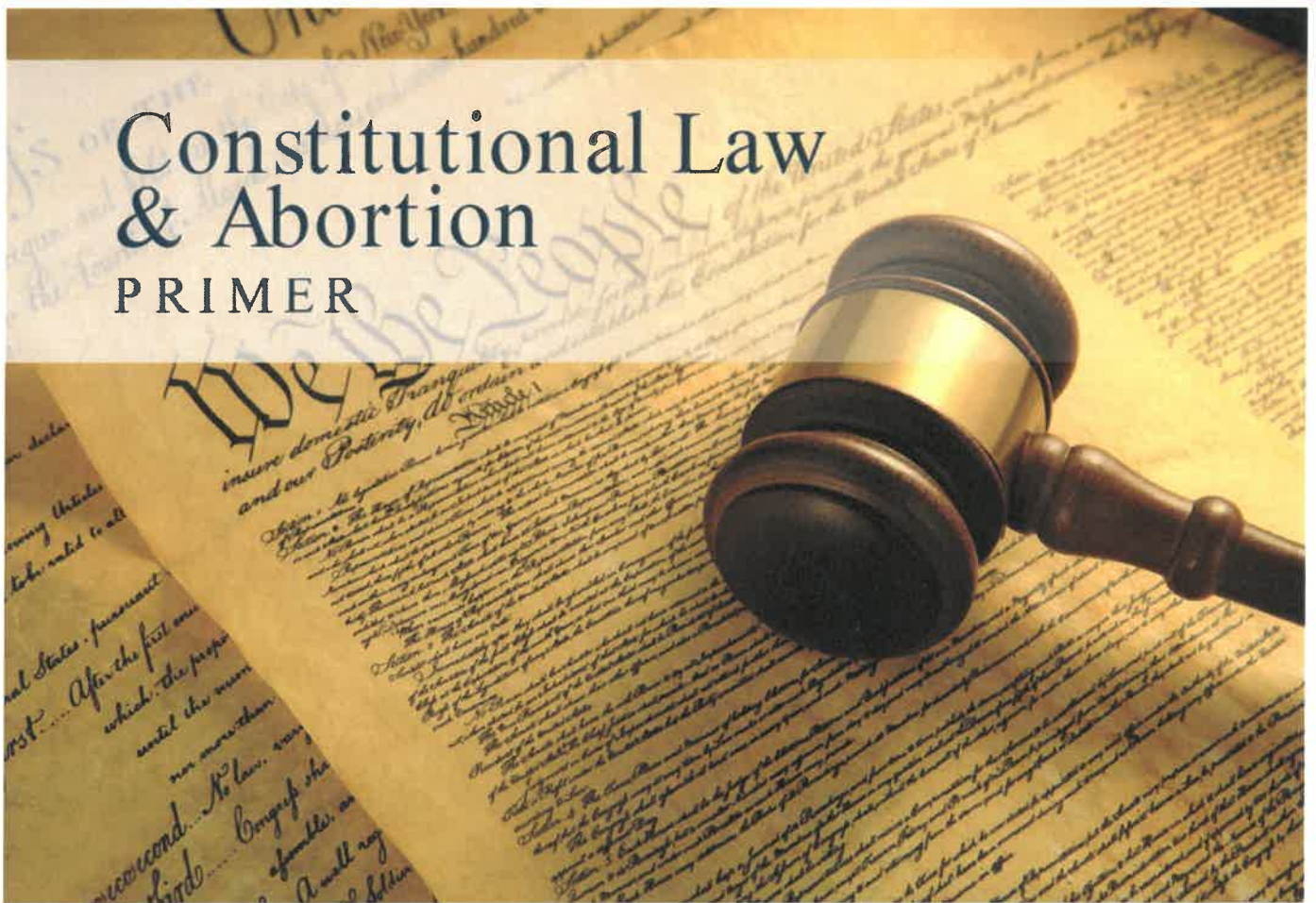




Constitutional Law & Abortion

PRIMER



**Constitutional Law
and
Abortion
Primer**

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Preface

Background

The law school environment—indeed the legal community at large—is often hostile to laws that protect the dignity of human life. Furthermore, it is often uninformed as to the evolution of the alleged “right to privacy” and the “right to abortion” in the United States. Most law school curricula fail to address adequately the important cases involving abortion and the issues they present. As future lawyers, judges, and legislators, you have the responsibility and the privilege to protect the most basic human right—the right to life.

Purpose

This Primer has two primary purposes. First, to fill in the gaps that might exist in your Constitutional Law coursework so as to provide you with a solid foundation to better understand and explore these topics throughout law school and as attorneys. The second purpose of this Primer is to help you stimulate a richer classroom discussion and dialogue with fellow students and professors. By asking questions based on what you read here, you can engage your professors and classmates in meaningful academic discourse that reaches beyond emotionally-based or ideological differences to legal theory and jurisprudence. As an advocate inside the classroom and within your law school community, you may reach many people. In the process, you will play a vital role in exposing future prosecutors, public defenders, law professors, politicians, policymakers, and judges to this significant, and largely misunderstood, area of law.

Uses

How your Chapter uses the Primer is up to you. At a minimum, your Chapter’s leaders should notify other members about this resource and how they can access it. One suggestion is to distribute copies of the Primer to your members to read. Then, meet to discuss the concepts and cases “book club style” before they are covered that semester in Constitutional Law. Keep the link (<http://www.aul.org/wp-content/uploads/2011/02/Constitutional-Law-and-Abortion-Primer.pdf>) on your laptop—you never know when the opportunity may arise in class discussion to reference a section. Use ideas or questions that arise as a basis for law review articles and future scholarship that will further develop this area of law. Regardless of how you implement it, after reading and discussing the Primer, members of your Chapter will enter the classroom and society better prepared to challenge false notions and to foster discussion about the law and abortion.

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I. Introduction

As Americans, we are privileged to have the world’s oldest and most successful written constitution. While the Supreme Court will sometimes err in its interpretation of the Constitution, Americans often complacently think that serious errors are eventually corrected. But are they? Two of the worst judicial errors in Supreme Court history took place on January 22, 1973, when the Supreme Court decided *Roe v. Wade*¹ and *Doe v. Bolton*.² The Supreme Court misconstrued fundamental rights, undermined our Democracy’s constitutional safeguards, and created a public health vacuum that has undermined women’s health and well-being for over three decades.

One of the foundational concepts of our Democracy, prescribed by our Constitution, is that the general lawmaking authority belongs to the legislative branch. Courts, in contrast, decide cases and controversies. They are limited to interpretation and application of those principles that can be derived either from constitutional and legislative language, or from the intent of lawmakers based on the history of their efforts. While judges have the responsibility to interpret and apply our nation’s Constitution and statutes, this does not give them license to implement their own personal opinions.

Abortion is an issue that should be discussed and resolved by the people’s elected representatives, as are other public health and social issues. In the late 1960s, an active, vibrant public debate over abortion was spreading across virtually all 50 states. However, the Supreme Court short-circuited it in 1973. *Roe* “constitutionalized” the abortion issue, thereby removing it from public debate and popular control.

Since *Roe*, the Supreme Court has entrenched itself into the “abortion law-making business.” Subsequent decisions involving the issue of abortion have created a series of court-enacted policy choices. As “abortion law” has developed, the language of Supreme Court opinions has resembled that of complex statutes or administrative regulations, specifying, often in minute detail, what our elected representatives may or may not do.

In this Primer, you will find an overview of how the “right to privacy” was “read into” the Constitution and the evolution of the alleged “right” to abortion, an analysis of the major cases from *Roe* to *Whole Women’s Health v. Hellerstedt*,³ and a discussion of why abortion is not a fundamental constitutional right. Appendix A of this Primer provides an annotated, critical bibliography of *Roe* and *Doe*, and Appendix B includes short summaries of additional Supreme Court cases involving abortion not covered in the Primer.

II. Setting the Groundwork for *Roe*: The Evolution of the Alleged “Right” to Abortion

¹ 410 U.S. 113 (1973).

² 410 U.S. 179 (1973).

³ 136 S.Ct. 2292 (2016).

The Supreme Court found that the Constitution protected a generalized “right to privacy” for the first time in history in *Griswold v. Connecticut*.⁴ In *Griswold*, the plaintiff was convicted of violating a Connecticut law that prohibited the use of contraceptives because she gave “information, instruction, and medical advice to married persons as to the means of preventing conception.”⁵ After the conviction was upheld by the Connecticut Supreme Court, the plaintiff appealed her conviction to the U.S. Supreme Court, arguing that the statute violated the Fourteenth Amendment, which states, “no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law...nor deny any person the equal protection of the laws.”⁶

The Supreme Court, by a vote of 7-2, held that the Connecticut law was unconstitutional and that it violated the “right to marital privacy.”⁷ Even though the Bill of Rights does not mention “privacy,” the Court stated that the Bill of Rights contains “specific guarantees,” which have “penumbras” and “emanations from those guarantees” that create “zones of privacy.”⁸ The Court said that the marital relationship lies within this “zone of privacy,” and a law which “seeks to achieve its goals by means having a maximum destructive impact upon that relationship” violates the “right to privacy” of “the marital relation.”⁹

The majority suggested that the Ninth Amendment, as well as the Fourteenth Amendment, can be used by the Court as authority to strike down state legislation that the Court believes violates “fundamental principles of liberty and justice,” or is “contrary to the traditions and collective conscience of our people.”¹⁰ The Ninth Amendment states: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”¹¹ However, as Justice Hugo Black stated in his dissent: “The Framers did not give this Court veto powers over lawmaking, [n]or does anything in the history of the Amendment offer any support for such a shocking doctrine.”¹²

Justice Black stated: “One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in [meaning].”¹³ He continued, “[M]erely using different words to claim the power to invalidate any legislative act which the judges find irrational, unreasonable, or offensive...require judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary.”¹⁴

⁴ 381 U.S. 479 (1965).

⁵ *Griswold*, 381 U.S. at 480.

⁶ U.S. CONST. amend. XIV, § 1.

⁷ *Griswold*, 381 U.S. at 487.

⁸ *Id.* at 485.

⁹ *Id.* at 499.

¹⁰ *Id.* at 493 n.4.

¹¹ U.S. CONST. amend. IX.

¹² *Griswold*, 381 U.S. at 519.

¹³ *Id.* at 509.

¹⁴ *Id.* at 512.

The dictum in Justice William Douglas' majority opinion was almost immediately seen as useful in a litigation strategy against state abortion laws (even with the specific limits and context of the holding in *Griswold*). This is because the dictum suggested an easily expandable and all-inclusive "right of privacy," purportedly lodged within the meaning of the Ninth Amendment and protected by the Fourteenth Amendment from infringement by the states.

The "Right to Privacy" Broadens

Subsequent decisions by the Supreme Court expanded the principles set forth in *Griswold*. In *Eisenstadt v. Baird*,¹⁵ the Court extended the "right of privacy" to apply to contraceptive decisions made by unmarried individuals.

Important dictum in Justice William Brennan's 4-3 opinion highlights the nature of the "right of privacy," and the extent to which *Eisenstadt* expanded the Court's narrower ruling in *Griswold*:

It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional make-up. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.¹⁶

Justice Brennan distributed the first draft of his *Eisenstadt* opinion (including this passage) on the same day as the first oral arguments took place in *Roe* and *Doe*. Justice Brennan intended his *Eisenstadt* opinion, given its timing, to bridge the gap between *Griswold* and *Roe*. "Justice Brennan included dictum in *Eisenstadt* (referring to a right to bear a child) while writing the opinion in anticipation...that Justice [Harry] Blackmun (or another Justice) could use the *Eisenstadt* dictum in writing an opinion in *Roe*."¹⁷ In an 11-page memo sent to Justice William Douglas prior to the *Roe* decision, Justice Brennan stated that the *Eisenstadt* draft will be useful in the abortion context: "Incidentally, *Eisenstadt* in its discussion of *Griswold* is helpful in addressing the abortion question. If you could find it possible to join my proposed Court opinion in *Eisenstadt*, in addition to filing a separate opinion, I believe that we would have a four-man majority." Thus, although *Eisenstadt* was decided on Equal Protection grounds, Justice Brennan's dictum expanding the "right to privacy" provided the groundwork that led to the Court's decision in *Roe*.

¹⁵ 405 U.S. 438 (1972).

¹⁶ *Id.* at 453 (emphasis in original).

¹⁷ Clarke D. Forsythe & Stephen B. Presser, *Restoring Self-Government on Abortion: A Federalism Amendment*, 10 TEX. REV. LAW & POL. 301, 316. See also EDWARD LAZARUS, CLOSED CHAMBERS 364-65 (1998): "Brennan's comments about the right to privacy [in *Eisenstadt*] were gratuitous dicta.... Brennan added the crucial 'bear or beget' language in *Eisenstadt* precisely because, while he was working on his *Eisenstadt* draft, the Court already was considering *Roe*. Brennan knew well the tactic of 'burying bones' - secreting language in one opinion to be dug up and put to use in another down the road.... And taking full advantage, Brennan slipped into *Eisenstadt* the tendentious statement explicitly linking privacy to the decision whether to have an abortion. As one clerk from that term recalled, 'We all saw that sentence, and we smiled about it. Everyone understood what that sentence was doing.' It was papering over holes in the doctrine."

III. Analysis of *Roe v. Wade* and *Doe v. Bolton*

A. *Roe v. Wade*: The “Right to Privacy” Expands

The Court’s majority opinion in *Roe* contains numerous historical and legal errors, omissions, and logical incongruities. Its analysis provides no legal foundation for the “right to abortion” it creates. The fact that *Roe* has been severely critiqued by both sides of the abortion debate¹⁸ underscores how weak the legal arguments are that the Court attempted to make, and validates the conclusion that *Roe* has no justification in law.¹⁹

In *Roe*, the Court, by a 7-2 vote, struck down a Texas law that prohibited abortion, except where necessary to preserve the life of the mother. The opinion, written by Justice Blackmun, held that the “right to privacy” (an implied right the Court found in the “penumbras” of the Fourteenth Amendment’s liberty interest in *Griswold*²⁰) includes a woman’s right to decide “whether or not to terminate her pregnancy.”²¹

In his dissent, Justice Byron White called the Court’s decision “an exercise of raw judicial power...an improvident and extravagant exercise of the power of [judicial review].”²² He said he found “nothing in the language or history of the Constitution to support the Court’s judgment. The Court simply fashions and announces a new constitutional right for pregnant mothers...”²³

Indeed, as Justice William Rehnquist noted in his dissent, in order to reach its erroneous decision, the Court had to find within the scope of the Fourteenth Amendment a “right” that was unknown to the drafters of the Amendment.²⁴ The English common law prohibited abortion when the child could reliably be determined to be alive, and the American colonies adopted that law. As early as 1821, the first state statute expressly addressing abortion was enacted by the Connecticut Legislature.²⁵ By the time of the Fourteenth Amendment’s adoption in 1868, there were at least 36 laws enacted by state or territorial legislatures prohibiting abortion. At the time the Fourteenth Amendment was adopted, there clearly was no question concerning the validity of these laws. This

¹⁸ See, e.g., Laurence H. Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 7 (1973) (stating “[o]ne of the most curious things about *Roe* is that, behind its own verbal smokescreen, the substantive judgment on which it rests is nowhere to be found.”); Benjamin Wittes, *Letting Go of Roe*, THE ATLANTIC MONTHLY, Jan/Feb 2005 (stating *Roe* “is a lousy opinion that disenfranchised millions of conservatives on an issue about which they care deeply.”); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 935-37 (1973) (stating “[w]hat is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the Framers’ thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation’s governmental structure . . .”).

¹⁹ *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 458 (1983) (O’Connor, J., dissenting).

²⁰ *Griswold*, 381 U.S. at 484.

²¹ *Roe*, 410 U.S. at 152-53.

²² *Doe*, 410 U.S. at 222.

²³ *Id.*

²⁴ *Roe*, 410 U.S. at 174.

²⁵ *Id.* at 174.

history reveals that the drafters never intended for the Fourteenth Amendment to deprive the states of the power to legislate with respect to abortion. General criminal law authority, whether homicide law or abortion law, was left to the states.

Nevertheless, the Court in *Roe* held that the Fourteenth Amendment’s “concept of personal liberty” was broad enough to include a woman’s “privacy,” which included her “right to abortion.”²⁶ In its discussion of this new-found “right,” the Court limited regulation to two state interests that it recognized: the “important interest” in protecting a pregnant woman’s health, and “still *another* important and legitimate interest in protecting the potentiality of human life.”²⁷ The Court then created a detailed “trimester system” to lay out when regulation of abortion may be permissible.²⁸ All of this was dictum, and—as the Justices’ papers show—consciously so.²⁹

Although the Court said that the state may regulate abortion during the second and third trimesters, the Court also stated that regulation may always be bypassed if the woman’s “health” is questioned.³⁰ The Court broadly defined “health” in *Doe* to include even the woman’s emotional “well-being” (see discussion of *Doe*, *infra*).³¹ In effect, therefore, *Roe* and *Doe* provide an unlimited “right to abortion” throughout all nine months of pregnancy because any state regulation must yield to *Doe*’s essentially limitless definition of “health.”

The Court in *Roe* also held the word “person” in the Fourteenth Amendment does not include the unborn; thus, the unborn lack any federal constitutionally-protected right to life.³² Even John Hart Ely, a pro-abortion scholar, noted that “after employing the most imaginative possible construction of the Fourteenth Amendment to find a right of abortion, the Court resorted to the most literalistic possible form of strict construction to avoid finding the unborn to be persons.”³³

B. The Companion Case: *Doe v. Bolton*

On the same day as the Court decided *Roe*, it also decided its companion case, *Doe v. Bolton*. The Court stated that *Roe* and *Doe* were to be “read together.”³⁴ In *Doe*, the Georgia law prohibited abortion except in the case of “grave, permanent, and irremediable mental or physical defect” in the fetus, “forcible or statutory rape,” or “serious and permanent injury” to the mother’s

²⁶ *Id.* at 153.

²⁷ *Roe*, 410 U.S. at 162 (emphasis in original).

²⁸ The “trimester system” is more “appropriate to a legislative judgment than to a judicial one.” Justice Rehnquist states in his dissent: “The decision here to break pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one partakes more of a judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment.” *Id.* at 173-74. The “trimester” system was later abandoned in *Casey* (see *infra*).

²⁹ See Randy Beck, *Self-Conscious Dicta: The Origins of Roe v. Wade’s Trimester Framework* (2010). UGA Legal Studies Research Paper No. 10-11. Available at SSRN: <http://ssrn.com/abstract=1615446>.

³⁰ *Roe*, 410 U.S. at 164.

³¹ *Doe*, 410 U.S. at 180.

³² *Roe*, 410 U.S. at 158.

³³ John Hart Ely, *supra* note 18 at 926.

³⁴ *Doe*, 410 U.S. at 165.

“health.”³⁵ The Georgia law also required that “two licensed physicians, based upon their separate personal medical examination of the woman,” must concur with the medical judgment of the abortionist before proceeding with the abortion.³⁶ The Court invalidated the law by a vote of 7-2 because it said the law violated the Fourteenth Amendment. (The dissents from *Roe* were also part of this case.)

Two significant propositions came from the Court’s decision in *Doe*. First, the *Doe* decision created an unlimited definition of maternal “health.” The Court wrote: “[T]he medical judgment may be exercised in the light of all factors – physical, emotional, psychological, familial, and the woman’s age – relevant to the well being of the patient. All these factors may relate to health.”³⁷ *Doe*’s definition of a woman’s health is so broad that there would never be a time when a woman could not find an abortionist (see *infra*) willing to perform an abortion to protect her “health.” Because of the *Doe* “health” definition, even after viability, any state prohibition of abortion must yield to a patient’s emotional “well-being,” which is delegated to the provider’s discretion.

Secondly, *Doe* held that only the abortionist need make the “medical judgment” that “an abortion is justified.”³⁸ The Court determined that requiring independent examinations of a woman by two additional licensed physicians “unduly restrict[s] the woman’s right of privacy,” and that the expertise of one doctor is “sufficient.”³⁹ (Since there is no requirement that this doctor be the woman’s personal physician, what this requirement means in actuality is that the “abortion doctor” can make the determination, despite the fact that he is financially interested in the decision whether to abort.)

In summary, because *Roe* authorized abortion for the “life or health” of the mother, and *Doe* defined a mother’s “health” without limit, no state could constitutionally prohibit abortion at any time during pregnancy, even after viability. The Supreme Court effectively made abortion-on-demand available through all nine months of pregnancy, and invalidated the abortion laws of all 50 states.

C. Why Justice Blackmun’s History in *Roe* is Wrong

Before laying out the specific holding in *Roe*, Justice Blackmun set forth a version of the history of abortion in an attempt to show that abortion had been generally-accepted, available, and not prohibited until the late nineteenth century. He viewed an historical discussion as essential to his conclusion that abortion should be recognized as a part of the “right to privacy” the Framers of the Fourteenth Amendment intended to protect.

Far from buttressing the Court’s majority opinion, Justice Blackmun’s history is full of inaccuracies and gaps. It provides a fabricated foundation for the “right to abortion” the Court

³⁵ *Id.* at 166.

³⁶ *Id.* at 182.

³⁷ *Doe*, 410 U.S. at 180.

³⁸ *Id.*

³⁹ *Id.* at 198-99.

claims to have found. Historical research available in 1973, and undertaken since then, repudiates virtually all of the Court's historical claims.⁴⁰

Justice Blackmun began by stating that the criminalization of abortion laws in the early twentieth century is “not of ancient or even of common-law origin.”⁴¹ He claimed they derived from statutory changes that took place in the latter half of the nineteenth century.⁴² Apart from remarking that the Persian Empire banned abortion, Justice Blackmun limited his survey of the ancient world to Greece and Rome, where he stated “abortion was practiced.”⁴³ Historian Martin Arbagi, however, recounts that ancient Greek and Roman temples contained inscriptions opposing abortion.⁴⁴ Justice Blackmun stated that “ancient religion did not bar abortion,” but failed to mention that abortion was condemned in the twelfth century B.C. by Assyrians, Hittites, early Hindus, Buddhists of India, and Indian law.⁴⁵

Although studies and reports were available to the Court, Justice Blackmun left a historical gap of more than a thousand years when he jumped from his discussion of ancient attitudes toward abortion to Anglo-American common law. During the period that he conveniently overlooked, the majority of the world, particularly those from Judeo-Christian roots, opposed abortion.⁴⁶ Of course some debate existed—and science was limited at the time—when it came to issues like the full humanity of the fetus or “ensoulment.” However, opposition to abortion, with few exceptions, was consistent.

Justice Blackmun very heavily relied on two articles by Professor Cyril Means⁴⁷ for three propositions—all of which were of central importance to the Court's general conclusion that “at

⁴⁰ See JOSEPH DELLAPENNA, *DISPELLING THE MYTHS OF ABORTION HISTORY* (2006); Robert Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 *FORDHAM L. REV.* 807 (1973); Robert Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 *CAL. L. REV.* 1250 (1975); James Witherspoon, *Reexamining Roe: Nineteenth Century Abortion Statutes and the Fourteenth Amendment*, 17 *ST. MARY'S L.J.* 29 (1985); Paul Benjamin Linton, *Planned Parenthood v. Casey: The Flight From Reason in the Supreme Court*, 13 *ST. LOUIS U. PUB. L. REV.* 15, 107-31 (1993) (This article, among other things, compiles 64 cases from 40 states demonstrating that the purpose of the nineteenth century state abortion prohibitions was to protect the life of the unborn child); Clarke D. Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms*, 21 *VAL. U.L. REV.* 563 (1987).

⁴¹ *Roe*, 410 U.S. at 129.

⁴² *Id.*

⁴³ *Id.* at 130.

⁴⁴ See Martin Arbagi, *Roe and the Hippocratic Oath*, in *ABORTION AND THE CONSTITUTION: REVERSING ROE V. WADE THROUGH THE COURTS*, 159-81 (1987); and S. KRASON & W. HOLLBERG, *THE LAW AND HISTORY OF ABORTION: THE SUPREME COURT REFUTED* (1984); and Special Project, *Survey of Abortion Law*, 1980 *ARIZ. ST. L.J.* 67, 77.

⁴⁵ Eugene Quay, *Justifiable Abortion—Medical and Legal Foundations* (Pt. 2), 49 *GEO. L.J.* 395 (1961), cited in *Roe*, 410 U.S. at 130 n.9.

⁴⁶ See Dennis J. Horan & Thomas J. Balch, *Roe v. Wade: No Justification in History, Law, or Logic*, in *ABORTION AND THE CONSTITUTION*, *supra* note 44 at 67.

⁴⁷ Cyril Means was general counsel to NARAL Pro-Choice America (formerly the National Association for the Repeal of Abortion Laws), when he wrote his first history article. See DELLAPENNA, *supra* note 40 at 14, 143. Means' two history articles were funded by the pro-abortion advocacy group, Association for the Study of Abortion (ASA). See DELLAPENNA, *supra* note 40 at 14, 143-44, 1004. Means developed this history as part of a deliberate strategy for overturning the abortion laws then in place in the American states. See DAVID J. GARROW, *LIBERTY & SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* at 300, 352, 356-57 (1st ed. 1994) and

common law, at the time of the adoption of our Constitution and throughout the major portion of the nineteenth century, abortion was viewed with less disfavor than under most American statutes currently in effect."⁴⁸

First, the Court claimed that abortion before quickening was "not an indictable offense,"⁴⁹ and that quickening was merely a theological concept about the origin of the soul.⁵⁰ Second, relying on Means, the Court believed that Sir Edward Coke's⁵¹ exposition of the common law was contradicted by two fourteenth century cases that Means cited, and concluded that it "now appear[s] doubtful that abortion was ever firmly established as a common-law crime" even after quickening.⁵² Third, relying on Means and others, the Court concluded that the purpose of the nineteenth century statutes was *only* to protect the health of women from dangerous abortions, and *not* to protect the life of the unborn child.⁵³ Means contended that "the sole historically demonstrable legislative purpose" behind abortion statutes was *the protection of the health of women*.⁵⁴ In reaching these conclusions, the Court, relying on the plaintiffs, assumed that no legislative history existed that described the purpose of these statutes.⁵⁵

Contrary to Justice Blackmun's historical presentation, however, the English common law prohibited abortion, and the American colonies adopted this common law.⁵⁶ The nineteenth century American statutes were intended to strengthen and broaden the common law prohibition of abortion.

Before the debate about abortion began in earnest in the 1960s, it was accepted by lawyers, both 'pro-life' and 'pro-choice,' that abortion had been prohibited by Anglo-American criminal law for 700 years and that the law's main, if not sole, purpose was protection of the fetus. In the 1950s Glanville Williams, the eminent Cambridge University law professor and vigorous pro-choice activist, explained the rationale of the anti-abortion legislation permeating the U.S. and England. The

DELLAPENNA, *supra* note 40 at 14-15, 143-144, 275-280. Justice Blackmun cited Means' two articles a total of seven times, and no other source on the history of abortion more than once. *See* Roe, 410 U.S. at 136-52, 158 n.54.

⁴⁸ Roe, 410 U.S. at 140.

⁴⁹ *Id.* at 132.

⁵⁰ *Id.* at 132 n.21 (citing Means, 133).

⁵¹ Chief Justice Sir Edward Coke was a sixteenth and seventeenth century jurist, who successfully led the fight to capture, for the common law courts, most of the jurisdiction exercised up to that time by the ecclesiastical courts. In his *Institutes*, he said that, while not "murder," abortion of a woman "quick with childe" was a "great misprision." *See* EDWARD COKE, *THIRD INSTITUTE*, 50.

⁵² Roe, 410 U.S. at 135, 136.

⁵³ *Id.* at 151 n.47 (citing Means).

⁵⁴ Cyril Means, *The Law of New York Concerning Abortion and the Status of the Fetus, 1664-1968: A Case of Cessation of Constitutionality* (pt. 1), 14 N.Y.L.F. 411, 418-428 (1968).

⁵⁵ Roe, 410 U.S. at 151.

⁵⁶ *See* DELLAPENNA, *supra* note 40 at 211ff. *See also* JOHN KEOWN, *ABORTION, DOCTORS, AND THE LAW: SOME ASPECTS OF THE LEGAL REGULATION OF ABORTION IN ENGLAND FROM 1803 TO 1982* (1988) (John Keown adduces a mountain of evidence from legislative records, judicial opinions, speeches, medical and jurisprudential textbooks, and other sources to show that a concern for the fetus was central both to the common law prohibitions and to the nineteenth century British statutes.).

fetus, he wrote, ‘is a human life to be protected by the criminal law from the moment when the ovum is fertilized.’⁵⁷

The common law of abortion and the nineteenth century state statutes thus treated the unborn child as a human being and were *intended* to protect the unborn child as such. The fact that pregnancies may fail from natural causes, just as people die from disease, does not undermine the criminal law’s authority to prohibit the *intentional* taking of one human life by another. That was the purpose of abortion law as it is of homicide law.

Furthermore, prior to the point at which science gained an accurate understanding of fertilization in the nineteenth century, scientists and contemporaneous jurists supposed that human life commenced at “formation,” “animation,” or “quickening.”⁵⁸ “Abortion was seen as unquestionably homicidal after the gestational point at which, in light of the science of the time, human life was finally understood to be present.”⁵⁹

Justice Blackmun gave three reasons to support his notion that the laws were enacted to protect maternal health and not the unborn child, all of which have subsequently been refuted. First, citing only one New Jersey decision, he said: “The few state courts called upon to interpret their laws in the late nineteenth and early twentieth century did focus on the state’s interests in protecting the woman’s health rather than in preserving the embryo and fetus.”⁶⁰ Directly contradicting Justice Blackmun, one scholar compiled 64 cases from 40 states demonstrating that the purpose of the nineteenth century state abortion prohibitions was to protect the life of the unborn child.⁶¹

Second, Justice Blackmun argued: “In many States...by statute or judicial interpretation, the pregnant woman herself could not be prosecuted for self-abortion or for cooperating in an abortion performed upon her by another.”⁶² He ignored, however, the lessons of the common law and of effective law enforcement in the nineteenth and twentieth centuries. Effective law enforcement measures resulted in treating women as a second victim of abortion, and not charging or prosecuting women as a principal, accomplice, or conspirator. As Professor Joseph Dellapenna points out:

The difficulties of proving abortion without the woman as a cooperative witness seems often to elude modern observers of the abortion debate...Such arguments seem wholly ignorant of the long history underlying this rule, wholly unaware of the need for corroborating testimony or of the long and fact-based tradition of abortion as a crime against women....Paternalistic or not, the tradition of not treating the woman undergoing an abortion (whether self-induced or otherwise) as a criminal does not contradict the desire to protect the life of the fetus. In fact, by

⁵⁷ John Keown, *Abortion Distortion: A Review of Dispelling the Myths of Abortion History*, 35 J.L. MED. & ETHICS 325 (2007).

⁵⁸ See ABORTION AND THE CONSTITUTION, *supra* notes 44 and 45 at 61.

⁵⁹ *Id.*

⁶⁰ Roe, 410 U.S. at 151 n.48, citing *State v. Murphy*, 27 N.J.L. 112, 114 (1858).

⁶¹ See Paul Benjamin Linton, *supra* note 40 at 107-31.

⁶² Roe, 410 U.S. at 151.

increasing the chance of conviction for the abortionist, it was perhaps the most effective means for protecting that life.⁶³

Not charging women for “self-abortion” was based in practical necessity. “Self-abortion” was rarely truly voluntary, but was typically caused by pressures from the family or the child’s father; and exempting “self-abortion” from prosecution was also a prudent choice in order to prevent confusion between “self-abortion” and spontaneous miscarriage. The difference would have been almost impossible to prove.

Finally, Justice Blackmun asserted: “Adoption of the ‘quickening’ distinction through received common law and state statutes tacitly recognizes the greater health hazard inherent in late abortion and impliedly repudiates the theory that life begins at conception.”⁶⁴ This statement is inaccurate. First and foremost, “quickening” was the only medically-reliable evidence of life at that point in medical history. In addition:

Although a number of the initial state laws contained a distinction based on quickening...the large majority of state laws never made this distinction, and most of these laws referred to a woman as “being with child” or some similar phrase which attributed a human status to the fetus. Furthermore, many of the states which initially had this distinction written into their law later dropped it and also referred to a woman at any period of her pregnancy as being with child.⁶⁵

Justice Blackmun’s assertion that the state abortion laws’ sole purpose was to protect the mother ignored the medical context and the important scientific developments that prompted the statutory changes. In actuality, it was because of a better scientific understanding of the unborn child and pregnancy that the old “quickening” distinction—embodied in much of the common, and some statutory, law—was deemed scientifically indefensible.⁶⁶

Indeed, in 1857, the American Medical Association (AMA) spearheaded efforts to enact laws protecting the unborn from the time of conception.⁶⁷ It was their efforts—and the emphasis on the life of the unborn child—that led to the passage of the new laws. Dellapenna notes that 26 of the 36 states, and 6 of the 10 territories, had prohibited abortion by the end of the Civil War.⁶⁸ “Justice Blackmun’s conclusion in *Roe v. Wade* that abortion did not generally become a crime, at least after quickening, until after the Fourteenth Amendment was adopted is simply wrong.”⁶⁹ In failing to accurately reflect history, Justice Blackmun ignored the fact that it was advances in

⁶³ See DELLAPENNA, *supra* note 40 at 302.

⁶⁴ *Roe*, 410 U.S. at 151-52.

⁶⁵ R. Sauer, *Attitudes to Abortion in America, 1800-1973*, 28 POPULATION STUD. 53, 58 (1974).

⁶⁶ See *The Human Life Bill: Hearings on S. 158 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 474 (statement of Victor Rosenblum, Professor of Law, Northwestern Univ.); see also DELLAPENNA, *supra* note 40 at 402-04; and Gerard V. Bradley, *Life's Dominion: A Review Essay*, 69 NOTRE DAME L. REV. 329, 348 (1993) (“The historical evidence clearly shows that progress in the scientific investigation of reproduction and fetal development wrought changes in abortion law.”).

⁶⁷ JAMES MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY* 200 (1978). See also FREDERICK N. DYER, *THE PHYSICIANS’ CRUSADE AGAINST ABORTION* (2005); FREDERICK N. DYER, *CHAMPION OF WOMEN AND THE UNBORN: HORATIO ROBINSON STORER, M.D.* (1999).

⁶⁸ See DELLAPENNA, *supra* note 40.

⁶⁹ See *Id.* at 321.

science and physician-lead initiatives to change the law that lead to the implementation of new statutes to protect both the mother and her unborn child.

In summary, contrary to Justice Blackmun's version of history, abortion was condemned in ancient times, and the consensus of Western civilization was opposed to abortion throughout the duration of pregnancy. Although the penalties varied, depending on what science viewed as the point at which human life began, history does not support Justice Blackmun's conclusion in *Roe* that "at common law, at the time of the nineteenth century...a woman enjoyed a substantially broader right to terminate a pregnancy" than in most states immediately before *Roe*. That "right" did not exist until *Roe* created it in 1973. Understanding the errors in Justice Blackmun's history of abortion is critical to understanding the weakness of the Court's assertion that a "right to abortion" is rooted in the Constitution.

IV. What Happened after *Roe*? The Post-*Roe* Cases

A. Revisiting and Revising *Roe*: *Planned Parenthood v. Casey*

In the 1992 case *Planned Parenthood v. Casey*,⁷⁰ the plurality decision of three Justices rejected *Roe*'s trimester framework, but reaffirmed the "essential" holding of *Roe* that prior to viability a woman's "right to abortion" cannot be restricted. However, the plurality shifted the Court's rationale and framework for assessing abortion restrictions.

Chief Justice William Rehnquist and three other Justices, Byron White, Antonin Scalia, and Clarence Thomas, would have reversed *Roe*, while Justices John Paul Stevens and Harry Blackmun would have affirmed it without change. Thus, by combining these two votes with the plurality, abortion was sustained by a 5-4 vote.

Stare Decisis

The joint opinion of Justices [Sandra Day] O'Connor, [Anthony] Kennedy, and [David] Souter cannot bring itself to say that *Roe* was correct as an original matter... Instead of claiming that *Roe* was correct as a matter of original constitutional interpretation, the opinion therefore contains an elaborate discussion of *stare decisis*.⁷¹

The plurality began by correctly explaining: "[I]t is common wisdom that *stare decisis* is not an 'inexorable command.'"⁷² However, the Justices proceeded to contradict established *stare decisis* doctrine.

When governing decisions are unworkable or are badly reasoned, the Supreme Court "has never felt constrained to follow precedent."⁷³ This is particularly true in *constitutional cases*,

⁷⁰ 505 U.S. 833 (1992). In *Casey*, five provisions of the Pennsylvania Abortion Control Act were challenged as unconstitutional under *Roe v. Wade*.

⁷¹ *Id.* at 953 (Rehnquist C.J., dissenting).

⁷² *Id.* at 868.

⁷³ *Smith v. Allwright*, 321 U.S. 649 (1944).

because in such cases "correction through legislative action is practically impossible."⁷⁴ Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved.⁷⁵

Thus, in matters involving constitutional questions, the Court has a greater obligation to review its decisions, as they are not easily corrected by the people. However, the plurality opinion of *Casey* turned this principle on its head.

The plurality alleged they had a special duty to uphold *Roe* because abortion was so controversial. *Roe*, they claimed, had "call[ed] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution."⁷⁶ The plurality maintained that overruling *Roe* would give the appearance that the Court was collapsing under pressure from abortion opponents and not issuing a principled decision.

In dissent, Chief Justice Rehnquist noted both the novelty and absurdity of the plurality's rationale for insulating *Roe* from critical review. "Under this principle, when the Court has ruled on a divisive issue, it is apparently prevented from overruling that decision for the sole reason that it was incorrect, *unless opposition to the original decision has died away.*"⁷⁷

The plurality, however, dedicated several paragraphs to explicating why overruling *Roe* would be disastrous for the nation. The crux of their argument was that overturning the opinion would "seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law."⁷⁸

Yet, as Justice Scalia pointed out – the Court has been at its weakest when clinging to, instead of reversing, erroneous decisions.

In my history book, the Court was covered with dishonor and deprived of legitimacy by *Dred Scott v. Sandford*, an erroneous (and widely opposed) opinion that it did not abandon, rather than by *West Coast Hotel Co. v. Parrish*, which produced the famous "switch in time" from the Court's erroneous (and widely opposed) constitutional opposition to the social measures of the New Deal.⁷⁹

⁷⁴ *Burnet v. Coronado Oil & Gas Co.*, 205 U.S. 393, 407 (1932) (Brandeis, J., dissenting).

⁷⁵ See *Swift & Co. v. Wickham*, 382 U.S. 111 (1965); *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977); *Burnet v. Coronado Oil & Gas Co.*, *supra* note 74 at 405-11 (Brandeis, J., dissenting); *United States v. Title Ins. & Trust Co.*, 265 U.S. 472 (1924); *The Genesee Chief v. Fitzhugh*, 53 U.S. 443 (1852).

⁷⁶ *Casey*, 505 U.S. at 867.

⁷⁷ *Id.* at 958 (Rehnquist, C.J., dissenting) (emphasis in original). In addition, Justice Scalia noted, "Not only did *Roe* not, as the Court suggests, *resolve* the deeply divisive issue of abortion; it did more than anything else to nourish it, by elevating it to the national level where it is infinitely more difficult to resolve. National politics were not plagued by abortion protests, national abortion lobbying, or abortion marches on Congress before *Roe v. Wade* was decided... The Court would profit, I think, from giving less attention to the *fact* of this distressing phenomenon, and more attention to the *cause* of it." *Id.* at 995 (Scalia, J., dissenting).

⁷⁸ *Id.* at 865.

⁷⁹ *Id.* at 998 (Scalia, J., dissenting).

Significantly, the plurality ignored the most important aspect of *stare decisis*. They neglected *the merits* of the decision they purported to uphold.⁸⁰ Instead, the plurality limited their discussion to declaring that *Roe* was no more wrong in 1992 than it was in 1973.⁸¹

Rewriting *Roe*

The plurality, while claiming to affirm the central holding of *Roe*, shifted both the Court's rationale and the framework for assessing abortion restrictions.

From Privacy to Liberty

At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.⁸²

This passage from the plurality's opinion has been widely criticized. In her essay, "Coming of Age in a Culture of Choice," Erika Bachiochi observes:

The Court's philosophizing in *Casey* is reminiscent of an earlier time in our nation's history, a time of marked embarrassment to all American people, when individuals were permitted to determine for themselves whether those with black skin were human beings to be respected as such, or property to be used according to one's will. A judgment of this kind – who is to be considered a person – is far too important and fundamental to be left to personal interpretation. To do so is to elevate will over reason and crown Nietzsche king of American law and culture; it is to endorse a philosophical coup d'état of our experiment in ordered liberty.⁸³

The "mystery" passage penned by the plurality shifted the basis for a "right to abortion" from an interest in "privacy" to one of "liberty." However, as Justice Scalia noted in his dissent, the Constitution is not implicated whenever a state restricts a liberty. It is only when that liberty is *protected by the Constitution* that it is of concern for the Court.⁸⁴ Abortion, Justice Scalia concluded, is not a *protected* liberty interest because of "two simple facts":

- (1) the Constitution says absolutely nothing about it, and

⁸⁰ *Id.* at 983. "[I]n their exhaustive discussion of all the factors that go into the determination of when *stare decisis* should be observed and when disregarded, they never mention 'how wrong was the decision on its face?' Surely, if 'the Court's power lies . . . in its legitimacy, a product of substance and perception,' the 'substance' part of the equation demands that plain error be acknowledged and eliminated."

⁸¹ However, as Chief Justice Rehnquist wrote, "surely there is no requirement, in considering whether to depart from *stare decisis* in a constitutional case that a decision be more wrong now than it was at the time it was rendered." *Id.* at 955 (Rehnquist, C.J., dissenting).

⁸² *Casey*, 505 U.S. at 851.

⁸³ Erika Bachiochi, *Coming of Age in a Culture of Choice*, in *THE COST OF CHOICE* 22-32 (Erika Bachiochi ed., 2004) 27.

⁸⁴ *Casey*, 505 U.S. at 980 (Scalia, J., dissenting).

(2) the longstanding traditions of American society have permitted it to be legally proscribed.⁸⁵

A New Rationale: Reliance

Instead of rooting the right to abortion in the Constitution, the plurality concluded that societal reliance on abortion prevented the Court from overruling *Roe*. They asserted—without evidence—that:

[F]or two decades of economic and social developments, people have organized 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.⁸⁶

In other words, the plurality believed that—regardless of the rightness or wrongness of the *Roe* decision—women need abortion. Women’s equality depends on abortion.

Chief Justice Rehnquist labeled this an “unconventional – and unconvincing – notion of reliance.”⁸⁷

The joint opinion's assertion of this fact is undeveloped and totally conclusory. In fact, one cannot be sure to what economic and social developments the opinion is referring. Surely it is dubious to suggest that women have reached their ‘places in society’ in reliance upon *Roe*, rather than as a result of their determination to obtain higher education and compete with men in the job market, and of society's increasing recognition of their ability to fill positions that were previously thought to be reserved only for men.⁸⁸

The plurality’s reliance argument seems particularly strange in light of our nation’s not too distant history, as Chief Justice Rehnquist detailed:

The "separate but equal" doctrine lasted 58 years after *Plessy*, and *Lochner's* protection of contractual freedom lasted 32 years. However, the simple fact that a generation or more had grown used to these major decisions did not prevent the Court from correcting its errors in those cases, nor should it prevent us from correctly interpreting the Constitution here.⁸⁹

⁸⁵ *Id.*

⁸⁶ *Casey*, 505 U.S. at 856.

⁸⁷ *Id.* at 956 (Rehnquist, C.J., dissenting).

⁸⁸ *Id.* at 956-57.

⁸⁹ *Id.* at 957 (Rehnquist, C.J., dissenting).

Finally, the argument that settled expectations and reliance should prohibit the overturning of *Roe* reflects an ignorance of the state of the law; in fact, if *Roe* were overturned, abortion would still be legal in at least 42 or 43 states.⁹⁰

Viability Replaces the Trimester Framework

The plurality opinion rejected the trimester framework established by *Roe*, finding it misconceived the respective interests of both women and the states.⁹¹ Instead, the three justices found that the central principle of *Roe* was really a “right to terminate her pregnancy before viability,”⁹² and that there was “no line other than viability which is more workable.”⁹³ The plurality also stated there was “an element of fairness” in drawing a line at viability. “In some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child.”⁹⁴

Out with Strict Scrutiny, In with the “Undue Burden” Standard

In the most significant change from *Roe*, the plurality adopted a new standard of review for abortion regulations. In the plurality's estimation, by applying strict scrutiny, the cases following *Roe* did not give sufficient weight to the state's interest in the life of the unborn.⁹⁵ The plurality announced the “appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty” was to measure whether a regulation was an “undue burden.”⁹⁶

Attempting to define this new standard of review, the plurality wrote, “A finding of an undue burden is shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”⁹⁷

However, this definition is unsatisfactory. As Justice Scalia noted, it “make[s] clear only that the standard is inherently manipulable and will prove hopelessly unworkable in practice.”⁹⁸

⁹⁰ Clarke D. Forsythe & Stephen B. Presser, *supra* note 17 at 343-54 (Appendix 1: “The Legal Status of Abortion Laws in the Fifty States and the District of Columbia if *Roe v. Wade* is Overturned” (as of April 2006)).

⁹¹ *Casey*, 505 U.S. at 873 (“In its formulation it misconceives the nature of the pregnant woman's interest; and in practice it undervalues the State's interest in potential life, as recognized in *Roe*.”).

⁹² *Id.* at 872.

⁹³ *Id.* at 870.

⁹⁴ *Casey*, 505 U.S. at 870. Justice Scalia sharply criticized the idea that viability is a more workable or logical line than the trimester framework the plurality rejects. “Precisely why is it that, at the magical second when machines currently in use (though not necessarily available to the particular woman) are able to keep an unborn child alive apart from its mother, the creature is suddenly able (under our Constitution) to be protected by law, whereas before that magical second it was not? That makes no more sense than according infants legal protection only after the point when they can feed themselves.” *Id.* at 989 (Scalia, J. dissenting).

⁹⁵ *Id.* at 871.

⁹⁶ *Id.* at 876.

⁹⁷ *Id.* at 877.

⁹⁸ *Id.* at 986 (Scalia, J., dissenting). “An obstacle is ‘substantial,’ we are told, if it is ‘calculated[,] [not] to inform the woman's free choice, [but to] hinder it.’ This latter statement cannot possibly mean what it says. Any regulation of abortion that is intended to advance what the joint opinion concedes is the State's ‘substantial’ interest in protecting unborn life will be ‘calculated [to] hinder’ a decision to have an abortion. It thus seems more accurate to say that the joint opinion would uphold abortion regulations only if they do not *unduly* hinder the woman's decision.

The dissent by Chief Justice Rehnquist noted that the plurality's application of this new test exposed the fatal flaw of the undue burden standard:⁹⁹

This may or may not be a correct judgment, but it is quintessentially a legislative one. The "undue burden" inquiry does not in any way supply the distinction between parental consent and spousal consent which the joint opinion adopts. Despite the efforts of the joint opinion, the undue burden standard presents nothing more workable than the trimester framework which it discards today. Under the guise of the Constitution, this Court will still impart its own preferences on the States in the form of a complex abortion code.¹⁰⁰

B. Applying *Casey*: the Partial-Birth Abortion Ban Cases

In the 2000 case, *Stenberg v. Carhart*,¹⁰¹ by a vote of 5-4, the Court in an opinion written by Justice Stephen Breyer struck down Nebraska's ban on partial-birth abortion and the partial-birth abortion prohibitions of 29 other states.

The Court purported to evaluate Nebraska's law under the framework erected by *Casey*,¹⁰² and concluded that key statutory terms were unconstitutionally vague such that it would affect not only the partial-birth abortion procedure, but also other second-trimester abortion methods.¹⁰³ The Court also found the statute invalid because it lacked a "health" exception.¹⁰⁴

Justice Kennedy, a co-author of the *Casey* plurality opinion, wrote a scathing dissent in the *Stenberg* case. He argued the majority had a "basic misunderstanding" of *Casey*,¹⁰⁵ that it "fail[ed] to acknowledge substantial authority allowing the State to take sides in a medical

That, of course, brings us right back to square one: Defining an 'undue burden' as an 'undue hindrance' (or a 'substantial obstacle') hardly 'clarifies' the test." *Id.* at 987.

⁹⁹ Applying the "undue burden" standard, the plurality upheld several portions of Pennsylvania's law. The plurality upheld the informed consent, 24-hour waiting period, one parent consent (with a judicial-bypass), and the record-keeping and reporting requirement provisions of the law. However, the plurality struck down as unduly burdensome the law's requirement that a married woman notify her spouse before undergoing an abortion.

¹⁰⁰ *Casey*, 505 U.S. at 965 (Rehnquist, C.J., dissenting).

¹⁰¹ 530 U.S. 914 (2000).

¹⁰² *Id.* at 929. ("The question before us is whether Nebraska's statute, making criminal the performance of a 'partial birth abortion,' violates the Federal Constitution, as interpreted in *Planned Parenthood of Southeastern Pa. v. Casey*.").

¹⁰³ *Id.* at 945.

¹⁰⁴ *Id.* at 932. The 2010 confirmation hearings of now-Supreme Court Justice Elena Kagan calls into question the Court's reliance on "medical authority" for the proposition that "without a health exception may not create significant health risks for women, because... in some circumstances, D&X would be the safest procedure." See AULACATION, INVESTIGATING THE CONFIRMATION TESTIMONY OF ELENA KAGAN BEFORE THE SENATE JUDICIARY COMMITTEE AND THE NEGATIVE IMPACT OF HER AMENDMENT OF THE JANUARY 1997 POLICY STATEMENT OF OBSTETRICIANS AND GYNECOLOGISTS ON THE FEDERAL ADMINISTRATION OF JUSTICE AND THE U.S. SUPREME COURT (2010), available at <http://www.aul.org/featured-images/Kagan-Ethics-Report.pdf>. Importantly, Justice O'Connor (a co-author of *Casey*) also emphasized the "body of medical opinion" regarding the relative safety of partial birth abortion in her concurrence. *Casey*, 530 U.S. at 948 (O'Connor, J., concurring).

¹⁰⁵ *Stenberg*, 530 U.S. at 964 (Kennedy, J., dissenting)

debate,”¹⁰⁶ that it “misapplie[d] settled doctrines of statutory construction and contradict[ed] *Casey*'s premise that the States have a vital constitutional position in the abortion debate,”¹⁰⁷ and that it ignored “substantial medical and ethical opinion.”¹⁰⁸

Seven years later, the Court evaluated once again the constitutionality of a partial-birth abortion ban in *Gonzales v. Carhart*.¹⁰⁹ There, in an opinion written by Justice Kennedy, the Court upheld by a 5-4 vote the Congressionally-passed ban on the partial-birth abortion procedure. The Court was displeased with developments in jurisprudence since *Casey* (*i.e.*, that all state regulations were being invalidated), and noted that “a central premise of [*Casey*'s] holding” was “that the government has a legitimate and substantial interest in preserving and promoting fetal life.”¹¹⁰ The *Gonzales* Court found that, under *Casey*, the ban advanced legitimate Congressional purposes, including that “[t]he Act expresses respect for the dignity of human life.”¹¹¹ The Court also found it was reasonable for Congress to think that the practice of partial-birth abortion would undermine the medical profession and pervert the process of bringing life into the world.¹¹²

The Court held that Congress’ partial-birth abortion ban was not vague, and banning the procedure did not impose an undue burden. The Court did not overrule *Stenberg*, but stated that the Congressional Act differed from the Nebraska ban in two relevant ways.¹¹³

The Court noted that whether the ban created significant health risks was a contested factual question. Following precedent, the Court deferred to Congressional fact findings that the partial-birth abortion procedure was never medically necessary to protect the health of the mother.¹¹⁴ The Court held that the lack of a “health” exception to the ban did not make it unconstitutional because other safe medical options were available.

In rejecting the plaintiff’s facial challenge to the partial-birth abortion ban, the Court’s holding marked a significant shift in the Court’s consideration of facial challenges to abortion

¹⁰⁶ *Id.* at 970.

¹⁰⁷ *Id.* at 973.

¹⁰⁸ *Id.* at 979.

¹⁰⁹ 550 U.S. 124 (2007).

¹¹⁰ *Id.* at 157.

¹¹¹ *Id.*

¹¹² *Gonzales*, 550 U.S. at 157.

¹¹³ First, Congress made factual findings. “Congress found, among other things, that ‘[a] moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion . . . is a gruesome and inhumane procedure that is never medically necessary and should be prohibited.’” *Id.* at 141. Second, the Act’s language differed from that of the Nebraska law and contained a more detailed definition of the partial-birth abortion procedure. To fall within the Act, a fetus must be delivered “until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother.” *Id.* at 147. By including the anatomical landmarks, along with the statute’s intent requirement, “the most reasonable reading and understanding of its terms” was that it only prohibited the D&X, or partial-birth abortion, procedure. *Id.* at 154.

¹¹⁴ *Id.* at 165. The Court also noted that it did not “place dispositive weight on Congress’ findings” because “[t]he Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake.” *Id.*

regulations.¹¹⁵ Reviewing the facial challenge, Justice Kennedy was adamant again about the Court's past misunderstanding of *Casey* and general hostility towards abortion regulation. Justice Kennedy noted that the canon of constitutional avoidance, a “longstanding maxim of statutory interpretation,” requiring that “every reasonable construction must be resorted to, in order to save a statute from unconstitutionality,” had “fallen by the wayside when the Court confronted a statute regulating abortion.”¹¹⁶ Justice Kennedy pointed out that instead of following this duty, the Court had in fact “employed an antagonistic ‘canon of construction under which, in cases involving abortion, a permissible reading of a statute [was] to be avoided at all costs.’”¹¹⁷

Thus, an important impact of the *Gonzales* Court’s decision is that facial challenges to abortion regulations should be held to the same legal standard as facial challenges to other laws. In fact, Justice Kennedy noted that the facial attacks against the Congressional partial-birth abortion ban “should not have been entertained in the first instance.”¹¹⁸ The Court held that the broad latitude permitted for a facial challenge in the *First Amendment* context (the standard the Court had previously used to enjoin and strike down abortion regulations) was inapplicable in cases involving abortion statutes.¹¹⁹

While not changing the framework established by *Casey*, the Court in *Gonzales* gave substance to the idea that the legislature can enact meaningful abortion restrictions—an idea that appeared to be mere rhetoric in previous Courts’ decisions due to its backwards statutory construction.

Although *Gonzales* left the door open for an as-applied challenge to the partial-birth abortion ban, there has been no such challenge to date.

C. *Whole Women’s Health v. Hellerstedt*: “Undue Burden” or “Strict Scrutiny”?

Texas passed House Bill 2 in 2013, in response to public revelations about Kermit Gosnell’s “House of Horrors” in Philadelphia and the slipshod nature of the abortion industry. HB2 mandated that abortion facilities adhere to ambulatory surgical center (ASC) requirements governing most outpatient facilities, and also required abortionists to have admitting privileges at a hospital within 30 miles of the abortion facility to be able to handle emergencies.¹²⁰ The Fifth

¹¹⁵ A facial challenge to a law seeks to strike down the entire law, while an as-applied challenge seeks merely to prevent the law's application in a particular, defined circumstance. In order to prevail on a facial challenge, the plaintiff must show that no set of circumstances exists under which the law would be valid.

¹¹⁶ *Casey*, 500 U.S. at 154.

¹¹⁷ *Id.* at 154-55 (citing *Stenberg*, 530 U.S. at 977, citing *Thornburgh*, 476 U.S. 747, 829 (1986) (O’Connor, J., dissenting)).

¹¹⁸ *Gonzales*, 550 U.S. at 167.

¹¹⁹ *Gonzales*, 550 U.S. at 167. However, the Court left open the question of “what that burden consists of in the specific context of abortion statutes.” The Court noted the difference between the standard applied in *Ohio v. Akron for Reproductive Health*, 497 U.S. 502, 514 (1990) (“[B]ecause appellees are making a facial challenge to a statute, they must show that no set of circumstances exists under which the Act would be valid.”) and *Casey*'s holding that the spousal-notification statute was facially invalid because it would impose an undue burden “in a large fraction of cases in which [it] is relevant.” *Casey*, 505 U.S. at 895. The *Gonzales* Court held that it “need not resolve that debate” in the present case. 500 U.S. at 167.

¹²⁰ *Whole Women’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

Circuit Court of Appeals upheld the facial validity of the provisions based on circuit precedent, but enjoined the application of the admitting privileges provision as to one physician at a clinic in the Lower Rio Grande Valley, and temporarily enjoined the ASC regulation only as to that one clinic.¹²¹ HB2 resulted in the closure of a number of Texas’s abortion businesses, but Texas maintained that women in the state were still within reasonable driving distance of abortion facilities, so that HB2 imposed no “undue burden” on abortion access.

In *Whole Women’s Health v. Hellerstedt*,¹²² the Supreme Court, with Justice Stephen Breyer writing for the majority, held 5-3 that HB2 posed an “undue burden” on abortion access and was therefore unconstitutional.¹²³ With respect to both the surgical center requirement and the admitting privileges requirement, Justice Breyer said, each provision “constitutes an undue burden on abortion access” because “neither . . . offers medical benefits sufficient to justify the burdens upon access that each imposes,” and “[e]ach places a substantial obstacle in the path of women seeking a previability abortion.”¹²⁴

Arguably, *Hellerstedt* adopts a modified version of the “undue burden” test whereby the benefits of an abortion regulation are balanced against the burdens on access it imposes.¹²⁵ Although Justice Breyer and the majority gave obeisance to the literal language of the undue burden test that a regulation must be “reasonable” and not constitute a “substantial obstacle” to abortion, he closely examined the facts found in the trial court and concluded the court had properly “weighed the asserted benefits against the burdens.”¹²⁶ In spite of this apparent ratcheting-up of the standard of review in abortion cases, however, Justice Breyer does not characterize the right found in *Roe* as “fundamental,” nor state that the Court is applying “strict scrutiny.”

D. What is Clear in Abortion Law: The Taxpayer is Not Obligated to Fund Abortion

Long before *Casey*, the Supreme Court made clear that public funding (i.e., the use of taxpayer revenue) of abortion was not constitutionally compelled.

*Harris v. McRae*¹²⁷ is perhaps the most significant Supreme Court decision on abortion between *Roe* and *Casey*. In 1980, by a vote of 5-4, the Court upheld the Hyde Amendment, which restricts federal funding of Medicaid abortions solely to cases of life endangerment (and since 1994, rape or incest). In the opinion written by Justice Potter Stewart, the Court reasoned that the government could distinguish between abortion and “other medical procedures” because “no other procedure involves the purposeful termination of a potential life.”¹²⁸ In upholding the Hyde Amendment, the Court rejected claims that the federal restriction on abortion funding was invalid as a denial of a constitutional right.

¹²¹ *Id.* at 2303-05.

¹²² 136 S. Ct. 2292.

¹²³ *Id.* at 2300.

¹²⁴ *Id.*

¹²⁵ See Stephen G. Gilles, “Restoring Casey’s Undue Burden Standard After *Whole Women’s Health v. Hellerstedt*,” 35 *Quinnipiac L.R.* 701 (2017).

¹²⁶ 136 S. Ct. at 2310.

¹²⁷ 448 U.S. 297 (1980).

¹²⁸ *Id.* at 325.

In 1991, the Court extended the reasoning of *McRae* to uphold federal regulations prohibiting personnel at family planning clinics that receive Title X funds from counseling or referring women regarding abortion, in the case of *Rust v. Sullivan*.¹²⁹ The 5-4 opinion, written by Justice Rehnquist, reiterated that the Due Process Clause does not confer an affirmative right to governmental aid, even with respect to a liberty interest with which government may not otherwise interfere. “Congress’ refusal to fund abortion counseling and advocacy leaves a pregnant woman with the same choices as if the Government had chosen not to fund family-planning services at all.”¹³⁰

V. Why Abortion is Not a Fundamental Right (and Never Has Been)¹³¹

It is common for academics and the media to refer to abortion as a “fundamental right.” Beyond its great rhetorical power, one of the reasons this is important is because proponents of the proposed federal Freedom of Choice Act (FOCA) claim that FOCA, which declares that abortion is a fundamental right, merely “codifies *Roe v. Wade*.” That FOCA sweeps beyond *Roe* is demonstrated by looking at what *Roe* actually said and by the change that the Court made in *Casey*.

Roe did not expressly declare abortion to be a “fundamental right.” This is clear from the opinion, and even clearer from the Court’s abortion decisions between *Roe* and *City of Akron v. Akron Center for Reproductive Health*, as will be discussed *infra*.¹³² But, whatever might be said about that line of cases, it is a fact that no majority of the Court has declared abortion to be a “fundamental right” since 1986 in *Thornburgh v. American College of Obstetricians & Gynecologists* (ACOG).¹³³ *Planned Parenthood v. Casey*¹³⁴ clearly did not hold abortion to be a fundamental right, and clearly rejected strict scrutiny (which is the standard of review required when fundamental rights are involved); *Stenberg v. Carhart*¹³⁵ did not reaffirm abortion as a fundamental right or apply strict scrutiny, and *Gonzales v. Carhart*¹³⁶ expressly readopted *Casey* and its undue-burden, intermediate standard of review.

Except for *Roe*, there is no source in American law or Supreme Court precedent to support the claim that abortion is a fundamental right. No right to abortion is expressed in the text of the Constitution or in the history or tradition of Anglo-American law.

Fundamental rights are not fundamental because someone feels deeply about them. Unenumerated rights must be “deeply rooted” in American history, and the precedents before *Roe*

¹²⁹ 500 U.S. 173 (1991).

¹³⁰ *Id.* at 202.

¹³¹ © 2010 by Clarke D. Forsythe.

¹³² 462 U.S. 416 (1983).

¹³³ 476 U.S. 747 (1986).

¹³⁴ 505 U.S. 833 (1992).

¹³⁵ 530 U.S. 914 (2000).

¹³⁶ 550 U.S. 124 (2007).

repeatedly confirm this. This requirement for unenumerated rights has been reaffirmed since *Roe* in *Washington v. Glucksberg*¹³⁷ and most recently in *McDonald v. City of Chicago*.¹³⁸

A. What *Roe* Actually Said

The Supreme Court's decision in *Roe* is commonly cited as having declared abortion to be a "fundamental right." But the text of *Roe* does not support this.

The opinion in *Roe* never stated that abortion *is* a "fundamental right" and the Court never said—in *Roe* or *Doe*—that strict scrutiny should apply to abortion. Instead, with considerable ambiguity, the Court wrote:

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 that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.

In the recent abortion cases, cited above, courts have recognized these principles. Those striking down state laws have generally scrutinized the State's interests in protecting health and potential life, and have concluded that neither interest justified broad limitations on the reasons for which a physician and his pregnant patient might decide that she should have an abortion in the early stages of pregnancy. Courts sustaining state laws have held that the State's determinations to protect health or prenatal life are dominant and constitutionally justifiable.

The District Court held that the appellee failed to meet his burden of demonstrating that the Texas statute's infringement upon Roe's rights was necessary to support a compelling state interest, and that, although the appellee presented "several compelling justifications for state presence in the area of abortions," the statutes outstripped these justifications and swept "far beyond any areas of compelling state interest." Appellant and appellee both contest that holding. Appellant, as has been indicated, claims an absolute right that bars any state imposition of criminal penalties in the area. Appellee argues that the State's determination to recognize and protect prenatal life from and after conception constitutes a compelling state interest. As noted above, we do not agree fully with either formulation.¹³⁹

This ambiguity is compounded in the Court's concluding "summary" in section XI of the opinion. That summary nowhere mentions abortion as a fundamental right, 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."¹⁴⁰

¹³⁷ 521 U.S. 702 (1997).

¹³⁸ 561 U.S. 472 (2010).

¹³⁹ *Roe*, 410 U.S. at 155-56 (citations omitted).

¹⁴⁰ *Id.* at 164-66.

So, the Court in *Roe* left hanging the precise nature of the abortion “right,” and the applicable level of judicial “scrutiny,” and, consequently, sowed considerable confusion.

In contrast to the *Roe* opinion, it is clear that some lower federal court decisions after *Roe* treated abortion as a “fundamental right” and did apply a “fundamental rights-strict scrutiny” analysis.¹⁴¹ But these cases are no longer good law because *Casey* changed the standard of review.

B. What the Court’s Decisions Said Between *Roe* and *Akron* (1973-1983)

The Supreme Court itself did not apply a fundamental rights-strict scrutiny analysis in its review of abortion regulations between *Roe* and *Akron*,¹⁴² as Justice O’Connor would eventually point out explicitly.

Instead, the Supreme Court’s abortion decisions after *Roe* often involved the Court reining in overbroad decisions made by the lower federal courts. When the lower federal courts rigorously applied a strict scrutiny analysis to strike down abortion regulations, the Supreme Court reversed their decisions.

The Supreme Court cases between *Roe* and *Akron* did not refer to abortion as a “fundamental right” or apply the strict scrutiny analysis that accompanies a fundamental right. In fact, the Court—in *Maher v. Roe*,¹⁴³ *Bellotti v. Baird*,¹⁴⁴ and *Harris v. McRae*¹⁴⁵—referred to an “undue burden” or “unduly burdensome” analysis.¹⁴⁶ Eventually, this would be adopted by a plurality of the Court in *Casey*, including Justice O’Connor, as an intermediate level of scrutiny.

Likewise, Justice Lewis Powell noted, in his concurring opinion in *Carey v. Population Services Inter'l*,¹⁴⁷ that “neither of those cases [*Planned Parenthood v. Danforth* or *Doe v. Bolton*] refers to the ‘compelling state interest’ test” and noted that the Court in *Doe* used the “reasonably related” test.¹⁴⁸

If the Court did, in fact, declare abortion to be a fundamental right in *Roe*, why was that “right” not declared, along with strict scrutiny analysis, in the cases after *Roe*?

In 1983, however, Justice Powell boldly attempted a judicial sleight of hand in *Akron*. He broadly claimed, in Footnote #1 to his opinion, that “the Court repeatedly and consistently has

¹⁴¹ See e.g., *Poe v. Gerstein*, 517 F.2d 787, 789 (5th Cir. 1975); *Friendship Medical Center v. Chicago Board of Health*, 505 F.2d 1141, 1148 (7th Cir. 1974); *Word v. Poelker*, 495 F.2d 1349 (8th Cir. 1974).

¹⁴² 462 U.S. 416 (1983).

¹⁴³ 432 U.S. 464 (1977).

¹⁴⁴ 443 U.S. 622, 640 (1979).

¹⁴⁵ 448 U.S. 297 (1980).

¹⁴⁶ *Maher*, 432 U.S. at 473-74 (“the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy”); *Bellotti v. Baird* (*Bellotti I*), 428 U.S. 132, 147 (1976) (“not unconstitutional unless it unduly burdens the right to seek an abortion”); *Bellotti v. Baird* (*Bellotti II*), 443 U.S. 622, 640 (1979) (Opinion of Powell, J.).

¹⁴⁷ 431 U.S. 678 (1977).

¹⁴⁸ *Id.* at 704.

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.”¹⁴⁹ He then cites nine Court decisions.

Why was this relegated to a footnote? Perhaps to downplay the reality that the claim was not accurate.

Indeed, an examination of the nine Court decisions that Justice Powell cited in Footnote #1 reveals that virtually none *held* abortion to be a “fundamental right,” nor applied strict scrutiny analysis, nor required that the statutes be “narrowly tailored” or that the state use the “least restrictive means” in regulating abortion.

- In *Connecticut v. Menillo*,¹⁵⁰ there is no reference to any “fundamental right” or “strict scrutiny” in the opinion. In fact, the Court overturned, *per curiam*, the Connecticut Supreme Court’s holding that a criminal abortion prohibition could not be applied to a non-physician, saying that “*Roe* did not go that far.”¹⁵¹
- In *Planned Parenthood of Central Missouri v. Danforth*,¹⁵² the opinion contains no reference to any “fundamental right” or “strict scrutiny,” but instead uses the term “undue burden.”
- In *Bellotti v. Baird*,¹⁵³ (*Bellotti I*) there is no reference to “fundamental right” or strict scrutiny. On the contrary, the Court, in a unanimous opinion, referred to the “unduly burdensome” standard more than once and characterized *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.”¹⁵⁴
- In *Beal v. Doe*,¹⁵⁵ only Justice Thurgood Marshall *in dissent* referred to abortion as a “fundamental right.”¹⁵⁶
- In *Maher v. Roe*,¹⁵⁷ 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

¹⁴⁹ Akron, 462 U.S. at 420 n.1. Justice Powell declared: “Since *Roe* was decided in January 1973, 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. See *Connecticut v. Menillo*, 423 U.S. 9 (1975); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *Bellotti v. Baird*, 428 U.S. 132 (1976); *Beal v. Doe*, 432 U.S. 438 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Colautti v. Franklin*, 439 U.S. 379 (1979); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Harris v. McRae*, 448 U.S. 297 (1980); *H.L. v. Matheson*, 450 U.S. 298 (1981).”

¹⁵⁰ 423 U.S. 9 (1975).

¹⁵¹ *Id.* at 10.

¹⁵² 428 U.S. 52 (1976).

¹⁵³ 428 U.S. 132 (1976).

¹⁵⁴ *Id.* at 147-48.

¹⁵⁵ 432 U.S. 438, 457 (1977).

¹⁵⁶ *Id.* at 457.

¹⁵⁷ 432 U.S. 464 (1977).

fundamental right recognized in *Roe*,¹⁵⁸ and overturned the overreaching district court that had applied the strict scrutiny standard. The Court also mentioned an “unduly burdensome” standard,¹⁵⁹ which is inconsistent with a fundamental rights analysis and reflects the standard that the Court eventually adopted in *Casey* and *re-adopted* in 2007 in *Gonzales v. Carhart*.¹⁶⁰

- In *Colautti v. Franklin*,¹⁶¹ the Court did not refer to any “fundamental right.”
- In *Bellotti v. Baird*,¹⁶² (*Bellotti II*) there is no reference to a “fundamental right”; instead, the Court employed an “undue burden” standard.¹⁶³
- In *Harris v. McRae*,¹⁶⁴ the Court’s majority stated the general proposition that: “[I]f a law impinges upon a fundamental right explicitly or implicitly secured by the Constitution [it] is presumptively unconstitutional [cit. omit.]. Accordingly, before turning to the equal protection issue in this case, we examine whether the Hyde Amendment violates any substantive rights secured by the Constitution.”¹⁶⁵ But the Court proceeded to overturn the overreaching district court, and held that no fundamental right was infringed by the denial of public funding.¹⁶⁶
- Finally, in the last of the nine cases cited by Justice Powell, *H.L. v. Matheson*,¹⁶⁷ the Court upheld the Utah parental notice law against a facial challenge. Only Justice Marshall *in dissent* referred to abortion as a “fundamental” right.¹⁶⁸

Besides the dictum in *Maher*, then, 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 only in the abstract, in passing, and without applying the strict scrutiny analysis that accrues to a fundamental right: Justice Powell’s Footnote #1 in his 1983 opinion in *Akron*,¹⁶⁹ and in *Thornburgh v. ACOG*,¹⁷⁰ where the majority stated that “[a] woman’s right to make that choice

¹⁵⁸ *Id.* at 470-71. (“We must decide, first, whether [state legislation] operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny...”).

¹⁵⁹ *Maher*, 432 U.S. at 473-74.

¹⁶⁰ 550 U.S. 124, 146, 156 (2007) (citing *Casey*, 505 U.S. at 878).

¹⁶¹ 439 U.S. 379 (1979).

¹⁶² 443 U.S. 622 (1979).

¹⁶³ *Id.* at 640.

¹⁶⁴ 448 U.S. 297 (1980).

¹⁶⁵ *Id.* at 312.

¹⁶⁶ *Harris*, 448 U.S. at 313-19.

¹⁶⁷ 450 U.S. 398 (1981).

¹⁶⁸ In *Zablocki v. Redhail*, 434 U.S. 373, 386 (1978), in the context of evaluating a residency regulation that impacted the fundamental right to marry, Justice Marshall in his majority opinion for the Court stated, in passing, that “[t]he woman whom appellee *desired* to marry had a fundamental right to seek an abortion of their expected child, *see Roe v. Wade supra*, or to bring the child into life to suffer the myriad social, if not economic, disabilities that the status of illegitimacy brings....” *Id.* at 386.

¹⁶⁹ 462 U.S. 416.

¹⁷⁰ 476 U.S. 747, 763 (1986) (“advances no legitimate state interest”); 764 (“are facially unconstitutional”); 767 (“the ‘the impermissible limits’ that *Danforth* mentioned...have been exceeded here”); 767-68 (“pose an

freely is fundamental.”¹⁷¹ However, the Court never expressly applied the “strict scrutiny-narrowly tailored” analysis in *Akron* or *Thornburgh*.

Since *Thornburgh*, the majority of the Court has never referred to abortion as a fundamental right, not even in its 2000 decision in *Stenberg v. Carhart*,¹⁷² which struck down the partial-birth abortion prohibitions of Nebraska and 29 other states.

C. Justice O’Connor’s Revelation

It was Justice O’Connor, ironically, who first showed that the Court had not followed strict scrutiny. Justice O’Connor made this point in her dissent in 1983 in *Akron*,¹⁷³ noting that, in *Roe*, “the Court mentioned ‘narrowly drawn’ legislative enactments [citing 410 U.S. at 155], but the Court never actually adopted this standard in the *Roe* analysis.”¹⁷⁴

Ironically, Justice O’Connor’s dissent provided the most frank and detailed analysis by any Justice that the Court between *Roe* and *Casey* had neither 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”¹⁷⁵ between *Roe* and *Akron*. She also noted that “the Court subsequent to *Doe [v. Bolton]* has expressly rejected the view that differential treatment of abortion requires invalidation of regulations”¹⁷⁶ 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.”¹⁷⁷ Justice O’Connor emphasized the “limited nature of the fundamental right that has been recognized in the abortion cases.”¹⁷⁸

D. What Rights are “Fundamental”?

Before *Roe*, the Supreme Court examined the particular right asserted to determine whether it was deeply rooted in American law and tradition. This is reflected in *Meyer v. Nebraska*,¹⁷⁹ *Snyder v. Massachusetts*,¹⁸⁰ and *Palko v. Connecticut*.¹⁸¹

unacceptable danger of deterring the exercise of that right, and must be invalidated”); and 769 (“find the statute to be facially invalid”).

¹⁷¹ *Id.* at 772.

¹⁷² 530 U.S. 914 (2000).

¹⁷³ 462 U.S. 461.

¹⁷⁴ *Id.* at 467-68 n.11.

¹⁷⁵ *Id.* at 461 & n.8.

¹⁷⁶ *Id.* at 465 n.9.

¹⁷⁷ *Id.* at 467 n.11.

¹⁷⁸ *Id.* at 465 n.10 (emphasis in original).

¹⁷⁹ 262 U.S. 390, 399 (1923) (Due Process Clause protects the right “generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”).

¹⁸⁰ 291 U.S. 97, 105 (1934) (“The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”).

¹⁸¹ 302 U.S. 319, 325 (1937) (“violate a ‘principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.’” (quoting *Snyder v. Massachusetts*)).

Even Justice John Harlan's dissenting opinion in *Poe v. Ullman*,¹⁸² reflected in his opinion in 1965 in *Griswold v. Connecticut*, emphasized the history and traditions of the Nation:

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decision, it has represented the balance which our Nation...has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing.¹⁸³

This is reflected as well in cases after *Roe*, such as *Moore v. City of East Cleveland*.¹⁸⁴

The critical importance of history and tradition is even clear in *Roe*, despite the fact that the Court got the history terribly wrong. The precedents before *Roe* which emphasized history explain why Justice Blackmun, in his opinion in *Roe*, spent 29-30 pages¹⁸⁵ trying to demonstrate that a right to abortion was based in history.

The Court's opinion in *Roe* expresses a clear belief that the medical and legal history of abortion was of central importance to its decision. Some have doubted the relevance of this history to the decision. But, since the Court stated that "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty'...are included in this guarantee of personal privacy,"¹⁸⁶ it seems clear that the historical analysis had three functions in the Court's decision: first, the history was thought to show that "prevailing legal abortion practices were far freer"¹⁸⁷ at the time of the common law and at the framing of the Constitution than at the time of the *Roe* decision; second, the nineteenth and twentieth century abortion statutes allegedly restricted what was previously a common law "right"; third, the history was examined to reveal "the state purposes and interests behind the criminal abortion laws."¹⁸⁸ The history was thought to show that abortion was a dangerous procedure during the common law and the nineteenth century, and that the purpose of the nineteenth century statutes was only to protect the woman's health and *not* the life of the unborn child. Hence, with the safer abortion procedures of the twentieth century, the Court reasoned, the single, limited purpose of the nineteenth and twentieth century abortion statutes had become meaningless and constituted an unconstitutional burden on an abortion "liberty."

¹⁸² 367 U.S. at 542, 554-55 (1961).

¹⁸³ *Griswold*, 381 U.S. at 500.

¹⁸⁴ 431 U.S. 494, 503 (1977) ("the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." (Op. of Powell)), and *Michael H. v. Gerald D.*, 491 U.S. 110, 122-24 (1989).

¹⁸⁵ *Roe*, 410 U.S. at 129-58.

¹⁸⁶ *Id.* at 152.

¹⁸⁷ *Id.* at 159.

¹⁸⁸ *Id.* at 129.

E. No Abortion “Liberty” is Rooted in History

Roe fails any historical test for determining unenumerated or fundamental rights. It has been thoroughly shown that Justice Blackmun’s “history” was false and that no “right to abortion” existed at any time of Anglo-American history. Professor Dellapenna’s encyclopedic account in *Dispelling the Myths of Abortion History* makes this especially clear. Abortion, therefore, cannot be shown to be a fundamental right in history or under any Supreme Court precedent. (An analysis of the inaccuracies in Justice Blackmun’s history of abortion is outlined *supra* in Section III-C.)

F. No Other Legal Sources or Authority Makes Abortion a Fundamental Right

Rights are not “fundamental” because some advocates feel deeply about them. Unenumerated rights must be deeply rooted in American history, and *Griswold* (see *supra*) didn’t suggest otherwise.¹⁸⁹ The abstractions of various provisions of the Constitution do not produce “penumbras” or “emanations” which take away what the Constitution, the Bill of Rights, and the Fourteenth Amendment left to the people at the state level. If Justices can create new “penumbras” and “emanations” that the people have not ratified, there is nothing left of self-government.

The plain language of the Ninth Amendment shows that it cannot be a source for abortion rights.¹⁹⁰ The people cannot “retain” a right that never existed in Anglo-American law. And even if it existed at some time in the past, the people do not “retain” it when they show overwhelming support for prohibiting the practice. The people adopted the common law of abortion, and then overwhelmingly passed statutes strengthening the common law of abortion during the nineteenth century. Those statutes were pervasive until the 1960s. Until 1966, at least 46 states prohibited abortion except to save the life of the mother. On the eve of *Roe*, 30 states retained such prohibitions, and only 2 or 3 permitted abortion-on-demand.¹⁹¹

While it is not necessary in theory that an unborn child be a constitutional “person” for the state’s authority over criminal abortion law to otherwise be justifiable as “deeply-rooted” in the states’ criminal law and police power authority under the Constitution, the Court has held that the words of the Fourteenth Amendment should be read against the background of the common law. And, at common law, all human beings were treated as persons, as William Blackstone indicated.¹⁹² Reading the Fourteenth Amendment against the background of the common law, the term “person” in the Fourteenth Amendment encompasses all human beings.

¹⁸⁹ In fact, in *Griswold*, Justice Arthur Goldberg, concurring with Chief Justice Earl Warren and Justice William Brennan, wrote that the Due Process Clause “protects those liberties that are ‘so deeply rooted in the traditions and conscience of our people to be ranked as fundamental...’ The inquiry is whether a right involved ‘is of such a character’ that it cannot be denied without violating those ‘fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.’” 381 U.S. at 493.

¹⁹⁰ See U.S. CONST. amend. IX. (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).

¹⁹¹ See Section III-C *supra*.

¹⁹² W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 123, 129 (1765); Horan, Forsythe, Grant, *Two Ships Passing in the Night: An Interpretivist Review of the White-Stevens Colloquy on Roe v. Wade*, 6 ST. LOU. U. PUB. L. REV. 229, 287-292 (1987); John D. Gorby, *The ‘Right’ to an Abortion, the Scope of Fourteenth Amendment ‘Personhood,’ and the Supreme Court’s Birth Requirement*, 1979 S. IL. U.L.J. 1; Robert Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CAL. L. REV. 1250 (1975). See also Meadows v.

Exceptions and limits in abortion law do not, in any way, contradict the purpose of the laws to protect the unborn child. Exceptions and limits to abortion law were based in common sense, long experience with effective law enforcement, or medical necessity.¹⁹³ Abortion law was always limited by available medical knowledge, and we cannot superimpose on the seventeenth century the medical knowledge of the twentieth century. The quickening distinction was based on the need for evidence of life in a time of limited medical technology. The life of the mother exception was based on surgical necessity and in the concept of self-defense.¹⁹⁴ The exceptions that Georgia enacted in 1968, for example, were based on broadening the concept of self-defense and were democratically adopted.

In conclusion, only those rights deeply rooted in American history can be called “fundamental.” Nothing in constitutional text, legal history, or Supreme Court precedent shows that abortion is a right, let alone a fundamental right.

State, 291 Ark. 105, 722 S.W. 584, 585 (1987) (the terms "human being" and "person" are "synonymous in common law.").

¹⁹³ DELLAPENNA, *supra* note 40 at 279-281, 298, 299-302.

¹⁹⁴ DELLAPENNA, *supra* note 40 at 279.

Appendix A: The Case Against *Roe*: A Critical, Annotated Bibliography on *Roe v. Wade* and *Doe v. Bolton*

Criticism of *Roe v. Wade* and *Doe v. Bolton* has spanned the political spectrum since 1973. Criticism by legal conservatives has been obvious. But liberals too have criticized these decisions. James Simon called *Roe v. Wade* “the most controversial decision of the modern Court era.”¹⁹⁵ A 2005 book edited by another liberal law professor, Jack Balkin, went farther, calling *Roe* simply “America’s Most Controversial Decision.” The Court’s opinion in *Roe* has been called “probably the weakest of any major decision in American history.”¹⁹⁶ Professor Mark Tushnet, who clerked for Justice Marshall at the time of *Roe*, commented that “It seems to be generally agreed that, as a matter of simple craft, Justice Blackmun’s opinion for the Court was dreadful.”¹⁹⁷ After retiring, Justice Powell, who voted with the majority in those cases, referred to *Roe* and *Doe* as “the worst opinions I ever joined.”¹⁹⁸

Behind these labels, what is the problem with *Roe v. Wade* and *Doe v. Bolton*?

A 1987 review of the exchange over *Roe* between Justices White and Stevens in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), summarized twelve points of criticism of *Roe*:

Scholars have argued that the decision contains numerous fundamental errors: (1) *Roe* failed to articulate a transcending principle which raised the decision above the realm of mere politics and convincingly based the right to abortion in the Constitution....(2) The decision was based on a notion of substantive due process that was repudiated in *Lochner v. New York*....(3) Ancient attitudes toward abortion were misunderstood or ignored....(4) The impact of the Hippocratic Oath on Anglo-American law and medicine was disregarded.....(5) The Court erroneously construed the common law on abortion....(6) The Court failed to understand the medical and technological context of the common law and the significance of the concepts of quickening, viability, and live birth.....(7) The decision disregarded prohibitions on abortion in the practice of midwifery and medicine which followed the common law and preceded the nineteenth century American statutes.... (8) The abortion statutes of the nineteenth century and their purpose was misconstrued.....

¹⁹⁵ JAMES F. SIMON, *THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT* 12 (1995).

¹⁹⁶ L.A. Powe, Jr., *The Court Between Hegemonies*, 49 WASH. & LEE L. REV. 31, 39 (1992).

¹⁹⁷ Mark Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 820 (1983).

¹⁹⁸ JOHN C. JEFFRIES, JR., *JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY* 341 (1994).

(9) The Court's analysis of nineteenth century caselaw was erroneous..... (10) The consideration of the status of the unborn child as [a] 'person' under the Fourteenth Amendment was conclusory..... (11) The Court underestimated the protection of the unborn child under tort law..... (12) Even the style of writing in the *Roe* opinion has been criticized.....The criticism since 1973 has addressed virtually every point of law, fact, and reasoning in the Court's opinion.¹⁹⁹

Since 1987, numerous other investigations into the reasoning and results in *Roe* and *Doe* have been undertaken, and a number of additional critiques have been published. The following is a summary of the leading critical analyses of the *Roe* and *Doe* opinions.

Books

By far, the most important was the publication in 2006 of Professor Joseph Dellapenna's encyclopedic critique, *Dispelling the Myths of Abortion History* (2006). This is the best one-volume criticism of *Roe*. It is the most comprehensive critique of *Roe*'s spurious history.

See also:

CLARKE D. FORSYTHE, *ABUSE OF DISCRETION: THE INSIDE STORY OF ROE V. WADE* (2013) (a critical review of the factual and legal mistakes made by the Justices in *Roe v. Wade* and *Doe v. Bolton* and of the unintended consequences of the decisions in law, politics, and public health).

DAVID J. GARROW, *LIBERTY & SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* (1st ed. 1994) (although Garrow's interpretation and conclusions are often wrong, his book is a treasure trove of original sources and documentation).

MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987) ("The problem of abortion regulation in the United States is immeasurably aggravated...by the fact that the extreme position of the Supreme Court...represents the views of only a minority of Americans.").

JOHN NOONAN, *A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES* (1979) (an important critique of the reasoning of *Roe* and of its extension by federal courts in the 1970s).

LYNN WARDLE, *THE ABORTION PRIVACY DOCTRINE* (1980) (an early exhaustive analysis of how the lower federal courts applied *Roe* in the 1970s).

ABORTION AND THE CONSTITUTION: REVERSING ROE V. WADE THROUGH THE COURTS (Dennis Horan, Edward R. Grant, Paige C. Cunningham eds., 1987).

The most influential law review critique of *Roe*

John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) (Ely had been a law clerk for Earl Warren at the time of *Griswold*. "What is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions

¹⁹⁹ Horan, Forsythe & Grant, *Two Ships Passing in the Night: An Interpretivist Review of the White-Stevens Colloquy on Roe v. Wade*, 6 ST. LOUIS U. PUBLIC L. REV. 229, 230-31 n.8 (1987).

they included, or the nation's governmental structure...And that, I believe...is a charge that can responsibly be leveled at no other decision of the past twenty years. At times the inferences the Court has drawn from the values the Constitution marks for special protection have been controversial, even shaky, but never before has its sense of an obligation to draw one been so obviously lacking.”).

Early Criticisms of *Roe & Doe*

ALEXANDER BICKEL, *THE MORALITY OF CONSENT* 28 (1975) (“The Court [in *Roe*]...refused the discipline to which its function is properly subject. It simply asserted the result it reached. If medical considerations only were involved, a satisfactory rational answer might be arrived at. But, as the Court acknowledged, they are not. Should not the question then have been left to the political process, which in state after state can achieve not one but many accommodations, adjusting them from time to time as attitudes change?”).

ARCHIBALD COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* (1976) (“The Court failed to establish the legitimacy of the decision by not articulating a precept of sufficient abstractness to lift the ruling above the level of a political judgment based upon the evidence currently available from the medical, physical, and social sciences. Nor can I articulate such a principle—unless it be that a state cannot interfere with individual decisions relating to sex, procreation, and family with only a moral or philosophical state justification; a principle which I cannot accept or believe will be accepted by the American people. The failure to confront the issue in principled terms leaves the option to read like a set of hospital rules and regulations, whose validity is good enough this week but will be destroyed with new statistics upon the medical risks of childbirth and abortion or new advances in providing for the separate existence of the fetus...Constitutional rights ought not to be created under the Due Process Clause unless they can be stated in principles sufficiently absolute to give them roots throughout the community and continuity over significant periods of time, and to lift them above the level of the pragmatic political judgments of a particular time and place.”).

Joseph Dellapenna, *Nor Wit Nor Pity: The Supreme Court on Abortion*, 6 COLUM. HUM. RTS. L. REV. 379 (1974).

Joseph Dellapenna, *The History of Abortion: Technology, Morality and Law*, 40 U. PITT. L. REV. 359 (1979) (explaining that the Court failed to understand the medical and technological context of the common law and the significance of the concepts of quickening, viability, and live birth).

Richard Epstein, *Substantive Due Process By Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159.

Philip Kurland, *Public Policy, The Constitution, and the Supreme Court*, 12 N. KY. L. REV. 181 (1985) (“But for a capacity to make constitutional bricks without any constitutional straws, certainly no prior case can be equaled by that of the abortion decisions. However much I like the results—and I do—I can find no justification for their promulgation as a constitutional judgment by the Supreme Court.”).

Arnold H. Loewy, *Why Roe v. Wade Should be Overruled*, 67 N.C.L. REV. 939 (1989) (“*Roe v. Wade*...is not simply wrong; it is wrong in a fundamental way that few, if any, recent decisions of the Supreme Court can match. The unique *Wrongness* of *Roe* lies in its utter lack of support from

any source that is legitimate for constitutional interpretation, coupled with its wholesale denial to a substantial portion of the populace of a meaningful opportunity to effective legislative change.”).

Richard D. Morgan, *Roe v. Wade and the Lessons of the Pre-Roe Case Law*, 77 MICH. L. REV. 1724 (1979).

Norman Vieira, *Roe and Doe: Substantive Due Process and the Right to Abortion*, 25 HASTINGS CONST'L L.Q. 867 (1974) (*Roe* and *Doe* were based on a notion of substantive due process that had been previously repudiated).

Harry Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 299 (1973) (“*Roe* perpetuates what seems to me a basic terminological mistake: The Court insists on describing the plaintiff’s interest as ‘fundamental.’ This is misleading, for it suggests either that the text of the Constitution has singled out the abortion decision for special attention or that the judge, as wise philosopher, has imposed his ethical system upon the people... [*Doe*] lacks persuasive force and treats the private physician with the reverence that one expects only from advertising agencies employed by the American Medical Association.”).

Criticism of Roe’s “History”

JOHN KEOWN, *ABORTION, DOCTORS AND THE LAW: SOME ASPECTS OF THE LEGAL REGULATION OF ABORTION IN ENGLAND FROM 1803 TO 1982* (1988) (documenting the protective purposes behind English common and statutory abortion law).

STEPHEN M. KRASON, *ABORTION: POLITICS, MORALITY AND THE CONSTITUTION* (1984) (criticizing the history and reasoning in *Roe*).

PHILIP RAFFERTY, *ROE V. WADE: THE BIRTH OF A CONSTITUTIONAL RIGHT* (University Microfilms Inter'l Dissertation Information Service, Ann Arbor, Michigan 1992) (exploring the English legal history of abortion and protection of the unborn child).

Robert Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORDHAM L. REV. 807 (1973) (detailing the historical errors in *Roe* involving the common law on abortion and the mistaken reliance on Cyril Means).

Robert Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CAL. L. REV. 1250 (1975) (explaining that the Court’s analysis of nineteenth century abortion case law was erroneous; also examining the Court’s reasoning about personhood under the 14th Amendment).

Shelley Gavigan, *The Criminal Sanction as It Relates to Human Reproduction: The Genesis of the Statutory Prohibition of Abortion*, 5 J. LEGAL HIST. 20 (1984).

John Keown, *Back to the Future of Abortion Law: Roe’s Rejection of America’s History and Traditions*, 22 ISSUES L. & MED. 3 (2006).

Paul Benjamin Linton, *Planned Parenthood v. Casey: The Flight From Reason in the Supreme Court*, 13 ST. LOUIS U. PUB. L. REV. 15, 107-131 (1993) (among other things, compiling 64 cases

from 40 states demonstrating that the purpose of the nineteenth century state abortion prohibitions was to protect the life of the unborn child).

Eugene Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 GEO. L.J. 173 (Pt I).

Eugene Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 GEO. L.J. 395 (Pt II) (among other things, detailing the legislative history of the American state abortion statutes of the 19th century).

Mark Scott, *Quickening in the Common Law: The Legal Precedent Roe Attempted and Failed to Use*, 1 MICH. L. & POL'Y REV. 199 (1996).

James Witherspoon, *Reexamining Roe: Nineteenth Century Abortion Statutes and the Fourteenth Amendment*, 17 ST. MARY'S L.J. 29 (1985) (showing the protective purposes of the abortion statutes of the nineteenth century and that their purpose were misconstrued by the Court).

Anticipating the Chaos caused by Roe

A. Raymond Randolph, *Before Roe v. Wade: Judge Friendly's Draft Abortion Opinion*, 29 HARV J.L. & PUB. POL'Y 1035 (2006).

Criticisms of the Court's Viability Rule

Randy Beck, Gonzales, Casey and the Viability Rule, 103 NW. U.L. REV. 249 (2009).

Randy Beck, *The Essential Holding of Casey: Rethinking Viability*, 75 UMKC L. REV. 713 (2007).

Other Evaluations (in alphabetical order)

Jason Adkins, *Meet me at the West Coast Hotel: The Lochner Era and the Demise of Roe v. Wade*, 90 MINN. L. REV. 500 (Dec 2005).

Helen Alvare, *Gonzales v. Carhart: Bringing Abortion Law Back into the Family Law Fold*, 69 MONT. L. REV. 409 (2008).

James Bopp & Richard Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 BYU J. PUB. L. 181 (1989).

Gerard V. Bradley, *Life's Dominion: A Review Essay*, 69 NOTRE DAME L. REV. 329, 348 (1993).

Brian W. Clowes, *The Role of Maternal Deaths in the Abortion Debate*, 13 ST. LOUIS U. PUB. L. REV. 327 (1993).

Joseph Dellapenna, *The History of Abortion: Technology, Morality and Law*, 40 U. PITT. L. REV. 359 (1979).

Clarke D. Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms*, 21 VAL. U.L. REV. 563 (1987) (demonstrating that the born-alive rule, originating about 1600, was a rule of *evidence*—to provide sufficient proof at a time of primitive medicine that the unborn child was alive—rather than a rule of substantive moral status, as Justice Blackmun wrongly assumed).

Clarke Forsythe & Stephen B. Presser, *Restoring Self-Government on Abortion: A Federalism Amendment*, 10 TEX. REV. OF L. & POL. 301 (2006) (combining and summarizing the scholarly criticism of *Roe* from the 1970s and 1980s).

Clarke Forsythe, *The Effective Enforcement of Abortion Law Before Roe v. Wade*, in THE SILENT SUBJECT: REFLECTIONS ON THE UNBORN IN AMERICAN CULTURE (Brad Stetson ed., 1996) (surveying the experience and reasoning behind efforts to effectively enforce abortion law in the states, an experience that the Court in *Roe* ignored).

Stephen G. Gilles, *Roe's Life-or-Health Exception: Self-Defense or Relative-Safety?* 85 NOTRE DAME L. REV. 525 (2010) (criticizing the vagueness of the *Roe* "health" exception and its lack of justification).

John Gorby, *The 'Right' to Abortion, the Scope of Fourteenth Amendment 'Personhood,' and the Supreme Court's Birth Requirement*, 1979 S. ILL. U.L.J. 1 (documenting how the Court's analysis of constitutional personhood in *Roe* was superficial).

David Kader, *The Law of Tortious Prenatal Death Since Roe v. Wade*, 45 MO. L. REV. 639 (1980) (demonstrating that the *Roe* Court misunderstood and underestimated the extent of the protection provided an unborn child under tort law).

Michael McConnell, *How Not To Promote Serious Deliberation About Abortion*, 58 U. CHI. L. REV. 1181 (1991) (a thoroughly critical review of Laurence Tribe's book, *The Clash of Absolutes*).

Jane Lang McGrew, *Comment, To be or Not to Be: The Constitutional Question of the California Abortion Law*, 118 U. PA. L. REV. 643 (1970) (one of the best critiques of the California Supreme Court's 1969 decision in *People v. Belous*, on which the Supreme Court predicated in *Roe*).

Kevin C. McMunigal, *Of Causes and Clients: Two Tales of Roe v. Wade*, 47 HASTINGS L.J. 779 (1996).

Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 NOTRE DAME L. REV. 349 (1971) (explaining the extent of legal protection of the unborn and the practical bases for the "inconsistencies" that the Court in *Roe* confused; written by Bill Maledon, who went on to clerk for Justice Brennan at the time of *Roe* and *Doe*).

Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995 (2003) ("*Roe* invented the abortion right out of the penumbras and emanations of past decisions that had invented new rights out of the perceived penumbras and emanations of constitutional texts. The Court reasoned from specific prior extrapolations (like *Griswold*, *Eisenstadt*, and *Skinner*) to a general 'right of privacy' and then read that principle back into the Constitution to create a right to abortion.").

Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?* 109 YALE L.J. 1535 (2000).

William L. Saunders, *Lethal Experimentation on Human Beings: Roe's Effect on Bioethics*, 31 FORDHAM URB. L.J. 817 (2004).

Richard Stith, *Location and Life*, 9 WM & MARY J. WOMEN & L. 255 (Winter 2003).

Lynn Wardle, *The Gap between Law and Moral Order: An Examination of the Legitimacy of the Supreme Court Abortion Decisions*, 1980 BYU L. REV. 820.

Lynn Wardle, *Rethinking Roe v. Wade*: 1985 BYU L. REV. 231.

Lynn Wardle, *Time Enough: Webster v. Reproductive Health Services and the Prudent Pace of Justice*, 41 FLA L. REV. 881 (1989).

Lynn D. Wardle, *The Quandary of Pro-Life Free Speech: A Lesson from the Abolitionists*, 62 ALB. L. REV. 853 (1999).

Why Planned Parenthood v. Casey didn't Fix Roe

MARY ANN GLENDON, *A NATION UNDER LAWYERS* 4 (1994) (“[The plurality in *Casey*] claimed for the Court a more exalted role than any to which the original judicial activist, John Marshall, had aspired in his boldest moments...[Marshall] never proposed, as did Justices Anthony Kennedy, Sandra O’Connor, and David Souter, that the Court’s powers should include telling the country what its ‘constitutional ideals’ should be. Nor can one imagine Marshall proclaiming that the American people would be ‘tested by following’ the Court’s leadership...[*Casey*] was less notable for its result...than for the plurality’s grandiose pretensions of judicial authority.”).

ROBERT F. NAGEL, *THE IMPLOSION OF AMERICAN FEDERALISM* 99 (2001) (“[B]ecause judicial supremacy distances interpretations from the rich variety of experiences and understandings that make up the American political culture, reliance on centralized judicial authority does not produce stability. Indeed, it produces unrooted interpretative innovations and frequent fluctuations that themselves add to anxiety about anarchy. The paradoxical consequence is to induce ever more extravagant claims for judicial power. This can be demonstrated, I think, by a close examination of one of the most dramatic and extraordinary opinions of the twentieth century, *Planned Parenthood v. Casey*.”).

Paul Benjamin Linton, *Planned Parenthood v. Casey: The Flight From Reason in the Supreme Court*, 13 ST. LOUIS U. PUB. L. REV. 15, 107-131 (1993) (a comprehensive critique of the plurality opinion).

Earl Maltz, *Abortion, Precedent, and the Constitution: A Comment on Planned Parenthood v. Casey*, 68 NOTRE DAME L. REV. 11 (1992) (criticizes the *stare decisis* rationale of *Casey*).

Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995 (2003) (why *Casey* is worse than *Roe*).

Michael Stokes Paulsen & Daniel N. Rosen, Brown, *Casey-Style: The Shocking First Draft of the Segregation Opinion*, 69 N.Y.U. L. REV. 1287 (1994) (imagines how *Brown v. Board of Education* might have come out if it had applied the *stare decisis* reasoning in *Casey*).

Sociological & Medical Critiques of the Impact of Roe

THE COST OF CHOICE (Erika Bachiochi ed., 2004) (a series of essays documenting the negative impact of abortion on women).

Clarke Forsythe & Stephen B. Presser, *The Tragic Failure of Roe v. Wade: Why Abortion Should be Returned to the States*, 10 TEX. REV. L. & POL. 87 (2005) (compiling medical and sociological evidence showing the negative impact of *Roe* and *Doe* on women's health and relationships).

Reardon, Strahan, Thorp & Shuping, *Deaths Associated with Abortion Compared to Childbirth*, 20 J. CONTEMP. HEALTH L. & POL'Y 279 (Spring 2004) (an in-depth critique demonstrating the falsity of the medical mantra ("abortion is safer than childbirth") which drove the Court's result in *Roe*).

Criticism of Attempts to Re-Fashion the Right to Abortion

Judge Richard Posner called *Roe* "the wandering Jew of modern constitutional law" because of the numerous efforts to devise a better rationale for the outcome. It's commonly noted that the opinion in *Roe* has been deemed unsatisfactory, and that there has been a cottage industry in academic attempts to draft a new, more satisfactory rationale for *Roe*. This is exemplified by a 2005 book: WHAT *ROE V. WADE* SHOULD HAVE SAID (Jack Balkin ed., 2005).

For various efforts to rebut these new rationales, see:

James Bopp, Jr., *Will There be a Constitutional Right to Abortion After the Reconsideration of Roe v. Wade?* 15 J. CONTEMP. L. 131 (1989).

James Bopp, Jr., *Is Equal Protection a Shelter for the Right to Abortion*, in ABORTION, MEDICINE AND THE LAW (J. Butler & David Walbert eds., 4th ed. 1992).

David Smolin, *Why Abortion Rights Are Not Justified by Reference to Gender Equality: A Response to Professor Tribe*, 23 J. MARSHALL L. REV. 621 (1990).

Mary Catherine Wilcox, *Why the Equal Protection Clause Cannot "Fix" Abortion Law*, 7 AVE MARIA L. REV. 307 (2008).

Major Judicial Opinions Criticizing Roe

City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 452 (1983) (O'Connor, J., dissenting).

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 809 (1986) (White, J., dissenting).

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting).

Webster v. Reproductive Health Services, 492 U.S. 490, 532 (1989) (Scalia, J., concurring in part).

Ohio v. Akron Center for Reproductive Health, 497 U.S. 502, 520 (1990) (Scalia, J., concurring).

Planned Parenthood v. Casey, 505 U.S. 833, 979-1002 (Scalia, J., concurring in the judgment in part and dissenting in part).

Stenberg v. Carhart, 530 U.S. 914, 956 (2000) (Scalia, J., dissenting).

McCorvey v. Hill, 385 F.3d 846, 850-53 (2004) (Jones, J., concurring).

Richmond Medical Center v. Herring, 570 F.3d 165, 180-183 (4th Cir. 2009) (Wilkinson, J., concurring).

Appendix B: Summaries of Supreme Court Cases Involving Abortion from *Roe* to *Casey* that Were Not Covered Extensively in the Text of the Primer

- ***Bigelow v. Virginia*, 421 U.S. 809 (1975):** In *Bigelow v. Virginia*, the Court invalidated a Virginia statute that prohibited the advertisement of abortion.
- ***Connecticut v. Menillo*, 423 U.S. 9 (1975):** In *Connecticut v. Menillo*, the Court upheld a Connecticut statute that criminalized abortions performed by non-physicians.
- ***Singleton v. Wulff*, 428 U.S. 106 (1976):** In *Singleton v. Wulff*, the Court held that physicians may challenge abortion-funding restrictions on behalf of their female patients seeking abortions. This case has had an enormous impact on abortion litigation because it allowed abortion providers and clinics to challenge state abortion laws as plaintiffs, instead of only individual women patients, as *Roe* prescribed.
- ***Planned Parenthood v. Danforth*, 428 U.S. 52 (1976):** In *Planned Parenthood v. Danforth*, plaintiffs challenged the constitutionality of several Missouri state regulations regarding abortion. The Court's plurality opinion upheld the woman's "right to have an abortion," striking the state's requirements of parental consent for minors and spousal consent for married women. The Court upheld an informed consent statute which provided that "a woman, prior to submitting to an abortion during the first 12 weeks of pregnancy, must certify in writing her consent to the procedure and 'that her consent is informed and freely given and is not the result of coercion.'" *Id.* at 65. The Court also upheld a ban on post-viability abortion procedures and left determination of whether the unborn child is viable to the physician. *Id.* at 64. This case is noteworthy because the Court neither referred to a "compelling interest/strict scrutiny" test, nor treated abortion as a "fundamental right." Instead, the Court used the term "undue burden," and struck down certain of the law's provisions because they were "unduly burdensome" on the woman's decision to abort her unborn child.
- ***Bellotti v. Baird*, 428 U.S. 132 (1976) (*Bellotti I*):** In *Bellotti I*, the Court upheld a Massachusetts law requiring parental consent for a minor to obtain an abortion, provided that "if one or both of the [minor]'s parents refuse ... consent, consent may be obtained by order of a judge ... for good cause shown." *Id.* at 149. In the Court's decision, written by Justice Blackmun, there is no reference to a "fundamental right" or strict scrutiny. On the contrary, the Court, in a unanimous opinion, referred to the "unduly burdensome" standard more than once and characterized *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." *Id.* at 147-48.
- ***Beal v. Doe*, 432 U.S. 438, 457 (1977):** In *Beal v. Doe*, the Court held that the federal statute establishing the Medicaid program (the federal- and state-financed program providing healthcare services to low-income people) did not require Pennsylvania to provide funding for non-therapeutic abortions as a condition of participation in the Medicaid program because it was not "unreasonable" under the terms of the statute to

further its “strong and legitimate interest in encouraging normal childbirth.” *Id.* at 445-46. The Court in its majority opinion makes no mention of abortion as a “fundamental right.”

- ***Maheer v. Roe*, 432 U.S. 464 (1977):** The resolution of the statutory question in *Beal v. Doe* prompted the constitutional question in *Maheer v. Roe*. The Court held that the Equal Protection Clause did not require Connecticut to pay for abortions that were “nontherapeutic,” i.e., not medically necessary. Foreshadowing the Court’s decision just three years later in *Harris v. McRae*, 448 U.S. 297 (1980), the Court held that the funding ban was not an invasion of the “right to abortion.” The Court applied the rational basis test (and not a strict scrutiny test) and rejected the equal protection argument, holding that the distinction drawn between abortion and childbirth was rationally related to the “constitutionally permissible” state interest in encouraging normal child birth. *Id.* at 478-79.
- ***Poelker v. Doe*, 432 U.S. 519 (1977):** In *Poelker v. Doe*, the Court held that the refusal of the city of St. Louis to provide publicly financed hospital services for “nontherapeutic” abortions did not deny equal protection, even where it provided such services for childbirth. *Id.* at 521.
- ***Colautti v. Franklin*, 439 U.S. 379 (1979):** In *Colautti v. Franklin*, the Court struck down, as unconstitutionally vague, a Pennsylvania statute that required physicians performing post-viability abortions to “exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born...and the abortion technique employed shall be that which would provide the best opportunity for the fetus to be aborted alive so long as a different technique would not be necessary in order to preserve the life or health of the mother.”
- ***Bellotti v. Baird*, 443 U.S. 622 (1979) (*Bellotti II*):** In *Bellotti II*, the Court limited the protections for minors seeking abortions and limited the historic rights of parents in the medical decisions of their minor children, striking down a Massachusetts statute that required a pregnant minor seeking an abortion to obtain the consent of her parents. The Court, however, implied that states might be able to require a pregnant, unmarried minor to obtain parental consent to an abortion so long as the state law included an alternative procedure to parental approval, such as letting the minor seek a state judge's approval instead (“judicial bypass”). These types of parental involvement requirements—with such Court imposed conditions—are currently enforced in 37 states. The fact that the Court relied on an “undue burden” standard and not a “strict scrutiny” test is also of note in this case. *Id.* at 640.
- ***H.L. v. Matheson*, 450 U.S. 398 (1981):** In *H.L. v. Matheson*, the Court upheld a Utah statute that required a physician to notify a minor’s parent before performing an abortion.

- ***City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (*Akron I*):** In *City of Akron v. Akron Center for Reproductive Health*, the Court struck down an Ohio abortion law requiring a 24-hour waiting period following counseling. In her dissenting opinion, Justice O'Connor (joined by Justices White and Rehnquist), urged that "the 'unduly burdensome' standard" from two prior cases, *Maher v. Roe* and *Bellotti v. Baird*, "be applied to the challenged regulations throughout the entire pregnancy without reference to the particular 'stage' of pregnancy involved." Again, the Court did not apply a "strict scrutiny" analysis in this case, but examined the law's requirements through an "undue burden" lens.
- ***Planned Parenthood Association of Kansas City, Mo. v. Ashcroft*, 462 U.S. 476 (1983):** In *Planned Parenthood Association of Kansas City, Mo. v. Ashcroft* (the companion case to *Akron I*), the Court invalidated a Missouri statute that required all second-trimester abortions to be performed in a hospital. However, the Court upheld requirements that 1) a second physician be in attendance during a post-viability abortion; 2) a minor obtain either parental consent or a judicial waiver; and 3) a pathology report be made for each abortion.
- ***Simopoulos v. Virginia*, 462 U.S. 506 (1983):** In *Simopoulos v. Virginia*, the Court affirmed a Virginia Supreme Court decision upholding the conviction of a doctor for unlawfully performing an abortion during the second trimester of pregnancy outside of a licensed hospital. Noting that Virginia's definition of "hospital" included outpatient clinics, the Court held that Virginia's requirement that second-trimester abortions be performed in licensed clinics was constitutional as a reasonable means of furthering the state's compelling interest in protecting the woman's own health and safety.
- ***Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986):** In *Thornburgh v. American College of Obstetricians and Gynecologists*, in a 5-4 decision, the Court held unconstitutional provisions of a Pennsylvania statute that required 1) a physician to give patients informed consent information on fetal development and the medical risks of abortion; 2) informational reporting requirements; 3) a physician to use the method of abortion most likely to preserve the life of a viable unborn child; and 4) the attendance of a second physician at a post-viability abortion (without medical emergency exception). Justice O'Connor distanced herself from the Court's decision in her dissent: "I dispute not only the wisdom but also the legitimacy of the Court's attempt to discredit and pre-empt state abortion regulation regardless of the interests it serves and the impact it has." *Id.* at 838.
- ***Webster v. Reproductive Health Services*, 492 U.S. 490 (1989):** In *Webster v. Reproductive Health Services*, the Court upheld a 1986 Missouri statute, which included a ban on the use of public funds for counseling and the use of public facilities for providing abortions not necessary to save a woman's life, as well as a requirement that physicians test for viability of unborn children after 20 weeks gestation. By unanimous vote, the justices declined to address the constitutionality of the public funds provision, accepting Missouri's contention that it would not prohibit publicly-employed health care providers

from counseling patients about abortion options. The Court also allowed Missouri's statutory preamble—declaring that life begins at conception—to go into effect.

- ***Hodgson v. Minnesota*, 497 U.S. 417 (1990):** In *Hodgson v. Minnesota*, the Court invalidated a Minnesota law that required a two-parent notification without a procedure for judicial bypass of the notice requirement. However, the Court upheld another provision that required a two-parent notification, which included a procedure for judicial waiver, as well as a 48-hour waiting period for minors.
- ***Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990) (Akron II):** In *Ohio v. Akron Center for Reproductive Health*, the Court, in rejecting a facial challenge, upheld an Ohio statute that required a minor to notify one parent or obtain a judicial waiver before having an abortion. The Court rejected the abortion clinic's claim that the judicial procedure was burdensome.