatedly stated – in the abstract – that the states have an

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Trimester Framework,” 51 *American Journal of Legal History* 505 (2011).

<sup>216</sup> See Randy Beck, “Transtemporal Separation of Powers in the Law of Precedent,” 87 *Notre Dame Law Review* 1405 (2012); Henry J. Friendly, “Time and Tide in the Supreme Court,” 2 *Connecticut Law Review* 213 (1968): “Neither Congress nor state legislatures are bound by language unnecessary for a decision, however strong.”

<sup>217</sup> *Akron*, 462 U.S. at 456 (O’Connor, J., dissenting); see also *Hellerstedt*, 136 S. Ct. at 2326 (Thomas, J., dissenting), noting the significance of *Hellerstedt* resurrecting appointment as “the nation’s ex officio medical board.”

<sup>218</sup> *Dent v. West Virginia*, 129 U.S. 114 (1889).

<sup>219</sup> 410 U.S. at 164–65; *Casey*, 505 U.S. at 869; *Akron*, 462 U.S. at 427, noting “two such interests that may justify state regulation of abortions.”

<sup>220</sup> 431 U.S. 678, 704 (1977), noting that, in contrast to what *Roe* purported to adopt, *Doe* did not refer to the “compelling interest” standard but instead used the “reasonably related” test.

“interest” in protecting “maternal health.”<sup>221</sup> Starting with *Roe*, however, the Court has actually examined record evidence of the impact of abortion or abortion regulations on maternal health in very few cases. In contrast to the normal capacity of public health administrators, this Court cannot conduct investigations or gather evidence. As our application of *Roe* and *Doe* in many subsequent cases has demonstrated, this Court has no capacity to assume or exercise such a role as the nation’s medical review board of abortion. This Court has no capacity to oversee operative procedures or to assess safety. This Court cannot regulate or monitor or intervene. It cannot anticipate medical developments or medical data. Instead, this Court, through *Roe* and *Doe* and *Casey* and *Hellerstedt*, has tied the hands of state and local public health officials who do have the capacity to create and effectively enforce adequate health and safety standards.

The five-month limits on abortion passed since *Gonzales* by the U.S. House and twenty-one states highlight the contradictions in the *Roe* Court’s construction of the so-called state interest in maternal health. The Court created the viability rule in *Roe* based largely on the mistaken factual assumption that abortion is safer than childbirth. In creating the viability rule, the Court looked only at the state interest in fetal life, but did not consider the state interest in maternal health when it extended the abortion right that late into pregnancy. The viability rule allows abortion beyond the point where abortion is more dangerous than childbirth (at least in the vast majority of cases).<sup>222</sup> And yet when states have asserted their interest in maternal health to limit abortion before viability, the federal courts following *Roe* and *Casey* have invalidated those limits by rigidly applying the viability rule.<sup>223</sup>

Judicial administration has been made more difficult by the fact that the Court issued *Roe* in a medical vacuum. Unlike other nations, the U.S. had no reliable system of abortion data collection, reporting, and analysis in 1973, and has none today.<sup>224</sup> The Court invalidated such state laws in *Thornburgh*.<sup>225</sup>

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<sup>221</sup> *Hellerstedt*, 136 S. Ct. at 2309: “[T]he ‘State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient,’” quoting *Roe*, 410 U.S. at 150.

<sup>222</sup> See Bartlett, *supra* n.161.

<sup>223</sup> See, e.g., *Isacson v. Horne*, 884 F. Supp. 2d 961 (D. Ariz. 2012) (upholding state’s 20-week limit), *rev’d*, *Isacson v. Horne*, 716 F.3d 1213 (9th Cir. May 21, 2013) (invalidating state’s 20-week limit).

<sup>224</sup> See Tara C. Jatlaoui et al., “Abortion Surveillance: United States, 2014,” 66 *Morbidity and Mortality Weekly Report* 1 (2017), <https://www.cdc.gov/mmwr/volumes/>

There is no federal law mandating the collection and reporting of abortion data. Basic data, such as the annual number of abortions, is based merely on *estimates*.<sup>226</sup> We cannot reliably know the annual number of abortions, nor the number of complications, nor the number of maternal deaths. We issued *Roe* without such an abortion data collection and reporting system in place, and this Court has no capacity to legislate an effective system of collection, reporting and analysis. Congress’s constitutional authority to require that every provider report public health data about abortions, unless tied to federal funds, is uncertain.<sup>227</sup> In any case, Congress has never enacted such a system. This makes adequate judicial administration difficult, if not impossible.

In cases since *Roe*, this Court has attempted to apply the lines drawn in *Roe* to numerous state abortion legislation. The lines drawn in *Roe* created confusion among the federal courts, which we attempted to fix in *Casey*. Justice O’Connor observed in *Akron* that the trimester scheme was “a completely unworkable method of accommodating the conflicting personal rights and compelling state interests that are involved in the abortion context.”<sup>228</sup> And the Court discarded the trimester scheme. In *Casey*, the Court found *Roe* to be unworkable, and overruled *Akron* and *Thornburgh*, attempting to make it more workable.

But the decisions since *Casey* have not demonstrated greater clarity or produced greater coherence among the federal courts. The federal courts have not been able to apply the “undue burden” standard created in *Casey* with coherence, consistency or clarity.<sup>229</sup> In *Casey*, the Court did not address the problem head-on, but only tinkered with it.

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66/ss/ss6624a1.htm [https://perma.cc/JS2A-L74F] (abortion data for 2014, the latest year for which abortion data is available). Abortion data from the federal Centers for Disease Control and Prevention (CDC) is incomplete. California, Maryland, and New Hampshire did not report any data for 2014. California has not reported abortion data to the CDC since 1997. CDC abortion data is typically two years late.

<sup>225</sup> See *Thornburgh*, 476 U.S. at 764-72.

<sup>226</sup> See Byron Calhoun, “The Maternal Mortality Myth in the Context of Legalized Abortion,” 80 *Linacre Quarterly* 264 (2013); John Thorp, “Public Health Impact of Legal Termination of Pregnancy in the U.S.: 40 Years Later,” *Scientifica*, Jan. 2013, <http://dx.doi.org/10.6064/2012/980812> [https://perma.cc/RAW4-7XQH].

<sup>227</sup> *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 547–61 (2012), holding that the individual mandate of the Affordable Care Act was not a valid exercise of the Commerce Clause or the Necessary and Proper Clause.

<sup>228</sup> *Akron*, 462 U.S. at 454 (O’Connor, J., dissenting).

<sup>229</sup> Appendix A, *infra*.

Since *Casey*, the essential problem has been in reaching the judgment of what's "undue." What is undue is in the eye of the beholder. That has led inevitably to inconsistency. The "undue burden" standard created in *Casey* was vigorously criticized by the dissenters. As Justice Scalia characterized the problem with the new undue burden standard:

The joint opinion explains that a state regulation imposes an "undue burden" if it "as the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus...." Consciously or not, the joint opinion's verbal shell game will conceal raw judicial policy choices concerning what is "appropriate" abortion legislation. The ultimately standardless nature of the "undue burden" inquiry is a reflection of the underlying fact that the concept has no principled or coherent legal basis.<sup>230</sup>

The problems forecast by that dissent have proven true.

The enterprise of applying a standard – whether undue burden or any other standard – to a public health issue such as abortion, with all its complexity, is not suited to the federal courts. Federal courts are not public health agencies and cannot serve that role. *Roe* and *Casey* have been repeatedly criticized by numerous federal judges for standards that cannot be consistently applied.<sup>231</sup>

Since *Casey*, it has become apparent that federal courts treat the two state interests identified by the *Roe* Court – maternal health and fetal life – as at odds with one another.<sup>232</sup> The protection of fetal life invariably inhibits maternal health, as the Court defines it. And the state's interest in maternal health has been continually diluted over the years by numerous factors. This Court prohibited the states from enacting health and safety standards during the first trimester, when 90% of abortions are done, and reaffirmed that throughout the 1970s. The Court effectively tied the hands of the states to enact health and safety regulations after the first trimester.<sup>233</sup> Until *Hellerstedt*, the Court had never approved state health and safety standards in the first trimester.<sup>234</sup>

<sup>230</sup> *Casey*, 505 U.S. at 986-87 (Scalia J., dissenting).

<sup>231</sup> Appendix A, *infra*.

<sup>232</sup> See *Casey*, 505 U.S. at 987 (Scalia, J., dissenting).

<sup>233</sup> See *Chicago Board of Health v. Friendship Medical Center*, 420 U.S. 997 (1975) (denying certiorari); *Sendak v. Arnold*, 429 U.S. 968 (1976) (affirming invalidation of first trimester clinic regulations); *Greenville Women's Clinic v. Bryant*, 531 U.S. 1191 (2000) (denying certiorari); *Greenville Women's Clinic v. Comm'r, S.C. Dept of Health & Envtl. Control*, 538 U.S. 1008 (2003) (denying certiorari).

<sup>234</sup> See generally Clarke D. Forsythe & Bradley N. Kehr, "A Road Map through

Throughout the experience with *Roe* and *Casey*, this Court's ability to sift through medical evidence and data and use that data to make coherent and consistent decisions, has been severely hampered by the limited nature of litigation and the judicial process. Evidence in each case is invariably selective and limited, and there is probably no other area of constitutional law where parties and *amici* attempt to pad the record with sociological briefs on appeal.<sup>235</sup> Litigation simply cannot provide the tools for this Court to act as an "ex officio medical board."<sup>236</sup>

The Court's inability to assess the medical implications of abortion and abortion regulations has been avoided over four decades by the fact that litigation is the only means by which this Court can assess the workability of its decisions. The Court is largely a passive institution that must wait for cases to be appealed. Many cases never make it to this Court. The Court has declined to review numerous abortion cases before *Casey*, after *Casey*, and since *Gonzales*. The Court has effectively avoided the issue by refusing to take cases and apply its abortion doctrine.

One example of the difficulty of judicial administration of the undue burden standard is seen in the Court's treatment of spousal notice of abortion. The Court invalidated state spousal *consent* laws in *Planned Parenthood v. Danforth*.<sup>237</sup> In *Casey*, the Court invalidated Pennsylvania's spousal *notice* law. The Pennsylvania law had never gone into effect and was challenged on its face. The Court proceeded to invalidate the Pennsylvania law based on speculative testimony about the *potential* for spousal abuse with such a law,<sup>238</sup> while the Court ignored data presented by the State of Utah showing that no incidents of spousal abuse had been reported during the *actual enforcement* of Utah's spousal notice law over eighteen years.<sup>239</sup>

Similarly, when the City of Akron attempted to follow the instruction in

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the Supreme Court's Back Alley," 57 *Villanova Law Review* 45 (2012).

<sup>235</sup> See, e.g., *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (where forty-five amicus briefs were filed in support of Petitioners and thirty-five briefs were filed in support of Respondents).

<sup>236</sup> *Akron*, 462 U.S. at 456 (O'Connor, J., dissenting).

<sup>237</sup> *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976).

<sup>238</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 887-95 (1992).

<sup>239</sup> 505 U.S. at 887-95. See *Planned Parenthood v. Casey*, 505 U.S. 833, 842 n. (1992) (citing Brief for the State of Utah as Amicus Curiae at 18-19); see also *Jane L. v. Bangert*, 809 F. Supp. 865, 876 (D. Utah 1992), *aff'd in part, rev'd in part* on other grounds, 61 F.3d 1493 (10th Cir. 1995), *cert. denied*, 520 U.S. 1274 (1997).



*Roe* that the states had a “compelling interest” in maternal health after the first trimester, and enacted a requirement that second trimester abortions be performed in a hospital, the City followed guidelines of the American College of Obstetricians & Gynecologists (ACOG) when the ordinance requiring hospitalization at that stage was enacted in 1978. The same guidelines existed when the law was reviewed by the district court in 1979 and by the court of appeals in 1981. But then ACOG changed its own standards, and when this Court reviewed the ordinance, the Court relied on changed standards adopted by ACOG to invalidate Akron’s ordinance.<sup>240</sup>

This problem of judicial administration has become more apparent as lower federal courts have attempted to apply the “undue burden” standard to health and safety regulations intended to protect the state’s interest in maternal health. The undue burden standard of *Casey* has led to a confusion by federal judges as to whether *Roe & Casey* put a greater emphasis on access or on health and safety. Regulations backed up by medical evidence and practice have sought to protect against risks to patients. Some federal judges have upheld these; others have concluded that health and safety regulations cannot limit access. *Hellerstedt* did not resolve this confusion.

Before *Hellerstedt*, federal courts had difficulty in applying the state’s interest in maternal health when it seemingly conflicted with access to abortion. Which value were federal courts to adopt? In *Planned Parenthood Southeast, Inc. v. Bentley*,<sup>241</sup> the court recognized that the American medical profession has largely abandoned abortion practice, that abortion providers are diminishing, that providers are often flown in from out of town, or out of state, or out of the country to do abortions, precisely the reason to require admitting privileges to protect patient follow-up and the physician-patient relationship.

Another facet of the Court’s abortion doctrine that has obscured the effects of abortion on maternal health has been the easy authorization of facial challenges to state abortion regulations. Facial challenges ease the normal burden of proof on plaintiffs to bring forth reliable evidence of the impact of abortion statutes, and ease the burden of fact-finding on judges, and prevent

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<sup>240</sup> *Akron*, 462 U.S. at 356-78. See also *Stenberg v. Carhart*, 530 U.S. 914, 966-67 (2000) (Kennedy, J., dissenting), emphasizing “courtroom conversion” of the medical witnesses, whose in-court statements were contradicted by pre-trial statements, though laws of 30 states were nevertheless invalidated.

<sup>241</sup> *Planned Parenthood Se., Inc. v. Bentley*, 951 F. Supp. 2d 1280 (M.D. Ala. 2013), granting temporary restraining order against challenge to Alabama law requiring local hospital admitting privileges law for abortion-performing physicians.

courts from seeing the actual impact of abortion regulations. As-applied challenges require judges to work to see the actual impact of abortion and abortion laws.<sup>242</sup>

*Hellerstedt* exemplifies this Court's inability to administer the standards laid down in *Roe* and *Casey*.<sup>243</sup> Twenty-four years after *Casey*, members of the Court disputed fundamental elements of *Roe*'s abortion doctrine in *Hellerstedt*.<sup>244</sup> The majority in *Hellerstedt* casually endorsed the district court's findings against the regulations, although the record contained medical evidence which showed that the regulations were reasonably related to protecting maternal health. The Court in *Gonzales* questioned the propriety of facial challenges to state abortion regulations,<sup>245</sup> but the majority in *Hellerstedt* distorted prior facial challenge doctrine to resurrect a claim that the plaintiffs did not ask for.<sup>246</sup> The majority exalted an interest in unfettered access to abortion against the state's interest in maternal health, in a case where the generally-applicable state regulations were reasonably related to protecting maternal health. The Court did not apply normal severability principles.<sup>247</sup>

*Hellerstedt* shows that the Court cannot perform its role as the "ex officio medical review board" because it cannot scrupulously examine the "benefits and burdens" of individual regulations. When faced with the obligation to carefully review multiple regulations, the Court invalidated all of the clinic regulations without specific findings against each, even medical regulations that are unquestionably sound and reasonable. *Hellerstedt* exemplifies the problem that, under the Court's abortion doctrine, judges can use facial challenges to broadly sweep away abortion regulations because of the difficulty of analyzing the specific impact of regulations.

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<sup>242</sup> The *Roe* Court imported facial challenges into abortion doctrine. 410 U.S. at 120. See generally, Jill Hamers, "Reeling in the Outlier: *Gonzales v. Carhart* and the End of Facial Challenges to Abortion Statutes," 89 *Boston University Law Review* 1069 (2009).

<sup>243</sup> *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

<sup>244</sup> *Ibid.* at 2321 (Thomas, J., dissenting) (questioning scrutiny level and third-party standing).

<sup>245</sup> *Gonzales v. Carhart*, 550 U.S. 124, 167 (2007): "[T]hese facial attacks should not have been entertained in the first instance. In these circumstances the proper means to consider exceptions is by as-applied challenge."

<sup>246</sup> *Hellerstedt*, 136 S. Ct. at 2339 (Alito, J., dissenting): "There is simply no reason why petitioners should be allowed to relitigate their facial claim."

<sup>247</sup> *Ibid.* at 2350 (Alito, J., dissenting).

It is no response to say that *Roe* would be more workable if complete deference was simply given to providers of abortion, because the Court has repeatedly affirmed, in decisions stretching from *Roe* to *Gonzales*, that the states have compelling interests in fetal life, maternal health, and medical standards. Policing those interests over forty-five years – or failing to – has demonstrated the institutional incapacity of this Court. Throwing out the state’s interest in fetal life or diminishing the state’s interest in maternal health now would be tantamount to overturning *Roe*.

Forty-five years of litigation have provided ample evidence of the difficulty created by *Roe* for the states in protecting the two main state interests that the *Roe* Court held that the states had authority to protect: fetal life and maternal health. Numerous states have passed regulations to protect these state interests, and they have been challenged in hundreds of cases, forcing the states to defend them in litigation. *Casey* conceded that *Roe* was not workable as applied in subsequent cases, overruling *Akron* and *Thornburgh*, and announced a new standard. But the “undue burden” standard applied since *Casey* has not been workable, because it unavoidably motivates judges to apply their policy preferences and subordinates any state interests to “access.” Because of the inherent institutional limits on this Court and its inconsistent application of the abortion doctrine over forty-five years, *Roe* has been demonstrated to be unworkable.<sup>248</sup> The undue burden standard has done nothing to improve predictability, consistency, or coherence. Our twenty-six years of experience since *Casey* demonstrate that *Casey*’s re-engineering of *Roe* has not made *Roe* any more workable.<sup>249</sup> Clearly, *Roe* has never been a “simple limitation.”<sup>250</sup> This has been a failure in judicial administration and it does not serve the rule of law.

#### V. Changes in Fact that have Eroded *Roe*

The *Casey* Court declared that “[t]he facts upon which [*Adkins v. Children’s Hospital*] had premised a constitutional resolution of social controversy had proven to be untrue, and history’s demonstration of their

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<sup>248</sup> *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009): “[T]he fact that a decision has proved ‘unworkable’ is a traditional ground for overruling it.”

<sup>249</sup> Paul C. Quast, “Respecting Legislators and Rejecting Baselines: Rebalancing *Casey*,” 90 *Notre Dame Law Review* 913 (2014).

<sup>250</sup> *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 855 (1992), describing *Roe* as a “simple limitation beyond which a state law is unenforceable.”

untruth not only justified but required the new choice of constitutional principle that *West Coast Hotel* announced.<sup>251</sup> The *Casey* Court concluded that no facts had changed that justified overruling *Roe*.<sup>252</sup>

There are several problems with the conclusion of the *Casey* Court. First, *Roe* established no reliable baseline from which to judge a change in facts: there was no trial or evidentiary record in *Roe* or *Doe*. No factual record was established according to the adversarial process. When the *Roe* Court decided to sidestep the jurisdictional issues for which *Roe* and *Doe* were first taken up for review in April 1971 – the application of *Younger v. Harris*<sup>253</sup> – and to use the cases to decide the constitutionality of abortion laws, the Court selected two cases without any evidentiary or factual record about abortion or its implications. Much if not all of *Roe* rested on sociological “assumptions.”<sup>254</sup> It is those assumptions that have been seriously challenged with the passage of time.

Second, the *Casey* Court deferred briefing on the overruling of *Roe* when it limited the questions to be addressed when review was granted to the constitutionality of the challenged provisions of Pennsylvania law<sup>255</sup> and side-stepped a searching analysis of changes in *Roe*’s assumptions. The Court simply issued an *ipse dixit* that change had not occurred. Much as the Court did in *Roe* – when it decided to use two cases, taken to decide the application of *Younger v. Harris*, to decide the constitutional question of abortion without an evidentiary record – the Court in *Casey* deferred briefing on overruling and after oral argument decided *sua sponte* to address the overruling question without the question thoroughly presented. This helps explain the short shrift given to the six factors of *stare decisis* and the conclusory emphasis on “reliance” in *Casey*.

However, to the objective observer, the assumptions on which the Justices based *Roe* in 1973 have changed considerably. These changes have eroded *Roe*’s assumptions and the decision which rested on them.

Biological and technological developments, including the development of in vitro fertilization since the 1970s, have reinforced the medical conclusion of

<sup>251</sup> *Ibid.* at 862.

<sup>252</sup> *Ibid.* at 864.

<sup>253</sup> *Younger v. Harris*, 401 U.S. 37 (1971).

<sup>254</sup> *City of Akron v. Akron Center for Reprod. Health, Inc.*, 462 U.S. 416, 430 n.12 (1983): “the validity of *Roe*’s factual assumption”; *Casey*, 505 U.S. at 860: “We have seen how time has overtaken some of *Roe*’s factual assumptions....”

<sup>255</sup> *Planned Parenthood of Se. Pennsylvania v. Casey*, 502 U.S. at 1056, 1056-57 (U.S. 1992).

the nineteenth century that the life of the individual human being begins at conception.<sup>256</sup> The states have increasingly relied on this biological evidence to increase legal protection from conception in prenatal injury, wrongful death, and fetal homicide law. The widespread clinical use of ultrasound, a technological development that the *Roe* Court did not anticipate, came to the commercial market after *Roe* and substantially affected medical practice and public opinion.<sup>257</sup>

*Roe* was premised on the assumption that legalization of abortion would end the “the back alley butchers”<sup>258</sup> and allow abortion to be treated as “a medical procedure...governed by the same rules as apply to other medical procedures...with reasonable medical safeguards.”<sup>259</sup> Repeated and continuing scandals involving clinics and providers have contradicted that assumption.<sup>260</sup>

Most abortions today are not performed by doctors from the Mayo Clinic or by a woman’s “own doctor.”<sup>261</sup> Abortion is largely separated from the rest

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<sup>256</sup> Maureen L. Condit, Ph.D., “When Does Human Life Begin? The Scientific Evidence and the Terminology Revisited,” 8 *University of St. Thomas Journal of Law and Public Policy* 44 (2013); Dellapenna, *supra* n.113 at 256-61 & n.241, 282, 298. describing evolution in medical understanding that influenced judicial and legislative protection from conception in the nineteenth century.

<sup>257</sup> Malcolm Nicolson & John Fleming, *Imaging and Imagining the Fetus: The Development of Obstetric Ultrasound* (2013), pp. 1-7: “Ultrasonic imaging has also had a momentous social impact because it can visualize the fetus. Fifty years ago, the unborn human being was hidden, enveloped within the female abdomen, away from the medical gaze.... [T]he scanner had become widely deployed within the British hospital system by 1975.... By the late 1970s, the ultrasound scanner had become a medical white good, a standardized commodity in a mass marketplace”; *ibid.* at 213: “By the early 1970s, some American hospitals were beginning to equip themselves with ultrasound scanners”; Laurie Troxclair et al., “Shades of Gray: A History of the Development of Diagnostic Ultrasound in a Large Multispecialty Clinic,” *J. Oschner* (Summer 2011) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3119221> [<https://perma.cc/64EK-RUWW>] (describing introduction of ultrasound for clinical use in 1975).

<sup>258</sup> Randy Beck, “Prioritizing Abortion Access over Abortion Safety in Pennsylvania,” 8 *Univ. of St. Thomas Journal of Law and Public Policy* 33, 40-41 (2013).

<sup>259</sup> *Ibid.* at 34 n.4 (quoting *amicus curiae* brief for Planned Parenthood entities in *Roe and Doe*).

<sup>260</sup> *Ibid.* at 34 (quoting brief of Planned Parenthood Federation of America in *Roe and Doe*); Clarke D. Forsythe & Bradley N. Kehr, “A Road Map through the Supreme Court’s Back Alley,” 57 *Villanova Law Review* 45, 65-70 (2012).

<sup>261</sup> See, e.g., Debra B. Stulberg et al., “Abortion Provision among Practicing Obstetricians-Gynecologists,” 118 *Obstetrics & Gynecology* 609, 609 (2011): “Among

of obstetrical and gynecological care and practice.<sup>262</sup> Abortion does not involve the medical *judgment* that *Roe* assumed.<sup>263</sup> In more than 90% of cases, abortion is not a medically-indicated procedure; it is an elective procedure chosen for social reasons.<sup>264</sup> A small percentage of doctors do abortions. American medicine has largely abandoned abortion.<sup>265</sup>

Contraception devices and methods have expanded in variety, availability, and effectiveness. Contraception has become less expensive.<sup>266</sup> The shame previously associated with non-marital childbearing, and with single parenting, has been largely eliminated from American life.<sup>267</sup>

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practicing ob-gyns, 97% encountered patients seeking abortions, whereas 14% performed them.”

<sup>262</sup> See *Stenberg v. Carhart*, 530 U.S. 914, 958 (2000) (Kennedy, J., dissenting): “Dr. Carhart has no specialty certifications in a field related to childbirth or abortion and lacks admitting privileges at any hospital”; *Akron v. Akron Center for Reprod. Health, Inc.*, 462 U.S. 416, at 473 (1983) (O’Connor, J., dissenting): “It is certainly difficult to understand how the Court believes that the physician-patient relationship is able to accommodate any interest that the State has in maternal physical and mental well-being in light of the fact that the record in this case shows that the relationship is non-existent.”

<sup>263</sup> *Roe v. Wade*, 410 U.S. 113, 165-66: “[T]he abortion decision in all its aspects is inherently, and primarily, a medical decision....”

<sup>264</sup> Lawrence B. Finer et al., “Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives,” 37 *Perspectives on Sexual & Reproductive Health* 110, 113-14 (2005), explaining that between 8% and 12% of women cited health concerns as a reason for obtaining an abortion; between 3-4% cited health reasons as the most important reason why they obtained an abortion), <https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1931-2393.2005.tb00045.x> [<https://perma.cc/5T6Z-JMAB>].

<sup>265</sup> *Planned Parenthood Se., Inc. v. Bentley*, 951 F. Supp. 2d 1280 (M.D. AL. 2013) (challenge to Alabama admitting privileges law), subsequent decision, *Planned Parenthood Se., Inc. v. Strange*, 9 F.Supp.3d 1272, 2014 U.S. Dist. Lexis 42876 (M.D. Ala. 2014); Steven H. Aden, “Driving Out Bad Medicine: How State Regulation Impacts the Supply and Demand of Abortion,” 8 *University of St. Thomas Journal of Law and Public Policy* 14 (2013).

<sup>266</sup> See, e.g., John Bongaarts & Elof Johansson, “Future Trends in Contraception in the Developing World: Prevalence and Method Mix,” 33 *Studies in Family Planning* 24 (2002). Multiple methods, when used together, can increase the likelihood of preventing a pregnancy. Jones et al., “Current Contraceptive Use in the United States, 2006–2010, and Changes in Patterns of Use since 1995,” 60 U.S. Dept. of Health and Human Services Center for Disease Control National Health Statistics Report 1, 4 (2012): “method choice has the most effect on their risk of unintended pregnancy”), <https://www.cdc.gov/nchs/data/nhsr/nhsr060.pdf> <https://perma.cc/U4H5-5WAQ>].

<sup>267</sup> Helen M. Alvare, “Beyond the Sex-Ed Wars: Addressing Disadvantaged Single

Nations face population *implosion*, not population *explosion*. Population in the U.S. in 2016 “grew at its lowest rate since the Great Depression,” below replacement levels (0.7%).<sup>268</sup> The abortion rate has fallen to its lowest level since *Roe*.<sup>269</sup> Clearly, there is less reliance than the *Casey* Court assumed.

There have been fundamental changes in the provision of abortion (the abortion market). Since *Casey*, there has been only one major provider.<sup>270</sup> There has been a growing body of international medical data from dozens of countries finding increased long-term risks to women from abortion.<sup>271</sup>

Then there are the unanticipated consequences caused by *Roe*. As the deliberations with no trial or evidentiary record in *Roe* and *Doe* demonstrate, the *Roe* Court hardly anticipated certain consequences of its sweeping decision. These include fetal experimentation and the creation of a commercial interest

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Mothers’ Search for Community,” 44 *Akron Law Review* 167 (2011).

<sup>268</sup> “Utah is Nation’s Fastest-Growing State,” U.S. Census Bureau Reports (Dec. 20, 2016), <https://www.census.gov/newsroom/press-releases/2016/cb16-214.html> [<https://perma.cc/6Q8Q-KV9H>]: “U.S. population grew by .7%” from July 2015 to July 2016). See also Janet Adamy & Paul Overberg, “Census Says U.S. Population Grew at Lowest Rate Since Great Depression This Year,” *Wall Street Journal* (Dec. 20, 2016) <https://www.wsj.com/articles/census-says-u-s-population-grew-at-lowest-rate-since-great-depression-this-year-1482262203>. For 2017, see Brady E. Hamilton et al., “Births: Provisional Data for 2017,” CDC 2 (May 2018) <https://www.cdc.gov/nchs/data/vsrr/report004.pdf> [<https://perma.cc/353S-HJZP>]: “The provisional total fertility rate (TFR) for the United States in 2017 was 1,764.5 births per 1,000 women, down 3% from the rate in 2016 (1,820.5) and the lowest TFR since 1978.... The TFR in 2017 was again below replacement – the level at which a given generation can exactly replace itself (2,100 births per 1,000 women). The rate has generally been below replacement since 1971....”

<sup>269</sup> The CDC Report of November, 2015 confirms the trend. Rachel K. Jones & Jenna Jerman, “Abortion Incidence and Service Availability in the United States, 2014,” 49 *Perspectives on Sexual & Reproductive Health* 17, 20 (2017): “This is the lowest rate since abortion was legalized nationally in 1973.”

<sup>270</sup> Steven H. Aden, “Driving Out Bad Medicine: How State Regulation Impacts the Supply and Demand of Abortion,” 8 *University of St. Thomas Journal of Law & Public Policy* 14, 19 (2013): “Since *Casey*, there has never been a close second to Planned Parenthood in market share for abortion.”

<sup>271</sup> See, e.g., Erika Bachiochi, “The Cost of ‘Choice’: Women Evaluate the Impact of Abortion,” *The Impact of Abortion*, ed. Erika Bachiochi, (2004), pp. 63-102; Clarke D. Forsythe, “The Medical Assumption at the Foundation of *Roe v. Wade* and Its Implications for Women’s Health,” 71 *Washington & Lee Law Review* 827, 852–69 (2014), citing dozens of international, peer-reviewed medical studies finding increased medical risks after abortion.

in fetal tissue from abortions.<sup>272</sup> The years after *Roe* saw an increase in infanticide.<sup>273</sup> Abortion has not been mainstreamed in American society or medicine.<sup>274</sup> Another unintended consequence of the Court's abortion doctrine has been the negative impact on women's physical security in childbearing. Pregnant women have experienced an increased rate of assault and battery from unmarried partners.<sup>275</sup> Women who pursue surrogacy have been subjected to contracts that require them to abort and, or to demands to abort.<sup>276</sup>

Finally, the *Casey* Court supposed that "the factual underpinnings" of *Roe* had not changed nor the Court's understanding of them.<sup>277</sup> Whose understanding is relevant in a democratic republic? The best indicator may be democratic action over the past four decades.

## VI. Changes in the Law that Have Eroded *Roe*

The legal disabilities that affected pregnant women before 1970, on which the *Roe* Court placed considerable emphasis, have been repealed. Employment discrimination against pregnant women is prohibited by federal statute and by most states.<sup>278</sup>

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<sup>272</sup> Jose L. Gonzalez, "The Legitimization of Fetal Tissue Transplantation Research Under *Roe v. Wade*," 34 *Creighton Law Review* 895 (2001); Gary L. Reback, Note, "Fetal Experimentation: Moral, Legal and Medical Implications," 26 *Stanford Law Review* 1191 (1974).

<sup>273</sup> Dellapenna, *supra* n.113 at 122-24 nn.529-46 (2006); Clarke D. Forsythe & Stephen B. Presser, "The Tragic Failure of *Roe v. Wade*: Why Abortion Should Be Returned to the States," 10 *Texas Review of Law & Policy* 85 (2005).

<sup>274</sup> David M. Smolin, "Cultural and Technological Obstacles to the Mainstreaming of Abortion," 13 *St. Louis University Public Law Review* 261 (1993).

<sup>275</sup> Clarke D. Forsythe & Stephen B. Presser, "The Tragic Failure of *Roe v. Wade*: Why Abortion Should Be Returned to the States," 10 *Texas Review of Law & Policy* 85, 100 (2005).

<sup>276</sup> See, e.g., *Cook v Harding*, 190 F. Supp. 3d 921 (C.D. Cal. 2016), donor father requested surrogate mother "reduce the pregnancy by one fetus, citing their surrogacy agreement's 'Selective Reduction' clause," *aff'd* *Cook v. Harding*, No. 16-55968 (9th Cir. Jan. 12, 2018).

<sup>277</sup> *Casey*, 505 U.S. at 864.

<sup>278</sup> Nat'l Conference of State Legislatures, "State Employment-Related Discrimination Statutes," NCSL (2015) <http://www.ncsl.org/documents/employ/Discrimination-Chart-2015.pdf> [<https://perma.cc/HA4Z-AAKX>] (citing 40 states). See also *Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338, 1367 (2015) (Kennedy, J., dissenting): "Although much progress has been made in recent decades and many employers have voluntarily adopted policies designed to recruit, accommodate, and



Women's rights have expanded since the 1960s due to the protections accorded them by anti-discrimination statutes, like Title VII of the Civil Rights Act, the Pregnancy Discrimination Act and a myriad of state civil rights and human rights statutes, and judicial interpretations of these.<sup>279</sup> All of these are independent of *Roe*.

"Safe Haven" laws have been enacted in all fifty states and the District of Columbia, allowing a woman to leave her newborn at a safe location.<sup>280</sup> The Family and Medical Leave Act of 1993 has altered the situation for maternity leave in America.<sup>281</sup>

The Court in *Roe* thrust itself into the middle of a matrix of long-standing legal rules protecting prenatal life and newborns in a way that arbitrarily disrupted surrounding areas of law. The law's protection of human life, exemplified in homicide law, goes back at least eight centuries in Anglo-American law. Legal protection of human life against abortion was considerable before *Roe*, more than the Court admitted in *Roe*, in areas of tort, criminal, property, and equity law.

Despite *Roe*, states have expanded legal protection for the unborn child, in many states *from conception*. *Roe* limited what the states could do to protect fetal life in the context of abortion, but *Roe* said nothing about state protection of fetal life outside the context of abortion, in the areas of tort, criminal, property, or equity law.<sup>282</sup> The states have increasingly isolated *Roe* as an anomaly in the law's protection of prenatal life. Virtually all of the states now have prenatal injury laws that recognize the unborn child as an independent human being. At least thirty-eight states now have fetal homicide laws, and

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retain employees who are pregnant or have young children..., pregnant employees continue to be disadvantaged – and often discriminated against – in the workplace." (citation omitted)).

<sup>279</sup> Paul Benjamin B. Linton, "Planned Parenthood v. Casey: The Flight from Reason in the Supreme Court," 13 *St. Louis University Public Law Review* 15, 43-45 (1993); Paige C. Cunningham & Clarke D. Forsythe, "Is Abortion the 'First Right' for Women? Some Consequences of Legal Abortion" in *Abortion, Medicine & Law*, ed. J. Douglas Butler & David F. Walbert, 4th ed. (1992), pp. 100, 154.

<sup>280</sup> Lynne Marie Kohm, "Roe's Effect on Family Law," 71 *Washington & Lee Law Review* 1339, 1354 n.58 (2014) (citing all fifty states' and the District's safe haven laws).

<sup>281</sup> Family Medical Leave Act (FMLA) of 1993, Pub. L. 103-3; 29 U.S.C. § 2601 (2012). See *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 724-25 (2003).

<sup>282</sup> Cf. *Webster v. Reprod. Health Services*, 492 U.S. 490, 506, recognizing that "[s]tate law has offered protections to unborn children in tort and probate law...."

thirty states have fetal homicide laws that extend protection from conception. At least thirty-six states now have wrongful death laws that protect the unborn child, and at least ten extend protection from conception. The viability rule has been expressly rejected by most states in the areas of prenatal injury law and in the area of fetal homicide, and it has been increasingly rejected in the area of wrongful death law.<sup>283</sup> And the states have moved ahead with legal protection of fetal life to a greater degree, creating a stark contrast between the Court's abortion doctrine and state protection for fetal life in other areas of American life.<sup>284</sup> *Roe* has become increasingly at odds with state tort law's treatment of the unborn child, with state criminal law's treatment of the unborn child, with limits placed on abortion by the states. This contradiction in *Roe*, and the subsequent developments in state and federal law, have created deep-seated incoherence between abortion law and all other areas of law affecting prenatal protection.

*Roe v. Wade* has not been adopted by the majority of states. Less than a dozen states have codified *Roe* expressly or maintained broad legalization by statute.<sup>285</sup> Yet, some have done so in anticipation that *Roe* will be overturned, showing decreasing reliance and the ability of states to enact abortion access by statute.<sup>286</sup>

Conversely, a growing number of states have, year after year, adopted stronger and stronger limits on abortion, consciously limited, in turn, by the federal courts. There are numerous ways in which the states discourage or limit abortion through regulations, partial prohibitions, and limits on public funding. Numerous states elected to opt-out of the abortion provisions of the Affordable Care Act: In March 2015, for example, Arizona became the twenty-fifth state to ban most abortion coverage on health care exchanges.<sup>287</sup>

Numerous federal statutes have been enacted to address the unintended

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<sup>283</sup> *Hamilton v. Scott*, 97 So. 3d 728, 735 (Ala. 2012) (applying state's wrongful death law from conception).

<sup>284</sup> See Paul Benjamin Linton, "The Legal Status of the Unborn Child under State Law," 6 *University of St. Thomas Journal of Law & Public Policy* 141, 141-43 (2012).

<sup>285</sup> Paul Benjamin Linton, "The Legal Status of Abortion in the States if *Roe v. Wade* Is Overruled," 27 *Issues in Law & Medicine* 181 (2012).

<sup>286</sup> E.g., An Act Concerning Abortion, Pub. Act No. 100-0538, 2017 Ill. Laws. Illinois (HB 40, signed September 28, 2017).

<sup>287</sup> Caitlin Owens, "Abortion Remains Contentious under Obamacare," *The Atlantic* (Apr. 1, 2015), <https://www.theatlantic.com/politics/archive/2015/04/abortion-remains-contentious-under-obamacare/452133/> [<https://perma.cc/9UP5-UPAV>].

consequences of *Roe*. In 2002, Congress passed the Born Alive Infant Protection Act (BAIPA), by a vote of 98-0 in the U.S. Senate. In 2003, Congress enacted the Partial Birth Abortion Ban Act (PBABA).

These acts by elected representatives, accountable to the people at regular elections, are the most reliable means to determine whether the assumptions underlying *Roe* have come to be understood *by the people* differently.<sup>288</sup> As reflected in the democratic acts of elected representatives, over four decades, at the state and federal level, the people have supported increasing limits on abortion that contradict what *Roe* in fact enacted.

*Roe* has not been followed internationally. The United States is one of only four nations, of 195 around the world, which allows abortion for any reason after fetal viability, and one of only seven nations that allows abortion after twenty weeks.<sup>289</sup> This puts the Court at odds with both international law and domestic public opinion.

Judicial review is inherently disruptive, but never more so than when it is untethered from the Constitutional text and repeatedly collides, over decades, with majority public opinion. This democratic action by Congress and the states make clear that this Court can never settle the abortion issue.

## VII. Reliance Interests

In the past, when we have examined *stare decisis* in the commercial context, we have looked at “reliance interests,” the extent to which individuals, organizations, society or other stakeholders have relied on the precedent, to what extent they have relied, and with what detriment if the precedent is overturned.<sup>290</sup>

In *Casey*, the Court abandoned *Roe*’s historical rationale for the abortion right and adopted a reliance interest rationale for retaining the abortion right – that women have come to rely on abortion as a back-up to failed contraception:

[F]or two decades of economic and social developments, people have organized

<sup>288</sup> Cf. *Planned Parenthood v. Casey*, 505 U.S. 833, 864 (1992).

<sup>289</sup> Randy Beck, “*Gonzales, Casey, and the Viability Rule*,” 103 *Northwestern University Law Review* 249, 261-65 (2009); Center. for Reproductive Rights, *The World’s Abortion Laws* 1-2 (2009).

<sup>290</sup> *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009); *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356 (1953) (emphasizing the reliance interests in precedent); *Janus v. AFSCME, Council 31*, 2018 U.S. Lexis 4028 (U.S. June 27, 2018).

intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.<sup>291</sup>

*Casey* was a unique example of the Court emphasizing reliance interests in the non-commercial context.<sup>292</sup>

There are several problems with the *Casey* Court's emphasis on reliance. First, the notion that women have "ordered their thinking and living" around abortion was not documented in *Casey* or derived from the record in the case.<sup>293</sup> Just as there was no record of evidence in *Roe* for its rationale for the abortion "right," there was no record of evidence in *Casey* for its switch to "reliance interests" as the rationale for keeping *Roe*. To support reliance – this fundamental shift, after twenty years of *Roe v. Wade*, from an historical foundation to a sociological foundation – the *Casey* Court offered nothing in the case record, but merely one citation to two pages in one book published in 1990, Rosalind Petchesky's *Abortion and Woman's Choice*.<sup>294</sup>

Second, the *Casey* Court never connected women's social or economic advancement to *abortion*. Contraception is more ubiquitous and widely used by individuals. There are more methods. More money is spent on contraception than abortion. Contraception is more publicly-funded than abortion. The Court never demonstrated that women rely on abortion more than contraception, never demonstrated that abortion allows more "control" than contraception. If there is any reliance, it would seem there is much more on contraception than abortion. The *Casey* Court simply confused abortion (for which there is little evidence of reliance among the general population) with contraception (for which there is much more evidence of reliance).

Third, the *Casey* Court assumed, erroneously, that overruling *Roe* would immediately make abortion illegal.<sup>295</sup> As was made clear by briefs filed in

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<sup>291</sup> 505 U.S. at 856.

<sup>292</sup> Powe, *supra* n.59 at 2095: "*Roe* was deemed that rarest of situations where reliance was found outside a commercial context."

<sup>293</sup> *Casey*, 505 U.S. at 856.

<sup>294</sup> 505 U.S. at 856. Cf. *McCorvey v. Hill*, 385 F.3d 846 (5th Cir. 2004) (Jones, J., concurring), noting courts cannot consider evidence of impact of abortion on women unless the Court changes the standard of review or invites such evidence, cert. denied, 543 U.S. 1154 (2005).

<sup>295</sup> 505 U.S. at 856, referring to "any sudden restoration of state authority to ban

*Casey*, it was false then, and it remains false today. Overturning *Roe* will not return the country to the *status quo ante*. Few states have enforceable prohibitions on the books, and many large, populous states, like California and New York, will keep it legal for the foreseeable future.<sup>296</sup> Reliance interests are weakened by the fact that the overturning of *Roe* would *not* lead to immediate prohibition of abortion in many, if any, states. By overturning *Roe*, few if any state prohibitions will come back into effect immediately. Most states have repealed their abortion prohibitions since *Roe*. Some state courts have created their own versions of *Roe* under the state constitution.<sup>297</sup>

In those states with enforceable prohibitions still on the books, few have prohibitions before twenty weeks of pregnancy. Approximately twenty-one states have prohibitions at twenty weeks. Abortion will be legal through the twentieth week of gestation, unless the states enact new prohibitions. Thus, there will be little immediate change in state law.<sup>298</sup> The states will clearly adopt a pluralistic approach to abortion policy.

Fourth, the Court conceded that reliance was limited because individuals can change their behavior based on a change in the law.<sup>299</sup> In addition, individuals may rely on contraception, or their local pharmacy, or monetary means, or state law, or the local market, but there is little evidence they rely on this Court's decision in *Roe*. There is little evidence – in terms of public opinion polls or state legislation or public actions since *Roe* – that a majority of Americans have relied on this Court retaining a right to abortion for any reason, at any time of pregnancy, or on the viability rule.

The consistent practice of three-fifths of our states to adopt the strongest possible limits on abortion contradicts the notion that the sweeping result in *Roe* has “become part of our national culture,”<sup>300</sup> or that the viability rule has engendered reliance interests,<sup>301</sup> or that abortion practice has “become part of

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abortions.”

<sup>296</sup> Linton, *supra* n.286.

<sup>297</sup> See generally Paul Benjamin Linton, *Abortion under State Constitutions* (2d ed. 2012).

<sup>298</sup> And any state that might act could adopt an effective date for the new legislation that is months in the future.

<sup>299</sup> 505 U.S. at 856: “[R]eproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions.”

<sup>300</sup> *Dickerson v. United States*, 530 U.S. 428, 443–44 (2000) (reaffirming *Miranda*).

<sup>301</sup> *Quill Corp. v. North Dakota*, 504 U.S. 298, 317 (1992).

the basic framework of a sizeable industry.”<sup>302</sup>

Without a record of evidence, the Court in *Roe* nevertheless put some emphasis on assumptions about the economic and social status of women and the impact of pregnancy and abortion policies. Much has changed in the United States since 1973 due to social practices and state and federal legislation. These social and legal changes will continue even if *Roe* is overturned.

The reliance issue when it comes to abortion, however, begs several questions that goes to the heart of *Roe*. Should there be reliance on abortion? Is there reliance on the Court or on the continued legality of abortion by the states? Can courts accurately assess reliance? Should courts or legislatures in our constitutional system assess reliance?

The Court assumed in *Casey* that women had come to rely upon abortion. Whether women rely upon abortion or not, or to what extent, is questionable, but the states are in a better position than this Court to decide whether that is so and how it should affect abortion policy. Whether abortion is good for women is strongly contested by the parties, but the States are in a better position than this Court to decide whether that is so and how it should affect abortion policy.

To the extent that these factors are policy reasons, voters and public officials can take them into consideration in their determination of future public policy in their state. And since *Roe*, there has been a significant growth in the number of women legislators who will shape future abortion policy.<sup>303</sup> Because state actions since *Roe* have continually challenged the scope of *Roe*, reliance and public expectation is more reasonably placed in democratic practices at the state level – the work by the people’s representatives who are accountable to the people at regular elections.

Despite the difficulty of assessing reliance interests on the issue of abortion, some things are clear about today’s decision. First, our decision today is limited to *Roe* and its holding that there is a federal constitutional right to “terminate pregnancy.” Consequently, today’s decision does not change

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<sup>302</sup> Ibid. Cf. *Direct Mktg. Assn. v. Brohl*, 814 F.3d 1129, 1151 (10th Cir. 2016) (Gorsuch, J., concurring): “[W]hile some precedential islands manage to survive indefinitely even when surrounded by a sea of contrary law, a good many others disappear when reliance interests never form around them or erode overtime.”

<sup>303</sup> *Women in State Legislatures 2018*, CAWP, <http://www.cawp.rutgers.edu/women-state-legislature-2018> [https://perma.cc/U775-TS6B]: “Since 1971, the number of women serving in state legislatures has more than quintupled.”

*Griswold v. Connecticut*,<sup>304</sup> or *Eisenstadt v. Baird*,<sup>305</sup> which announced a constitutional right to contraception.

Many will be concerned that overruling *Roe*, however strong the legal case, will lead to social disruption. That might be the case if legal prohibitions were immediately enforceable, but the fact is that most states have no prohibitions on abortion before twenty weeks or viability.<sup>306</sup>

No individual or state can require a woman to become pregnant or mandate conception. Laws that criminalize rape are in effect and enforced in every state. Likewise, there should be no concern that overturning *Roe* will result in *coerced* abortion. The problem of coerced abortion by private parties was not solved by *Roe*; in fact, it has been a problem while *Roe* has been in place over the past forty-five years, and numerous states have passed laws against coerced abortion.<sup>307</sup> Coerced abortion – by governmental officials or private individuals – would be a homicide of the unborn child by the perpetrator in many, if not all, states.

Overruling the first holding in *Roe* does not mean that abortion is prohibited. This Court does not enact criminal legislation. The authority that the states possessed before *Roe* and *Doe* to allow, regulate, limit or prohibit abortion may be resumed by the states, depending on decisions the states themselves have made in the interim.<sup>308</sup> It is for the states to decide the abortion

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<sup>304</sup> 381 U.S. 479 (1965).

<sup>305</sup> 405 U.S. 438 (1972).

<sup>306</sup> Linton, *supra* n.286.

<sup>307</sup> Ala. Code: § 26-21-3 (2018); Ariz. Rev. Stat. § 36-2153 (2017); Ark. Code Ann. § 20-16-1705 (West 2017); Del. Code Ann. tit. 24, § 1786 (2018) (only protects minors); Idaho Code Ann. § 18-615 (West 2018); Kan. Stat. Ann. § 65-6710 (West 2017); La. Stat. Ann. § 40:1061.15 (2017); Mich. Comp. Laws Ann. § 750.213a (West 2018); Minn. Stat. Ann. § 145.925 (West 2017) involving people receiving state aid; Mo. Ann. Stat. § 188.027.1 (West 2017); Neb. Rev. Stat. Ann. § 71-6902.02 (West 2017); G.S. N.C. Gen. Stat. Ann. §§ 90-21.90, G.S. 90-21.91 (West 2018); N.D. Cent. Code Ann. § 12.1-41-21 (West 2017); Ohio Rev. Code Ann. §§ 2919.12, 2317.56, 3701.791 (West 2018); Okla. Stat. Ann. tit. 63, § 1-7387.24 (West 2018); 18 Pa. Stat. and Cons. Stat. Ann. § 3205 (West 2018); S.D. Codified Laws § 34-23A-56 (2018); Tenn. Code Ann. § 39-15-202 (West 2017); Tex. Health & Safety Code Ann. § 171.012 (West 2017) (involving informed consent); Tex. Ins. Code Ann. § 546.053 (West 2017) (forbids using genetic information to coerce or compel a pregnant woman to have an induced abortion); Utah Code Ann. § 76-7-312 (West 2017); Wis. Stat. Ann. § 253.10 (West 2017).

<sup>308</sup> Cf. *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997): “Our holding permits this debate to continue, as it should in a democratic society.”

issue.

When we overturned *Plessy v. Ferguson* and its “separate but equal” rule in *Brown v. Board of Education* in 1954, significant disruption of certain social practices followed. State school policy was significantly changed. Litigation ensued for decades. State policy was forced to change. Federal legal change was instigated. Much of this was foreseeable and predicted. And yet, we overturned *Plessy* after fifty-eight years because it conflicted with the text and original understanding of the Equal Protection Clause of the Fourteenth Amendment.

We think that overruling *Roe*, instead of retaining it, will *reduce* disruption over time, and *better promote* consistency, stability, and judicial integrity. It will do so by allowing majority public opinion to be more accurately reflected in public policy, enacted at the state and local level by representatives accountable to the people at regular elections, without the disruption caused by federal court invalidation of public policies. Hundreds of times over the past four decades, states have passed abortion legislation that state legislators could have reasonably believed, in good faith, to be consistent with *Roe v. Wade* to protect fetal life and maternal health, only to have those laws quickly enjoined by a federal court, and after years and years of costly litigation reached a final judgment which the public may or may not recall or understand. Allowing state laws that accord with majority public opinion will reduce the disruption of the past four decades.<sup>309</sup>

### Conclusion

*Roe* stands alone in the law. It is about “terminating pregnancy” and that alone. It does not deal with other medical procedures, or with other reproductive technologies, or with other gynecological procedures.

*Roe* has not fostered other areas of protection for women’s rights. That has been done by a growing body of state and federal legislation that is independent of *Roe* and *Doe*. These laws will continue despite the overruling of *Roe*.

On virtually every factor of *stare decisis* that we have considered, the factors strongly weigh in favor of overturning *Roe v. Wade* and *Doe v. Bolton*

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<sup>309</sup> Cf. *Mapp v. Ohio*, 367 U.S. 643, 666 (1961) (Black, J., concurring): “[T]he continued existence of mutually inconsistent precedents together with the Court’s inability to settle upon a [standard for determining when illegally seized evidence could not be admitted in state prosecutions] left the situation at least as uncertain as it had been before.”



and returning the abortion issue to the democratic process, where virtually all other public health issues are decided, and where the abortion issue had been decided since colonial times. The only reasons for retaining *Roe* are policy reasons, and the policy reasons are as accessible to the American people, and to members of Congress or state legislators, as they are to judges.

However, the administration of public health has never been within the province or competence of judges. Overruling *Roe* recognizes this Court's inability to monitor public health conditions, trends, and crises, and recognizes the traditional authority and greater capacity of the states to regulate the public health and to legislate to protect human life.

Our constitution established a system of dual sovereignty.<sup>310</sup> To the extent we may underestimate majoritarian opinion by overruling *Roe*, majoritarian solutions are possible through a constitutional amendment or through not passing limits and allowing abortion, to one degree or another. If our estimation of the reliance interests, or the disruption costs of overruling, are mistaken, the states too can take that into consideration in their formulation of future policy. The policy reasons that could be offered in support of allowing abortion are as familiar to the public, and to legislators, as to us, and different states can identify different limits. The states can preserve the sweeping outcome of *Roe*, sustain current limits, lift current limits, or enact greater limits. And they can do this with accountability to the people through regular elections. Resolving such policy conflicts is a democratic question that state courts and state legislatures commonly address.<sup>311</sup>

*Roe* and *Doe* have been subjected to repeated, frequent, intense and comprehensive criticism that they were inconsistent with the original public

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<sup>310</sup> *Printz v. United States*, 521 U.S. 898 (1997).

<sup>311</sup> See e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in the judgment in part, dissenting in part): "The States may, if they wish, permit abortion on demand, but the Constitution does not *require* them to do so. The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting"; *Stenberg v. Carhart*, 530 U.S. 914, 956 (2000) (Scalia, J., dissenting): "If only for the sake of its own preservation, the Court should return this matter to the people – where the Constitution, by its silence on the subject, left it – and let *them* decide, State by State, whether this practice should be allowed"; *ibid.* at 980 (Thomas, J., dissenting): "Nothing in our Federal Constitution deprives the people of this country of the right to determine whether the consequences of abortion to the fetus and to society outweigh the burden of an unwanted pregnancy on the mother. Although a State *may* permit abortion, nothing in the Constitution dictates that a State *must* do so."

meaning of our Constitution. Because our experience applying *Roe* shows that retaining *Roe* has not promoted stability, predictability, or consistency that are supposedly furthered by *stare decisis*, we conclude that *stare decisis* does not require retaining *Roe* and *Doe*. *Roe v. Wade* and *Doe v. Bolton* are accordingly hereby overruled.

#### Appendix A: Federal Judicial Opinions Addressing Abortion

*Planned Parenthood of Indiana & Kentucky v. Comm’r of the Indiana State Dept. of Health*, 2018 U.S. App. LEXIS 9883, at \*29-30 (7th Cir. April 19, 2018) (Manion, J., concurring in part, dissenting in part): “[A]bortion is now a more untouchable right than even the freedom of speech. The doctrinal reason for this is that *Casey*’s “undue burden” standard is not a means-ends test, but a pure effects test. The key quote from the *Casey* joint opinion reveals this: a regulation of abortion is invalid if it ‘has the *purpose or effect* of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.’ This means that even a regulation narrowly tailored to serve a compelling state interest is invalid if it prohibits any abortions before viability.” (quoting, with emphasis, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877).

*Isaacson v. Horne*, 716 F.3d 1213, 1233 (9th Cir. 2013), (Kleinfeld, J., concurring): “Viability is the ‘critical fact’ that controls constitutionality. That is an odd rule, because viability changes as medicine changes. As *Planned Parenthood v. Casey* noted, between *Roe v. Wade* in 1973 and the time *Casey* was decided in 1992, viability dropped from 28 weeks to 23 or 24 weeks, because medical science became more effective at preserving the lives of premature babies.”

*Richmond Medical Center for Women v. Herring*, 570 F.3d 165, 181 (4th Cir. 2009) (Wilkinson, J., concurring): “[M]atters of such medical complexity and moral tension as partial birth abortion should not be resolved by the courts, with no semblance of sanction from the Constitution they purport to interpret. Indeed, the sheer mass of medical detail summoned in this case has led us far beyond the ambit of our own professional competence.”

*Nat’l Abortion Federation v. Gonzales*, 437 F.3d 278, 290-96 (2d Cir. 2006) (Walker, J., concurring): “I can think of no other field of law that has been subject to such sweeping constitutionalization as the field of abortion.

Under the Supreme Court's current jurisprudence, the legislature is all but foreclosed from setting policy regulating the practice; instead, federal courts must give their constitutional blessing to nearly every increment of social regulation that touches upon abortion – from gathering statistics about its frequency to establishing informed-consent standards that govern its use.... In the end, I cannot escape the conclusion that, in these abortion cases, the federal courts have been transformed into a sort of super regulatory agency—a role for which courts are institutionally ill-suited and one that is divorced from accepted norms of constitutional adjudication.”

*McCorvey v. Hill*, 385 F.3d 846, 852 (5th Cir. 2004) (Jones, J., concurring): “In sum, if courts were to delve into the facts underlying *Roe*'s balancing scheme with present-day knowledge, they might conclude that the woman's “choice” is far more risky and less beneficial, and the child's sentience far more advanced, than the *Roe* Court knew. This is not to say whether *McCorvey* would prevail on the merits of persuading the Supreme Court to reconsider the facts that motivated its decision in *Roe*. But the problem inherent in the Court's decision to constitutionalize abortion policy is that, unless it creates another exception to the mootness doctrine, the Court will never be able to examine its factual assumptions on a record made in court. Legislatures will not pass laws that challenge the trimester ruling adopted in *Roe* (and retooled as the “undue burden” test in *Casey*. No “live” controversy will arise concerning this framework. Consequently, I cannot conceive of any judicial forum in which *McCorvey*'s evidence could be aired. At the same time, because the Court's rulings have rendered basic abortion policy beyond the power of our legislative bodies, the arms of representative government may not meaningfully debate *McCorvey*'s evidence. The perverse result of the Court's having determined through constitutional adjudication this fundamental social policy, which affects over a million women and unborn babies each year, is that the facts no longer matter” (citation omitted).

*Women's Medical Professional Corp. v. Taft*, 353 F.3d 436, 449 (6th Cir. 2003) (Ryan, J.): “And finally, we suffer from a serious institutional disability in a case in which vitally important issues turn on medical facts, yet the record consists mainly of the conflicting opinions of highly interested, even ideologically motivated, experts. All these considerations compel us, if possible, to interpret Ohio's maternal health exception in a manner that will ‘avoid constitutional difficulties’” (citation omitted).

*A Woman's Choice-East Side Women's Clinic v. Newman*, 305 F.3d 684,

687 (7th Cir. 2002) (Easterbrook, J.): “When the Justices themselves disregard rather than overrule a decision—as the majority did in *Stenberg*, and the plurality did in *Casey* – they put courts of appeals in a pickle. We cannot follow *Salerno* without departing from the approach taken in both *Stenberg* and *Casey*; yet we cannot disregard *Salerno* without departing from the principle that only an express overruling relieves an inferior court of the duty to follow decisions on the books.”

*Planned Parenthood of Rocky Mountains Services Corp. v. Owens*, 287 F.3d 910, 931 (10th Cir. 2002) (Baldock, J., dissenting): “Justice White accurately predicted the future a quarter century ago: ‘In *Roe v. Wade*...this Court recognized a right to an abortion free from state prohibition. The task of policing this limitation on state police power is and will be a difficult and continuing venture in substantive due process.’ True to Justice White’s words, state lawmakers continue to test the limits of *Roe* and courts continue to police those limits with no foreseeable end to the struggle” (citation omitted).

*Okpalobi v. Foster*, 190 F.3d 337, 354 (5th Cir. 1999) (Wiener, J. and Parker, J.): “The *Casey* Court provided little, if any, instruction regarding the type of inquiry lower courts should undertake to determine whether a regulation has the ‘purpose’ of imposing an undue burden on a woman’s right to seek an abortion.”

*Women’s Medical Prof. Corp. v. Voinovich*, 130 F.3d 187, 212 (6th Cir. 1997) (Boggs, J., dissenting): “The abortion area, of course, has been largely constitutionalized, as the Supreme Court has made clear in a line of decisions starting with *Roe* [cit. omit.]. Some choices, however, remain within the state’s legislative power. These choices have not always been well delineated by the Court....” (citation omitted); *ibid.* at. 218: “The post-*Casey* history of abortion litigation in the lower courts is reminiscent of the classic recurring football drama of Charlie Brown and Lucy in the *Peanuts* comic strip. Lucy repeatedly assures Charlie Brown that he can kick the football, if only this time he gets it just right. Charlie Brown keeps trying, but Lucy never fails to pull the ball away at the last moment. Here, our court’s judgment is that Ohio’s legislators, like poor Charlie Brown, have fallen flat on their backs. I doubt that the lawyers and litigants will ever stop this game. Perhaps the Supreme Court will do so.”

*United States v. Board of Educ. of City of Chicago*, 11 F.3d 668, 675 (7th Cir. 1993) (Cudahy, J., dissenting): “Where there truly is no federal issue involved, federal courts should stay out of local politics. As is often the case,

the federal court here stepped in after the political actors all but abdicated their responsibilities. Justice Ruth Bader Ginsburg, for example, has written that the ‘need for interventionist decisions’ by judges ‘would be reduced significantly if elected officials shouldered their responsibility’ for decision-making. She thus notes that the involvement of the federal courts in announcing a full-blown constitutionalized abortion right may have unduly interfered with a political process that might have otherwise worked out the solution to its own problems. Leaving the matter to the political actors “might have served to reduce rather than to fuel controversy” (citations omitted).

*Margaret S. v. Edwards*, 794 F.2d 994, 995 (5th Cir. 1986) (Higginbotham, J.): “It is no secret that the Supreme Court’s abortion jurisprudence has been subjected to exceptionally severe and sustained criticism”; *ibid.* at 996 n.3: “While we are unquestionably bound to obey the Supreme Court, we are not obliged to give expansive readings to a jurisprudence that the whole judicial world knows is swirling in uncertainty.”

*Cincinnati Women’s Services, Inc. v. Taft*, 466 F.Supp.2d 934, 941 (S.D. Ohio 2005) (Chief Judge Beckwith): “At this point, it is evident that *Casey* produces decisions that seem to be based more on intuition than application of a discernible legal standard. The need for more clarity is acute because, as Judge Boggs and others have noted, legislatures will continue to legislate in this area, pro-choice advocates will continue to challenge such legislation, and the federal courts will continue to be caught in the middle” (citation omitted).

*Women’s Medical Center of Providence, Inc. v. Roberts*, 530 F. Supp. 1136, 1143 n.5 (D.R.I. 1982) (Pettine, J.): “I agree with the Seventh Circuit that the concept of ‘undue burden’ used by the Supreme Court in analyzing some recent cases involving alleged restrictions on the right to an abortion causes some confusion regarding the standard to be applied in cases involving first trimester restrictions. The confusion appears to stem from attempts to reconcile the position taken by the Court in *Roe v. Wade*, which arguably holds that there are no compelling state interests that ever justify a state-imposed burden on the right to a first trimester abortion, with the Court’s position in *Danforth* that limited informed consent requirements may be imposed by the state during the first trimester, and with its position in *Maher v. Roe* and *Harris v. McRae* that the state may discourage indigents from exercising their right to an abortion by refusing to pay for the procedure.... Two approaches have emerged as lower federal courts have struggled with the line of Supreme Court abortion decisions” (citation omitted).