



A Survey of Judicial and Scholarly Criticism of *Roe v. Wade* Since 1973
Legal Criticism and Unsettled Precedent

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Introduction

Writing in the 1920s, between his two terms of service on the U.S. Supreme Court, Justice Charles Evans Hughes “referred to the decision in *Dred Scott v. Sandford*² as one of three notable instances in which the Court suffered severely from self-inflicted wounds.”³ (The other two decisions Hughes cited were the Legal Tender Cases (*Hepburn v. Griswold*)⁴ and the Income Tax Cases (*Pollock v. Farmers’ Loan & Trust Co.*)⁵) The Supreme Court’s 1973 decision in *Roe v. Wade*⁶ has arguably eclipsed *Dred Scott* and all other cases in its negative impact on the Supreme Court and the Nation. *Roe v. Wade* (and the companion decision in *Doe v. Bolton*) is the most controversial decision ever issued by the Supreme Court in its 233-year history. *Roe* is more controversial than *Dred Scott v. Sanford*. The negative legal impact of *Dred Scott* was virtually eclipsed by the passage and ratification of the Fourteenth Amendment in 1868. *Roe*, by contrast, has been the subject of sustained criticism from Justices, judges and scholars for nearly five decades, and has collided with an increasing number of State governors and legislatures, as reflected in the more than forty cases (as of this writing) challenging state abortion limits that are working their way through the federal court system.

By centralizing control of the abortion issue in American society, *Roe* has negatively impacted national politics and the Supreme Court nomination process for almost a half century.⁷ The *Roe* opinion was extraordinarily weak—“probably the weakest of any major decision in American history,” according to one scholar⁸—and subjected to severe criticism from major constitutional scholars for two decades leading up to the Court’s *Casey* decision in 1992.

Roe created at least three constitutional conflicts: Congress’ debate over pro-life constitutional amendments between 1973 and 1983, the dispute between Congress and the Court over abortion funding that induced the Court to retreat a few years after *Roe* in *Harris v. McRae*,⁹ and the ongoing 48-year tension between the Court and a growing number of States that are determined to protect human life.

² 60 U.S. (19 How.) 393 (1856).

³ CARL B. SWISHER, THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES, VOLUME V: THE TANEY PERIOD, 1836–1864 631 (1974).

⁴ 75 U.S. (8 Wall.) 603 (1869), overruled by *Knox v. Lee*, 79 U.S. (12 Wall.) 457 (1870).

⁵ 157 U.S. 429, 601 (1895).

⁶ 410 U.S. 113 (1973).

⁷ For the detailed survey with statutory citations of state abortion legislation enacted between 1973–1990, see Lynn D. Wardle, “*Time Enough*”: *Webster v. Reproductive Health Services and the Prudent Pace of Justice*, 41 FLA. L. REV. 881 app. at 958–980 (1989).

⁸ L.A. Powe, Jr., *The Court Between Hegemonies*, 49 Wash. & Lee L. Rev. 31, 39 (1992).

⁹ 448 U.S. 297 (1980).

Because *Roe* is arguably the most controversial Supreme Court decision ever, the critical commentary over nearly fifty years has been vast. It can be found in Supreme Court decisions, federal and state court decisions, and Congressional and state legislative hearings,¹⁰ in addition to many scholarly publications, popular journals, and online sources. This compilation seeks to explore what the controversy over *Roe* is all about, why the negative reaction to *Roe* has been so strong, and why it has endured for nearly half a century.

These criticisms have come, year after year, from Justices, other federal judges, and leading legal scholars, and they have endured and multiplied, addressing virtually every point of law, fact, and reasoning in *Roe v. Wade*. In addition, as time passes and experience with *Roe* and its abortion “right” expands, the criticism has broadened as well, reflecting the impact of the Court’s hegemony over the issue and its experience affecting Americans and American society.

In 1992, three Justices (the plurality) tried to entrench *Roe* in the Supreme Court’s decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.¹¹ That attempt to fix and secure *Roe* has also been harshly criticized by Justices and scholars. In contrast, the basic defense of *Roe* has been to ignore Justice Blackmun’s opinion in *Roe*, and instead defend the Court’s *Casey* decision as a successful vindication of the “right” to abortion. Today, defending *Casey* is the primary means of defending *Roe*. The effort by abortion advocates is not to defend the *Roe* opinion but the result: a “right” to abortion, however rationalized. The *Casey* plurality attempted to replace the “P” word (privacy) with the “L” word (liberty) and to argue, based on two pages from Rosalind Petchesky’s 1990 book, *Abortion and Women’s Choice*, that women need abortion for equal opportunity in American society. *Casey* is no more sophisticated than that. That’s the pillar on which the Court imposed *Roe* for another twenty-nine years.

Casey failed. It didn’t provide any better justification for the Court’s decision than *Roe* provided, and it didn’t settle the controversy. *Casey* merely created a temporary lull of several months, until the States began to enact informed consent laws in the 1993–94 state legislative sessions and partial-birth abortion was thrust to the center of national debate in Congress in early 1995.

¹⁰ See e.g., *The Consequences of Roe v. Wade and Doe v. Bolton: Hearing Before the Subcomm. on the Const., Civil Rights, and Prop. Rts. of the S. Comm. on the Judiciary*, 109th Cong., 1st Sess. (2005); *The 25th Anniversary of Roe v. Wade: Has It Stood the Test of Time: Hearing Before the Subcomm. on the Const., Federalism, and Prop. Rts. of the S. Comm. on the Judiciary*, 100th Cong. 2nd Sess. (1998).

¹¹ 505 U.S. 833 (1992).

And *Casey* itself has been unsettled by a series of flip-flops in which the Court has changed the standard of review for abortion regulations across nearly thirty years.¹² Today, *Roe* and *Casey* remain radically unsettled, and two of the most important factors contributing to the Court’s failure to settle the abortion issue are judicial and scholarly criticism, which show no signs of abating.

The Supreme Court has reversed itself more than 230 times over its history,¹³ and in numerous cases those reversals have come in response to judicial dissents and scholarly criticism. Law and judicial opinions have often been open to change in response to reasoned criticism, the test of experience in a rule’s application and acceptance, and more persuasive ideas. In the spirit of optimism that this process will soon lead to a thoughtful reexamination and repudiation of this badly misguided precedent, Americans United for Life offers the following compilation and summary of the leading critical analyses, judicial and academic, of the Supreme Court’s opinions in *Roe*, *Doe*, and *Casey*.

The Expansive Sweep of *Roe v. Wade* and *Doe v. Bolton*

The starting point for understanding *Roe* is understanding its practical legal impact on abortion law in America and on the states more specifically. What we know as *Roe v. Wade* is actually two cases, *Roe v. Wade* from Texas and *Doe v. Bolton*¹⁴ from Georgia (hereafter described together as “*Roe*”); they were “companion cases,” reviewed, heard, and decided together, and explicitly intended by the Court “to be read together.”¹⁵ Indeed, *Roe* and *Doe* must be read together—which too few have done—to understand U.S. abortion law today. The Court in *Roe* held that there is a right to abortion up to fetal viability and that the states could prohibit abortion after fetal viability “except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.”¹⁶ *Doe* added a significant “health of the mother” exception that is often overlooked. The Justices defined health as “all factors—physical, emotional, psychological, familial, and the woman’s age—relevant to the well-being of the patient.”¹⁷ Thus, “health,” in abortion law, includes emotional well-being without limits. Where *Roe* prevented any prohibition of abortion before fetal viability, the *Doe* “health” exception eliminated State prohibitions after

¹² These inconsistencies in judicial decisions started just ten months after *Casey* with Justice O’Connor’s opinion in *Fargo Women’s Health Organization v. Schafer*. 507 U.S. 1013, 1014 (1993) (O’Connor, J., concurring in denial of stay).

¹³ Cong. Rsch. Serv., *Table of Supreme Court Decisions Overruled by Subsequent Decisions*, CONSTITUTION ANNOTATED, <https://constitution.congress.gov/resources/decisions-overruled/> (last visited Jan. 18, 2022).

¹⁴ 410 U.S. 179 (1973).

¹⁵ *Roe*, 410 U.S. at 165.

¹⁶ *Id.*

¹⁷ *Doe*, 410 U.S. at 192.

viability as well.¹⁸ Together, they created a sweeping right to abortion, for any reason, at any time of pregnancy, in all 50 states.

Another way of reading *Roe* that confirms this expansive scope of abortion even after fetal viability is that the Court gave broad “discretion” to physicians to use their “judgment” to perform abortions. The Court has repeatedly spoken about the “discretion” that the States must leave to physicians for any abortion, at any time of pregnancy.¹⁹ That “discretion” includes the authority to decide whether any *Doe* health reason exists for an abortion up to birth. *Roe* and *Doe* were sweeping decisions.

As Harvard law professor Laurence Tribe wrote in 1973, “in *Roe v. Wade* and *Doe v. Bolton*, when the Court had its most dramatic opportunity to express its supposed aversion to substantive due process, it carried that doctrine to lengths few observers had expected, imposing limits on permissible abortion legislation so severe that no abortion law in the United States remained valid.”²⁰

A decade after *Roe*, legal historian Lawrence M. Friedman wrote, “*Roe v. Wade* belongs to a very select club of Supreme Court decisions—those that sent shock waves through the country, affecting every aspect of political life. . . . [I]n one bold, cataclysmic move the Court undid about a century of legislative action. It swept away every abortion law in the country. . . .”²¹ Joseph Dellapenna, the foremost historian of abortion law in the Western World, noted of *Roe*: “The Supreme Court’s haste to decide these cases . . . imposed a more extreme approach to abortion on the United States than is found in almost any other nation.”²²

¹⁸ *Abortion: The High Court Has Ruled*, 5 FAM. PLAN. PERSP. i (1973) (editorial) (“Even New York’s law appears to be overbroad in proscribing all abortions after 24 weeks except to preserve the woman’s life, since the Court had held that an exception must also be made for preservation of the woman’s health (interpreted very broadly).”).

¹⁹ See also *Beal v. Doe*, 432 U.S. 438, 441–42 n.3 (1977) (referencing how “medically necessary” is defined in the Pennsylvania Medicaid program to include if “the pregnancy may threaten the health of the mother,” citing the “all factors” sentence in *Doe v. Bolton*, 410 U.S. at 192, and writing: “We were informed during oral argument that the Pennsylvania definition of medical necessity is broad enough to encompass the factors specified in *Bolton*.”).

²⁰ 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, 2 (1973).

²¹ Lawrence M. Friedman, *The Conflict Over Constitutional Legitimacy*, in THE ABORTION DISPUTE AND THE AMERICAN SYSTEM 13, 16 (Gilbert Y. Steiner ed., 1983); see also Elizabeth N. Moore, *Moral Sentiment in Judicial Opinions on Abortion*, 15 SANTA CLARA L. REV. 591, 633 (1975) (“*Roe v. Wade* invalidated every abortion statute then in effect in the United States, and, in practical effect, legalized abortion on demand in this country.”).

²² JOSEPH W. DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY 746–47 (2006) [hereinafter “Dellapenna, Dispelling the Myths”]. For additional arguments that the Court rushed to judgment in *Roe* and *Doe*, see Richard G. Morgan, *Roe v. Wade and the Lesson of the Pre-Roe Case Law*, 77 MICH. L. REV. 1724 (1979) (arguing that the *Roe* Court should have erred on the side of judicial discretion, refused to decide the case, and let the case law develop in lower courts).

Supreme Court Justice Ruth Bader Ginsburg was a modest critic of the scope of the *Roe* decision *before* she joined the Court, writing in 1992 after the *Casey* decision:

Suppose the Court . . . had not gone on, as the Court did in *Roe*, to fashion a regime blanketing the subject, a set of rules that displaced virtually every state law then in force. Would there have been the twenty-year controversy we have witnessed, reflected most recently in the Supreme Court’s splintered decision in *Planned Parenthood v. Casey*?²³

But once on the Court, Justice Ginsburg sought to expand *Roe*’s scope to eliminate any limit on abortion and to sink *Roe* permanently in constitutional concrete, as reflected in her dissent in *Gonzales v. Carhart*²⁴ and concurrence in *Whole Woman’s Health v. Hellerstedt*.²⁵

As Harvard law professor and comparative constitutional scholar Mary Ann Glendon showed in *Abortion and Divorce in Western Law*, “If we were to broaden our field of comparison to include the seven Warsaw Pact nations, we still would not find any country [in Europe] where there is so little restriction on abortion in principle as there is in the United States.”²⁶ As Glendon observed:

Doe’s broad definition of “health” spelled the doom of statutes designed to prevent the abortion late in pregnancy of children capable of surviving outside the mother’s body unless the mother’s health was in danger. By defining health as “well-being,” *Doe* established a regime of abortion-on-demand for the entire nine months of pregnancy, something that American public opinion has never approved in any state, let alone nationally.²⁷

Professor Dellapenna agreed with Glendon, commenting, “By 1987 . . . [t]he Supreme Court was firmly committed to one of the most open approaches to abortion found anywhere on the planet.”²⁸

²³ Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1199 (1992).

²⁴ 550 U.S. 124 (2007).

²⁵ 136 S. Ct. 2292 (2016).

²⁶ MARY A. GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 24 (1987).

²⁷ Mary Ann Glendon, *From Culture Wars to Building a Culture of Life*, in *THE COST OF “CHOICE”: WOMEN EVALUATE THE IMPACT OF ABORTION*, 3, 5 (Erika Bachiochi ed., 2004).

²⁸ Dellapenna, *Dispelling the Myths*, at 835; *see also Abortion: The High Court Has Ruled*, *supra* note 21 (“Even New York’s law appears to be overbroad in proscribing all abortions after 24 weeks except to preserve the woman’s life, since the Court had held that an exception must also be made for preservation of the woman’s health (interpreted very broadly).”).

A number of federal courts have invalidated legislative limits on late term abortions due to the *Doe v. Bolton* definition of “health.”²⁹ Federal courts have also invalidated 20-week limits on abortion based on the conclusion that the viability rule of *Casey* is categorical.³⁰ And the Court has persistently bypassed the specific question of the application of the *Doe* health definition after viability or whether any prohibition on elective abortions before viability is permissible, until this term’s *Dobbs v. Jackson Women’s Health Organization*.³¹

Procedural and Evidentiary Irregularities in *Roe* and *Doe*

Despite that *Roe* and *Doe* may be among the most consequential Supreme Court decisions of the Twentieth Century, they were based upon a near-absolute dearth of facts and evidence to support them or to guide the Justices in their decision-making. *Roe* and *Doe* were decided without any trial or evidentiary proceeding in the federal district courts, since both cases were decided on motions to dismiss or for summary judgment. There was no intermediate appellate review; the cases were appealed directly to the Supreme Court. They may thus be the worst examples of the Supreme Court relying on unsubstantiated “amicus facts” to decide major questions of constitutional doctrine that have had a significant, enduring impact on the law, the Nation, and the Supreme Court. And the problems with *Roe* and *Doe* are directly attributable to the procedural irregularities, the lack of any factual or evidentiary record, and the Court’s reliance on assumptions and factual claims that were not part of the record but presented to the Court through the briefs of advocacy organizations for the first time on appeal in the Supreme Court.

The Court later acknowledged in *Akron v. Akron Center for Reproductive Health* and *Casey* that *Roe* was based on factual “assumptions,” specifically mentioning the Court’s assumption that abortion in the first trimester was just as safe as normal childbirth.³² One of the most respected federal judges in America during the 1960s and 1970s, Henry J. Friendly, was one of the few who noted how the Court had issued the *Roe* decision without an evidentiary record.³³

²⁹ Michael J. Tierney, *Post-Viability Abortion Bans and the Limits of the Health Exception*, 80 NOTRE DAME L. REV. 465 (2004).

³⁰ See e.g., *Isaacson v. Horne*, 716 F.3d 1213 (9th Cir. 2013), cert. denied, 571 U.S. 1127 (2014).

³¹ *Jackson Women’s Health Org. v. Currier*, 349 F. Supp. 3d 536 (S.D. Miss. 2018), *aff’d sub. nom.*, *Jackson Women’s Health Org. v. Dobbs*, 945 F.3d 265 (5th Cir. 2019), *cert. granted sub. nom.*, *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (argued Dec. 1, 2021).

³² 462 U.S. 416, 430 n.12 (1983); see also *Casey*, 505 U.S. at 860 (“We have seen how time has overtaken some of *Roe*’s factual assumptions . . .”).

³³ Henry J. Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 U. MIA. L. REV. 21 (1978); see also A. Raymond Randolph, *Before Roe v. Wade: Judge Friendly’s Draft Abortion Opinion*, 29 HARV J. L. PUB. POL. 1035 (2006).

*Abuse of Discretion: The Inside Story of Roe v. Wade*³⁴ evaluates the Court’s internal deliberations in 1971–1972, leading to the *Roe* decision of January 1973, and highlights the historical, medical, legal and procedural errors made by the Court. The book specifically analyzes the personal papers of eight of the nine Justices who voted in *Roe* and *Doe*, which illuminate the issue. In regard to the procedural errors, the Court “abruptly dispos[ed] of a number of difficult preliminary orders” and “brushed aside serious problems of federalism, mootness, and standing.”³⁵

The two rounds of oral arguments in 1971 and 1972 left serious questions unanswered. Some of the seven justices who first heard *Roe* and *Doe* in December 1971 saw these problems and sought to circumvent them. Justice Brennan, in a memo to Justice Douglas on December 30, 1971, raised the question: “there would seem to be a number of threshold issues that are of varying difficulty. Some, I think, must be expressly addressed, while others perhaps require no discussion or should be simply finessed. None in my opinion, forecloses decision on the crucial question here—the existence and nature of a right to abortion.”³⁶

The Court brushed over (“finessed”) serious questions of justiciability and of procedure and evidence. First, the concept of viability was not presented to the Court. It was not a factor in either the Texas or Georgia laws. No party or amicus urged the Court to adopt a viability rule or tie an abortion right to viability. The word “viability” was not mentioned once in four hours of argument in December 1971 and October 1972.³⁷

Second, the Justices brushed aside the lack of evidence regarding whether Mary Doe in *Doe v. Bolton* was a real person, the medical reasons for her abortion, and whether she was permitted one under Georgia’s 1968 abortion reform law. Though the Court never knew it, that had real consequences: even before the district court ruled in her case, Sandra Cano, Mary Doe of *Doe v. Bolton*, told her attorney, Margie Pitts Hames, she no longer wanted to have an abortion or to go ahead with the case after she felt her baby kick during her pregnancy.³⁸ Hames ignored her and proceeded with litigation. During argument before the Supreme Court, Hames told the Justices that *Doe* was unable to have an abortion due to

³⁴ CLARKE D. FORSYTHE, *ABUSE OF DISCRETION: THE INSIDE STORY OF ROE V. WADE* (2013) [hereinafter “Forsythe, Abuse of Discretion”].

³⁵ Norman Vieira, *Roe and Doe: Substantive Due Process and the Right of Abortion*, 25 HASTINGS L.J. 867, 868 & n.6 (1974).

³⁶ Memorandum from Justice William J. Brennan Jr. to Justice William O. Douglas on *Roe v. Wade* and *Doe v. Bolton*, (Dec. 30, 1971), (on file with the Library of Congress, William J. Brennan Papers, Box I: 285, Folder 9).

³⁷ The transcript and original audio are available at *Roe v. Wade*, OYEZ, <https://www.oyez.org/cases/1971/70-18> (last visited Jan. 17, 2022).

³⁸ Dellapenna, *Dispelling the Myths* at 682; Forsythe, *Abuse of Discretion*, at 94–95, 378 nn.18 & 19 (citing DAVID GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* (1994)); *The Consequences of Roe v. Wade and Doe v. Bolton*, *supra* note 12.

poverty. This raises the question, was Cano an adequate representative of the class of women in that class-action litigation?³⁹

Another procedural problem with *Roe* was that it allowed facial challenges to abortion laws—suits challenging the laws *in toto* (on their face, in their entirety) and not—as is usual in most constitutional litigation outside of First Amendment law—as-applied, to the application of the laws. Facial challenges ease the burden on abortion clinics to challenge abortion laws and ease the burden on judges to thoroughly assess the facts. Facial challenges have also obscured the safety record of abortion clinics and of providers bringing suit.⁴⁰

Major Judicial Criticisms

The Supreme Court opinions are cited and excerpted here in chronological order because judicial opinions respond to precedent, what has previously been written, and the experience with legal rules issued and applied by courts. Because the Supreme Court has avoided dozens of abortion cases since *Roe* that have been defended by the States and appealed to the Court, some lesser-known abortion decisions are cited, showing the periodic skirmishes within the Court over its abortion doctrine.

Supreme Court Criticism

The first modern abortion case decided by the Court was not *Roe v. Wade* but *United States v. Vuitch*, decided months before *Roe* and *Doe*.⁴¹ The Court issued a limited opinion upholding the District of Columbia’s abortion statute against the claim that it was unconstitutionally vague, and putting off the question whether there was a constitutional right to abortion. Like *Roe* and *Doe*, the *Vuitch* case was without evidence or a record. As Justice White pointed out, “The case comes to us unilluminated by facts or record.”⁴² However, the Court’s machinations in this area began with an interpretation of the abortion statute that presumed that a wide-open exception for “mental health” existed.⁴³ This was a harbinger of a sorry trend in abortion cases: most would be decided on a facial challenge without evidence of the actual effect of the law or of its application to any individual woman.

Like *Dred Scott v. Sanford*, *Roe* and *Doe* were 7-2 decisions. The two dissents by Justices White and Rehnquist became prophetic. They leveled fundamental criticisms at *Roe* that

³⁹ See Dellapenna, *Dispelling the Myths*, at 672–695; Kevin C. McMunigal, *Of Causes and Clients: Two Tales of Roe v. Wade*, 47 HASTINGS L.J. 779 (1996) (detailing the story of *Roe* from the eyes of Norma McCorvey and Sarah Weddington and arguing that Weddington violated legal ethics in her treatment of McCorvey).

⁴⁰ See *June Med. Servs. v. Russo*, 140 S. Ct. 2103 (2020).

⁴¹ 402 U.S. 62 (1971).

⁴² *Id.* at 73.

⁴³ *Doe*, 410 U.S. at 192.

have been quoted ever since by later Justices and by scholars. As Justice White noted in his dissent, the Court in *Roe* and *Doe* “announce[d] a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invest[ed] that right with sufficient substance to override most existing state abortion statutes.”⁴⁴ Justice White argued that the language and history of the Constitution did not support the Court’s decision to legalize abortion:

The upshot is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand. As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court.⁴⁵

Then-Justice (later Chief Justice) William Rehnquist also wrote a strong dissent in *Roe*, emphasizing the Court’s lack of authority and reasoning in creating the “constitutional right.” Rehnquist argued that the Court would become a continuous de facto review board of state regulations:

As in *Lochner* and similar cases applying substantive due process standards to economic and social welfare legislation, the adoption of the compelling state interest standard will inevitably require this Court to examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular state interest put forward may or may not be “compelling.” The decision here to break pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment.⁴⁶

Rehnquist also agreed with White that the “right” to abortion was not rooted in tradition or history. “The fact that a majority of the States . . . have had restrictions on abortions for at least a century is a strong indication . . . that the asserted right to an abortion is not ‘so rooted in the traditions and conscience of our people as to be ranked as fundamental,’”⁴⁷ he observed. The Court found “within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment . . .,”⁴⁸ Rehnquist charged.

⁴⁴ *Id.* at 221–22.

⁴⁵ *Id.* at 222.

⁴⁶ *Roe*, 410 U.S. at 174.

⁴⁷ *Id.* (citing *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

⁴⁸ *Id.*

Rehnquist argued that even if “the enunciation of the substantive constitutional law in the Court’s opinion were proper, the actual disposition of the case by the Court is still difficult to justify.”⁴⁹ Rehnquist discussed the procedural problems with the Court’s decision:

The Texas statute is struck down *in toto*, even though the Court apparently concedes that at later periods of pregnancy Texas might impose these selfsame statutory limitations on abortion. My understanding of past practice is that a statute found to be invalid as applied to a particular plaintiff, but not unconstitutional as a whole, is not simply “struck down” but is, instead, declared unconstitutional as applied to the fact situation before the Court.⁵⁰

Two years later, White and Rehnquist were joined by Chief Justice Burger in White’s dissent from denial of review in *Greco v. Orange Memorial Hospital Corp.*⁵¹ *Greco* marked the first known time that Chief Justice Burger would express his dissent—or his concern—with the Court’s abortion doctrine. “The task of policing this Court’s decisions in [*Roe* and *Doe*], is a difficult one; but having exercised its power as it did, the Court has a responsibility to resolve the problems arising in the wake of those decisions,” Burger said.⁵²

The following year, Chief Justice Burger and Justice Rehnquist would again join Justice White’s dissent from summary affirmance in *Sendak v. Arnold.*⁵³ The three Justices agreed that “Statutes passed by the legislatures of the States may not be so lightly struck down. Normal principles of constitutional adjudication apply even in cases dealing with abortion.”⁵⁴

In *Planned Parenthood of Central Missouri v. Danforth*,⁵⁵ Justice White wrote a dissent in which Burger and Rehnquist joined him in part. The Justices believed that a father’s interest in having a child should not be outweighed by a woman’s right to terminate her pregnancy:

It is truly surprising that the majority finds in the United States Constitution, as it must in order to justify the result it reaches, a rule that the State must assign a greater value to a mother’s decision to cut off a potential human life by abortion than to a father’s decision to let it mature into a live child. Such a rule cannot be found there, nor can it be found in *Roe v. Wade*. . . These are

⁴⁹ *Id.* at 177.

⁵⁰ *Id.* at 177–78.

⁵¹ 423 U.S. 1000 (1975).

⁵² *Id.* at 1006.

⁵³ 429 U.S. 968 (1976).

⁵⁴ *Id.* at 972.

⁵⁵ 428 U.S. 52 (1976).

matters which a State should be able to decide free from the suffocating power of the federal judge, purporting to act in the name of the Constitution.⁵⁶

White also addressed the Court's decision to overturn a state legislative statute that sought to prohibit abortion by saline amniocentesis and thereby to encourage the use of the "safer prostaglandin method generally available."⁵⁷ The evidence the legislature studied demonstrated abortions could still be performed. White argued, "That should end our inquiry, unless we purport to be not only the country's continuous constitutional convention but also its *ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States."⁵⁸

The Court continued to ignore medical evidence and practice that the state legislatures had carefully studied. In her dissent in *City of Akron v. Akron Center for Reproductive Health*, Justice Sandra Day O'Connor asserted that the "*Roe* framework . . . is clearly on a collision course with itself."⁵⁹ She was worried about states' authority to regulate abortion for reasons of maternal health:

As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception. Moreover, it is clear that the trimester approach violates the fundamental aspiration of judicial decisionmaking through the application of neutral principles "sufficiently absolute to give them roots throughout the community and continuity over significant periods of time" The *Roe* framework is inherently tied to the state of medical technology that exists whenever particular litigation ensues. Although legislatures are better suited to make the necessary factual judgments in this area, the Court's framework forces legislatures, as a matter of constitutional law, to speculate about what constitutes "accepted medical practice" at any given time. Without the necessary expertise or ability, courts must then pretend to act as science review boards and examine those legislative judgments.⁶⁰

Justice O'Connor was clear in her dissent that the Court's determination to act as the nation's "de facto medical board" had usurped the power the states had been given by the constitutional Framers.

⁵⁶ *Id.* at 93.

⁵⁷ *Id.* at 98.

⁵⁸ *Id.* at 99.

⁵⁹ 462 U.S. 416, 458 (1983).

⁶⁰ *Id.* (alteration in original) (quoting ARCHIBALD COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 114 (1976)).

Rather than heed these dissents, the Court continued down a dangerous road in *Thornburgh v. American College of Obstetricians and Gynecologists*.⁶¹ White, joined by Rehnquist in his dissent, argued the Court had been extremely misguided in its application of substantive due process in the abortion cases that began with *Roe* and followed “in the 13 years since that decision was handed down.”⁶² The dissent argued that the state statutes should not be invalidated because “our precedents in this area, applied in a manner consistent with sound principles of constitutional adjudication, require reversal of the Court of Appeals on the ground that the provisions before us are facially constitutional.”⁶³

Justice O’Connor, joined by Justice Rehnquist, wrote a separate dissent in *Thornburgh*, stating:

This Court’s abortion decisions have already worked a major distortion in the Court’s constitutional jurisprudence. . . . Today’s decision goes further, and makes it painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion. The permissible scope of abortion regulation is not the only constitutional issue on which this Court is divided, but—except when it comes to abortion—the Court has generally refused to let such disagreements, however longstanding or deeply felt, prevent it from evenhandedly applying uncontroversial legal doctrines to cases that come before it. . . . That the Court’s unworkable scheme for constitutionalizing the regulation of abortion has had this institutionally debilitating effect should not be surprising, however, since the Court is not suited to the expansive role it has claimed for itself in the series of cases that began with *Roe*⁶⁴

Chief Justice Warren Burger joined the Court’s decision in *Roe* but, through a series of cases that caused concern, came to issue an ultimate dissent thirteen years later in *Thornburgh* just before he retired. He had to “regretfully conclude that some of the concerns of the dissenting Justices in *Roe*, as well as the concerns I expressed in my separate opinion, have now been realized.”⁶⁵ Burger was astounded by:

[T]he Court astonishingly go[ing] so far as to say that the State may not even require that a woman contemplating an abortion be provided with accurate medical information concerning the risks inherent in the medical procedure which she is about to undergo and the availability of state-funded alternatives

⁶¹ 476 U.S. 747 (1986).

⁶² *Id.* at 786.

⁶³ *Id.*

⁶⁴ *Id.* at 814 (citations omitted).

⁶⁵ *Id.* at 783.

if she elects not to run those risks. Can anyone doubt that the State could impose a similar requirement with respect to other medical procedures? Can anyone doubt that doctors routinely give similar information concerning risks in countless procedures having far less impact on life and health, both physical and emotional than an abortion, and risk a malpractice lawsuit if they fail to do so?

Yet the Court concludes that the State cannot impose this simple information-dispensing requirement in the abortion context where the decision is fraught with serious physical, psychological, and moral concerns of the highest order. Can it possibly be that the Court is saying that the Constitution *forbids* the communication of such critical information to a woman? We have apparently already passed the point at which abortion is available merely on demand. If the statute at issue here is to be invalidated, the “demand” will not even have to be the result of an informed choice

The Court’s opinion today is but the most recent indication of the distance traveled since *Roe*. Perhaps the first important road marker was the Court’s holding in [*Danforth*], in which the Court held (over the dissent of Justice White joined by Justice Rehnquist and myself) that the State may not require that minors seeking an abortion first obtain parental consent. Parents, not judges or social workers, have the inherent right and responsibility to advise their children in matters of this sensitivity and consequence. Can one imagine a surgeon performing an amputation or even an appendectomy on a 14-year-old girl without the consent of a parent or guardian except in an emergency situation?⁶⁶

Burger concluded that “The soundness of our holdings must be tested by the decisions that purport to follow them. If *Danforth* and today’s holding really mean what they seem to say, I agree we should reexamine *Roe*.”⁶⁷

The Justices’ criticism of *Roe* continued when Justice Antonin Scalia joined the Court in 1986. Scalia argued that the Supreme Court’s decision in *Webster v. Reproductive Health Services* in 1989 “prolong[ed] this Court’s self-awarded sovereignty over a field where it has little proper business since the answers to most of the cruel questions posed are political and not juridical—a sovereignty which therefore quite properly, but to the great damage of the Court, makes it the object of the sort of organized public pressure that political institutions in a democracy ought to receive.”⁶⁸

⁶⁶ *Id.* at 783–85.

⁶⁷ *Id.* at 785.

⁶⁸ 492 U.S. 490, 532 (1989).

In *Ohio v. Akron Center for Reproductive Health*, Justice Scalia stated in his concurrence “that the Constitution contains no right to abortion. It is not to be found in the longstanding traditions of our society, nor can it be logically deduced from the text of the Constitution—not, that is, without volunteering a judicial answer to the nonjusticiable question of when human life begins.”⁶⁹ He advised the Court that “Leaving this matter to the political process is not only legally correct, it is pragmatically so. That alone—and not lawyerly dissection of federal judicial precedents—can produce compromises satisfying a sufficient mass of the electorate that this deeply felt issue will cease distorting the remainder of our democratic process. The Court should end its disruptive intrusion into this field as soon as possible.”⁷⁰

Scalia continued to voice his strong opinions in *Planned Parenthood v. Casey*.⁷¹ He argued that the Court’s application of “reasoned judgment” in *Roe* would not have led them to their conclusion:

Today’s opinion describes the methodology of *Roe*, quite accurately, as weighing against the woman’s interest the State’s “important and legitimate interest in protecting the potentiality of human life.” But “reasoned judgment” does not begin by begging the question, as *Roe* and subsequent cases unquestionably did by assuming that what the State is protecting is the mere “potentiality of human life”

The authors of the joint opinion, of course, do not squarely contend that *Roe v. Wade* was a *correct* application of “reasoned judgment”; merely that it must be followed, because of *stare decisis*. But in 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 “[t]he 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. *Roe* was plainly wrong—even on the Court’s methodology of “reasoned judgment,” and even more so (of course) if the proper criteria of text and tradition are applied.⁷²

Scalia continued his dissent arguing that the “reasoned judgment that produced *Roe*” is empty, as evidenced by the fact that “after more than 19 years of effort by some of the brightest (and most determined) legal minds in the country, after more than 10 cases upholding abortion rights in this Court, and after dozens upon dozens of *amicus* briefs submitted in these and other cases, the best the Court can do to explain how it is that the

⁶⁹ 497 U.S. 502, 520 (1990).

⁷⁰ *Id.* at 520–21.

⁷¹ 505 U.S. at 979–1002.

⁷² *Id.* at 982–83 (second and third alterations in original)(citations omitted).

word “liberty” *must* be thought to include the right to destroy human fetuses is to rattle off a collection of adjectives that simply decorate a value judgment and conceal a political choice.”⁷³

The Court did not normalize abortion, Scalia noted, nor did it “*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.”⁷⁴ And Scalia emphasized that political compromise was actually more possible before *Roe*:

National politics were not plagued by abortion protests, national abortion lobbying, or abortion marches on Congress before *Roe v. Wade* was decided. Profound disagreement existed among our citizens over the issue—as it does over other issues, such as the death penalty—but that disagreement was being worked out at the state level

Roe’s mandate for abortion on demand destroyed the compromises of the past, rendered compromise impossible for the future, and required the entire issue to be resolved uniformly, at the national level. At the same time, *Roe* created a vast new class of abortion consumers and abortion proponents by eliminating the moral opprobrium that had attached to the act.⁷⁵

Scalia argued that the abortion issue had not been settled, and “to portray *Roe* as the statesmanlike ‘settlement’ of a divisive issue, a jurisprudential Peace of Westphalia that is worth preserving, is nothing less than Orwellian. . . . And by keeping us in the abortion-umpiring business, it is the perpetuation of that disruption, rather than of any *Pax Roeana* that the Court’s new majority decrees.”⁷⁶

In regard to the Court’s legitimacy, Scalia stated he was “appalled by[] the Court’s suggestion that the decision whether to stand by an erroneous constitutional decision must be strongly influenced—*against* overruling, no less—by the substantial and continuing public opposition the decision has generated.”⁷⁷ He argued that the unsettledness of *Roe* and the proceeding body of law should lead to *Roe* being overruled.⁷⁸

Eight years later, Scalia continued to voice his strong dissent in *Stenberg v. Carhart*.⁷⁹ He recalled that the *Casey* plurality had believed “that *Roe v. Wade* had ‘call[ed] the contending

⁷³ *Id.* at 983.

⁷⁴ *Id.* at 995 (emphasis in original).

⁷⁵ *Id.*

⁷⁶ *Id.* at 995–96.

⁷⁷ *Id.* at 998 (emphasis in original).

⁷⁸ *Id.* at 999.

⁷⁹ 530 U.S. 914 (2000).

sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution,’ and that the decision in *Casey* would ratify that happy truce.”⁸⁰ But, Scalia pointed out, the opposite had happened, noting that “in the opening words of Justice O’Connor’s concurrence, ‘[t]he issue of abortion is one of the most contentious and controversial in contemporary American society.’”⁸¹ He did not see how the Supreme Court “armed with neither constitutional text nor accepted tradition, can resolve that contention and controversy rather than be consumed by it. If only for the sake of its own preservation, the Court should return this matter to the people—where the Constitution, by its silence on the subject, left it—and let them decide, State by State, whether this practice should be allowed.”⁸²

The Court has not heeded the criticism or wisdom of these Justices. Instead, the debate continues with Justice Clarence Thomas recently dissenting in *June Medical Services v. Russo*: “Today a majority of the Court perpetuates its ill-founded abortion jurisprudence by enjoining a perfectly legitimate state law and doing so without jurisdiction.”⁸³ Thomas reiterated:

The Constitution does not constrain the States’ ability to regulate or even prohibit abortion. This Court created the right to abortion based on an amorphous, unwritten right to privacy, which it grounded in the “legal fiction” of substantive due process. As the origins of this jurisprudence readily demonstrate, the putative right to abortion is a creation that should be undone.⁸⁴

Because of this lack of reasoning and rationale, “Members of this Court have decried the unworkability of our abortion case law and repeatedly called for course corrections of varying degrees.”⁸⁵

Although Justice Lewis Powell joined the Court’s opinions in *Roe* and *Doe* and praised them privately to Justice Blackmun, he grew to have a different view. After retiring from the Supreme Court, Powell referred to *Roe* and *Doe* as “the worst opinions I ever joined.”⁸⁶

⁸⁰ *Id.* at 956 (alteration in original)(citations omitted).

⁸¹ *Id.* (alteration in original).

⁸² *Id.*

⁸³ 140 S. Ct. 2103, 2142 (2020).

⁸⁴ *Id.* (citation omitted).

⁸⁵ *Id.* at 2152.

⁸⁶ JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 341 (1994).

Circuit Court Criticism

Judges on various federal courts at both the Circuit and District Court levels have also contributed their views to the criticism of *Roe v. Wade*.

Second Circuit Court of Appeals

Judge John M. Walker, Jr. wrote, in a case involving partial-birth abortion:

I can think of no other field of law that has been subject to such sweeping constitutionalization as the field of abortion. Under the Supreme Court's current jurisprudence, the legislature is all but foreclosed from setting policy regulating the practice; instead, federal courts must give their constitutional blessing to nearly every increment of social regulation that touches upon abortion—from gathering statistics about its frequency to establishing informed-consent standards that govern its use. . . . In the end, I cannot escape the conclusion that, in these abortion cases, the federal courts have been transformed into a sort of super regulatory agency—a role for which courts are institutionally ill-suited and one that is divorced from accepted norms of constitutional adjudication.⁸⁷

Fourth Circuit Court of Appeals

In 2009, Judge J. Harvie Wilkinson wrote in *Richmond Medical Center for Women v. Herring* that “matters of such medical complexity and moral tension as partial birth abortion should not be resolved by the courts, with no semblance of sanction from the Constitution they purport to interpret. Indeed, the sheer mass of medical detail summoned in this case has led us far beyond the ambit of our own professional competence.”⁸⁸

Judge Paul Niemeyer noted in *Greenville Women's Clinic v. Bryant* that abortion was not like any other simple medical procedure:

Why have inspections, keep records, and minimize the medical risks for only the abortion procedure, when such a protocol is not mandated for comparable medical practices addressing injury and disease? But the importance of the deeply divided societal debate over the morality of abortion and the weight of the interests implicated by the decision to have an abortion can hardly be overstated. As humankind is the most gifted of living creatures and the mystery of human procreation remains one of life's most awesome events, so it

⁸⁷ Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278, 290–96 (2d Cir. 2006) (Walker, J., concurring).

⁸⁸ 570 F.3d 165, 181 (4th Cir. 2009).

follows that the deliberate interference with the process of human birth provokes unanswerable questions, unpredictable emotions, and unintended social and, often, personal consequences beyond simply the medical ones. In adopting an array of regulations that treat the often relatively simple medical procedures of abortion more seriously than other medical procedures, South Carolina recognizes the importance of the abortion practice while yet permitting it to continue, as protected by the Supreme Court’s cases on the subject.⁸⁹

Fifth Circuit Court of Appeals

As early as the 1980s, Judge Patrick Higginbotham noted wryly that judges “are not obliged to give expansive readings to a jurisprudence that the whole judicial world knows is swirling in uncertainty.”⁹⁰

Judge Carl Stewart mused in *Causeway Medical Suite v. Ieyoub*:

Therefore it is not impertinence that makes me question the Supreme Court's abortion jurisprudence, but institutional modesty. I am uncomfortable invoking the authority of the Constitution to invalidate this statute, especially under such an ambiguous mandate from the Constitution. Although the Court said in *Bellotti II* that *Roe* and the Fourteenth Amendment set minimum standards for parental consent statutes, it is unclear that the post-*Casey* Supreme Court still believes that the Constitution demands this outcome. Overturning Louisiana's legislature on such thin authority runs dangerously close to anticonstitutional hubris.⁹¹

Judge Jacques Wiener, Jr. continued this line of thought in *Okpalobi v. Foster*, opining that “The *Casey* Court provided little, if any, instruction regarding the type of inquiry lower courts should undertake to determine whether a regulation has the ‘purpose’ of imposing an undue burden on a woman’s right to seek an abortion.”⁹²

Judge Edith Jones, writing for the court in *McCorvey v. Hill*,⁹³ a case brought by the “Jane Roe” of *Roe v. Wade* to have its result overturned, discussed the development of neonatal and medical science which “now graphically portrays, as science was unable to do 31 years ago, how a baby develops sensitivity to external stimuli and to pain much earlier than was

⁸⁹ 222 F.3d 157, 175 (4th Cir. 2000).

⁹⁰ *Margaret S. v. Edwards*, 794 F.2d 994, 995 n.3 (5th Cir. 1986).

⁹¹ 109 F.3d 1096, 1124 (5th Cir. 1997).

⁹² 190 F.3d 337, 354 (5th Cir. 1999).

⁹³ 385 F.3d 846 (5th Cir. 2004).

then believed.”⁹⁴ She conjectured that “if courts were to delve into the facts underlying *Roe*’s balancing scheme with present-day knowledge, they might conclude that the woman’s “choice” is far more risky and less beneficial, and the child’s sentience far more advanced, than the *Roe* Court knew.”⁹⁵ Judge Jones criticized the “Court’s decision to constitutionalize abortion policy [in] that, unless it creates another exception to the mootness doctrine, the Court will never be able to examine its factual assumptions on a record made in court.”⁹⁶ “The perverse result of the Court’s having determined through constitutional adjudication this fundamental social policy, which affects over a million women and unborn babies each year, is that the facts no longer matter.”⁹⁷

Sixth Circuit Court of Appeals

In *Women’s Medical Professional Corporation v. Voinovich*, Judge Danny Boggs argued that states will never be able to effectively legislate on the abortion issue if *Roe* remained the law:

The abortion area, of course, has been largely constitutionalized, as the Supreme Court has made clear in a line of decisions starting with *Roe* . . . Some choices, however, remain within the state’s legislative power. These choices have not always been well delineated by the Court . . . The post-*Casey* history of abortion litigation in the lower courts is reminiscent of the classic recurring football drama of Charlie Brown and Lucy in the Peanuts comic strip. Lucy repeatedly assures Charlie Brown that he can kick the football, if only this time he gets it just right. Charlie Brown keeps trying, but Lucy never fails to pull the ball away at the last moment. Here, our court’s judgment is that Ohio’s legislators, like poor Charlie Brown, have fallen flat on their backs. I doubt that the lawyers and litigants will ever stop this game. Perhaps the Supreme Court will do so.⁹⁸

Judge James Ryan, writing in *Women’s Medical Professional Corporation v. Taft*, observed:

[W]e suffer from a serious institutional disability in a case in which vitally important issues turn on medical facts, yet the record consists mainly of the conflicting opinions of highly interested, even ideologically motivated, experts.

⁹⁴ *Id.* at 852.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ 130 F.3d 187, 212–19 (6th Cir. 1997).

All these considerations compel us, if possible, to interpret Ohio’s maternal health exception in a manner that will “avoid constitutional difficulties.”⁹⁹

Recently, two prominent members of the Sixth Circuit released strong criticisms of the *Roe* decision and the Court’s abortion doctrine. Judge Jeffrey Sutton leveled fundamental criticisms against the Court’s entire abortion doctrine:

What have been the effects of this centralization of power? Has it left the competing sides to the debate content or more fearful of what’s next? Has judicial authority over the issue been healthy for the federal courts? More than all that, has it worked? Has our jurisprudence facilitated more compromise and thus more settled law? Today’s case, it seems to me, is Exhibit A in a proof that federal judicial authority over the [abortion] issue has not been good for the federal courts or for increased stability over this difficult area of law.¹⁰⁰

Later in 2021, Judge Thapar reviewed *Roe*’s constitutional rationale and explained how the history outlined in *Roe* did not show that abortion was “deeply rooted” in American law or tradition. He wrote pages demolishing the historical case for an abortion right put forth by the Court in *Roe*, the only rationale for *Roe* that a majority of the Court has ever agreed upon but which the Court abandoned and has never replaced.¹⁰¹

Seventh Circuit Court of Appeals

Judge Richard Cudahy in *United States v. Board of Education of City of Chicago* argued that “Where there truly is no federal issue involved, federal courts should stay out of local politics.”¹⁰² He remarked on Justice Ruth Bader Ginsburg’s observation that “the involvement of the federal courts in announcing a full-blown constitutionalized abortion right may have unduly interfered with a political process that might have otherwise worked out the solution to its own problems. Leaving the matter to the political actors ‘might have served to reduce rather than to fuel controversy.’”¹⁰³

Judge Frank Easterbrook, joined by Judge Diane Sykes, in *A Woman’s Choice—East Side Women’s Clinic v. Newman*, argued the Court’s were confused by the Supreme Court’s lack of consistency:

⁹⁹ 353 F.3d 436, 449 (6th Cir. 2003) (citing *Frisby v. Schultz*, 487 U.S. 474, 483 (1988)).

¹⁰⁰ *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 536 (6th Cir. 2021) (Sutton, J., concurring).

¹⁰¹ *Memphis Ctr. for Reprod. Health v. Slatery*, No. 20-5969, ___F.4th___, at *36 (6th Cir. Sept. 10, 2021) (Thapar, J., concurring in judgment in part and dissenting in part).

¹⁰² 11 F.3d 668, 675 (7th Cir. 1993) (Cudahy, J., dissenting).

¹⁰³ *Id.*

When the Justices themselves disregard rather than overrule a decision—as the majority did in *Stenberg*, and the plurality did in *Casey*—they put courts of appeals in a pickle. We cannot follow *Salerno* without departing from the approach taken in both *Stenberg* and *Casey*; yet we cannot disregard *Salerno* without departing from the principle that only an express overruling relieves an inferior court of the duty to follow decisions on the books.¹⁰⁴

Judge Easterbrook again expressed criticism of the Supreme Court and the unworkability of *Casey* in *Planned Parenthood of Indiana & Kentucky v. Box*:

Unless a baleful outcome is either highly likely or ruinous even if less likely, a federal court should allow a state law (on the subject of abortion or anything else) to go into force; otherwise the prediction cannot be evaluated properly. And principles of federalism should allow the states that much leeway. Talk of the states as laboratories is hollow if federal courts enjoin experiments before the results are in. . . . Before the Justices can address [in *June Medical*] whether Louisiana’s statute creates an “undue burden,” they must first decide what it would do if implemented—and the pre-enforcement injunction has made that difficult. . . . Perhaps the Justices will say something about the circumstances under which it is appropriate for a district court to issue pre-enforcement relief that forever prevents the judiciary from knowing what a law *really* does. If that happens, a grant of rehearing en banc in this case would be unproductive. And whether or not it happens, a grant of rehearing en banc would delay the ultimate resolution of this dispute. For a court of appeals cannot decide whether requiring a mature minor to notify her parents of an impending abortion, when she cannot persuade a court that avoiding notification is in her best interests, is an “undue burden” on abortion. The “undue burden” approach announced in [*Casey*] does not call on a court of appeals to interpret a text. Nor does it produce a result through interpretation of the Supreme Court’s opinions. How much burden is “undue” is a matter of judgment, which depends on what the burden would be (something the injunction prevents us from knowing) and whether that burden is excessive (a matter of weighing costs against benefits, which one judge is apt to do differently from another, and which judges as a group are apt to do differently from state legislators). Only the Justices, the proprietors of the undue-burden standard, can apply it to a new category of statute, such as the one Indiana has enacted. Three circuit judges already have guessed how that inquiry would come out; they did not agree. The quality of our work cannot be improved by having eight more circuit judges try the same exercise. It is better to send this

¹⁰⁴ 305 F.3d 684, 687 (7th Cir. 2002).

dispute on its way to the only institution that can give an authoritative answer.¹⁰⁵

The criticism in the *Box* case continued with Judge Michael Kanne’s dissent joined by Judges Joel Flaum, (now Justice) Amy Coney Barrett, Michael Brennan, and Michael Y. Scudder, Jr.:

This case implicates an important and recurring issue of federalism: Under what circumstances, and with what evidence, may a state be prevented from enforcing its law before it goes into effect? Given the existing unsettled status of pre-enforcement challenges in the abortion context, I believe this issue should be decided by our full court. Preventing a state statute from taking effect is a judicial act of extraordinary gravity in our federal structure.¹⁰⁶

Judge Kanne, dissenting in *Planned Parenthood of Indiana & Kentucky, Inc. v. Adams*,¹⁰⁷ argued that the Supreme Court’s decision in *Hellerstedt* did not render *A Woman’s Choice* irrelevant:

Hellerstadt [sic] ignored seemingly contradictory jurisprudence and so does not clarify the confusion we identified in *A Woman’s Choice*. More importantly, *Hellerstadt* [sic] involved a district court record that contained eight peer-reviewed studies regarding the likelihood of abortion complications and testimony from at least four experts regarding the same. . . . The present record contains essentially no comparable empirical data. To the extent that Dr. Pinto’s declaration qualifies as expert testimony, Planned Parenthood hasn’t shown why the information regarding abused minors demonstrates the necessity of a maturity exception. *A Woman’s Choice* supports reversal here because, like in that case, the party seeking invalidation of the statute has not provided probative evidence of an undue burden.¹⁰⁸

In *Planned Parenthood of Indiana & Kentucky, Inc. v. Commissioner of the Indiana State Department of Health*,¹⁰⁹ Judge Daniel Manion stated that “abortion is now a more untouchable right than even the freedom of speech.”¹¹⁰ He discussed the reason for this higher elevated standard and called upon the Court to reconsider *Roe* and *Casey*:

¹⁰⁵ 949 F.3d 997, 998–99 (7th Cir. 2019) (emphasis in original).

¹⁰⁶ *Id.* at 999.

¹⁰⁷ 937 F.3d 973 (7th Cir. 2019).

¹⁰⁸ *Id.* at 998 n.5. (2019).

¹⁰⁹ 888 F.3d 300 (7th Cir. 2018).

¹¹⁰ *Id.* at 312.

The doctrinal reason for this is that *Casey*'s "undue burden" standard is not a means-ends test, but a pure effects test. The key quote from the *Casey* joint opinion reveals this: a regulation of abortion is invalid if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." This means that even a regulation narrowly tailored to serve a compelling state interest is invalid if it prohibits any abortions before viability. . . . That today's outcome is compelled begs for the Supreme Court to reconsider *Roe* and *Casey*. But assuming the Court is not prepared to overrule those cases, it is at least time to downgrade abortion to the same status as actual constitutional rights.¹¹¹

A few years earlier in *Planned Parenthood of Wisconsin, Inc. v. Schimel*,¹¹² Judge Manion had penned a dissent arguing the Circuit Court had misapplied the Supreme Court's jurisprudence:

I regret that today's decision marks the latest chapter in our circuit's continued misapplication of the Supreme Court's abortion jurisprudence. By a majority of one, the court has eliminated a measure that Wisconsin's elected officials have enacted to protect the health and safety of women who choose to incur an abortion. There is no question that Wisconsin's admitting-privileges requirement furthers the legitimate, rational basis of protecting women's health and welfare. Among other benefits, the requirement promotes continuity of care and helps to ensure that abortionists are properly credentialed and qualified.¹¹³

Eighth Circuit Court of Appeals

The Eighth Circuit recently heard *Little Rock Family Planning Services v. Rutledge*,¹¹⁴ a challenge to viability abortion regulations. Judge Bobby Shepherd, in a concurrence joined by Judge Ralph Erickson, called upon the Supreme Court to reevaluate its abortion jurisprudence in regard to viability standards announced in *Casey* because the "standard has proven unsatisfactory."¹¹⁵ In a separate concurrence, Judge Erickson argued that "Viability as a standard is overly simplistic and overlooks harms that go beyond the state's interest in a nascent life alone."¹¹⁶

¹¹¹ *Id.* at 312–13 (citation omitted).

¹¹² 806 F.3d 908 (7th Cir. 2015).

¹¹³ *Id.* at 935.

¹¹⁴ 984 F.3d 682 (8th Cir. 2021).

¹¹⁵ *Id.* at 692.

¹¹⁶ *Id.* at 693.

Ninth Circuit Court of Appeals

Judge Andrew Kleinfeld in *Isaacson v. Horne*¹¹⁷ addressed viability and the changing standard:

Viability is the “critical fact” that controls constitutionality. That is an odd rule, because viability changes as medicine changes. As *Planned Parenthood v. Casey* noted, between *Roe v. Wade* in 1973 and the time *Casey* was decided in 1992, viability dropped from 28 weeks to 23 or 24 weeks, because medical science became more effective at preserving the lives of premature babies.¹¹⁸

He recognized that viability is not a valid standard to control the abortion issue due to the fact it fluctuates as medicine advances.

Tenth Circuit Court of Appeals

Judge Baldock in *Planned Parenthood of Rocky Mountains Services Corporation v. Owens*¹¹⁹ discussed the courts’ ability to police states:

Justice White accurately predicted the future a quarter century ago: “In *Roe v. Wade* . . . this Court recognized a right to an abortion free from state prohibition. The task of policing this limitation on state police power is and will be a difficult and continuing venture in substantive due process.” True to Justice White’s words, state lawmakers continue to test the limits of *Roe* and courts continue to police those limits with no foreseeable end to the struggle.

¹²⁰

Eleventh Circuit Court of Appeals

In *West Alabama Women’s Center v. Williamson*,¹²¹ the Eleventh Circuit heard a case involving D&E (“dismemberment”) procedures on a living unborn child. Chief Judge Ed Carnes wrote in the opinion that “Some Supreme Court Justices have been of the view that there is constitutional law and then there is the aberration of constitutional law relating to abortion. If so, what we must apply here is the aberration.”¹²²

¹¹⁷ 716 F.3d 1213 (9th Cir. 2013).

¹¹⁸ *Id.* at 1233.

¹¹⁹ 287 F.3d 910 (10th Cir. 2002).

¹²⁰ *Id.* at 931 (alteration in original)(citation omitted).

¹²¹ 900 F.3d 1310 (11th Cir. 2018).

¹²² *Id.* at 1314.

Judge Joel Dubina concurred in Carnes' opinion but wrote separately to record his agreement with Justice Thomas' concurrence in *Gonzales v. Carhart*. He specifically emphasized Thomas's statement "that the Court's abortion jurisprudence, including *Casey* and *Roe v. Wade* has no basis in the Constitution."¹²³

District Court Criticism

Judge Raymond Pettine, writing in *Women's Medical Center of Providence, Inc. v. Roberts*,¹²⁴ discussed the undue burden standard:

I agree with the Seventh Circuit that the concept of "undue burden" used by the Supreme Court in analyzing some recent cases involving alleged restrictions on the right to an abortion causes some confusion regarding the standard to be applied in cases involving first trimester restrictions. The confusion appears to stem from attempts to reconcile the position taken by the Court in *Roe v. Wade*, which arguably holds that there are no compelling state interests that ever justify a state-imposed burden on the right to a first trimester abortion, with the Court's position in *Danforth* that limited informed consent requirements may be imposed by the state during the first trimester, and with its position in *Maher v. Roe* and *Harris v. McRae* that the state may discourage indigents from exercising their right to an abortion by refusing to pay for the procedure. . . . Two approaches have emerged as lower federal courts have struggled with the line of Supreme Court abortion decisions.¹²⁵

In the Southern District of Ohio, Chief Judge Sandra Beckwith in *Cincinnati Women's Services, Inc. v. Taft*¹²⁶ stated the *Casey* standard has led to confusion within the district courts:

At this point, it is evident that *Casey* produces decisions that seem to be based more on intuition than application of a discernible legal standard. The need for more clarity is acute because, as Judge Boggs and others have noted, legislatures will continue to legislate in this area, pro-choice advocates will continue to challenge such legislation, and the federal courts will continue to be caught in the middle.¹²⁷

¹²³ *Id.* at 1330 (quoting *Carhart*, 550 U.S. at 169 (Thomas, J., concurring)(citations omitted)).

¹²⁴ 530 F. Supp. 1136 (D.R.I. 1982).

¹²⁵ *Id.* at 1143 n.5 (citations omitted).

¹²⁶ 466 F. Supp. 2d 934 (S.D. Ohio 2005).

¹²⁷ *Id.* at 941.

Judge Adrian Duplantier, writing in *Sojourner v. Roemer*,¹²⁸ expressed his concerns about Roe’s impact on the American system of federalism:

“The Court simply fashions and announces a new constitutional right for pregnant women and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes. The upshot is that the people and the legislatures of 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand.” However, the majority opinion in *Roe*, not Justice White’s dissent, is still the law of this land. . . . The Court has still not revisited *Roe*. The Texas statute held unconstitutional in *Roe* is in all pertinent respects identical to the Louisiana statute under attack here. Thus *Roe* in effect declares the Louisiana statute unconstitutional. Even though the Supreme Court has thus far explicitly refused to overrule *Roe*, counsel for defendants urge that I should anticipate that it will now do so. The Supreme Court has repeatedly held that I have no such authority.¹²⁹

In 2020, Judge Campbell in *Memphis Center for Reproductive Health v. Slatery*¹³⁰ wrote that the issue remains unsettled: “This Court leaves debate about *Roe*, *Casey* and their progeny to the learned jurists on the Supreme Court, legal scholars, legislators and the public—a debate that remains lively and important.”¹³¹

Early Scholarly Criticism

Since the 1800s, the Justices have been sensitive to criticisms and evaluations of their decisions by the Bar, legal commentators, and academics. That commentary evolved as law schools and law reviews developed in the nineteenth century. The Justices have acknowledged that legal criticism may unsettle a decision by the Court.¹³² In opinions in

¹²⁸ 772 F. Supp. 930 (E.D. La. 1991).

¹²⁹ *Id.* at 931 (quoting *Roe*, 410 U.S. at 222–23 (White, J., dissenting)).

¹³⁰ No. 3:20-cv-00501 (M.D. Tenn. July 24, 2020).

¹³¹ *Id.* at *3.

¹³² See e.g., *Morse v. Frederick*, 551 U.S. 393, 431 (2007) (Breyer, J., concurring in the judgment in part and dissenting in part) (“[T]he rule of *Saucier* has generated considerable criticism from both commentators and judges.”); *Continental T.V. Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 47–48, 58 (1977) (“Since its announcement, *Schwinn* has been the subject of continuing controversy and confusion, both in the scholarly journals and in the federal courts.”)

which the Court has overruled a past decision, the Justices have acknowledged the significance of legal criticism.¹³³

The most influential law review critique of *Roe* ever published was Professor John Hart Ely's 1973 article, *The Wages of Crying Wolf: A Comment on Roe v. Wade*.¹³⁴ Professor Ely was a law clerk for Chief Justice Earl Warren at the time of *Griswold v. Connecticut*, but Ely rejected *Roe* as an illegitimate extension 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 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.¹³⁵

Ely also rejected the constitutional foundation for the Court's viability rule, noting "the Court's defense seems to mistake a definition for a syllogism."¹³⁶

In 1987, an article by Horan, Forsythe, and Grant reviewed the exchange on constitutional doctrine and judicial review between Justices White and Stevens in *Thornburgh v. American College of Obstetricians and Gynecologists* and summarized twelve points of criticism of *Roe*:

(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)

¹³³ See e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 232 (1995) (citing several examples of scholarly criticism of *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990)); *Swift Co. v. Wickham*, 382 U.S. 111, 124 n.20 (1965) (noting *Kesler* rule has been "uniformly criticized by commentators" and collecting scholarly criticism).

¹³⁴ 82 YALE L.J. 920 (1973).

¹³⁵ *Id.* at 935–37.

¹³⁶ *Id.* at 924.

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 were misconstrued. (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 [F]ourteenth [A]mendment 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.¹³⁷

Some of the leading law professors in the United States were strongly critical of the *Roe* decision. Alexander Bickel, a constitutional legal scholar and professor at Yale University penned the following:

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?¹³⁸

Another influential work by Archibold Cox, *The Role of the Supreme Court in American Government*,¹³⁹ was cited by Justice O’Connor in her dissent in *Akron*. Cox called out the Court’s failures in handling *Roe*:

[T]he 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 opinion 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

¹³⁷ Dennis J. Horan et al., *Two Ships Passing in the Night: An Interpretivist Review of the White-Stevens Colloquy on Roe v. Wade*, 6 ST. LOUIS U. PUB. L. REV. 229, 230–31 n.8 (1987) (citations omitted).

¹³⁸ ALEXANDER BICKEL, *THE MORALITY OF CONSENT* 28 (1975).

¹³⁹ ARCHIBOLD COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* (1976).

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.¹⁴⁰

Other insightful and critical works include:

JOHN T. NOONAN, JR., *A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES* (1979) (a probing critique of the reasoning of *Roe*, its impact on American politics, and its application by federal courts in the 1970s)

MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 47 (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.”)

LYNN D. WARDLE, *THE ABORTION PRIVACY DOCTRINE: A COMPENDIUM AND CRITIQUE OF FEDERAL COURT ABORTION CASES* (1980) (an exhaustive analysis of how the lower federal courts applied *Roe* during the 1970s)

Lynn D. Wardle, *The Gap Between Law and Moral Order: An Examination of the Legitimacy of the Supreme Court Abortion Decisions*, 1980 B.Y.U. L. REV. 811 (1980) (arguing that the Court’s abortion jurisprudence is illegitimate because it does not conform to society’s notion of morality, previewing future social and political conflict which overlaps with stare decisis factors including acquiescence and settlement)

Joseph W. Dellapenna, *Nor Piety Nor Wit: The Supreme Court on Abortion*, 6 COLUM. HUM. RTS. L. REV. 379 (1974) (arguing that the Supreme Court’s decision in *Roe* was an act of judicial fiat and that Congress should define personhood in the law)

Joseph W. 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)

Philip Kurland, *Public Policy, the Constitution, and the Supreme Court*, 12 N. KY. L. REV. 181, 196 (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.”)

¹⁴⁰ *Id.* at 113–14.

Arnold H. Loewy, *Why Roe v. Wade Should be Overruled*, 67 N.C. L. REV. 939, 939 (1989) (emphasis omitted) (“*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 effectuate legislative change.”)

William Van Alstyne, *Closing the Circle of Constitutional Review from Griswold v. Connecticut to Roe v. Wade: An Outline of a Decision Merely Overruling Roe*, 1989 DUKE L.J. 1677 (1989) (distinguishing *Griswold* from *Roe* and arguing that *Roe*’s holding does not follow from *Griswold*)

Richard G. Morgan, *Roe v. Wade and the Lesson of the Pre-Roe Case Law*, 77 MICH. L. REV. 1724 (1979) (arguing that the *Roe* Court should have erred on the side of judicial discretion, refused to decide the case, and let the case law in lower courts develop)

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

Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 299, 301 (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.”).

Arnold H. Loewy, *Abortive Reasons and Obscene Standards: A Comment on the Abortion and Obscenity Cases*, 52 N.C. L. REV. 223 (1973) (contrasting the Court’s 1973 decisions on abortion and obscenity and arguing that they cannot be reconciled)

Among many others, a stream of liberal law professors has harshly criticized the *Roe* and *Doe* decisions at various times:

Laurence H. Tribe, *Foreward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 7 (1973) (“One of the most curious things about *Roe* is that, behind its own verbal smokescreen, the substantive judgment on which it rests is nowhere to be found.”)

Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 820 (1983) (Tushnet clerked for Justice Thurgood Marshall at the time of *Roe* and stated “It seems to be generally agreed that, as a matter of simple craft, Justice Blackmun's opinion for the Court was dreadful.”)

JAMES F. SIMON, *THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT* 12 (1999) (A liberal law professor and former NYU law school dean, calling *Roe v. Wade* “the most controversial decision of the modern Court era.”)

WHAT ROE V. WADE SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S MOST CONTROVERSIAL DECISION (Jack M. Balkin ed., 2005).

For more examples of scholarly criticism of *Roe* from the 1970s and 1980s see:

Clarke D. Forsythe & Stephen B. Presser, *Restoring Self-Government on Abortion: A Federalism Amendment*, 10 TEX. REV. L. & POL’Y 301 (2006).

Criticism of *Roe*’s “History”

Supreme Court decisions have been criticized and undermined by their inaccurate recounting of historical facts underlying the Court’s opinion. *Dred Scott v. Sanford* is perhaps the most famous example.¹⁴¹ Chief Justice Taney’s opinion for the Court recounted a history of state treatment of blacks which was roundly criticized by Justices McLean’s and Curtis’ dissents. Those criticisms were highlighted by anti-slavery critics until *Dred Scott* was functionally overturned by Section 1 of the Fourteenth Amendment.

One of the essential pillars of the *Roe* decision was Justice Blackmun’s history of the common law and American statutory treatment of legal protection of the prenatal human being. A substantial part of the Court’s opinion in *Roe* is an argument that an abortion right was based in American history. Almost half of Justice Blackmun’s opinion for the Court in *Roe* is history, and that history has been thoroughly discredited.¹⁴²

¹⁴¹ 60 U.S. 393 (1856).

¹⁴² Jeffrey D. Jackson, *Blackstone’s Ninth Amendment: A Historical Common Law Baseline for the Interpretation of Unenumerated Rights*, 62 OKLA. L. REV. 167, 218 (2010) (“Although Justice Blackmun’s majority opinion in *Roe* attempted to infuse some doubt into the status of the common law crime of abortion, stating at one point that research ‘makes it now appear doubtful that abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus,’ his opinion was based on faulty history and was quickly debunked by scholars.”) (quoting *Roe v. Wade*, 410 U.S. 113, 136 (1973)); Lynn D. Wardle, “*Time Enough*”: *Webster v. Reproductive Health Services and the Prudent Pace of Justice*, 41 FLA. L. REV. 881, 949 n.348 (1989) (documenting that the assertion in *Roe* that “abortion was never established as a common law crime” has been thoroughly discredited).

By far, the most exhaustive books of abortion history was written by Professor Joseph Dellapenna in his encyclopedic critique, *Dispelling the Myths of Abortion History* (2006). This is the best one-volume criticism of *Roe* and presents the most comprehensive critique of *Roe*'s spurious history.

Other books and articles that extensively discuss the history of abortion and criticize *Roe*'s history are as follows:

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) (thoroughly criticizing the history and reasoning in *Roe*)

Philip A. Rafferty, *Roe v. Wade: The Birth of a Constitutional Right* (1992) (Ph.D. dissertation, University of Michigan), available at <https://www.parafferty.com/Documents/Roe%20v%20Wade%20-%20Philip%20Rafferty%201992.pdf> (exploring the English legal history of abortion protecting 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) (demonstrating that the born alive rule, originating in the 1600s, 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)

Robert M. Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORDHAM L. REV. 807 (1973) (detailing the common law on abortion known at that time)

Robert A. 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) (detailing the history of criminalizing abortion in the common law)

John Keown, *Back to the Future of Abortion Law: Roe's Rejection of America's History and Traditions*, 22 ISSUES L. & MED. 3 (2006) (challenging pro-choice arguments that abortion was commonplace and accepted in American and English common law)

Eugene Quay, *Justifiable Abortion—Medical and Legal Foundations* [pt. I], 49 GEORGETOWN L.J. 173 (1961) (arguing that the model penal Code's newest suggestions on abortion are a massive departure from the common law, disputing the argument that abortion is necessary if health issues arise during pregnancy, and pointing out the possibility of abortion being used for eugenics purposes)

Eugene Quay, *Justifiable Abortion—Medical and Legal Foundations* [pt. II], 49 GEORGETOWN L.J. 395 (1961) (detailing the history of abortion restrictions from ancient Mesopotamia to the present and overviewing the abortion laws in all fifty states)

Mark S. Scott, *Quickening in the Common Law: The Legal Precedent Roe Attempted and Failed to Use*, 1 MICH. L. & POL'Y REV. 199 (1996) (providing an overview of the history of quickening in the common law and arguing that the *Roe* court misapplied this history)

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

Paul Benjamin Linton, *Planned Parenthood v. Casey: The Flight From Reason in the Supreme Court*, 13 ST. LOUIS U. PUB. L. REV. 15 (1993) (compiling sixty-four cases from forty states demonstrating that the purpose of nineteenth century state abortion prohibitions was to protect the life of the unborn child)

Clarke D. 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 ignored in *Roe*)

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) (contributing one of the best critiques of the California Supreme Court's 1969 decision in *People v. Belous*, 458 P.2d 194 (Cal. 1969), upon which the Supreme Court relied in *Roe*)

Paul Benjamin Linton, *Abortion Convictions Before Roe*, 36 ISSUES L. & MED. 77 (2021) (providing a catalogue of state judicial cases involving abortion across the fifty states)

Maureen L. Condic, *When Does Human Life Begin? The Scientific Evidence and Terminology Revisited*, 8 U. ST. THOMAS J.L. & PUB. POL'Y 44, 62–68 (2013) (a neurobiologist at the University of Utah analyzing numerous studies and concluding that human life begins at the point of sperm implantation, including a table of more than two dozen scientific papers “documenting the organismal functions of human embryos from the one-cell stage onward”, and challenging the view, based on the terminology of the Carnegie Stages, “that the zygote is present only after syngamy”)

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

The Turmoil Caused by *Roe*

Other scholars have studied the turmoil caused by *Roe* and the continuing controversy that has existed for almost fifty years:

Elizabeth N. Moore, *Moral Sentiment in Judicial Opinions on Abortion*, 15 SANTA CLARA LAWYER 591, 634 (1975) (“In erroneously treating abortion as a single-faceted issue, the Court gives little guidance for the subtle, multi-faceted questions facing us in the future.”)

Randy Beck, *Fueling Controversy*, 95 MARQ. L. REV. 735 (2011) (discussing the controversy and backlash that has occurred because of *Roe*’s broad decision and hypothesizing about what would have occurred if the Court had issued a minimal ruling)

A. Raymond Randolph, *Before Roe v. Wade: Judge Friendly’s Draft Abortion Opinion*, 29 HARV. J. L. & PUB. POL'Y 1035 (2006) (detailing the 1970 draft opinion of Judge Henry Friendly that could have influenced the Justices to leave the abortion issue to the states)

Richard Wasserman, *Implications of the Abortion Decisions: Post Roe and Doe Litigation and Legislation*, 74 COLUM. L. REV. 237 (1974) (detailing the major issues in abortion law that *Roe* and *Doe* did not decide, exploring how the law will be changed, and predicting a long litigation battle to resolve these issues)

Criticism of the Court’s Viability Rule

Another essential pillar of *Roe* is its viability rule. The plurality in *Casey* repeatedly called it part of the “central” or “essential” holding of *Roe*.¹⁴³ During the Supreme Court’s two years

¹⁴³ See Paul Benjamin Linton’s thorough analysis of the plurality’s use of *Roe* and the distinctions between the plurality opinion and *Roe* in his article, *Planned Parenthood v. Casey: The Flight From Reason in the Supreme Court*, 13 ST. LOUIS U. PUB. L. REV. 15, 15–40 (1993).

of deliberations in 1971–1972 leading up to the *Roe* decision in January 1973, the early drafts of the opinions proposed that a right to abortion would extend to the end of the first trimester (12 weeks).

The Texas and Georgia laws were not premised on viability. No party asked the Court to extend the abortion right to viability. The word “viability” was never mentioned once during the four hours of oral argument before the Court in December 1971 and October 1972: “No one had briefed or argued in favor of viability in the arguments of *Roe v. Wade*.”¹⁴⁴ Only after the second round of arguments in October 1972 did the Justices seriously discuss the scope of the abortion right that they were creating. This history is laid out and documented in detail in Clarke D. Forsythe, *Abuse of Discretion: The Inside Story of Roe v. Wade* (2013).

John Hart Ely was the first scholar to seriously criticize the Court’s viability rule. He famously retorted that the Court’s explanation for the viability rule in *Roe* “seems to mistake a definition for a syllogism.”¹⁴⁵

Paul Benjamin Linton, *Planned Parenthood v. Casey: The Flight from Reason in the Supreme Court*, 13 ST. LOUIS U. PUB. L. REV. 15 (1993) (thoroughly examining the *Casey* plurality’s treatment of the viability rule)

Paul Benjamin Linton & Maura K. Quinlan, *Does Stare Decisis Preclude Reconsideration of Roe v. Wade: A Critique of Planned Parenthood v. Casey*, 70 CASE W. RESV. L. REV. 283 (2019) (a recent effort applying a contemporary medical understanding of medical viability)

Professor Randy Beck has thoroughly explored all aspects of the viability rule in a series of four articles:

- Randy Beck, *The Essential Holding of Casey: Rethinking Viability*, 75 UMKC L. REV. 713 (2007) (arguing that *Casey*’s positing of an undue burden standard did not adequately defend the *Roe* viability framework using stare decisis but instead stated dicta and that it should reconsider its holding on viability)
- Randy Beck, *Gonzales, Casey and the Viability Rule*, 103 NW. U. L. REV. 249 (2009) (arguing that, despite the Court’s opinion that every decision must have sufficient justification in order to protect “judicial legitimacy”, the Court’s decision in *Casey* falls short of the very justification framework that it posits for the viability rule in that same case)
- Randy Beck, *Self-Conscious Dicta: The Origins of Roe v. Wade’s Trimester Framework*, 51 AM. J. LEGAL HIST. 505 (2011) (documenting that the Justices

¹⁴⁴ Dellapenna, *Dispelling the Myths*, at 594.

¹⁴⁵ *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 924 (1973).

in *Roe* knew that the viability rule was dictum—not necessary to its decision in *Roe* or *Doe* because neither statute was tied to viability and neither party asked the Court to adopt any limit tied to fetal viability)

- Randy Beck, *Twenty-Week Abortion Statutes: Four Arguments*, 43 HASTINGS CONST. L.Q. 187 (2016) (arguing that the Court’s viability framework is unstable and should be changed, that limits on late abortions are still acceptable under the framework, and that the viability rule should not be preserved under stare decisis)¹⁴⁶

Shea Leigh Line, *Twenty Week Bans, New Medical Evidence, and the Effect on Current United States Supreme Court Abortion Law Precedent*, 50 IDAHO L. REV. 139 (2014) (arguing that *Roe*’s viability framework was doomed to fail and be overturned because of its reliance on inaccurate and outdated medical evidence and arguing that the state should be able to regulate abortion when the child begins to feel pain)

Criticisms of the Sociological and Medical Assumptions Underlying *Roe*

A third essential pillar of the *Roe* decision is the Court’s assumption that “abortion is safer than childbirth.” This medical assumption had a pervasive impact on the structure and reasoning of the Court’s opinion in *Roe*:

The medical mantra was arguably the single most important premise that drove the results in the abortion decisions. It is difficult to exaggerate its importance. It formed the historical rationale for the right to abortion, the trimester framework, the state interest analysis, the prohibition on health and safety regulations in the first trimester, the limitations on health and safety regulations in the second trimester, the “health” exception after viability, and the extreme deference to the subjective discretion of the provider throughout.¹⁴⁷

All of the medical, factual and sociological assertions in the *Roe* opinion, including the assumption that “abortion is safer than childbirth” were derived from Justice Blackmun’s personal research or amicus briefs filed for the first time in the Supreme Court. As the attorney for Texas told the Justices at the first oral argument in December 1971: “The record

¹⁴⁶ See also Randy Beck, *State Interests and the Duration of Abortion Rights*, 44 MCGEORGE L. REV. 31 (2013) (considering Justice Kennedy’s impact on the viability rule—especially his majority opinion in *Gonzalez v. Carhart*, 550 U.S. 124 (2007) and dissenting opinion in *Stenberg v. Carhart*, 530 U.S. 914 (2000)—and what effect this will have on future abortion decisions by the Court)

¹⁴⁷ Clarke D. Forsythe & Bradley N. Kehr, *A Road Map Through the Supreme Court’s Back Alley*, 57 VILL. L. REV. 45, 51 (2012).

that came up to this Court contains the amended petition of Jane Roe, an unsigned alias affidavit, and that is all.”¹⁴⁸

As Dorothy Beasley, the Assistant Attorney General for Georgia who argued both rounds of argument, told the Justices: “that again is one of the great problems with this case. We know of no facts, there are no facts in this case, no established facts.”¹⁴⁹ She repeated at one point: “That, again, is not in the record because there was no evidence presented.”¹⁵⁰ The Court acknowledged in *Akron* that this was a “factual assumption.”¹⁵¹

Among the books and articles that discuss these issues in further detail are:

David C. Reardon et al., *Deaths Associated with Abortion Compared to Childbirth—A Review of New and Old Data and the Medical and Legal Implications*, 20 J. CONTEMP. HEALTH L. & POLY 279 (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*)

Clarke Forsythe, *The Medical Assumption at the Foundation of Roe v. Wade and Its Implications for Women’s Health*, 71 WASH. & LEE L. REV. 827 (2014) (the Supreme Court failed to use reliable medical evidence in reaching its decision in *Roe* and the “medical assumption” that “abortion is safer than childbirth” from which the Court derived their opinion was inherently flawed)

Brian W. Clowes, *The Role of Maternal Deaths in the Abortion Debate*, 13 ST. LOUIS U. PUB. L. REV. 327 (1993) (detailing the falsehood of the argument that legalizing abortion dropped death rates due to very unsafe, illegal abortions; arguing that legalizing abortion hurts women and is inherently unsafe, and rebutting the argument that abortion is safer than childbirth)

Clarke D. Forsythe & Bradley N. Kehr, *A Road Map Through the Supreme Court’s Back Alley*, 57 VILL. L. REV. 45 (2012) (a compilation of the medical data on the dangers of abortion, danger compared to childbirth, and the health dangers in abortion clinics that cannot be regulated because of the Court’s excepting of abortion from normal public health regulations in *Roe* and *Doe*; arguing the Court should allow further regulation of abortion to protect maternal health)

¹⁴⁸ Forsythe, *Abuse of Discretion*, at 89 (quoting Transcript of Oral Argument at 16, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18)).

¹⁴⁹ *Id.* (quoting Transcript of Oral Argument at 18, *Doe v. Bolton*, 410 U.S. 179 (1973) (No. 70-40)).

¹⁵⁰ Transcript of Oral Argument at 17, *Doe v. Bolton*, 410 U.S. 179 (1973) (No. 70-40).

¹⁵¹ 462 U.S. at 430 n.12. (“Of course, the State retains an interest in ensuring the validity of *Roe*’s factual assumption that “the first trimester abortion [is] as safe for the woman as normal childbirth at term,” an assumption that “holds true only if the abortion is performed by medically competent personnel under conditions insuring maximum safety for the woman.” (alteration in original)(citation omitted)).

Clarke D. Forsythe & Stephen B. Presser, *The Tragic Failure of Roe v. Wade: Why Abortion Should be Returned to the States*, 10 TEX. REV. L. & POL. 85 (2005) (detailing the heavy social and medical consequences of the Court legalizing abortion by fiat and arguing that with such weighty policy matters at stake, the legislature should be the one to set abortion policy in the United States)

Stephen G. Gilles, *Roe's Life-or-Health Exception: Self-Defense or Relative-Safety*, 85 NOTRE DAME L. REV. 525 (2010) (criticizing the *Roe* Court's "postviability health exception" and detailing its transition to *Casey*'s "significant health risks" test and the "life-or-health exception" in *Carhart* to argue that the Court's precedent in this area is simply a judicial usurpation of the legislative power)

The Unworkability of *Roe*

Another essential pillar of *Roe* was the assumption that skilled doctors at the highest level of the medical profession would do abortions. This was reflected in Justice Blackmun's assumption that doctors like the ones he worked with while Resident Counsel at the Mayo Clinic in the 1950s would do abortions. Doctors, like Dr. Joseph Pratt and other Mayo Doctors, filed an amicus brief in the *Roe* and *Doe* cases. As Dellapenna records:

[Dr. Jane] Hodgson's role turned out to be crucial to the success of the abortion repeal movement as she identified fellow Minnesotan Harry Blackmun as someone who could be influenced by his close friend, Dr. Joseph Pratt of the Mayo Clinic (where Justice Harry Blackmun had been in-house counsel for a time.¹⁵²

Further resources are as listed:

Steven H. Aden, *Driving Out Bad Medicine: How State Regulation Impacts the Supply and Demand of Abortion*, 8 U. ST. THOMAS J.L. & PUB. POL'Y 14 (2013) (presenting "an overview of recent economic data analyzing both the supply side of abortion, such as state restrictions on licensing and credentialing of providers and baseline health and safety regulations, and the demand side of abortion, such as Medicaid funding or de-funding, . . . parental involvement, . . . and wait and counsel requirements")

Randy Beck, *Prioritizing Abortion Access Over Abortion Safety in Pennsylvania*, 8 U. ST. THOMAS J.L. & PUB. POL'Y 33 (2013)

¹⁵² Dellapenna, *Dispelling the Myths*, at 665 (citing DAVID GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 474 (1998) and JAMES RISEN & JUDY THOMAS, *WRATH OF ANGELS: THE AMERICAN ABORTION WAR* 29–31 (1998)).

Clarke D. Forsythe & Rachel N. Morrison, *Stare Decisis, Workability, and Roe v. Wade: An Introduction*, 18 AVE MARIA L. REV. 48 (2020) (overview of the aspects of stare decisis and workability and assertion that Roe and abortion jurisprudence is flawed precedent, systematically “unworkable,” and should be abandoned)

Attempts to Create a New Rationale for the Abortion “Right”

Judge Richard Posner called *Roe* “the Wandering Jew of constitutional law.”¹⁵³ It is commonly noted that the opinion in *Roe* has been deemed unsatisfactory, and that there have been academic attempts to draft a new, more satisfactory rationale for *Roe*. This is exemplified by this collection of essays:

WHAT ROE V. WADE SHOULD HAVE SAID (Jack Balkin ed., 2005) (eleven legal scholars present what they believe the *Roe v. Wade* opinion should have said)

Nancy K. Rhoden, *Trimesters and Technology: Revamping Roe v. Wade*, 95 YALE L. J. 639 (1986)

James Bopp, Jr., *Will There Be a Constitutional Right to Abortion After the Reconsideration of Roe v. Wade?* 15 J. CONTEMP. LAW 131 (1989) (considering the “alternate foundations” upon which the Court may base a right to privacy and concluding that none are intellectually satisfactory and that *Roe*’s privacy framework will one day be abandoned)

James Bopp, Jr., *Is Equal Protection a Shelter for the Right to Abortion?*, in ABORTION, MEDICINE, AND THE LAW (J. Douglas Butler & David F. Walbert, eds., 4th ed. 1992) (explaining why equal protection cannot be considered a justification for a “right” to abortion)

David M. Smolin, *Why Abortion Rights Are Not Justified by Reference to Gender Equality: A Response to Professor Tribe*, 23 J. MARSHALL L. REV. 621 (1990) (critiquing Laurence Tribe’s book, *The Clash of Absolutes*, and arguing that abortion is not necessary for full equality for women and that a worldview of radical autonomy that would allow such an act is wrong)

¹⁵³ Richard A. Posner, *Legal Reasoning from the Top Down and from the Bottom Up: The Question of Unenumerated Constitutional Rights*, 59 U. CHI. L. REV. 433, 441 (1992).

The Effect Overturning *Roe* and *Casey* Will Have on State Abortion Law

Paul Benjamin Linton, *Enforcement of State Abortion Statutes After Roe: A State-by-State Analysis*, 67 U. DET. L. REV. 157 (1990) (an overview of state law on abortion and how a repeal of *Roe* in 1990 would have effected state abortion laws)

Paul Benjamin Linton, *The Legal Status of Abortion in the States if Roe v. Wade is Overruled*, 23 ISSUES L. & MED. 3 (2007) (an overview of how each state's laws would stand on abortion if *Roe v. Wade* is overturned)

David M. Smolin, *The Status of Existing Abortion Prohibitions in a Legal World Without Roe: Applying the Doctrine of Implied Repeal to Abortion*, 11 ST. LOUIS. U. PUB. L. REV. 385 (1992) (discussing what the effect of the repeal of *Roe* will have on pre-*Roe* abortion restrictions and how this will set up the political battle over abortion)

State Protection of the Unborn Despite *Roe v. Wade*

For centuries, as Professor Dellapenna spelled out in great detail in *Dispelling the Myths of Abortion History*, the Anglo-American legal heritage treated the prenatal child as a human being and sought to protect it as a human being through property law and criminal law to the greatest extent possible given contemporary medical understanding and proof.¹⁵⁴ As tort law developed in the early 20th century, it too protected the unborn child.

The common law quickening rule and born alive rule were evidentiary rules, and were practically applied to protect the unborn child to the greatest extent possible. The States in the nineteenth century were influenced by contemporary medical understanding to upgrade the common law and extend protection by statute, from quickening back to conception. Legal protection advanced through judicial decision and legislation up to the time of *Roe*.

Roe sundered that tradition of legal protection, though *Roe* is limited to abortion and did not overturn tort, criminal and property law outside the context of abortion. In addition to Dellapenna's *Dispelling the Myths*, a number of books and articles explain that legal heritage, which underlies the States' interest in protecting the unborn child from conception:

Paul Benjamin Linton, *The Legal Status of the Unborn Child under State Law*, 6 U. ST. THOMAS J.L. & PUB. POL'Y 141 (2011) (reviewing how state law protects the life of the unborn outside of abortion statutes in every area of law)

¹⁵⁴ Dellapenna, *Dispelling the Myths*, at 186–203. 464.

John M. Breen, *Modesty and Moralism: Justice, Prudence and Abortion: A Reply to Skeel & Stuntz*, 31 HARV. J.L. & PUB. POL'Y 219 (2008) (countering the argument that the law should not attempt to prohibit abortion or protect the prenatal human being through abortion law)

Abortion Distortion

Justices and legal scholars have criticized the Court's abortion decisions for the impact they have had in distorting *other* legal and constitutional doctrines. These include the First Amendment, severability, res judicata, facial challenge standards, third party standing, and stare decisis. For further discussions of these issues, see the following cases and articles:

Hill v. Colorado, 530 U.S. 703 (2000) (Justices Scalia and Kennedy warning of *Roe's* impact in distorting First Amendment law)

Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016) (Justice Alito highlighting *Roe's* impact in distorting res judicata law in his dissent)

Planned Parenthood v. Casey, 505 US 833 (1992) (Justice Scalia spotlighting *Roe's* impact in distorting stare decisis)

Jacqueline Nolan-Haley, *Haunting Shadows from the Rubble of Roe's Right of Privacy*, 9 SUFFOLK U. L. REV. 145 (1974) (exploring the effect *Roe* could have on the doctrine of *parens patrie*, fetal experimentation, and born alive policy)

Jill Hamers, *Reeling in the Outlier: Gonzalez v. Carhart and the End of Facial Challenges to Abortion Statutes*, 89 B.U. L. REV. 1069 (2009) (discussing the Court's return in *Gonzales* to an as-applied challenges framework to abortion statutes and their abandonment of hearing facial challenges of such statutes under the overbreadth doctrine)

Stephen J. Wallace, *Why Third-Party Standing in Abortion Suits Deserves A Closer Look*, 84 NOTRE DAME L. REV. 1369 (2009) (arguing that under the Court's *Kowalski* framework on *jus tertii* standing, the defendants in abortions cases should challenge the standing of abortion providers under the Court's third-party standing doctrine)

Lynn D. Wardle, *The Quandary of Pro-Life Free Speech: A Lesson from the Abolitionists*, 62 ALB. L. REV. 853 (1999) (analyzing *Roe* and its change on the law and drawing a parallel between suppression of abolitionist speech prior to the civil war and suppression of pro-life speech; making the case for the protection of pro-life speech in modern America just months before the Court's decision in *Hill v. Colorado*)

Why Casey Could Not Fix Roe

Although the plurality in *Casey* sought to settle abortion law, they did not succeed. Justices Scalia and Thomas have illuminated why *Casey* did not settle abortion law in *Stenberg* and subsequent decisions.¹⁵⁵

Numerous scholars have also explored why *Casey* was inadequate to reinforce *Roe* or settle abortion law:

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 (1993) (a comprehensive critique of the plurality opinion in *Casey*)

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.

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

¹⁵⁵ *Stenberg*, 530 U.S. at 953 (Scalia, J., dissenting); *Id.* at 980 (Thomas, J., dissenting).

Michael S. Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995 (2003) (arguing that *Casey* is worse than *Roe* because it sought to entrench *Roe* without an honest or thorough evaluation of *Roe*, its impact, or the traditional factors of stare decisis)

Stephen G. Gilles, *Why the Right to Elective Abortion Fails Casey's Own Interest-Balancing Methodology—And Why It Matters*, 91 NOTRE DAME L. REV. 691 (2015) (examining *Casey*'s interest-balancing approach and arguing that under that approach the greatest interest should be preserving life and a limitation of elective abortions)

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) (imagining how *Brown v. Board of Education* might have come out if it had applied the Court's stare decisis reasoning and its emphasis on "reliance interests" in *Casey*)

David M. Smolin, *The Jurisprudence of Privacy in a Splintered Supreme Court*, 75 MARQ. L. REV. 975 (1992) (a thorough critique of the plurality opinion in *Casey* and various views of privacy and liberty that purport to undergird a "right" to abortion)

Roe v. Wade and Stare Decisis

Stare decisis is a truncated shorthand for the common law maxim *stare decisis et non quieta movere*, which means to stand by things decided and not disturb settled points. The maxim is the foundation for the judicial doctrine of sticking with settled precedent. The starting question of stare decisis is whether the law or precedent is settled. If the precedent is not settled, it is not entitled to stare decisis respect. If the precedent is settled, then a judge needs a compelling reason to reconsider and overrule it. If the precedent is settled, stare decisis serves as a rebuttable presumption; judges should presumably stick to precedent unless the precedent is erroneous or otherwise defective.

What constitutes a "compelling reason" has been addressed by state and federal judges for 200 years. The six primary stare decisis factors are an attempt to provide a compelling reason. Besides settled, those factors are: wrongly decided, unworkable, factual changes that have eroded the precedent, legal changes that have eroded the precedent, and reliance interests.

Numerous scholars have discussed this issue in relation to *Roe* in some capacity:

James Bopp, Jr. & Richard E. Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 BYU J. PUB. L. 181 (1989) (a comprehensive effort to argue for the reversal of *Roe* from a stare decisis framework; arguing that *Roe* was a striking departure from precedent and detailing the specific ways *Roe* departed from precedent)

Steven G. Calabresi, *Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling Planned Parenthood of Southeastern Pennsylvania v. Casey*, 22 CONST. COMMENT. 311 (2005) (providing originalist and normative arguments for why the Supreme Court should overturn *Casey* due to its improper application of stare decisis)

Thomas J. Molony, *Taking Another Look at the Call on the Field: Roe, Chief Justice Roberts, and Stare Decisis*, 43 HARV. J.L. PUB. POL'Y 733 (2020) (a thorough survey of the Chief Justice's judicial opinions addressing precedent with an analysis of how these might apply to the question of overruling *Roe*)

Michael J. Gerhardt, *The Pressure of Precedent: A Critique of the Conservative Approaches to Stare Decisis in Abortion Cases*, 10 CONST. COMMENT. 67 (1993) (examining the Conservative approach to precedent among the Rehnquist Court, especially in *Casey* and other abortion cases, and arguing that the conservative majority's approach to precedent is flawed and should be discarded)

Jason A. Adkins, *Meet Me at the (West Coast) Hotel: The Lochner Era and the Demise of Roe v. Wade*, 90 MINN L. REV. 500 (2005) (arguing new evidence of abortion's risks and detriments could influence the Court to revisit *Roe* in a similar fashion to how the Court in *West Coast Hotel* revisited *Lochner*)

Clarke D. Forsythe, *A Draft Opinion Overruling Roe v Wade*, 16 GEO. J.L. & PUB. POL'Y 445 (2018) (presenting what a future Supreme Court decision overturning *Roe* could look like and how the application of the six traditional stare decisis factors could weigh in favor of overruling *Roe*)

Paul Benjamin Linton, *Overruling Roe v. Wade: The Implications for the Law*, 32 ISSUES L. & MED. 341 (2017) (discussing the effects on abortion law if *Roe* is overturned).

Clarke D. Forsythe & Rachel N. Morrison, *Stare Decisis, Workability, and Roe v. Wade: An Introduction*, 18 AVE MARIA L. REV. 48 (2020) (overviewing the aspects of stare decisis and workability and asserting that *Roe* and abortion jurisprudence is flawed precedent, systematically "unworkable," and should be abandoned)

Paul Benjamin Linton & Maura K. Quinlan, *Does Stare Decisis Preclude Reconsideration of Roe v. Wade? A Critique of Planned Parenthood v. Casey*, 70 CASE W. RESV. L. REV. 283 (2019) (criticizing the Court's use of the doctrine of stare decisis in *Casey* and calling for the Court to overturn it)

Richard S. Myers, *Re-Reading Roe v. Wade*, 71 WASH. & LEE L. REV. 1025 (2014) (reexamining *Roe*'s opinions to discern their logic, discuss the opinions' weaknesses, and explain why the case will probably be overturned)

Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535 (2000) (exploring whether Congress could pass a statute limiting the effect of stare decisis and require the Court to decide abortion cases based on first principles and their understanding of the Constitution)

Michael Stokes Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Star [sic] Decisis*, 86 N.C. L. REV. 1165 (2008) (examining the Supreme Court's doctrine of stare decisis as revealed in *Casey* and arguing that the Court's own doctrine of stare decisis should be overturned as it is illogical and undermines its own existence)

Michael F. Moses, *Institutional Integrity and Respect for Precedent: DO They Favor Continued Adherence to an Abortion Right*, 27 NOTRE DAME J.L. ETHICS & PUB. POL'Y 541 (2013) (discussing precedent and stare decisis in light of the Court's abortion precedent and arguing that the preservation of judicial integrity necessitates the overturning of *Roe*)

Criticism of *Casey*'s "Reliance Interests" Rationale for Affirming *Roe*

The plurality in *Casey* gave short shrift to five of the six traditional stare decisis factors—the settled, wrongly decided, workability, factual change, and legal change factors—and placed their major emphasis on the reliance interests factor of stare decisis in order reaffirm *Roe*. Since *Casey*, scholars have mounted a more thorough response than any justice to *Casey*'s reliance interests rationale. These include:

THE COST OF "CHOICE": WOMEN EVALUATE THE IMPACT OF ABORTION (Erika Bachiochi ed., 2004) (a collection of essays documenting the negative impact of abortion on women at the 30th anniversary)

Erika Bachiochi, *Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights*, 34 HARV. J.L. & PUB. POL'Y 889 (2011) (arguing against the contention that the Fourteenth Amendment's Equal Protection clause should be the basis of abortion rights and analyzing the burden of motherhood and pregnancy arguments to conclude that instead of protecting abortion, the law must enforce men's parental duties if women are to achieve full equality)

Clarke D. Forsythe & Stephen B. Presser, *The Tragic Failure of Roe v. Wade: Why Abortion Should be Returned to the States*, 10 TEX. REV. L. & POL. 85 (2005) (compiling medical and

sociological evidence showing the negative impact of *Roe* and *Doe* on women's health and relationships)

Clarke Forsythe, *The Medical Assumption at the Foundation of Roe v. Wade and Its Implications for Women's Health*, 71 WASH. & LEE L. REV. 827 (2014) (compiling three appendices with citations to international peer-reviewed medical studies, examining women from many different countries, and finding increased risks of preterm birth, mental trauma and breast cancer after abortion)

Erika Bachiochi, *A Putative Right in Search of a Constitutional Justification: Understanding Planned Parenthood v. Casey's Equality Rationale and How It Undermines Women's Equality*, 35 QUINNIPIAC L. REV. 593 (2017) (examining and rejecting *Casey's* reliance interests rationale and its purported claims to advance women's equality)

The Problems With *Casey's* Undue Burden Standard and Its Application

The Court in *Casey* downgraded abortion from a fundamental right and replaced *Roe's* strict scrutiny standard with an undue burden standard. The Court's application of that standard in subsequent decisions elicited criticisms from justices, lower court judges, and scholars:

Barry P. McDonald, *A Hellerstedt Tale: There and Back Again*, 85 U. CINN. L. REV. 979 (2018) (presenting *Hellerstedt's* test for scrutiny as a retreat from the *Casey* compromise back to a Roesque strict undue burden standard and hypothesizing how this will work out in future cases)

Thomas J. Molony, *Liberty Finds No Refuge: The Doubt-Filled Future of Casey's Undue Burden Standard*, 2019 MICH. ST. L. REV. 23 (2019) (analyzing *Casey's* undue burden standard in light of the *Hellerstedt* ruling and arguing that the undue burden standard in *Casey* is far from settled law)

Stephen G. Gilles, *Restoring Casey's Undue-Burden Standard After Whole Women's [sic] Health v. Hellerstedt*, 35 QUINNIPIAC L. REV. 701 (2017) (discussing the Court's warping of *Casey's* undue burden standard in *Hellerstedt* and the harmful effect this will have on abortion jurisprudence going forward)

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* and *Doe* "health" exception and its lack of justification by the Court)

Roe's Conflict with Other Constitutional Doctrines

Steven G. Calabresi, *Substantive Due Process after Gonzales v. Carhart*, 106 MICH. L. REV. 1517 (2008) (examining the framework of substantive due process laid down in *Gonzalez v.*

Carhart and concluding it was correct to confine such rights only to those that have a deep historical and traditional basis)

Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665 (1997) (discussing how the Court's decision in *Washington v. Glucksburg*, rejecting a substantive due process right to assisted suicide conflicted with the *Roe* Court's substantive due process doctrine)

The Unintended Consequences of the Court's Sweeping Decision in *Roe*

At least Justice Blackmun (and perhaps other Justices) foresaw that *Roe* would create a vacuum in state abortion law that some States would attempt to fill, but the unintended consequences have gone far beyond anything that the Justices anticipated:

Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198 (1992) (recognizing the negative implications of the sweeping decision in *Roe*. "Doctrinal limbs too swiftly shaped, experience teaches, may prove unstable.")

Roe's sweeping legalization of abortion at any time of pregnancy, in all 50 states, quickly led to live births after abortion, as exemplified in cases like *Commonwealth v. Edelin* from Massachusetts and *Floyd v. Anders* from South Carolina. See e.g., Nancy K. Rhoden, *The New Neonatal Dilemma: Live Births from Late Abortions*, 72 GEO. L.J. 1451 (1984).

Roe has sparked constant and unending conflicts of conscience throughout American society, as reflected in Congressional laws and state conscience laws enacted in forty plus states between 1973 and 1975. See e.g., Mark L. Rienzi, *The Constitutional Right Not to Participate in Abortions: Roe, Casey, and the Fourteenth Amendment Rights of Healthcare Providers*, 87 NOTRE DAME L. REV. 1 (2013).

Jason C. Greaves, *Sex-Selective Abortion in the U.S.: Does Roe v. Wade Protect Arbitrary Gender Discrimination?*, 23 GEO. MASON U. CIV. RTS. L.J. 333 (2013) (arguing the unlawfulness of sex-selective abortion and urging the Supreme Court to change its abortion jurisprudence so that it may be banned)

Lynne Marie Kohm, *Sex Selection Abortion and the Boomerang Effect of a Woman's Right to Choose: A Paradox of the Skeptics*, 4 WM & MARY J. WOMEN & L. 91 (1997)

Richard Stith, *Location and Life: How Stenberg v. Carhart Undercut Roe v. Wade*, 9 WM & MARY J. WOM. & L. 255 (2003) (arguing that the Court's validation of state partial-birth abortion prohibitions in *Stenberg* destroys *Roe*'s "perinatal location" framework and that

this violates the equal protection clause and could lead to a devaluation of living life as well as unborn life)

Roe's Negative Impact on Supreme Court Nominations

Justice John Paul Stevens's nomination to the Supreme Court in 1975 (replacing Justice William O. Douglas) was the last Supreme Court nomination to be unaffected by the *Roe* decision.¹⁵⁶ As the Justices of the *Roe* Court aged, Supreme Court nominations became more contentious. The nomination of Sandra Day O'Connor in 1981 (to replace Justice Potter Stewart) was the first to involve the abortion issue in an overt way. By 1987, President Reagan's nomination of Judge Robert Bork to the Supreme Court "clearly centered on Bork's views on abortion."¹⁵⁷ Justice Kennedy "would be followed by other appointments (David Souter and Clarence Thomas) in whose selection and confirmation process the abortion controversy figured just as prominently."¹⁵⁸

There is a vast literature of books and articles on how *Roe* has negatively affected the judicial confirmation process. See in particular:

MOLLIE HEMINGWAY & CARRIE SEVERINO, *JUSTICE ON TRIAL: THE KAVANAUGH CONFIRMATION AND THE FUTURE OF THE SUPREME COURT* (2019) (providing a detailed history of the hearings for Justice Kavanaugh)

Stephen B. Presser, *Judicial Ideology and the Survival of the Role of Law: A Field Guide to the Current Political War over the Judiciary*, 39 LOY. U. CHI. L.J. 427 (2008)

DELLAPENNA, *DISPELLING THE MYTHS*, at 837 (citing numerous books and articles)

Conclusion

Over its history, the Supreme Court has repeatedly looked to judicial dissent from its decisions and insightful criticism from the legal profession and scholars in considering the

¹⁵⁶ Linda Greenhouse, *Justice John Paul Stevens as Abortion-Rights Strategist*, 43 U.C. Davis L. Rev. 749, 751 (2010) ("no senator asked Justice Stevens a single question about abortion") (citing *Nomination of John Paul Stevens to Be a Justice of the Supreme Court: Hearing Before the S. Comm. on the Judiciary*, 94th Cong. (1975).

¹⁵⁷ Dellapenna, *Dispelling the Myths*, at 836 n.10 (citing numerous books and articles documenting this fact, including ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* (1989); PATRICK B. MCGUIGAN & DAWN M. WEYRICH, *NINTH JUSTICE: THE FIGHT FOR BORK* (1990); MICHAEL PERTSCHUK & WENDY SCHAEZEL, *THE PEOPLE RISING: THE CAMPAIGN AGAINST THE BORK NOMINATION* (1989)).

¹⁵⁸ Dellapenna, *Dispelling the Myths*, at 837 (citing numerous books and articles); *Nomination of David H. Souter to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 101st Cong., 2d Sess. 363 (1990).

respect due precedent. Is a prior decision settled? If not, what factors have kept it unsettled? If settled, is there a compelling reason to reconsider it?

Roe's abortion right is an unenumerated right not derived from text, structure, history, or tradition. The Anglo-American legal heritage, based in the common law quickening and born alive rules, directly and powerfully refutes it. And the states, through prenatal injury, wrongful death, and fetal homicide laws, have heightened the conflict year by year since *Roe*, and the conflict has not subsided even after *Casey*. The Court's abortion doctrine consists of numerous judge-made rules. The construction of the right and its application through more than thirty Supreme Court decisions over forty-eight years have produced enduring criticism from Justices, judges and scholars that shows no sign of abating. In fact, the changes in the standard of review and legal doctrines, case by case, and continuing conflict with more than half the states, ensure unremitting criticism.