May 9. This is the May 14 version. This document was cleaned up by Professor Eric Rasmusen, erasmuse61@gmail.com from a machine scan of the pdf that was leaked in May 2022. I have tried to preserve original formatting, but the font size and type are different. The pagination is the same. Please let me know of any corrections I should make. I have omitted Appendix A and Appendix B.

I plan to rewrite this opinion with stylistic improvements, but without changing the argument or moving sections around, to help the Supreme Court redraft and to lobby for improvements in legal writing.

1st Draft

SUPREME COURT OF THE UNITED STATES

No. 19-1502

THOMAS E. DOBBS, STATE HEALTH OFFICER OF THE MISSISSIPPI DEPARTMENT OF HEALTH, ET AL., PETITIONERS v. JACKSON WOMEN'S HEALTH ORGANIZATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[February ___, 2022]

JUSTICE ALITO delivered the opinion of the Court.

Abortion presents a profound moral issue on which Americans hold sharply conflicting views. Some believe fervently that a human person comes into being at conception and that abortion ends an innocent life. Others feel just as strongly that any regulation of abortion invades a woman's right to control her own body and prevents women from achieving full equality. Still others in a third group think that abortion should be allowed under some but not all circumstances, and those within this group hold a variety of views about the particular restrictions that should be imposed.

For the first 185 years after the adoption of the Constitution, each State was permitted to address this issue in accordance with the views of its citizens. Then, in 1973, this Court decided *Roe* v. *Wade*, 410 U. S. 113. Even though the Constitution makes no mention of abortion, the Court held that it confers a broad right to obtain one. It did not claim that American law or the common law had ever recognized

such a right, and its survey of history ranged from the constitutionally irrelevant (*e.g.,* its discussion of abortion in antiquity) to the plainly incorrect (*e.g.,* its assertion that abortion was probably never a crime under the common law). After cataloguing a wealth of other information having no bearing on the meaning of the Constitution, the opinion concluded with a numbered set of rules much like those that might be found in a statute enacted by a legislature.

Under this scheme, each trimester of pregnancy was regulated differently, but the most critical line was drawn at roughly the end of the second trimester, which, at the time, corresponded to the point at which a fetus was thought to achieve "viability," *i.e.,* the ability to survive outside the womb. Although the Court acknowledged that States had a legitimate interest in protecting "potential life,"[1] it found that this interest could not justify any restriction on pre-viability abortions. The Court did not explain the basis for this line, and even abortion supporters have found it hard to defend *Roe*'s reasoning. One prominent constitutional scholar wrote that he "would vote for a statute very much like the one the Court end[ed] up drafting" if he were "a legislator," but his assessment of *Roe* was memorable and brutal: *Roe* was "not constitutional law" at all and gave almost no sense of an obligation to try to be."[2]

At the time of *Roe*, 30 States still prohibited abortion at all stages. In the years prior to that decision, about a third of the States had liberalized their laws, but *Roe* abruptly ended that political process. It imposed the same highly restrictive regime on the entire Nation, and it effectively struck down the abortion laws of every single State.[3] As Justice Byron White aptly put it in his dissent, the decision

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[1] *Roe,* 410 U. S., at 163.

[2] J. Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L. J. 920, 926, 947 (1973) (Ely).

[3] L. Tribe, Foreword: Toward A Model of Roles in the Due Process of Life and Law, 87 Harv. L. Rev. 1, 2 (1973) (Tribe).

represented the "exercise of raw judicial power," 410 U. S., at 222, and it sparked a national controversy that has embittered our political culture for a half-century.[4]

Eventually, in *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992), the Court revisited *Roe*, but the members of the Court split three ways. Two Justices expressed no desire to change *Roe* in any way.[5] Four others wanted to overrule the decision in its entirety.[6] And the three remaining Justices, who jointly signed the controlling opinion, took a third position.[7] Their opinion did not endorse *Roe*'s reasoning, and it even hinted that one or more of its authors might have "reservations" about whether the Constitution protects a right to abortion.[8] But the opinion concluded that *stare decisis*, which calls for prior decisions to be followed in most instances, required adherence to what it called *Roe*'s "central holding" — that a State may not constitutionally protect fetal life before "viability'— even if that holding was wrong.[9] Anything less, the opinion claimed, would undermine respect for this Court and the rule of law.

Paradoxically, the judgment in *Casey* did a fair amount of overruling. Several important abortion decisions were

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[4] See R. Ginsburg, Speaking in a Judicial Voice, 67 N.Y.U. L. Rev. 1185, 1208 (1992). ("*Roe* ... halted a political process that was moving in a reform direction and thereby, I believed, prolonged divisiveness and deferred stable settlement of the issue.").

[5] See 505 U. S., at 911 (Stevens, J., concurring in part and dissenting in part), *id.,* at 932 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

[6] See 505 U. S., at 944 (Rehnquist, C. J., concurring in the judgment in part and dissenting in part); *id.*, at 979 (Scalia, J., concurring in the judgment in part and dissenting in part).

[7] See 505 U. S., at 843 (plurality opinion of O'Connor, Kennedy, and Souter, JJ.).

[8] 505 U. S., at 853.

[9] 505 U. S., at 860 (plurality opinion).

overruled *in toto*, and *Roe* itself was overruled in part.[10] *Casey* threw out *Roe*'s trimester scheme and substituted a new rule of uncertain origin under which States were forbidden to adopt any regulation that imposed an "undue burden" on a woman's right to have an abortion.[11] The decision provided no clear guidance about the difference between a "due" and an "undue" burden. But the three Justices who authored the controlling opinion "call[ed] the contending sides of a national controversy to end their national division" by treating the Court's decision as the final settlement of the question of the constitutional right to abortion.[12]

As has become increasingly apparent in the intervening years, *Casey* did not achieve that goal. Americans continue to hold passionate and widely divergent views on abortion, and state legislatures have acted accordingly. Some have recently enacted laws allowing abortion, with few restrictions, at all stages of pregnancy. Others have tightly restricted abortion beginning well before viability. And in this case, 26 States have expressly asked this Court to overrule *Roe* and *Casey* and allow the States to regulate or prohibit pre-viability abortions.

Before us now is one such state law. The State of Mississippi asks us to uphold the constitutionality of a law that generally prohibits an abortion after the fifteenth week of pregnancy—several weeks before the point at which a fetus is now regarded as "viable" outside the womb. In defending this law, the State's primary argument is that we should reconsider and overrule *Roe* and *Casey* and once again allow each State to regulate abortion as its citizens wish. On the other side, respondents and the Solicitor General ask us to

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[10] 505 U. S., at 861, 870, 873 (overruling *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416 (1983), and *Thornburgh* v. *American College of Obstetricians and. Gynecologists*, 476 U. S. 747 (1986)).

[11] 505 U. S., at 874 (plurality opinion).

[12] *Casey*, 505 U. S., at 567.

reaffirm *Roe* and *Casey* , and they contend that the Mississippi law cannot stand if we do so. Allowing Mississippi to prohibit abortions after 15 weeks of pregnancy, they argue, "would be no different than overruling *Casey* and *Roe* entirely." Brief for Respondents 43. They contend that "no half measures" are available and that we must either reaffirm or overrule *Roe* and *Casey*. *Id.,* at 50.

We hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington* v. *Glucksberg,* 521 U. S. 702, 721 (1997) (internal quotation marks omitted)

The right to abortion docs not fall within this category. Until the latter part of the 20th century, such a right was entirely unknown in American law. Indeed, when the Fourteenth Amendment was adopted, three-quarters of the States made abortion a crime at all stages of pregnancy. The abortion right is also critically different from any other right that this Court has held to fall within the Fourteenth Amendment's protection of "liberty." *Roe*'s defenders characterize the abortion right as similar to the rights recognized in past decisions involving matters such as intimate sexual relations, contraception, and marriage, but abortion is fundamentally different, as both *Roe* and *Casey* acknowledged, because it destroys what those decisions called "fetal life" and what the law now before us describes as an "unborn human being."[13]

Stare decisis, the doctrine on which *Casey*'s controlling

[13] Miss Code Ann. §41-41-191(4)(b).

opinion was based, does not compel unending adherence to *Roe*'s abuse of judicial authority. *Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences. And far from bringing about a national settlement of the abortion issue, *Roe* and *Casey* have enflamed debate and deepened division.

It is time to heed the Constitution and return the issue of abortion to the people's elected representatives. "The permissibility of abortion, and the limitations, upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting." *Casey*, 505 U.S. at 979 (Scalia, J., concurring in the judgment in part and dissenting in part). That is what the Constitution and the rule of law demand.

I

The law at issue in this case, Mississippi's Gestational Age Act, see Miss. Code Ann. §41-41-191, contains this central provision: "Except in a medical emergency or in the case of a severe fetal abnormality, a person shall not intentionally or knowingly perform or induce an abortion of an unborn human being if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks." §4(b).[14]

To support this Act, the legislature made a series of factual findings. It began by noting that, at the time of enactment, only six countries besides the United States "permit[ted] nontherapeutic or elective abortion-on-demand after the twentieth week of gestation."[15] §2(a). The legislature then found that at five or six weeks' gestational age an

[14] The Act defines "gestational age" to be "the age of an unborn human being as calculated from the first day of the last menstrual period of the pregnant woman." §3(f).

[15] Those other six countries were Canada, China, the Netherlands, North Korea, Singapore, and Vietnam. See A. Baglini, Charlotte Lozier Institute, Gestational Limits on Abortion in the United States Compared to International Norms, 6-7 (2014); *Is the United States one of seven countries that 'allow elective abortions after 20 weeks of pregnancy?'*, Wash. Post (Oct. 8, 2017) (stating that the claim made by the Mississippi Legislature and the Charlotte Lozier Institute was "backed by data"). A more recent compilation from the Center for Reproductive Rights indicates that Iceland and Guinea-Bissau are now also similarly permissive. See The World's Abortion Laws, Center for Reproductive Right (Feb. 23, 2021) (Last accessed Jan. 16, 2022).

"unborn human being's heart begins beating;" at eight weeks the "unborn human being begins to move in the womb" at nine weeks "all basic physiological functions are present;" at ten weeks "vital organs begin to function," and "[h]air, fingernails, and toenails begin to form;" at eleven weeks "an unborn human being's diaphragm is developing," and he or she "may move about freely in the womb;" and at twelve weeks the "unborn human being" has "taken on the human form in all relevant respects." §2(b)(i) (quoting *Gonzales* v. *Carhart*, 560 U. S. 124, 160 (2007). It found that most abortions after fifteen weeks employ "dilation and evacuation procedures which involve the use of surgical instruments to crush and tear the unborn child," and it concluded that the "intentional commitment of such acts for nontherapeutic or elective reasons is a barbaric practice, dangerous for the maternal patient, and demeaning to the medical profession." §2(b)(ii).

Respondents are an abortion clinic, Jackson Women's Health Organization, and one of its doctors. On the day the Gestational Age Act was enacted, respondents filed suit in federal district court against. various Mississippi officials, alleging that the Act violated this Court's precedents establishing a constitutional right to abortion. The District Court granted summary judgment in favor of respondents and permanently enjoined enforcement of the Act, reasoning that "viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions" and

that fifteen weeks' gestational age is "prior to viability." 349 F. Supp. 3d. 536, 539-540 (SD Miss 2019) (internal quotation marks and citation omitted). The Fifth Circuit affirmed. 945 F. 3d 265 (CA5 2019).

We granted certiorari to resolve the question whether "all pre-viability prohibitions on elective abortions are unconstitutional." Pet. for Cert. at i. Petitioners' primary defense of the Mississippi Gestational Age Act is that *Roe* and *Casey* 'were wrongly decided and that "the Act is constitutional because it satisfies rational-basis review." Brief for Petitioners 49. Respondents answer that allowing Mississippi to ban pre-viability abortions "would be no different than overruling *Casey* and *Roe* entirely." Brief for Respondents 43. They tell us that "no half measures" are available: we must either reaffirm or overrule *Roe* and *Casey*. *Id.,* at 50.

II

We begin by considering the critical question whether the Constitution, properly understood, confers a right to obtain an abortion. Skipping over that question, the controlling opinion in *Casey* reaffirmed *Roe*'s "central holding" based solely on the doctrine of *stare decisis,* but as we will explain, proper application of *stare decisis* required an assessment of the strength of the grounds on which *Roe* was based. See *infra*, at_~_.

We therefore turn to the question that the *Casey* plurality did not consider, and we address that question in three steps. First, we explain the standard that our cases have used in determining whether the Fourteenth Amendment's reference to "liberty" protects a particular right. Second, we examine whether the right at issue in this case is rooted in our Nation's history and tradition and whether it is an essential component of what we have described as "ordered liberty." Finally, we consider whether a right to obtain an abortion is supported by other precedents.

A
1

Constitutional analysis must begin with "the language of the instrument," *Gibbons* v. *Ogden*, 9 Wheat. 1, 186-189 (1824), which offers a "fixed standard" for ascertaining what our founding document means. J. Story, Commentaries on the Constitution §399 (1833). The Constitution makes no express reference to a right to obtain an abortion, and therefore those who claim that it protects such a right must show that the right is somehow implicit in the constitutional text. *Roe*, however, was remarkably loose in its treatment of the constitutional text. It held that the abortion right, which is not mentioned in the Constitution, is part of a right to privacy, which is also not mentioned. See 410 U. S., at 152-153. And that privacy right, *Roe* observed, had been found to spring from no fewer than five different constitutional provisions—the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. *Id.,* at 152. The Court's discussion left open at least three ways in which some combination of these provisions could protect the abortion right. One possibility was that the right was "founded . . . in the Ninth Amendment's reservation of rights to the people." *Id.*, at 13. Another was that the right was rooted in the First, Fourth, or Fifth Amendment, or in some combination of those provisions, and that this right had been "incorporated" into the Due Process Clause of the Fourteenth Amendment just as many other Bill of Rights provisions had by then been incorporated. *Ibid*; see also *McDonald* v. *Chicago*, 561 U. S. 742, 763-766 (2010) (plurality opinion) (discussing incorporation). And a third path was that the First, Fourth, and Fifth Amendments played no role and that the right was simply a component of the "liberty" protected by the Fourteenth Amendment's Due Process Clause. 410 U.S., at 153. *Roe* expressed the

"feel[ing]" that the Fourteenth Amendment was the provision that did the work, but its message seemed to be that the abortion right could be found somewhere in the Constitution and that specifying its exact location was not of paramount importance.[16] The *Casey* Court did not defend this unfocused analysis and instead grounded its decision solely on the theory that the right to obtain an abortion is part of the "liberty" protected by the Fourteenth Amendment's Due Process Clause.

We discuss this theory in depth below, but before doing so, we briefly address one additional constitutional provision that some of respondents' amici have now offered as yet another potential home for the abortion right: the Fourteenth Amendment's Equal Protection Clause. See Brief for the United States as *Amicus Curiae* 24; see also Brief of Equal Protection Constitutional Law Scholars as *Amici Curiae*. Neither *Roe* nor *Case*y saw fit to invoke this theory, and it is squarely foreclosed by our precedents, which establish that a State's regulation of abortion is not a sex-based classification and is thus not subject to the "heightened scrutiny" that applies to such classifications.[17] The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a "mere pretext[] designed to effect an invidious discrimination against members of one sex or the other." *Geduldig v. Aiello*, 417 U. S. 484, 496 n. 20 (1974). And, as the Court has stated, the "goal of preventing abortion" does not constitute "invidiously discriminatory animus against women." *Bray* v. *Alexandria Women's*

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[16] The Court's words were as follows: "This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U. S., at 153.

[17] See, *e.g., Sessions* v. *Morales-Santana*, 137 S. Ct. 1678, 1689 (2017).

Health Clinic, 506 U. S. 263, 273-274 (1993) (internal quotation marks omitted). Accordingly, laws regulating or prohibiting abortion are not subject to heightened scrutiny. Rather, they are governed by the same standard of review as other health and safety measures.[18]

With this new theory addressed, we turn to *Casey*'s bold assertion that the abortion right is an aspect of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment, 505 U. S., at 846; Brief for Respondents 17; Brief for United States as *Amicus Curiae* 21-22,

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The underlying theory on which this argument rests—that the Fourteenth Amendment's Due Process Clause provides substantive, as well as procedural, protection for "liberty"—has long been controversial. But our decisions have held that the Due Process Clause protects two categories of substantive rights. The first consists of rights guaranteed by the first eight amendments. Those amendments originally applied only to the federal government, *Barron ex rel. Tiernan* v. *Mayor of Baltimore*, 7 Pet. 243, 247-251 (1833) (opinion of Marshall, C. J.), but this Court has held that the Due Process Clause of the Fourteenth Amendment "incorporates" the great majority of those rights and thus makes them equally applicable to the States. See *McDonald*, 561 U. S., at 763-767 & nn. 12-13. The second category—which is the one in question here—comprises a select list of fundamental rights that are not mentioned anywhere in the Constitution.

In deciding whether a right falls into either of these categories, the Court has long asked whether the right is "deeply rooted in [our] history and tradition" and whether it is essential to our Nation's "scheme of ordered liberty."

[18] We discuss this standard in Part V of this opinion.

Timbs v. *Indiana*, 586 U. S. __ (2019) (slip op. at 3) (internal quotation marks omitted); *McDonald*, 561 U. S., at 764; *Glucksberg,* 521 U. S., at 721 (1997).[19] And in conducting this inquiry, we have engaged in a careful analysis of the history of the right at issue. Justice Ginsburg's opinion for the Court in *Timbs* v. *Indiana*, *supra*, is a recent example. In concluding that the Eighth Amendment's protection against excessive fines is "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition," 568 U. S., at __ (slip op., at 7) (citation omitted), her opinion traced the right back to Magna Carta, Blackstone's Commentaries, and 35 of the 37 state constitutions in effect at the ratification of the Fourteenth Amendment. *Id.* at __ (slip op., at 3).

A similar inquiry was undertaken in *McDonald, supra*, which held that the Fourteenth Amendment protects the right to keep and bear arms. The lead opinion surveyed the origins of the Second Amendment, the debates in Congress about the adoption of the Fourteenth Amendment, the state constitutions in effect when that Amendment was ratified (at least 22 of the 37 States protected the right to keep and bear arms), federal laws enacted during the same period, and other relevant historical evidence. 561 U. S., at 767-777. Only then did the opinion conclude that "the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty." 561

[19] See also, *e.g., Duncan* v. *Louisiana,* 391 U.S. 145, 148 (1965) asking whether "a right is among those fundamental principles of liberty and justice which is at the base of our civil and political institutions"); *Palko* v. *Connecticut,* 302 U. S. 319, 327 (1937) (requiring "a principle of justice so rooted in the traditions and consciences of our people as to be ranked as fundamental" (quoting *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934)).

U. S., at 778; see also *id.,* at 822-850 (THOMAS, J., concurring in part and concurring in the judgment) (surveying history and reaching the same result under Fourteenth Amendment's Privileges or Immunities Clause).

Timbs and *McDonald* concerned the question whether the Fourteenth Amendment protects rights that are expressly set out in the Bill of Rights, and it would be anomalous if similar historical support were not required when a putative right is not mentioned anywhere in the Constitution. Thus, in *Glucksberg,* which held that the Due Process Clause does not confer a right to assisted suicide, the Court surveyed more than 700 years of "Anglo-American common law tradition," 521 U. S., at 710, and made clear that a fundamental right must be "objectively, deeply rooted in this Nation's history and tradition," *id.,* at 720-721.

Historical inquiries of this nature are essential whenever we are asked to recognize a new component of the "liberty" protected by the Due Process Clause because the term "liberty" alone provides little guidance. "Liberty" is a capacious term. As Lincoln once said: "We all declare for Liberty; but in using the same word we do not all mean the same thing."[20] In a well-known essay, Isaiah Berlin reported that "[historians of ideas" had catalogued more than 200 different senses in which the terms had been used.[21]

In interpreting what is meant by the Fourteenth Amendment's reference to "liberty," we must guard against the natural human tendency to confuse what that Amendment protects with our own ardent views about the liberty that Americans should enjoy. That is why the Court has long been "reluctant" to recognize rights that are not mentioned in the Constitution. *Collins* v. *Harker Heights,* 503 U. S. 115,125 (1992). "Substantive due process has at times been

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[20] 7 The Collected Works of Abraham Lincoln, Address at a Sanitary Fair, at 301 (April 18, 1864).

[21] I. Berlin, Four Essays on Liberty 121 (1965).

a treacherous field for this Court," *Moore* v. *East Cleveland*, 431 U. S. 494, 503 (1977) (plurality opinion), and it has sometimes led the Court to usurp authority that the Constitution entrusts to the people's elected representatives. See *Regents of Univ. of Mich.* v. *Ewing*, 474 U. S. 214, 225-226 (1985). As the Court cautioned in *Glucksberg*, "[w]e must ... exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court." 521 U. S., at 720 (internal citation and quotation marks omitted).

On occasion, when the Court has ignored the "[a]ppropriate limits" imposed by "respect for the teachings of history," *Moore*, 431 U. S., at 503, it has fallen into the freewheeling judicial policymaking that characterized discredited decisions such as *Lochner* v. *New York,* 198 U. S. 45, 25 (1905). The Court must not fall prey to such an unprincipled approach. Instead, guided by the history and tradition that map the essential components of our Nation's concept of ordered liberty, we must ask what the Fourteenth Amendment means by the term "liberty." When we engage in that inquiry in the present case, the clear answer is that the Fourteenth Amendment does not protect the right to an abortion.[22]

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[22] That is true regardless of whether we look to the Amendment's Due Process Clause or its Privileges or Immunities Clause. Some scholars and Justices have maintained that the Privileges or Immunities Clause is the provision of the Fourteenth Amendment that guarantees substantive rights. See, *e.g., McDonald* v. *Chicago,* 561 U.S. 742, 813-850 (2010) (THOMAS, J., concurring), *Duncan* v. *Louisiana,* 391 U.S. 145, 165-166 (1968) (Black. J., concurring); A. Amar, Bill of Rights: Creation and Reconstruction 165-180 (1998) (Amar); J. Ely, Democracy and Distrust 22-30 (1980); 2 W. Crosskey, Politics and the Constitution in the History of the United States 1089-1095 (1953). But even on that view, such a right would need to be rooted in the Nation's history and tradition. See *Corfield* v. *Coryell,* 6 F. Cas. 546, 551-552 (No. 3,230) (CC ED Pa. 1825) (declaring unenumerated rights under the Privileges and Immunities Clause, U. S. Const. Art. IV, §2, as those "fundamental" rights "which have, at all time, been enjoyed by the citizens of the several states"; Amar 176 (relying on *Corfield* to interpret the Privileges or Immunities Clause; cf. *McDonald*, *supra*, at 819-820, 832, 854 (THOMAS, J., concurring in part and concurring in the judgment) (reserving the question whether the Privileges or Immunities Clause protects "any rights besides those enumerated in the Constitution").

B

1

Until the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion. Zero. None. No state constitutional provision had recognized such a right. Until a few years before *Roe* was handed down, no federal or state court had recognized such a right. Nor had any scholarly treatise of which we are aware. And although law review articles are not reticent about advocating new rights, the earliest article proposing a constitutional right to abortion that has come to our attention was published only a few years before *Roe.*[23]

Not only was there no support for such a constitutional right until shortly before *Roe,* but abortion had long been a crime in every single State. At common law, abortion was criminal in at least some stages of pregnancy and was regarded as unlawful and could have very serious consequences at all stages. American law followed the common law until a wave of statutory restrictions in the 1800s expanded criminal liability for abortions. By the time of the adoption of the Fourteenth Amendment, three-quarters of the States had made abortion a crime at any stage of pregnancy, and the remaining States would soon follow.

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[23] See R. Lucas, Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes, 46 N. C. L. Rev. 730 (1968); see also D. Garrow, Liberty and Sexuality 334-335 (1994) (stating that Mr. Lucas was "undeniably the first person to fully articulate on paper" the argument that "a woman's right to choose abortion was fundamental individual freedom protected by the U. S. Constitution's guarantee of personal liberty").

Roe either ignored or misstated this history, and *Casey* declined to reconsider *Roe* faulty historical analysis. It is therefore important to set the record straight.

2

i

We begin with the common law, under which abortion was a crime at least after "quickening"—*i.e.,* the first felt movement of the fetus in the womb, which usually occurs between the 16th and 18th week of pregnancy.[24]

The "eminent common-law authorities (Blackstone, Coke, Hale, and the like)," *Kahler* v. *Kansas*, 589 U.S. __, __ (2020) (slip op., at 7), *all* describe abortion after quickening as criminal. Henry de Bracton's 13th-century treatise explained that if a person has "struck a pregnant woman, or has given her poison, whereby he has caused an abortion, if the foetus be already formed and animated, and particularly if it be animated, he commits homicide." H. Bracton, De Legibus et Consuetudinibus Angliae 279 (T. Twiss ed. 1879); see also 1 Fleta ch. 20, reprinted in 53 Selden Soc'y 60-61 (HG. Richardson & G.0 Sayles eds. 1953)

[24] The exact meaning of 'quickening" is subject of some debate. Compare Brief for *Amici Curiae* Scholars of Jurisprudence John M. Finis and Robert P. George in Support of Petitioners 12-14 & n.32. ("a quick Child" meant simply a "live" child and under the era's outdated knowledge of embryology, a fetus was thought to become "quick" at around the sixth week of pregnancy), with Brief for *Amici Curiae* American Historical Association and Organization of American Historians Br. 6 n. 2 ("quick" and "quickening" consistently meant "the woman's perception of fetal movement"). We need not wade into this debate. First it suffices for present purposes to show that abortion was criminal by at least the 16th or 18th week of pregnancy. Second, as we will show, during the relevant period---*i.e.,* the period surrounding the enactment of the Fourteenth Amendment---the quickening distinction was abandoned as States criminalized abortion at all stages of pregnancy. See *infra,* at ___-___.

(13th century treatise).[25]

Sir Edward Coke's 17th-century treatise likewise asserted that abortion of a quick child was "murder" if the "childe be born alive" and a "great misprision" if the "childe dieth in her body." 3 Institutes of the Laws of England 50-51 (1644). (Misprision" referred to "some heynous offence under the degree of felony." *Id.*, at 139). Two treatises by Sir Matthew Hale likewise described abortion of a quick child who died in the womb as a "great crime" and a "great misprision." See M. Hale, Pleas of the Crown: Or, A Methodical Summary of the Principal Matters Relating to that Subject 53 (1673) (P. R. Glazebrook, ed., 1973); 1 M. Hale, History of Pleas of the Crown 433 (1736) (Hale). And writing near the time of the adoption of our Constitution, Blackstone explained that abortion of a "quick" child was "by the ancient law homicide or manslaughter" (citing Bracton), and at least "a very heinous misdemeanor" (citing Coke). 1 Blackstone, Commentaries on the Laws of England *129-*130 (7th ed. 1775) (Blackstone).

English cases dating all the way back to the 13th century corroborate the treatises' statements that abortion was a crime. See generally J. Dellapenna, Dispelling the Myths of Abortion History 126 & n. 16, 134-142, 188-194 & nn.84-86 (2005) (Dellapenna); J. Keown, Abortion, Doctors, and the Law 3-12 (1988) (Keown). In 1732, for example, Eleanor Beare was convicted of "destroying the Foetus in the Womb" of another woman and "there-by causing her to miscarry."[26] For that crime and another "misdemeanor," Beare was sentenced to two days in the pillory and three years' imprisonment.[27]

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[25] Even before Bracton's time, English law imposed punishment for the killing of a fetus. See Lagos Henrici Primi 222-223 (L. J. Downer ed., 1972) (imposing penalty for any abortion and treating a woman who aborted a "quick" child "as if she were a murderess").

[26] 2 Gentleman's Magazine 931 (Aug. 1732).

[27] *Id.,* at 932.

Although a pre-quickening abortion was not itself considered homicide, it does not follow that abortion was permissible at common law—much less that abortion was a legal right. *Cf. Washington* v. *Glucksberg*, 521 U. S. 702, 713 (1997) (removal of "common law's harsh sanctions did not represent an acceptance" of suicide). Quite to the contrary, in the 1732 case mentioned above, the judge said of the charge of abortion (with no mention of quickening) that he had never met with a case so barbarous and unnatural."[28] Similarly, an indictment from 1602, which did not distinguish between a pre-quickening and post-quickening abortion, described abortion as "pernicious" and "against the peace of our Lady the Queen, her crown and dignity." Keown 7 (discussing *R.* v. *Webb*, Calendar of Assize Records, Surrey Indictments 512 (1980).

That the common law did not condone even pre-quickening abortions is confirmed by what one might call a proto-felony-murder rule. Hale and Blackstone explained a way in which a pre-quickening abortion could rise to the level of a homicide. Hale wrote that if a physician gave a woman "with child" a "potion" to cause an abortion, and the woman died, it was "murder" because the potion was given "*unlawfully* to destroy her child within her." 1 Hale 129-130 (emphasis added). As Blackstone explained, to be "murder" a killing had to be done with "malice aforethought, either express or implied." 4 Blackstone 198, 199. In the case of an abortionist, Blackstone wrote, "the law will imply [malice]" for the same reason that it would imply malice if a person who intended to kill one person accidentally killed a different person:

> "[I]f one shoots at A and misses *him*, but kills B, this is murder; because of the previous felonious intent, which the law transfers from one to the other. The same is the case, where one lays poison for A; and B, against

[28] 2 Gentleman's Magazine 932.

> whom the prisoner had no malicious intent, takes it, and it kills him; this is likewise murder. *So also*, if one gives *a woman with child* a medicine to procure abortion, and it operates so violently as to kill the woman, *this is murder* in the person who gave it." 4 Blackstone 200 (emphasis added).[29]

Notably, Blackstone, like Hale, did not state that this proto-felony-murder rule required that the woman be "with quick child"—only that she be "with child." *Ibid.* And it is revealing that Hale and Blackstone treated abortionists differently from other physicians or surgeons who caused the death of a patient "without any intent of doing [the patient] any bodily hurt." Hale 429; see 4 Blackstone 197. These other physicians—even if "unlicensed"—would not be "guilty of murder or manslaughter." Hale 429. But a physician performing an abortion would, precisely because his aim was an "unlawful" one.

In sum, although common law authorities differed on the severity of punishment for abortions committed at different points in pregnancy, none endorsed the practice. Moreover, we are aware of no common law case or authority, and the parties have not pointed to any, that remotely suggests a positive right to procure an abortion at any stage of pregnancy.

ii

In this country, the historical record is similar. The "most important early American edition of Blackstone's Commentaries," *District of Columbia* v. *Heller*, 554 U. S. 510, 594 (2008), reported Blackstone's statement that abortion of a

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[29] Other treatises restated the same rule, See 1 W. Russell, A Treatise on Crimes and Misdemeanors 539 (5th ed. 1816) ("So where a person gave medicine to a woman to procure an abortion, and where a person put skewers into the woman for the same purpose, by which in both cases the women were killed, these acts were clearly held to be murder"); 1 E. H. East, A Treatise of the Pleas of the Crown 230 (1809) (similar).

quick child was at least "a heinous misdemeanor," 1 St. George Tucker, Blackstone's Commentaries 129-130 (1803) (Tucker's Blackstone), and that edition also included Blackstone's discussion of the proto-felony-murder rule, 4 Tucker's Blackstone 200-201. Manuals for justices of the peace printed in colonies in the 18th century typically restated the common law rule on abortion, and some manuals repeated Hale's and Blackstone's statements that anyone who prescribed medication "unlawfully to destroy the child" would be guilty of murder if the woman died. See, *e.g.,* J. Parker, Conductor Generalis: Or the Office, Duty and Authority of Justices of the Peace 220 (1788); 2 R. Burn, Justice of the Peace, and Parish Officer 221-222 (7th ed. 1762) (English manual stating the same).[30]

The few cases available from the early colonial period corroborate that abortion was a crime. See generally Dellapenna 215-228 (collecting cases). In Maryland in 1652,

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[30] For manuals restating one or both rules, see J. Davis, A Treatise an Criminal Law with an Exposition of the Office and Authority of Justices of the Peace in Virginia 96, 102-103, 339 (1838); Conductor Generalis Or, the Office. Duty and Authority of Justices of the Peace 194-195 (1801) (printed in Philadelphia); Conductor Generals: Or, the Office, Duty and Authority of Justices of the Peace 194-195 (1794) (printed in Albany); Conductor Generals: Or, the Office, Duty and Authority of Justices of the Peace 220 (1788) (printed in Now York); J. Parker, Conductor Generalis: Or, the Office, Duty and Authority of Justices of the Peace 198 (1749) (printed in New York): G. Webb, Office and Authority of a Justice of a Peace 202 (1736) (printed in Williamsburg); Conductor Generalis Or, the Office, Duty and Authority of Justice of the Peace 161 (1722) (printed in Philadelphia see also J.A. Conley, Doing It by the Book: Justice of the Peace Manuals and English Law in Eighteenth Century America 6.1. Legal Hist. 257, 265, 267 (1985) (noting that these manuals were the justices' "primary source of legal reference" and of "practical value for a wider audience than the justices"). For cases stating the proto-felony-murder rule, see, *e.g., Commonwealth* v. *Parker*, 50 Mass. (9 Met.) 263, 265 (1845)); *People* v. *Sessions,* 58 Mich. 504, 595-596 (1886) See *Moore*, 25 Iowa 128, 131-132 (1868); *Smith v. State* 33 Me. 48, 54-55 (1851).

for example, an indictment charged that a man "Murtherously endeavoured to destroy or Murther the Child by him begotten in the Womb." *Proprietary* v. *Mitchell,* 10 Md. Archives 183 (W.H. Browne, ed., 1891). By the 19th century, courts frequently explained that the common law made abortion of a quick child a crime. See, *e.g., Smith* v. *Gaffard*, 31 Ala. 45, 51 (1857); *Smith* v. *State,* 33 Me. 48, 55 (1851); *State* v. *Cooper*, N. J. L. 52, 52-55 (1849); *Commonwealth* v. *Parker*, 50 Mass. 263, 264-268 (1845).

iii

The original ground for drawing a distinction between pre- and post-quickening abortions is not entirely clear, but some have attributed the rule to the difficulty of proving that a pre-quickening fetus was alive. At that time, there were no scientific methods for detecting pregnancy in its early stages,[31] and thus, as one court put it in 1872: "[U]ntil the period of quickening there is no *evidence* of life; and whatever may be said of the feotus, the law has fixed upon this period of gestation as the time when the child is endowed with life" because "foetal movements are the first clearly marked and well defined *evidences of life*". *Evans* v. *People*, 49 N.Y. 86, 90 (1872) (emphasis added); *State* v. *Cooper,* 22 N. J. L: 52, 56 (1849) ("In contemplation of law life commences at the moment of quickening, at the moment when the embryo gives *the first physical proof of life*, no matter when it first received it." (emphasis added)).

The Solicitor General offers a different explanation of the basis for the quickening rule, namely, that before quickening the common law did not regard a fetus "as having a 'separate and independent existence.'" Brief for United States

[31] See E. Rigby, A System of Midwifery 73 ("Under all circumstances, the diagnosis of pregnancy must ever be difficult and obscure during the early months"); see also *id.*, at 74-80 (discussing rudimentary techniques or detecting early pregnancy); A.S. Taylor, A Manual of Medical Jurisprudence 418-421 (6th American ed., 1866) (same)

as *Amicus Curiae* 26 (quoting *Commonwealth* v. *Parker,* 50 Mass. 263, 266 (1818)). But the case on which the Solicitor General relies for this proposition also suggested that the criminal law's quickening rule was out of step with the treatment of prenatal life in other areas of law, noting that "to many purposes, in reference to civil rights, an infant *in ventre sa mere* is regarded as a person in being." *Parker*, 50 Mass., at 266 (citing 1 Blackstone 129); see also *Evans* v. *People*, 49 N.Y. 86, 89 (N. Y. 1872); *Mills* v. *Commonwealth*, 13 Pa. 631, 633 (1850); *Morrow* v. *Scott,* 7 Ga. 535, 537 (1849); *Hall* v. *Hancock,* 32 Mass. 255, 258 (1834); *Thellusson* v. *Woodford*, 31 Eng. Rep. 117, 163 (1789).

At any rate, the original ground for the quickening rule is of little importance for present purposes because the rule was abandoned in the 19th century. During that period, treatise writers and commentators criticized the quickening distinction as "neither in accordance with the result of 'medical experience, nor with the principles of the common law." 1 F. Wharton, The Criminal Law of the United States §1220, at 606 (4th rev. ed. 1857); see also J. B. Beck, Researches in Medicine and Medical Jurisprudence 26-28 (2d ed. 1835) (describing the quickening distinction as "absurd" and "injurious").[32] In 1803, the British Parliament made

[32] See *Mitchell* v. *Commonwealth,* 78 Ky. 204, 209-210 (1879) acknowledging the common-law rule but arguing that "the law should punish abortions and miscarriages, willy produced, at any time during the period of gestation"); *Mills* v. *Commonwealth,* 13 Pa. 631, 633 (1850) (the quickening rule "never ought to have been the law anywhere"); 1 J.P. Bishop, Commentaries on the Law of Statutory Crimes §741 (1873) ("If we look at the reason of the law, we shall prefur" a rule that "discard[s| this doctrine of the necessity of a quickening"); 5 Transactions of the Maine Medical Association 37-39 (1866) 12 Transactions of the American Medical Association 75-77 (1859); W. Guy, Principles of Medical Forensics 133-134 (1st American ed. 1845); 1 J. Chitty, A Practical Treatise on Medical Jurisprudence 438 (2d American ed., 1836); T.R. Beck & J.B. Beck, Elements of Medical Jurisprudence 293 (1823) T. Percival, The Works, Literary, Moral and Medical 430 (1807); see also Keown 38-39 (collecting English authorities).

abortion a crime at all stages of pregnancy and authorized the imposition of severe punishment. See Lord Ellenborough's Act, 43 Geo. 3 c. 58. One scholar has suggested that Parliament's decision "may partly have been attributable to the medical man's concern that fetal life should be protected by the law at all stages of gestation." Keown 22.

In this country during the 19th century, the vast majority of the States enacted statutes criminalizing abortion at all stages of pregnancy. See Appendix A (listing state statutory provisions in chronological order).[33] By 1868, when the Fourteenth Amendment was ratified, three-quarters of the States, 28 out of 37, had enacted statutes making abortion a crime even if it was performed before quickening.[34] See Appendix A. Of the nine States that had not yet criminalized abortion at all stages, all but one did so by 1910. *Ibid.*

The trend in the territories that would become the last 13 States was similar: all of them criminalized abortion at all stages of pregnancy between 1850 (the Kingdom of Hawaii) and 1919 (New Mexico). See Appendix B; see also *Casey*, 505 U. S., at 952 (Rehnquist, C. J., dissenting); Dellapenna 817-319. By the end of the 1950s, according to the *Roe*

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[33] See generally Dellapenna 315-319 (cataloging the development of the law in the States); E. Quay, Justifiable Abortion—Medical and Legal Foundations, 49 Geo. L.J. 395, 435-437, 447-520 (1961) (Quay) (same); J. Witherspoon, Reexamining Roe: Nineteenth-Century Abortion Statutes and The Fourteenth Amendment, 17 St. Mary's Law J. 29, 34-36 (1985) (Witherspoon) (same).

[34] Some scholars assert that only 27 States prohibited abortion at all stages. See, *e.g.,* Dellapenna 315; Witherspoon 34-35 & n. 15. Those scholars appear to have overlooked Rhode Island, which criminalized abortion at all stages in 1861. See Act of Mar. 15, 1861, ch. 371, §1, Acts: & Resolves R. I. 133 (criminalizing the attempt to "procure the miscarriage" of "any pregnant woman" or "any woman supposed by such person to be pregnant," without mention of quickening). The amicus brief for the American Historical Association asserts that only 26 States prohibited abortion at all stages, but that brief incorrectly excludes West Virginia and Nebraska from its count. Compare Br. 27-28 (citing Quay, *supra*), with Appendix A.

Court's own count, statutes in all but four States and the District of Columbia prohibited abortion "however and whenever performed, unless done to save or preserve the life of the mother" 410 U. S., at 139.[35]

This overwhelming consensus endured until the day *Roe* was decided. At that time, also by the *Roe* Court's own count, a substantial majority—30 States—still prohibited abortion at all stages except to save the life of the mother. See *Roe,* 410 U. S., at 118 & n. 2 (listing States). And though *Roe* discerned a "trend toward liberalization" in about "one-third of the States," those States still criminalized some abortions and regulated them more stringently than *Roe* would allow. See *Roe*, 410 U. S., at 110 & n.37; Tribe 2. In short, the "Court's opinion in *Roe* itself convincingly refutes the notion that the abortion Liberty is deeply rooted in the history or tradition of our people." *Thornburgh*, 476 U. S., at 793 (White, J., dissenting).

iv

The inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and traditions. On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest

[35] The statutes of three States (Massachusetts, New Jersey, and Pennsylvania) prohibited abortions performed "unlawfully" or "without lawful justification". *Roe*, 410 U. S., at 139. In Massachusetts, case law hold that abortion was allowed when, according to the judgment of physicians in the relevant community, the procedure was necessary to preserve the woman's life or for physical or emotional health. *Commonwealth* v. *Wheeler*, 53 N.E. 2d 4, 5 (Sup. J. Ct. 1944). In the other two States, however, there is no clear support in case law for the proposition that abortion was lawful where the mother's life was not at risk. See *State* v. *Brandenberg,* 53 4.2709 (N.J. 1948; *Commonwealth* v. *Trombetta,* 200 A. 107 (Pa. Super. Ct. 1938).

Statutes in the two remaining jurisdictions (the District of Columbia and Alabama) permitted "abortion to preserve the mother's health." *Roe*, 410 U. S., at 139. Case law in those jurisdictions does not clarify the breadth of these exceptions.

days of the common law until 1973. The Court in *Roe* could have said of abortion exactly what *Glucksberg* said of assisted suicide: "Attitudes toward [abortion] have changed since Bracton, but our laws have consistently condemned, and continue to prohibit, [that practice]." *Glucksberg*, 521 U. S., at 719.

3

Respondents and their *amici* have no persuasive answer to this historical evidence.

Neither respondents nor the Solicitor General disputes the fact that by 1868 the vast majority of States criminalized abortion at all stages of pregnancy. See Brief for the Petitioners 12-13; see also Brief for American Historical Association and Organization of American Historians as *Amicus Curiae* 27-28 & nn. 14-15 (conceding that 26 out of 37 States prohibited abortion before quickening); Oral Arg. Tr. 74-75 (respondents' counsel conceding the same). Instead, respondents are forced to argue that it "does [not] matter that some States prohibited abortion at the time *Roe* was decided or when the Fourteenth Amendment was adopted." Brief for Respondents 21. But that argument flies in the face of the standard we have applied in determining whether an asserted right that is nowhere mentioned in the Constitution is nevertheless protected by the Fourteenth Amendment.

Not only are respondents and their amici unable to show that a constitutional right to abortion was established when the Fourteenth Amendment was adopted, but they have found no support for the existence of an abortion right that predates the latter part of the 20th century—no state constitutional provision, no statute, no judicial decision, no learned treatise. The earliest sources called to our attention are a few district court and state court decisions decided shortly before *Roe* and a small number of law review

articles from the same time period.[36]

A few of respondents' *amici* muster historical arguments, but they are very weak. The Solicitor General repeats *Roe*'s claim that it is "doubtful abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus." Brief for United States as *Amicus Curiae* 26 (quoting *Roe,* 410 U. S., at 136). But as we have seen, great common-law authorities like Bracton, Coke, Hale, and Blackstone all wrote that a post-quickening abortion was a crime—and a serious one at that. Moreover, Hale and Blackstone (and many other authorities following them) asserted that even a pre-quickening abortion was "unlawful" and that, as a result, an abortionist was guilty of murder if the woman died from the attempt.

Instead of following these authorities, *Roe* relied largely on two articles by a pro-abortion advocate who claimed that Coke had intentionally misstated the common law because of his strong anti-abortion views.[37] These articles have been discredited,[38] and it has come to light that even members of Jane Roe's legal team did not regard them as serious

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[36] See *Roe,* 10 U. S., at 154-155 (collecting cases decided between 1970 and 1973) C. Means, Jr., The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty? 17 N.Y.L.F. 335, 337-539 (1971) (Means II); C. Means, Jr., The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1668: A Case of Cessation of Constitutionality, 14 N.Y.L.F. 411 (1968) (Means I); R. Lucas, Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes, 46 N. C. L. Rev. 730 (1968).

[37] See *Roe,* 410 U. S., at 136 n. 6 (citing Means I, *supra*); *id.*, at 132-133 n. 21 (citing Means I, *supra*).

[38] For critiques of Means's work, see, *e.g.,* Dellapenna 143-152, 325-331; Keown 3-12; J. Finnis, "Shameless Acts in Colorado: Abuse of Scholarship in Constitutional Cases, 7 Academic Q. 10, 11-12 (1994); Destro, Abortion and the Constitution: The Need for a Life-Protective Amendment, 63 Calif. L. Rev. 1250, 1267-1252 (1975); Byrn, An American Tragedy: The Supreme Court on Abortion, 41 Fordham L. Rev. 807, 814-620 (1973).

scholarship. An internal memorandum characterized this author's work as donning "the guise of impartial scholarship while advancing the proper ideological goals."[39] Continued reliance on such scholarship is unsupportable.

The Solicitor General next suggests that history supports an abortion right because the common law's failure to criminalize abortion before quickening means that "at the Founding and for decades thereafter, women generally could terminate a pregnancy, at least in its early stages."[40] *Id.,* at 26-27; see also Brief for Respondents 21. But the insistence on quickening was not universal, see *Mills,* 13 Pa., at 633; *State* v. *Slagle*, 83 N. C. 630, 632 (N. C. 1880), and, regardless, the fact that many States in the late 18th and early 19th century did not criminalize pre-quickening abortions does not mean that anyone thought the States lacked the authority to do so. When legislatures began to exercise that authority as the century wore on, no one, as far as we are aware, argued that the laws they enacted violated a fundamental right. That is not surprising since

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[39] Garrow 500-501 & n. 41.

[40] In any event, *Roe, Casey*, and other related abortion decisions imposed substantial restrictions on a State's capacity to regulate abortions performed after quickening. See, *e.g., June Medical Services L. L. C.* v. *Russo*, 591 U. S. __ (2020) (holding a law requiring doctors performing abortions to secure admitting privileges to be unconstitutional); *Whole Woman's Health* v. *Hellerstedt,* 579 U. S. 582 (2016) (similar); *Casey,* 505 U. S., at 846 (declaring that prohibitions on "abortion before viability" are unconstitutional; *id.*, at 837-899 (holding that a spousal notification provision was unconstitutional). In addition, *Doe* v. *Bolton,* 410 U. S. 179 (1973), has been interpreted by some to protect a broad right to obtain an abortion at any stage of pregnancy provided that a physician is willing to certify that it is needed due to a woman's "emotional needs" or "familial" concerns. *Id.,* at 192. See, *e.g., Women's Medical Professional Corp.* v. *Voinovich,* 130 F. 3d 187, 209 (CA6 1997) cert. den., 523 U. S. 1036 (1998); but see *id.,* at 1339 (THOMAS, J., dissenting from: denial of certiorari).

common-law authorities had repeatedly condemned abortion and described it as an "unlawful" act without regard to whether it occurred before or after quickening. See *supra*, at__

Another *amicus* brief relied upon by the respondents (see Brief for Respondents 21) tries to dismiss the significance of the state criminal statutes that were in effect when the Fourteenth Amendment was adopted by suggesting that they were enacted for illegitimate reasons. According to this account, which is based almost entirely on statements made by one prominent proponent, important motives for the laws were the fear that Catholic immigrants were having more babies than Protestants and that the availability of abortion was leading white Protestant women to "shirk[]their maternal duties." Brief for *Amici Curiae* American Historical Association and Organization of American Historians 20.

Resort to this argument is a testament to the lack of any real historical support for the right that *Roe* and *Casey* recognized. This Court has long disfavored arguments based on alleged legislative motives. See, *e.g., City of Erie* v. *Pap's A.M.,* 529 U. S. 217, 292 (2000) (plurality); *Turner Broadcasting System, Inc.* v. *F.C.C.*, 512 U. S. 622, 652 (1994); *United States* v. *O'Brien,* 391 U. S. 367, 383 (1968); *Arizona v. California*, 283 U. S. 423, 455 (1931) (collecting cases). The Court has recognized that inquiries into legislative motives "are a hazardous matter." *O'Brien*, 391 U. S., at 383. Even when an argument about legislative motive is backed by statements made by legislators who voted for a law, we have been reluctant to attribute those motives to the legislative body as a whole. "What motivates one legislator to 'make a speech about a statute is not necessarily what motivates scores of others to enact it." *Ibid.*

Here, the argument about legislative motive is not even based on statements by legislators, but on statements made by a few supporters of the new 19th century abortion laws,

and it is quite a leap to attribute these motives to all the legislators whose votes were responsible for the enactment of those laws. Recall that at the time of the adoption of the Fourteenth Amendment, over three quarters of the States had adopted statutes criminalizing abortion (usually at all stages of pregnancy), and that from the early 20th century until the day *Roe* was handed down, every single State had such a law on its books. Are we to believe that the hundreds of lawmakers whose votes were needed to enact these laws were motivated by hostility to Catholics and women?

There is ample evidence that the passage of these laws was instead spurred by a sincere belief that abortion kills a human being. Many judicial decisions from the late 19th and early 20th centuries made that point. See, *e.g., Nash* v. *Meyer,* 54 Idaho 283, 301 (1984); *State* v. *Aupsplund*, 86 Ore. 121, 131-132 (1917); *Trent* v. *State,* 15 Ala. App. 485, 188 (1916); *State* v. *Miller*, 90 Kan. 230, 233 (1913); *State* v. *Tippie*, 89 Ohio St. 35, 39-40 (1913); *State* v. *Gedicke*, 43 N. J. L. 86, 90 (N. J. Sup. Ct. 1881); *Dougherty* v. *People*, 1 Colo. 514, 522-523 (1873); *State* v. *Moore,* 25 Iowa 128, 131-132 (1868); *Smith* v. *State*, 33 Me. 48, 57 (1851); see also *Memphis Center for Reproductive Health,* 14 F.4th, at 446 & n. 11 (Thapar, J., concurring in the judgment in part and dissenting in part) (citing cases).

One may disagree with this belief (and our decision is not based on any view about when a State should regard pre-natal life as having rights or legally cognizable interests), but even *Roe* and *Case*y did not question the good faith of abortion opponents. See, *e.g.*, *Casey*, 505 U.S., at 850 ("Men and women of good conscience can disagree … about the profound moral and spiritual implications of terminating a pregnancy even in its earliest stage."). And we see no reason to discount the significance of the state laws in question based on these amici's suggestions about legislative

motive.[41]

C

1

Instead of seriously pressing the argument that the abortion right itself has deep roots, supporters of *Roe* and *Casey* contend that the abortion right is an integral part of a broader entrenched right. *Roe* termed this a right to privacy, 410 U. S., at 164, and *Casey* described it as the freedom to make "intimate and personal choices" that are "central to personal dignity and autonomy," 505 U. S., at 851. *Casey* elaborated: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Id.*, at 851.

The Court did not claim that this broadly framed right is absolute, and no such claim would be plausible. While individuals are certainly free to think and to say what they wish about "existence," "meaning," the "universe," and "the mystery of human life," they are not always free to act in accordance with those thoughts. License to act on the basis of such beliefs may correspond to one of the many understandings of "liberty," but it is certainly not "ordered liberty."

[41] Other amicus briefs present arguments about the motives of proponents of liberal access to abortion. They note that some such supporters have been motivated by a desire to suppress the size of the African American population. See Brief for Amici Curiae African American, Hispanic, Roman Catholic and Protestant Religious and Civil Rights Organization and Leaders Supporting Petitioners 14--21; see also *Box* v. *Planned Parenthood of Indiana and. Kentucky,* 139 S. Ct. 1780, 1783--84 (2019) (THOMAS J., dissenting from the denial of certiorari). And it is beyond dispute that *Roe* has had that demographic effect. A highly disproportionate percentage of aborted fetuses are black. See, *e.g.*, Center for Disease Control, Abortion Surveillance-—United States, 2019, 70 Surveillance Summaries, at 20, tbl. 6 (Nov. 26, 2021). For our part, we do not question the motives of either those who have supported and those who have opposed laws restricting abortions.

Ordered liberty sets limits and defines the boundary between competing interests. *Roe* and *Casey* each struck a particular balance between the interests of a woman who wants an abortion and the interests of what they termed “potential life." *Roe,* 410 U. S., at 150; *Casey*, 505 U. S., at 852. But the people of the various States may evaluate those interests differently. In some States, voters may believe that the abortion right should be more even more extensive than the right that *Roe* and *Casey* recognized. Voters in other States may wish to impose tight restrictions based on their belief that abortion destroys an “unborn human being” Miss. Code Ann. §41-41-191(4)(b). Our Nation's historical understanding of ordered liberty does not prevent the people's elected representatives from deciding how abortion should be regulated.

Nor does the right to obtain an abortion have a sound basis in precedent. *Casey* relied on cases involving the right to marry a person of a different race, *Loving* v. *Virginia*, 388 U. S. 1(1967); the right to marry while in prison, *Turner* v. *Saftey*, 482 U. S. 78 (1987); the right to obtain contraceptives, *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), *Eisenstadt* v. *Baird,* 405 U. S. 438 (1972), *Carey* v. *Population Services International,* 431 U. S. 678 (1977); the right to reside with relatives, *Moore* v. *East Cleveland,* 431 U. S. 494 1977); the right to make decisions about the education of one's children, *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925), *Meyer* v. *Nebraska*, 262 U. S. 390 (1923); the right not to be sterilized without consent, *Skinner* v. *Oklahoma ex rel. Williamson,* 316 U. S. 535 (1942); and the right in certain circumstances not to undergo involuntary surgery, forced administration of drugs, or other substantially similar procedures, *Winston* v. *Lee,* 470 U. S. 753 (1985), *Washington v. Harper*, 494 U. S. 210 (1990), *Rochin* v. *California*, 342 U. S. 165 (1952). Respondents and the Solicitor General also rely on post-*Casey* decisions like *Lawrence* v.

Texas, 539 U. S. 558 (2008) (right to engage in private, consensual sexual acts), and *Obergefell* v. *Hodges,* 576 U. S. 644 (2015) (right to marry a person of the same sex). See Brief for Respondents 18; Brief for United States as *Amicus Curiae* 23-24.

These attempts to justify abortion through appeals to a broader right to autonomy and to define one's "concept of existence" prove too much. *Casey*, 505 U. S., at 851. Those criteria, at a high level of generality, could license fundamental rights to illicit drug use, prostitution, and the like. See *Compassion in Dying* v. *Washington*, 85 F.3d 1140, 1444 (CA9 1996) (O'Scannlain, J., dissenting from denial of rehearing *en banc*). None of these rights has any claim to being deeply rooted in history. *Id.*, at 1440, 1445.

What sharply distinguishes the abortion right from the rights recognized in the cases on which *Roe* and *Casey* rely is something that both those decisions acknowledged*:* Abortion destroys what those decisions call "potential life" and what the law at issue in this case regards as the life of an "unborn human being." See *Roe*, 410 U. S., at 159 (abortion is "inherently different"); *Casey*, 505 U. S., at 852 (abortion is "a unique act'). None of the other decisions cited by *Roe* and *Casey* involved the critical moral question posed by abortion. They are therefore inapposite. They do not support the right to obtain an abortion, and by the same token, our conclusion that the Constitution does not confer such a right does not undermine them in any way.

2

In drawing this critical distinction between the abortion right and other rights, it is not necessary to dispute *Casey*'s claim (which we accept for the sake of argument) that "the specific practices of States at the time of the adoption of the Fourteenth Amendment" do not "mark[] the outer limits of the substantive sphere of liberty which the Fourteenth

Amendment protects." 505 U. S., at 848. Abortion is nothing new. It has been addressed by lawmakers for centuries, and the fundamental moral question that it poses is ageless.

Defenders of *Ro*e and *Casey* do not claim that any new scientific learning calls for a different answer to the underlying moral question, but they do contend that changes in society require the recognition of a constitutional right to obtain an abortion. Without the availability of abortion, they maintain, people will be inhibited from exercising their freedom to choose the types of relationships they desire, and women will be unable to compete with men in the workplace and in other endeavors.

Americans who believe that abortion should be restricted press countervailing arguments about modern developments. They note that attitudes about the pregnancy of unmarried women have changed drastically; that federal and state laws ban discrimination on the basis of pregnancy,[42] that leave for pregnancy and childbirth are now guaranteed by law in many cases,[43] that the costs of medical care associated with pregnancy are covered by insurance or government assistance;[44] that States have increasingly adopted

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[42] See, *e.g.* Pregnancy Discrimination Act (1978) codified at 42 U.S.C. §2000e(k) (federal law prohibiting pregnancy discrimination in employment): US. Dep't of Labor, Women's Bureau, Employment Protections for Workers Who Are Pregnant or Nursing. https://www.dol gov/agencies/wb/pregnant-nursing-employment-protections (showing that 46 States and the District of Columbia. have employment protections against pregnancy discrimination).

[43] See, *e.g.,* Family and Medical Leave Act of 1993 (codified at 29 U.S.C. §2612) (federal law guaranteeing employment leave for pregnancy and birth); U.S. Bureau of Labor Statistics, Access to paid and unpaid family leave in 2018, https://www.bls.gov/opub/ted/2019/access-to-paid-and-unpaid family-leave-in-2018.htm (showing that 89 percent of civilian workers had access to unpaid family leave in 2018).

[44] The Affordable Care Act requires non-grandfathered health plans in the individual and small group markets to cover certain essential health benefits, which includes maternity and newborn care. See 42 U.S.C. §18022(b)(1)(D). The ACA also prohibits annual limits, see 42 U.S.C. §300gg-11, and limits annual cost-sharing obligations on such benefits, *id*. §18022(c). State Medicaid plans must provide coverage for pregnancy related services—including, but not limited to, prenatal care, delivery, and postpartum care—as well as services for other conditions that might complicate the pregnancy. 42 C.F.R. §440.210(a)(2)(i)-(ii). State Medicaid plans are also prohibited from imposing deductions, cost-sharing or similar charges for pregnancy-related services for pregnant women. 42 U.S.C. §§1396o(a)(2)(B), 1396o(b)(2)(B).

"safe haven" laws, which generally allow women to drop off babies anonymously;[45] and that a woman who puts her new- born up for adoption today has little reason to fear that the baby will not find a suitable home.[46] They also claim that many people now have a new appreciation of fetal life and that when prospective parents who want to have a child view a sonogram, they typically have no doubt that what they see is their daughter or son.

Both sides make important policy arguments, but supporters of *Roe* and *Casey* must show that this Court has the authority to weigh those arguments and decide how abortion may be regulated in the States. They have failed to make that showing, and we thus return the power to weigh

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[45] Since *Casey*, all 50 States and the District of Columbia have enacted 'such laws Children's Bureau, HES, Infant Safe Haven Laws 12 (2016), https://www.childwalfare.gov/pubPDFs/safehaven.pdf (noting that safe haven laws began in Texas in 1999).

[46] See, *e.g.,* Centers for Disease Control, Adoption Experiences of Women and Men and Demand for Children to Adopt by Women 18-44 Years of Age in the United States 16 (Aug. 2008) ("[N]early 1 million women were seeking to adopt children in 2002 (i.e., they were in demand for a child), whereas the domestic supply of infants relinquished at birth or within the first month of life and available to be adopted had become virtually nonexistent." Centers for Disease Control, National Center for Health Statistics, Adoption and nonbiological parenting, https://www.cdcgov/nchs/nsfg/key_statistics/a-keystate.htm#adoption (showing that approximately 3.1 million women between the ages of 18-49 had ever "[t]aken steps to adopt a child" based on data collected from 2015-2019).

those arguments to the people and their elected representatives.

III

We next consider whether the doctrine of *stare decisis* counsels continued acceptance of *Roe* and *Casey*. *Stare decisis* plays an important role in our case law, and we have explained that it serves many valuable ends. It protects the interests of those who have taken action in reliance on a past decision. See *Casey*, 505 U. S., at 856 (plurality opinion); see also *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991). It "reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation." *Kimble* v. *Marvel Entertainment,* LLC, 576 U. S. 446, 455 (2016). It fosters "evenhanded" decision making by requiring that like cases be decided in a like manner. *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991). It "contributes to the actual and perceived integrity of the judicial process." *Ibid.* And it restrains judicial hubris and reminds us to respect the judgment of those who grappled with important questions in the past. "Precedent is a way of accumulating and passing down the learning of past generations, a font of established wisdom richer than what can be found in any single judge or panel of judges." N. Gorsuch, A Republic If You Can Keep It 217 (2019).

We have long recognized, however, that *stare decisis* is "not an inexorable command," *Pearson* v. *Callahan*, 555 U. S. 223, 233 (2009) (internal quotation marks and citation omitted), and it "is at its weakest when we interpret the Constitution," *Agostini* v. *Felton,* 521 U. S. 208, 235 (1997). It has been said that it is sometimes more important that an issue "be settled than that it be settled right." *Kimble,* 576 U. S., at 455 (emphasis added) (quoting *Burnet* v. *Coronado Oil & Gas Co,* 285 U. S. 393, 406 (1932) (Brandeis, J., dissenting)). But when it comes to the interpretation of the Constitution—the "great charter of our liberties," which

was meant "to endure through a long lapse of ages," *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 326 (1816) (opinion of Story, J.)—we place a high value on having the matter "settled right." In addition, when one of our constitutional decisions goes astray, the country is usually stuck with the bad decision unless we correct our own mistake. An erroneous constitutional decision can be fixed by amending the Constitution, but our Constitution is notoriously hard to amend. See U.S. Const., art. V; Kimble, 576 U. S., at 456. Therefore, in appropriate circumstances we must be willing to reconsider and if necessary overrule constitutional decisions.

Some of our most important constitutional decisions have overruled prior precedents. We mention three. In *Brown* v. *Board of Education*, the Court repudiated the "separate but equal" doctrine, which had allowed States to maintain racially segregated schools and other facilities. 347 U. S. 483, 488 (1954). In so doing, the Court overruled the infamous decision in *Plessy* v. *Ferguson,* 163 U. S. 537 (1896), along with six other Supreme Court precedents that had applied the separate-but-equal rule. See *Brown*, 347 U. S., at 491.

In *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 879 (1937), the Court overruled *Adkins* v. *Children's Hospital of D. C.*, 261 U. S. 525 (1923), which had held that a law setting minimum wages for women violated the "liberty" protected by the Fifth Amendment's Due Process Clause. *Id.,* at 545. *West Coast Hotel* signaled the demise of an entire line of important precedents that had protected an individual liberty right against state and federal health and welfare legislation. See *Lochner* v. *New York*, 198 U. S. 45 (1905) (holding invalid a law setting maximum working hours); *Coppage* v. *Kansas*, 236 U. S. 1 (1915) (holding invalid a law banning contracts forbidding employees to join union); *Jay Burns Baking Co.* v. *Bryan*, 264 U. S. 504 (1924) (holding invalid laws fixing the weight of loaves of bread).

Finally, in *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624 (1943), after the lapse of only three years, the Court overruled *Minersville School Dist.* v. *Gobitis,* 310 U. S. 536 (1940), and held that public school students could not be compelled to salute the flag in violation of their sincere beliefs. *Barnette* stands out because nothing had changed during the intervening period other than the Court's belated recognition that its earlier decision had been seriously wrong.

On many other occasions, this Court has overruled important constitutional decisions. (We include a partial list in the footnote that follows.[47]) Without these decisions,

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[47] See, *e.g., Obergefell* v. *Hodge*, supra (right to same-sex marriage) (overruling *Baker* v. *Nelson,* 409 U. S. 810 (1972)); *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310 (2010) (right to engage in campaign related speech)(overruling *Austin* v. *Michigan Chamber of Commerce*, 494 U. S. 652 1990), and partially overruling *McConnell* v. *Federal Election Comm.*, 540 U. S. 98 (2003)); *Monte* v. *Louisiana,* 556 U. S. 118 (2009) (Sixth Amendment right to counsel) (overruling *Michigan* v. *Jackson*, 475 U. S. 625 (1966)); *Crawford* v. *Washington,* 541 U. S. 36 2004) (Sixth Amendment right to confront witnesses) (overruling *Ohio* v. *Roberts,* 48 U. S. 56 (1980)); *Lawrence* v. *Texas*, 539 U. S. 558 (2003) (right to engage in consensual, same-sex intimacy in one's home) (overruling *Bowers* v. *Hardwick*, 478 U. S. 186 (1986)); *Ring* v. *Arion*, 536 U. S. 584 (2002) (Sixth Amendment right to jury trial in capital prosecutions) (overruling *Walton* v. *Arizona*, 497 U. S. 639 1990)); *Agosto* v. *Felton,* 521 U. S. 20 (1997) (evaluating whether government aid violates the Establishment Clause) (overruling *Aguilar* v. *Felton*, 473 U. S. 102 (1985), and *School Dist. of City of Grand Rapids* v. *Ball,* 473 U. S. 373 (1983)); *Seminole Tribe of Flo.* v. *Florida,* 517 U. S. 442 (1996) (lack of congressional power under the Indian Commerce Clause to abrogate states' Eleventh Amendment immunity) (overruling *Pennsylvania* v. *Union Gas Co.,*491 U. S. 1 (1989)); *Payne* v. *Tennessee,* 501 U. S. 808 (1991) (the Eighth Amendment does not erect a *per se* bar to the admission of victim impact evidence during the penalty phase of a capital trial) (overruling *Booth* v. *Maryland*, 483 U.S. 496 (1957), and *South Carolina v. Gathers*, 490 U.S. 805 (1989)); *Batson* v. *Kentucky,* 476 U.S. 79 (1986) the Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race) (overruling *Swain* v. *Alabama*, 380 U. S. 202 (1965)); *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528 (1985) (rejecting the principle that the Commerce Clause does not empower Congress to enforce requirements such as minimum wage laws, against the States "in areas of traditional governmental functions") (overruling *National League of Cities* v. *Usery*, 426 U. S. 833 (1976)); *Illinois* v. *Gates*, 462 U. S. 213 (1983) (the Fourth Amendment requires a totality of the circumstances approach for determining whether an informant's tip establishes probable cause) (overruling *Aguilar* v. *Texas*, 78 U. S. 108 (1964) and *Spinelli* v. *United States*, 393 U. S. 410 (1969)); *United States* v. *Scott*, 437 U. S. 82 (1978) (the Double Jeopardy Clause does not apply to Government appeals from orders granting defense motions to terminate a trial before verdict) (overruling *United States* v. *Jenkins*, 120 U. S. 358 (1975)); *Craig.* v. *Boren*, 429 U. S. 190 (1976) (gender-based classifications are subject to intermediate scrutiny under the Equal Protection Clause) (overruling *Goesaert* v. *Cleary*, 335 U. S. 464 (1948)); *Taylor* v. *Louisiana,* 419 U. S. 522 (1975) (jury system which operates to exclude women from jury service violates the defendant's Sixth and Fourteenth Amendment right to an impartial jury) (overruling *Hoyt v. Florida*, 368 U. S. 57 (1961)*; Brandenburg* v. *Ohio*, 395 U. S. 444 (1969) (*per curiam*) (the mere advocacy of violence is protected under the First Amendment unless it is directed to incite or produce imminent lawless action) (overruling *Whitney* v. *California*, 274 U. S. 357 (1927)); *Katz* v. *United States,* 389 U. S. 347 (1967) (Fourth Amendment

"protects people, not places" and extends to what a person "seeks to preserve as private") (overruling *Olmstead* v. *United. States*, 277 U. S. 438 (1928) and *Goldman* v. *United States*, 316 U. S. 129 (1942)); *Miranda* v. *Arizona*, 384 U. S. 436 (1966) (procedural safeguards to protect the Fifth Amendment privilege against self incrimination) (overruling *Crooker* v. *California,* 51 U. S. 433 (1958), and *Cicenia* v. *La. Gay*, 357 U. S. 504 (1958)); *Malloy* v. *Hogan*, 378 U. S. 1 (1964) (the Fifth Amendment privilege against self-incrimination is also protected by the Fourteenth Amendment against abridgement by the States) (overruling *Twining* v. *New Jersey*, 211 U. S. 78 (1908) and *Adamson* v. *California*, 332 U. S. 46 (1947)); *Wesberry* v. *Sanders*, 376 U. S. 1 (1964) (congressional districts should be apportioned so that "as nearly as practicable one man's vote in a congressional election is to be worth as much as another's) (overruling in effect *Colegrove* v. *Green*, 328 U. S. 549 (1946)); *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) (right to counsel for indigent defendant in a criminal prosecution in state court under the Sixth and Fourteenth Amendments) (overruling *Betts* v. *Brady*, 316 U. S. 465 (1942)); *Baker* v. *Carr*, 369 U. S. 185 (1962) (federal courts have jurisdiction to consider constitutional challenges to state redistricting plans) (effectively overruling in part *Colegrove* v. *Green*, 328 U. S. 549 (1946)); *Mapp* v. *Ohio*, 357 U. S. 643 (1961) (the exclusionary rule regarding the inadmissibility of evidence obtained in violation of the Fourth Amendment applies to the States) (overruling *Wolf* v. *Colorado*, 398 U. S. 25 (1949)): *Smith* v. *Allwright*, 321 U. S. 640 (1944) (racial restrictions on the right to vote in primary elections violates the Equal Protection Clause of the Fourteenth Amendment) (overruling *Grovey* v. *Townsend*, 295 U. S. 45 (1935)); *United States* v. *Darby*, 312 U. S. 100 (1941) (congressional power to regulate employment conditions under the Commerce Clause) (overruling *Hammer* v. *Dagenhart*, 247 U. S. 251 (1918)); *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938) (Congress does not have the power to declare substantive rule of common law; a federal court sitting in diversity jurisdiction must apply the substantive state law) (overruling *Swift* v. *Tyson,* 41 U. S. (16 Pet.) 1 (1842)).

American constitutional law as we know it would be unrecognizable, and this would be a different country,

No Justice of this Court has ever argued that the Court should never overrule a constitutional decision, but overruling a precedent is a serious matter. It is not a step that should be taken lightly. Our cases have attempted to provide a framework for deciding when a precedent should be overruled, and they have identified factors that should be considered in making such a decision. *Janus* v. *State, County, and Municipal Employees,* 585 U. S. _, __ (2018) (slip op., at 34-35); *Ramos* v. *Louisiana,* 500 U. S. __ (2020) (KAVANAUGH, J., concurring in part) (slip op., at 7-9.

In this case, five factors weigh strongly in favor of overruling *Roe* and *Casey:* the nature of their error, the quality of their reasoning, the "workability" of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance.

A

The nature of the Court's error. An erroneous interpretation of the Constitution is always important, but some are more damaging than others.

The infamous decision in *Plessy* v. *Ferguson, supra,* was one such decision. It betrayed our commitment to "equality

under law." *Id.*, at 562 (Harlan, J., dissenting). It was "egregiously wrong" on the day it was decided, see *Ramos, supra* (KAVANAUGH, J., concurring in part) (slip op., at 7), and as the Solicitor General agreed at oral argument, it should have been overruled at the earliest opportunity, see Oral Arg. Tr., 92:20-93:17.

Roe was also egregiously wrong and deeply damaging. For reasons already explained, *Roe*'s constitutional analysis was far outside the bounds of any reasonable interpretation of the various constitutional provisions to which it vaguely pointed.

Roe was on a collision course with the Constitution from the day it was decided, and *Casey* perpetuated its errors, and the errors do not concern some arcane corner of the law of little importance to the American people. Rather, wielding nothing but "raw judicial power," *Roe,* 410 U. S., at 222 (White, J., dissenting), the Court usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people. *Casey* described itself as calling both sides of the national controversy to resolve their debate, but in doing so, *Casey* necessarily declared a winning side. Those on the losing side—those who sought to advance the state's interest in fetal life—could no longer seek to persuade their elected representatives to adopt policies consistent with their views. The Court short-circuited the democratic process by closing it to the large number of Americans who dissented in any respect from *Roe. "Roe* fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the selection of Justices to this Court in particular, ever since." *Casey,* 505 U. S., at 995-996 (Scalia, J., concurring in part and dissenting in part). Together, *Roe* and *Casey* represent an error that cannot be allowed to stand.

As the Court's landmark decision in *West Coast Hotel* illustrates, the Court has previously overruled decisions that

wrongly removed an issue from the people and the democratic process. As Justice White later explained, "decisions that find in the Constitution principles or values that cannot fairly be read into that document usurp the people's authority, for such decisions represent choices that the people have never made and that they cannot disavow through corrective legislation. For this reason, it is essential that this Court maintain the power to restore authority to its proper possessors by correcting constitutional decisions that, on reconsideration, are found to be mistaken." *Thornburgh*, 476 U. S., at 787 (White, J., dissenting).

B

The quality of the reasoning. Under our precedents, the quality of the reasoning in a prior case has an important bearing on whether it should be reconsidered. See *Janus* v. *State, County, and Municipal Employees,* 585 U. S., at _ (slip op., at 38); *Ramos*, 590 U. S., at __ (KAVANAUGH, J., concurring) (slip op., at 7-8). In part II of this opinion, we explained why *Roe* was incorrectly decided, but that decision was more than just wrong. It stood on exceptionally weak grounds.

Roe found that the Constitution implicitly conferred a right to obtain an abortion, but it failed to ground its decision in text, history, or precedent. It relied on an erroneous historical narrative; it devoted great attention to and presumably relied on matters that have no bearing on the meaning of the Constitution; it disregarded the fundamental difference between the precedents on which it relied and the question before the Court; it concocted an elaborate set of rules, with different restrictions for each trimester of pregnancy, but it did not explain how this veritable code could be teased out of anything in the Constitution, the history of abortion laws, prior precedent, or any other cited source; and its most important rule (that States cannot protect fetal life prior to "viability") was never raised by any

party and has never been plausibly explained. *Roe's* reasoning quickly drew scathing scholarly criticism, even from supporters of broad access to abortion.

The *Casey* plurality, while reaffirming *Roe*'s central holding, pointedly refrained from endorsing most of its reasoning. It revised the textual basis for the abortion right, silently abandoned *Roe*'s erroneous historical narrative, and jettisoned the trimester framework. But it replaced that scheme with an arbitrary "undue burden" test and relied on an exceptional version of *stare decisis* that, as explained below, this Court had never before applied and has never invoked since.

1
i

The weaknesses in *Roe*'s reasoning are well-known. Without any grounding in the constitutional text, history, or precedent, it imposed on the entire country a detailed set of rules much like those that one might expect to find in a statute or regulation. See *Roe*, 410 U. S., at 163-164. Dividing pregnancy into three trimesters, the Court imposed special rules for each. During the first trimester, the Court announced, "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician." *Id.*, at 164. After that point, a State's interest in regulating abortion for the sake of a woman's health became compelling, and accordingly, a State could "regulate the abortion procedure in ways that are reasonably related to maternal health." *Ibid.* Finally, "in the stage subsequent to viability," which in 1973 roughly coincided with the beginning of the third trimester, the State's interest in "the potentiality of human life" became compelling, and therefore a State could "regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the

mother." *Ibid.*

This elaborate scheme was the Court's own brainchild. Neither party advocated the trimester framework; nor did either party or any *amicus* argue that "viability" should mark the point at which the scope of the abortion right and a State's regulatory authority should be substantially transformed. See Brief for Appellant in No. 70-18; Brief for Appellee in No. 70-18; see also C. Forsythe, Abuse of Discretion: The Inside Story of *Roe* v. *Wade* 127, 141 (2012).

ii

Not only did this scheme resemble the work of a legislature, but the Court made little effort to explain how these rules could be deduced from any of the sources on which constitutional decisions are usually based. We have already discussed *Roe*'s treatment of constitutional text, and the opinion failed to show that history, precedent, or any other cited source supported its scheme.

Roe featured a lengthy survey of history, but much of its discussion was irrelevant, and the Court made no effort to explain why it was included. For example, multiple paragraphs were devoted to an account of the views and practices of ancient civilizations where infanticide was widely accepted. See *Roe*, 410 U. S., at 130-132(discussing ancient Greek and Roman practices).[48] When it came to the most important historical fact—how the States regulated abortion when the Fourteenth Amendment was adopted—the Court said almost nothing. It allowed that States had tightened

[48] See, *e.g.*, C. Patterson, "Not Worth the Rearing": The Causes of Infant Exposure in Ancient Greece, 115 Transactions Am. Philosophical Ass'n 103, 111-123 (1985); A. Cameron, The Exposure of Children and Greek Ethics, 46 Classical Rev. 105-105 (1932); H. Bennett, The Exposure of Infants in Ancient Rome, 18 Classical J. 341-351 (1929); W. V. Harris, Child Exposure in the Roman Empire, 84 J. Roman Studies 1 (1994).

their abortion laws "in the middle and late 19th century," *id.,* at 139, but it implied that these laws might have been enacted, not to protect fetal life, but to further "a Victorian social concern" about "illicit sexual conduct," *id.*, at 148.

Roe's failure even to note the overwhelming consensus of state laws in effect in 1868 is striking, and what it said about the common law was simply wrong. Relying on two discredited articles by an abortion advocate, the Court erroneously suggested—contrary to Bracton, Coke, Hale, Blackstone, and a wealth of other authority—that the common law had probably never really treated post-quickening abortion as a crime. See *id.,* at 136 "[I]t now appear[s] doubtful that abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus"). This erroneous understanding appears to have played an important part in the Court's thinking because the opinion cited "the lenity of the common law" as one of the four factors that informed its decision. *id.*, at 165.

After surveying history, the opinion spent many paragraphs conducting the sort of fact-finding that might be undertaken by a legislative committee. This included a lengthy account of the "position of the American Medical Association" and "[t]he position of the American Public Health Association," as well as the vote by the American Bar Association's House of Delegates in February 1972 on proposed abortion legislation. *Id.,* at 141, 143, 146. Also noted were a British judicial decision handed down in 1939 and a new British abortion law enacted in 1967. *Id.,* at 137--138. The Court did not explain why these sources shed light on the meaning of the Constitution, and not one of them adopted or advocated anything like the scheme that *Roe* imposed on the country.

Finally, after all this, the Court turned to precedent. Citing a broad array of cases, the Court found support for a

constitutional "right of personal privacy," *id.,* at 152, but it conflated two very different meanings of the term: the right to shield information from disclosure and the right to make and implement important personal decisions without governmental interference. See *Whalen v. Roe*, 429 U. S. 589, 599-600 (1977). Only the cases involving this second sense of the term could have any possible relevance to the abortion issue, and some of the cases in that category involved personal decisions that were obviously very, very far afield. See *Pierce* v.. *Society of Sisters*, 268 U. S. 510 (1925) (right to send children to religious school); *Meyer* v. *Nebraska*, 262 U. S. 390 (1937) (right to have children receive German language instruction).

What remained was a handful of cases having something to do with marriage, *Loving* v. *Virginia*, 388 U. S. 1 (1967) (right to marry a person of a different race), or procreation, *Skinner* v. *Oklahoma*, 316 U. S. 535 (1942) (right not to be sterilized); *Griswold* v. *Connecticut*, 381 U. S. 479 (1965) (right of married persons to obtain contraceptives); *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972) (same, for unmarried persons). But none of these decisions involved what is distinctive about abortion: its effect on what *Roe* termed "potential life."

When the Court summarized the basis for the scheme it imposed on the country, it asserted that its rules were "consistent with" the following: (1) "the relative weights of the respective interests involved," (2) "the lessons and examples of medical and legal history," (3) "the lenity of the common law," and (4) "the demands of the profound problems of the present day." *Id.,* at 165. Put aside the second and third factors, which were based on the Court's flawed account of history, and what remains are precisely the sort of considerations that legislative bodies often take into account when they draw lines that accommodate competing interests. The scheme *Roe* produced looked like legislation, and the Court provided the sort of explanation that might

be expected from a legislative body.

iii

What *Roe* did not provide was any cogent justification for the lines it drew. Why, for example, does a State have no authority to regulate first trimester abortions for the purpose of protecting a woman's health? The Courts only explanation was that mortality rates for abortion at that stage were lower than the mortality rates for childbirth. *Roe*, 410 U. S., at 163. But the Court did not explain why mortality rates were the only factor that a State could legitimately consider. Many health and safety regulations aim to avoid adverse health consequences short of death. And the Court did not explain why it departed from the normal rule that courts defer to the judgments of legislatures "in areas fraught with medical and scientific uncertainties." *Marshall* v. *United States,* 414 U. S. 417, 427 (1974)

An even more glaring deficiency was *Roe*'s failure to justify the critical distinction it drew between pre- and post-viability abortions. Here is the Court's entire explanation:

> With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the womb. *Roe*, 410 U. S., at 163.

As Professor Laurence Tribe has written, "[c]learly, this mistakes a definition for a syllogism." Tribe 4 (quoting Ely 924). The definition of a "viable" fetus is one that is capable of surviving outside the womb, but why is this the point at which the State's interest becomes compelling? If, as *Roe* held, a State's interest in protecting prenatal life is compelling "after viability," 410 U. S, at 163, why isn't that interest "equally compelling before viability"? *Webster* v. *Reproductive Health Servs.,* 492 U. S. 490, 519 (1989) (plurality) (quoting *Thornburgh* v. *American College of Obstetricians*

and Gynecologists, 476 U. S. 747, 795 (1986) (White, J., dissenting). *Roe* did not say, and no explanation is apparent.

This arbitrary line has not found much support among philosophers and ethicists who have attempted to justify a right to abortion. Some have argued that a fetus should not be entitled to legal protection until it acquires the characteristics that they regard as defining what it means to be a "person." Among the characteristics that have been offered as essential attributes of "personhood" are sentience, self-awareness, the ability to reason, or some combination thereof.[49] By this logic, it would be an open question whether even born individuals, including young children or those afflicted with certain developmental or medical conditions, merit protection as "persons." But even if one takes the view that "personhood" begins when a certain attribute or combination of attributes is acquired, it is very hard to see why viability should mark the point where "personhood" begins.

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[49] See, *e.g.*, P. Singer, Rethinking Life & Death 218 (1994) (defining a person as "a being with awareness of her or his own existence over time, and the capacity to have wants and plans for the future"); B. Steinbock, Life Before Birth: The Moral and Legal Status of Embryos and Fetuses 9--13 (1992) (arguing that "the possession of interests is both necessary and sufficient for moral status" and that the "capacity for conscious awareness is a necessary condition for the possession of interests"); M. A. Warren, On the Moral and Legal Status of Abortion, 57 The Monist 5 (No. 4, 1973) (arguing that, to qualify as a person, a being must have at least one of five traits that are "central to the concept of personhood": (1) "consciousness (of objects and events external and/or internal to the being), and in particular the capacity to feel pain"; (2) "reasoning (the developed capacity to solve new and relatively complex problems); (3) "self-motivated activity (activity which is relatively independent of either genetic or direct external control)"; (4) "the capacity to communicate, by whatever means, messages of an indefinite variety of types"; and (5) "the presence of self-concepts, and self-awareness, either individual or racial, or both"); M. Tooley, Abortion & Infanticide, 2 Philosophy & Public Affairs 37, 49 (Autumn 1972) (arguing that "having a right to if presupposes that one is capable of desiring to continue existing as a subject of experiences and other mental states").

The most obvious problem with any such argument is that viability is heavily dependent on factors that have nothing to do with the characteristics of a fetus. One is the state of neonatal care at a particular point in time. Due to the development of new equipment and improved practices, the viability line has changed over the years. In the 19th century, a fetus may not have been viable until 32 or 33 weeks after conception or even later.[50] When *Roe* was decided, viability was gauged at roughly 28 weeks. See *Roe*, 410 U. S., at 160. Today, respondents draw the line at 23 or 24 weeks. Brief of Respondents at 8. So, according to *Roe*'s logic, States now have a compelling interest in protecting a fetus with a gestational age of, say, 26 weeks, but in 1973 States did not have an interest in protecting an identical fetus. How can that be?

Viability also depends on the "quality of the available medical facilities," *Colautti* v. *Franklin,* 139 U. S. 379, 396 (1979). Thus, a 24-week-old fetus may be viable if a woman gives birth in a city with hospitals that provide advanced care for very premature babies, but if the woman travels to a remote area far from any such hospital, the fetus may no longer be viable. On what ground could the constitutional status of a fetus depend on the pregnant woman's location?

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[50] See W. T. Lusk, Science and the Art of Midwifery 74-75 (1882) (explaining that "[w]ith care, the life of a child born within [the eighth month] of pregnancy may be preserved"); *id.* 396 ("Where the choice lies with the physician, the provocation of labor is usually deferred until the thirty-third or thirty-fourth week); J. Beck, Researches in Medicine and Medical Jurisprudence 68 (2d ed., 1835) ("Although children born before the completion of the seventh month have occasionally survived and been reared, yet in the medico-legal point of view. no child ought to be considered as capable of sustaining an independent existence until the seventh month has been fully completed."; see also J. P. Baker, The Incubator and the Medical Discovery of the Premature Infant, J. Perinatology 322 (2000) (explaining that, in the 19th century, infants born at 7 to 8 months' gestation were unlikely to survive beyond "the first days of life").

And if viability is meant to mark a line having universal moral significance, can it be that a fetus that is viable in a big city in the United States has a privileged moral status not enjoyed by an identical fetus in a remote area of a poor country?

In addition, as the Court once explained, viability is not really a hard-and-fast line. *Colautti*, 139 U. S., at 396. A physician determining a particular fetus's odds of surviving outside the womb must consider "a number of variables," including "gestational age," "fetal weight," a woman's "general health and nutrition," the "quality of the available 'medical facilities," and other factors. *Id.*, at 395-396. It is thus "only with difficulty" that a physician can estimate the "probability" of a particular fetus's survival. *Id.,* at 396. And even if each fetus's probability of survival could be ascertained with certainty, settling on a "probabilit[y] of survival" that should count as "viability" is another matter. *Id.,* at 396. Is a fetus viable with a 10 percent chance of survival? 25 percent? 50 percent? Can such a judgment be made by a State? And can a State specify a gestational age limit that applies in all cases? Or must these difficult questions be left entirely to the individual "attending physician on the particular facts of the case before him"? *Id.*, at 388.

The viability line, which *Casey* termed *Roe*'s central rule, makes no sense, and it is telling that other countries almost uniformly eschew such a line.[51] The Court thus asserted raw judicial power to impose, as a matter of constitutional law, a uniform viability rule that allowed the States less freedom to regulate abortion than the majority of western democracies enjoy.

iv

[51] According to the Center for Reproductive Rights, only the United States and the Netherlands use viability as a gestational limit on the availability of abortion on request, See The World's Abortion Laws, Center for Reproductive Rights (Feb. 23, 2021) (last accessed Jan. 21, 2022).

All in all, *Roe*'s reasoning was exceedingly weak, and academic commentators, including those who agreed with the decision as a matter of policy, were unsparing in their criticism. John Hart Ely famously wrote that *Roe* was "not constitutional law and gave almost no sense of an obligation to try to be." Ely 947. Archibald Cox, who served as Solicitor General under President Kennedy, commented that *Roe* "read[s] like a set of hospital rules and regulations" that "[neither historian, layman, nor lawyer will be persuaded .... are part of ... the Constitution." Archibald Cox, The Role of the Supreme Court in American Government 113--114 (1976). Laurence Tribe wrote that "even if there is a need to divide pregnancy into several segments with lines that clearly identify the limits of governmental power, 'interest-balancing' of the form the Court pursues fails to justify any of the lines actually drawn." Tribe 5. Mark Tushnet termed *Roe* a "totally unreasoned judicial opinion." M. Tushnet, Red, White, and Blue: A Critical Analysis of Constitutional Law 54 (1988). See also P. Bobbitt, Constitutional Fate 157 (1982); A. Amar, Foreword: The Document and the Doctrine, 114 Harv. L. Rev. 26, 110 (2000).

Despite *Roe*'s weaknesses, its reach was steadily extended in the years that followed. The Court struck down laws requiring that second-trimester abortions be performed only in hospitals, *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 433-139 (1983); that minors obtain parental consent, *Planned Parenthood of Central Mo.* v. *Danforth,* 428 U. S. 52, 74 (1976); that women give written consent after being informed of the status of the developing prenatal life and the risks of abortion, *Akron,* 462 U. S., at 442--445; that women wait twenty-four hours for an abortion, *id.,* at 449-451; that a physician determine viability in a particular manner, *Colautti,* 439 U. S, at 890--897; that a physician performing a post-viability abortion use the technique most likely to preserve the life of the fetus, *id.*, at 397--401; and that fetal remains be

treated in a humane and sanitary manner, *Akron,* 162 U. S., at 451-452.

Justice White complained that the Court was engaging in "unrestrained imposition of its own extraconstitutional value preferences." *Thornburgh*, 476 U. S., at 794 (White, J., dissenting). And the United States as *amicus curiae* asked the Court to overrule *Roe* five times in the decade before *Planned Parenthood* v. *Casey*, see 505 U. S., at 844 (plurality opinion), and then asked the Court to overrule it once more in *Casey* itself.

2

When *Casey* revisited *Roe* almost 20 years later, very little of *Roe*'s reasoning was defended or preserved. The Court abandoned any reliance on a privacy right and instead grounded the abortion right entirely on the Fourteenth Amendment's Due Process Clause. 505 U. S., at 816. The Court did not reaffirm *Roe*'s erroneous account of abortion history. In fact, none of the Justices in the majority said anything about the history of the abortion right. And as for precedent, the Court relied on essentially the same body of cases that *Roe* had cited. Thus, with respect to the standard grounds for constitutional decisionmaking—text, history, and precedent—Casey did not attempt to bolster *Roe*'s reasoning.

The Court also made no real effort to remedy one of the greatest weaknesses in *Roe*'s analysis—its much-criticized discussion of viability. The Court retained what it called *Roe*'s "central holding"—that a State may not regulate pre-viability abortions for the purpose of protecting fetal life—but it provided no principled defense of the viability line. *Id.*, at 860, 870-871. Instead, it merely rephrased what *Roe* had said, stating that viability marked the point at which "the independent existence of a second life can in reason and fairness be the object of state protection that now overrides the rights of the woman." *Id.*, at 870. Why "reason

and fairness" demanded that the line be drawn at viability the Court did not explain. And the Justices who authored the controlling opinion conspicuously failed to say that they agreed with the viability rule; instead, they candidly acknowledged "the reservations [some] of us may have in reaffirming [that] holding of *Roe*." *Id.*, at 853.

The controlling opinion criticized and rejected *Roe*'s trimester scheme, *id.,* at 872, and substituted a new "undue burden" test, but the basis for this test was obscure. And as we will explain, the test is full of ambiguities and is difficult to apply.

Casey, in short, either refused to reaffirm or rejected important aspects of *Roe* analysis, failed to remedy glaring deficiencies in *Roe*'s reasoning, endorsed what it termed *Roe*'s central holding while suggesting that a majority might not have thought it was correct, provided no new support for the abortion right other than *Roe*'s status as precedent, and imposed a new and problematic test with no firm grounding in constitutional text, history, or precedent.

As discussed below, *Casey* also deployed a novel version of the doctrine of *stare decisis*. See Part III-E, *infra*. This new doctrine did not account for the profound wrongness of the decision in *Roe*, and placed great weight on an intangible form of reliance with little if any basis in prior case law. *Stare decisis* does not command the preservation of such a decision.

C

Workability. Our precedents counsel that another important consideration in deciding whether a precedent should be overruled is whether the rule it imposes is workable—that is, whether it can be understood and applied in a consistent and predictable manner. *Montejo* v. *Louisiana*, 556 U. S. 778, 792 (2009); *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 173 (1989); *Gulfstream Aerospace Corp.*

v. *Mayacamas Corp.,* 485 U. S. 21, 283--284 (1988). *Casey*'s "undue burden" test has scored poorly on the workability scale.

1

Problems begin with the very concept of an "undue burden." As Justice Scalia noted in his *Casey* dissent, determining whether a burden is "due" or "undue" is "inherently standardless." 505 U. S., at 992 (Scalia, J. dissenting); see also *June Medical Services, LLC,* 591 U. S., at _ (GORSUCH, J., dissenting) (slip op., at 17) ('Whether a burden is deemed undue depends heavily on which factors the judge considers and how much weight he accords them." internal quotation marks and alterations omitted).

The *Casey* plurality tried to put meaning into the "undue burden" test by setting out three subsidiary rules, but these rules created their own problems. The first rule is that "a provision of law is invalid, if its purpose or effect is to place *a substantial obstacle* in the path of a woman seeking an abortion before the fetus attains viability." 505 U. S., at 878 (emphasis added); see also *id.*, at 877. But whether a particular obstacle qualifies as "substantial" is often open to reasonable debate. In the sense relevant here, "substantial" means "of ample or considerable amount, quantity, or size" Random House Webster's Unabridged Dictionary 1897 (2d ed. 2001). Huge burdens are plainly "substantial" and trivial ones are not, but in between these extremes, there is a wide gray area.

This ambiguity is a problem, and the second rule, which applies at all stages of a pregnancy, muddies things further. It states that measures designed "to ensure that the woman's choice is informed" are constitutional so long as they do not impose "an undue burden on the right." *Casey*, 505 U. S., at 878. To the extent that this rule applies to pre-viability abortions, it overlaps with the first rule and appears to impose a different standard. Consider a law that imposes an insubstantial obstacle but serves little purpose.

As applied to a pre-viability abortion, would such a regulation be constitutional on the ground that it does not impose a "*substantial* obstacle"? Or would it be unconstitutional on the ground that it creates an "*undue* burden" because the burden it imposes, though slight, outweighs its negligible benefits? *Casey* does not say, and this ambiguity would lead to confusion down the line. Compare *June Medical*, 591 U.S, at __ (slip op., 1-2), with *id.*, at _ (ROBERTS, C. J., concurring) (slip op., at 5-6).

The third rule complicates the picture even more. Under that rule, "*[u]nnecessary health* regulations that have the purpose or effect of presenting a *substantial obstacle* to a woman seeking an abortion impose an *undue burden* on the right." 505 U. S., at 878 (emphasis added). This rule contains no fewer than three vague terms. It includes the two already discussed—"undue burden" and "substantial obstacle"—even though they are inconsistent. And it adds a third ambiguous term when it refers to "*unnecessary* health regulations." The term "necessary" has a range of meanings—from "essential" to merely "useful." See Black's Law Dictionary 928 (5th ed. 1979); American Heritage Dictionary of the English Language 877 (1975). *Casey* did not explain the sense in which the term is used in this rule.

In addition to these problems, one more applies to all three rules. They all fall on courts to examine a law's effect on women, but a regulation may have a very different impact on different women for a variety of reasons, including their places of residence, financial resources, family situations, work and personal obligations, knowledge about fetal development and abortion, psychological and emotional disposition and condition, and the firmness of their desire to obtain abortions. In order to determine whether a regulation presents a substantial obstacle to women, a court needs to know which set of women it should have in mind and how many of the women in this set must find that an obstacle is "substantial."

Casey provided no clear answer to these questions. It said that a regulation is unconstitutional if it imposes a substantial obstacle "in a large fraction of cases in which [it] is relevant," 505 U. S., at 895, but there is obviously no clear line between a fraction that is "large" and one that is not. Nor is it clear what the Court meant by "cases in which" a regulation is "relevant." These ambiguities have caused confusion and disagreement. Compare *Whole Woman's Health* v. *Hellerstedt*, 579 U. S. 582, __ (2016) (slip op., at 39), with *id.*, at _ (ALITO, J., dissenting) (slip op., 24-25 & n. 11.

2

The difficulty of applying *Casey*'s new rules surfaced in that very case. The controlling opinion found that Pennsylvania's 24-hour waiting period requirement and its informed-consent provision did not impose "undue burden[s]," *Casey*, 550 U. S., at 881--888 (plurality opinion), but Justice Stevens, applying the same test, reached the opposite result. *Id.*, at 920-922 (Stevens, J., concurring in part and dissenting in part). That did not bode well, and then-Chief Justice Rehnquist aptly observed that "the undue burden standard presents nothing more workable than the trimester framework." *Id*, at 964-966 (Rehnquist, C. J., dissenting)

The ambiguity of the "undue burden" test also produced disagreement in later cases. In *Whole Woman's Health* v. *Hellerstedt*, the Court adopted the cost-benefit interpretation of the test, stating that that "[t]he rule announced in *Casey* ... requires that courts consider the burdens a law imposes on abortion access *together with the benefits those laws confer*." 579 U. S. __, __ (2016) (slip op., at 19-20) (emphasis added). But five years later, a majority of the Justices rejected that interpretation. See *June Medical*, 591 U. S. __ (2020). Four Justices reaffirmed *Whole Woman's Health*'s instruction to "weigh" a law's "benefits" against

"the burdens it imposes on abortion access." *Ibid.*, at _ (opinion of BREYER, J.) (slip op., at 2) (internal quotation marks omitted). But the Chief Justice—who cast the deciding vote—argued that "[n]othing about *Casey* suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts." *Id.*, at __ (ROBERTS, C. J., concurring) (slip op., at 6). And the four Justices in dissent rejected the lead opinion's interpretation of *Casey.* See *id.*, at __(ALITO, J., dissenting, joined in relevant part by THOMAS, GORSUCH, and KAVANAUGH, JJ) (slip op., at 4); *id.,* at _ (GORSUCH, J. dissenting) (slip op. at 15-18; (CAVANAUGH, J., dissenting) (slip op., at 1-2) ("five Members of the Court reject the *Whole Woman's Health* cost-benefit standard"). This Court's experience applying *Casey* has confirmed Chief Justice Rehnquist's prescient diagnosis that the undue-burden standard was "not built to last." *Casey*, 505 U. S., at 965 (Rehnquist, C. J, dissenting in part).

3

The experience of the Courts of Appeals provides further evidence that *Casey*'s "line between" permissible and unconstitutional restrictions "has proved to be impossible to draw with precision." *Janus*, 585 U. S., at _ (slip op., at 38).

Casey has generated a long list of circuit conflicts. Most recently, the Courts of Appeals have disagreed about whether the balancing test from *Whole Woman's Health* correctly states the undue-burden framework.[52] They have disagreed on the legality of parental notification rules.[53]

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[52] Compare *Whole Woman's Health* v. *Paxton,* 10 F. 4th 430, 440 (CA5 2021), *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 978 F. 3d 418, 437 (CA6 2020), and *Hopkins v. Jegley*, 968 F. 3d 912, 915 (CA8 2020), with *Planned Parenthood of Ind. & Ky., Inc.,* v. *Box*, 991 F. 3d 740, 751--752 (CA7 2021).

[53] Compare *Planned Parenthood* v. *Camblos*, 155 F. 3d 352, 367 (CA4 1998), with *Planned Parenthood of Ind. & Ky., Inc.,* v. *Adams*, 937 F. 3d 973, 985--990 (CA7 2019), certiorari granted, judgment vacated, 591 U. S. _ (2020), and *Planned Parenthood* v. *Miller*, 63 F. 3d 1452, 1460 (CA8 1995).

They have disagreed about bans on certain dilation and extraction procedures.[54] They have disagreed about when an increase in the time needed to reach a clinic constitutes an undue burden.[55] And they have disagreed on whether a state may regulate abortions performed because of the fetus's race, sex, or disability.[56]

The Courts of Appeals have experienced particular difficulty in applying the large-fraction-of-relevant-cases test. They have criticized the assignment while reaching unpredictable results.[57] And they have candidly outlined Casey's many other problems.[58]

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[54] Compare *Whole Woman's Health* v. *Paxton,* 10 F. 4th, at 435-436, with *W. Ala. Women's Ctr.* v. *Williamson*, 900 F. 3d 1310, 1319, 1327 (CA11 2018), and *EMW Women's Surgical Ctr., P.S.C.* v. *Friedlander,* 960 F. 3d 785, 806--808 (CA6 2020).

[55] Compare *Tucson Woman's Clinic* v. *Eden*, 379 F. 3d 531, 541 (CA9 2004), with *Women's Med. Prof'l Corp.* v. *Baird*, 438 F. 3d 595, 605 (CA6 2006) and *Greenville Women's Clinic* v. *Bryant*, 222 F. 3d 157, 171-172 (CA4 2000).

[56] Compare *Preterm-Cleveland*, 994 F. 3d 512, 520--535 (CA6 2021), with *Little Rock Family Planning Servs.* v. *Rutledge*, 984 F. 3d 682, 685--690 (CA8 2021).

[57] See, *e.g., Bristol Reg'l Women's Center, P.C.* v. *Slatery,* 7 F.4th 478, 485 (CA6 2021); *Reproductive Health Servs.* v. *Strange*, 3 F. 4th 1240 1265; *June Medical Servs., LLC* v. *Gee,* 905 F. 3d 787, 814 (CA5 2020), reversed, 591 U. S. _ *Preterm-Cleveland*, 994 F. 3d, at 534; *Planned Parenthood of Ark. & E. Okla.* v. *Jegley,* 564 F. 3d 953, 958-960 (CA8 2017); *McCormack* v. *Hertzog,* 788 F. 3d 1017, 1029-100 (CA9 2015); compare *Newman,* 305 F.3d., at 699 (Coffey, J., concurring), with *id.,* at 708 (Wood, J., dissenting).

[58] See, *e.g.*, *Memphis Ctr. for Reproductive Health* v. *Slatery*, 14 F. 4th 408,451 (CA6 2021) (Thapar, J., concurring in judgment in part and dissenting in part); *Preterm-Cleveland*, 991 F. 3d, at 521 (CA6 2021); *Planned Parenthood of Ind. & Ky., Inc.*, 888 F. 3d, at 313 (Manion, J., concurring in the judgment in part and dissenting in part); *Planned Parenthood of Ind. & Ky., Inc.* v. *Box*, 949 F. 3d 997, 999 (CA7 2019) (Easterbrook, J., concurring in denial of rehearing en banc) ("How much burden is 'undue' is a matter of judgment, which depends on what the burden is and whether that burden is excessive (a matter of weighing costs and. 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)"); *Nat'l Abortion Fed'n v. Gonzales,* 437 F. 3d 278, 290--296 (CA2 2008) (Walker, C.J., concurring); *Planned Parenthood of Rocky Mountains Servs. Corp. v. Owens,* 287 F. 3d 910, 931 (CA10 2002) (Baldock. J., dissenting).

Casey's "undue burden" test has proven to be unworkable. "[P]lucked from nowhere," 505 U. S., at 965 (Rehnquist, C. J., dissenting in part), it "seems calculated to perpetuate give-it-a-try litigation" before judges assigned an unwieldy and inappropriate task. *Lehnert* v. *Ferris Faculty Assn.*, 500 U. S. 507, 551 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part). Continued adherence to that standard would undermine, not advance, the "even-handed, predictable, and consistent development of legal principles." *Payne*, 501 U. S., at 821.

D

Effect on other areas of law. Roe and *Casey* have led to the distortion of many important but unrelated legal doctrines, and that effect provides further support for overruling those decisions. See *Ramos*, 590 U. S. at _ (KAVANAUGH, J., concurring) (slip op., at 8); *Janus*, 585 U. S, at _ (slip op., at 34).

Members of this Court have repeatedly lamented that "no legal rule or doctrine is safe from *ad hoc* nullification by the Court when an occasion for its application arises in a case involving state regulation of abortion." *Thornburgh*, 476 U. S., at 814 (O'Connor, J., dissenting); see *Madsen* v. *Women's Health Center, Inc.*, 512 U. S. 753, 185 (1994) (Scalia, J., concurring in the judgment in part and dissenting in part); *Whole Woman's Health*, 579 U. S. at _ (THOMAS, J., dissenting) (slip op., at 1); *id.*, at _-__ (ALITO, J., dissenting) (slip op., at 4-24, 37-43); *June Medical,* 591

U. S., at_-_ (GORSUCH, J., dissenting) (slip op., at 1-13).

The Court's abortion cases have diluted the strict standard for facial constitutional challenges.[59] They have ignored the Court's third-party standing doctrine.[60] They have disregarded standard *res judicata* principles.[61] They have flouted the ordinary rules on the severability of unconstitutional provisions,[62] as well as the rule that statutes should be read where possible to avoid unconstitutionality.[63] And they have distorted First Amendment doctrines.[64]

When vindicating a doctrinal innovation requires courts to engineer exceptions to longstanding background rules, the doctrine "has failed to deliver the 'principled and intelligible development of the Law that stare decisis purports to secure." *June Medical*, 591 U. S., at __ (THOMAS, J., dissenting) (slip op., at 19) (quoting *Vasquez* v. *Hillery*, 474 U. S. 254, 265 (1986).

E

Reliance interests. We last consider whether overruling *Roe* and *Casey* will upend substantial reliance interests. See *Ramos,* 590 U. S., at _(KAVANAUGH, J., concurring)

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[59] Compare *United States v. Salerno*, 481 U. S. 739, 745 (1981), with *Casey*, 505 U. S., at 895; see also *supra*, at ___-___.

[60] Compare *Warth* v. *Seldin,* 422 U. S. 490, 499 (1975), and *Elk Grove Unified School Dist.* v. *Newdow*, 542 U. S. 1, 15, 17--18 (2004), with *June Medical*, 591 U. S., at _ (ALITO, J., dissenting) (slip op., at 29), *id.*, at __ (GORSUCH, J., dissenting) slip op., at 6-7) (collecting cases), and *Whole Woman's Health*, 579 U. S., at __ n. 1 (THOMAS, J. , dissenting) (slip op., at 4-5).

[61] Compare *Whole Woman's Health*. 579 U. S., at __ (slip op., at 12), with *id.*, at _ (ALITO, J., dissenting) (slip op., at 10).

[62] Compare *Whole Woman's Health,* at (slip op., at 36-38), with *id.,* at __ (ALITO, J., dissenting) (slip op., at 2).

[63] See *Sternberg* v. *Carhart,* 530 U. S. 914, 977-978 (2000) (Kennedy, J., dissenting; *id.,* at 996--997 (THOMAS, J., dissenting).

[64] See *Hill* v. *Colorado*, 630 U. S. 703, 741-742 (Scalia, J., dissenting); *id,* at 765 (Kennedy, J., dissenting).

(slip op., at 15); *Janus,* 585 U. S., at __ (slip op., at 34--35).

1

Traditional reliance interests arise "when advance planning of great precision is most obviously a necessity." *Casey*, 505 U. S., at 856 (plurality opinion); see also *Payne*, 501 U. S., at 828. In *Casey*, the controlling opinion conceded that those traditional reliance interests were not implicated because getting an abortion is generally "unplanned activity," and "reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions." 505 U. S., at 856. For these reasons, we agree with the *Casey* plurality that conventional, concrete reliance interests are not present here.

2

Unable to find reliance in the conventional sense, the controlling opinion in *Casey* perceived a more intangible form of reliance. It wrote that "people [had] organized intimate relationships and made choices that define their views of themselves and their places in society[] in reliance on the availability of abortion in the event that contraception should fail" and that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Ibid.* But this Court is ill-equipped to assess "generalized assertions about the national psyche." *Id.*, at 957 (Rehnquist, C. J., concurring in part and dissenting in part). *Casey*'s notion of reliance thus finds little support in our cases, which instead emphasize very concrete reliance interests, like those that develop in "cases involving property and contract rights." *Payne,* 501 U. S., at 820.

When a concrete reliance interest is asserted, courts are equipped to evaluate the claim, but assessing the novel and intangible form of reliance endorsed by the *Casey* plurality

is another matter. That form of reliance depends on an empirical question that is hard for anyone—and in particular, for a court—to assess, namely, the effect of the abortion right on society and in particular on the lives of women. The contending sides in this case make impassioned and conflicting arguments about the effects of the abortion right on the lives of women. Compare Brief for Petitioners 34-36; Brief for *Amici Curiae* Women Scholars & Professionals et al. 13-20, 29-41, with Brief for Respondents 36--41; Brief for Nat'l Women's Law Center et al. as *Amici Curiae* 15-32. The contending sides also make conflicting arguments about the status of the fetus. This Court has neither the authority nor the expertise to adjudicate those disputes, and the *Casey* plurality's speculations and weighing of the relative importance of the fetus and mother represent a departure from the "original constitutional proposition" that "courts do not substitute their social and economic beliefs for the judgment of legislative bodies." *Ferguson* v. *Shrupa*, 372 U. S. 726, 729--739 (1963).

Our decision returns the issue of abortion to those legislative bodies, and it allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office. Women are not without electoral or political power. It is noteworthy that the percentage of women who register to vote and cast ballots is consistently higher than the percentage of men who do so.[65] In the last election in November 2020, women, who make up around 51.5% of the population of Mississippi,[66] constituted 55.5%

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[65] See Dep't of Commerce, U.S. Census Bureau, An Analysis of the 2018 Congressional Election 6, tbl. 5 (Dec. 2021) (showing that women made up over 50% of the voting population in every congressional election between 1978 and 2018).

[66] Dep't. of Commerce, U.S, Census Bureau, QuickFacts, Mississippi, https://www.census.govi/quickfacts/MS (July 1, 2021).

of the voters who cast ballots.[67]

3

Unable to show concrete reliance on *Roe* and *Casey* themselves, the Solicitor General suggests that overruling those decisions would "threaten the Court's precedents holding that the Due Process Clause protects other rights." Brief for United States as *Amicus Curiae* 26 (citing *Obergefell* v. *Hodges*, 576 U. S. 644 (2015); *Lawrence* v. *Texas,* 539 U. S. 558 (2008); *Griswold* v. *Connecticut*, 381 U. S. 479 (1965)). That is not correct for reasons we have already discussed. As even the *Casey* plurality recognized, "[a]bortion is a unique act" because it terminates "life or potential life." 505 U. S., at 852; see also *Roe,* 410 U. S., at 159 (abortion is "inherently different from marital intimacy," "marriage," or "procreation"). And to ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.

IV

Having shown that traditional *stare decisis* factors do not weigh in favor of retaining *Roe* or *Casey*, we must address one final argument that featured prominently in the *Casey* plurality opinion.

The argument was cast in different terms, but stated simply, it was essentially as follows. The American people's belief in the rule of law would be shaken if they lost respect for this Court as an institution that decides important cases based on principle, not "social and political pressures." *Casey*, 505 U. S., at 865. There is a special danger that the

[67] Dep't of Commerce, U. S. Census Bureau, Voting and Registration in the Election of November 2020, Table 4b, Reported Voting and Registration, by Sex, Race and Hispanic Origin, for States: November 2020, https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-585.html.

public will perceive a decision as having been made for unprincipled reasons when the Court overrules a controversial "watershed" decision, such as *Roe, Id.,* at 866--867. A decision overruling *Roe* would be perceived as having been made "under fire" and as a "surrender to political pressure," *id.,* at 867, and therefore the preservation of public approval of the Court weighs heavily in favor of retaining *Roe*, see *id.*, at 869.

This analysis starts out on the right foot but ultimately veers off course. The *Casey* plurality was certainly right that it is important for the public to perceive that our decisions are based on principle, and we should make every effort to achieve that objective by issuing opinions that carefully show how a proper understanding of the law leads to the results we reach. But we cannot exceed the scope of our authority under the Constitution, and we cannot allow our decisions to be affected by any extraneous influences such as concern about the public's reaction to our work. Cf. *Texas* v. *Johnson,* 491 U. S. 397 (1989); *Brown* v. *Board of Education*, 347 U. S. 483 (1954). That is true both when we initially decide a constitutional issue and when we consider whether to overrule a prior decision. As Chief Justice Rehnquist explained, "The Judicial Branch derives its legitimacy, not from following public opinion, but from deciding by its best lights whether legislative enactments of the popular branches of Government comport with the Constitution. The doctrine of *stare decisis* is an adjunct of this duty and should be no more subject to the vagaries of public opinion than is the basic judicial task" *Casey*, 505 U. S., at 963 (Rehnquist, C. J.) In suggesting otherwise, the *Casey* plurality went beyond this Court's role in our constitutional system.

The *Casey* plurality "call[ed] the contending sides of a national controversy to end their national division," and claimed the authority to impose a permanent settlement of the issue of a constitutional abortion right simply by saying

that the matter was closed. *Id.,* at 867. That unprecedented claim exceeded the power vested in us by the Constitution. As Hamilton famously put it, the Constitution gives the judiciary "neither Force nor Will." The Federalist No. 78, p. 523 (J. Cooke ed. 1961). Our sole authority is to exercise "judgment"—which is to say, the authority to judge what the law means and how it should apply to the case at hand. *Ibid.* The Court has no authority to decree that an erroneous precedent is *permanently* exempt from evaluation under traditional *stare decisis* principles. A precedent of this Court is subject to the usual principles of *stare decisis* under which adherence to precedent is the norm but not an inexorable command. If the rule were otherwise, erroneous decisions like *Plessy* and *Lochner* would still be the law. That is not how *stare decisis* operates.

The *Casey* plurality also misjudged the practical limits of this Court's influence. *Roe* certainly did not succeed in ending division on the issue of abortion. On the contrary, *Roe* "inflamed" a national issue that has remained bitterly divisive for the past half-century. See *Casey*, 505 U. S., at 995 (Scalia, J., dissenting); see also R. B. Ginsburg, Speaking in a Judicial Voice, 67 N.Y.U. L. Rev. 1185, 1208 (1992) (*Roe* may have "halted a political process," "prolonged divisiveness," and "deferred stable settlement of the issue."). And for the past 30 years, *Casey* has done the same.

Neither decision has ended debate over the issue of a constitutional right to obtain an abortion. Indeed, in this case, 26 States expressly ask us to overrule *Roe* and *Casey* and to return the issue of abortion to the people and their elected representatives. This Court's inability to end debate on the issue should not have been surprising. This Court cannot bring about the permanent resolution of a rancorous national controversy simply by dictating a settlement and telling the people to move on. Whatever influence the Court may have on public attitudes must stem from the strength of our opinions, not an attempt to exercise "raw

judicial power." *Roe*, 410 U. S., at 222 (White, J., dissenting).

We do not pretend to know how our political system or society will respond to today's decision overruling *Roe* and *Casey*. And even if we could foresee what will happen, we would have no authority to let that knowledge influence our decision. We can only do our job, which is to interpret the law, apply longstanding principles of *stare decisis*, and decide this case accordingly.

We therefore hold that the Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives.

V

We must now decide what standard will govern if state abortion regulations undergo constitutional challenge and whether the law before us satisfies the appropriate standard.

A

Under our precedents, rational-basis review is the appropriate standard for such challenges. As we have explained, procuring an abortion is not a fundamental constitutional right because such a right has no basis in the Constitution's text or in our Nation's history. See *supra*, at _-_.

It follows that the States may regulate abortion for legitimate reasons, and when such regulations are challenged under the Constitution, courts cannot "substitute their social and economic beliefs for the judgment of legislative bodies." *Ferguson*, 372 U. S., at 729-139; see also *Dandridge* v. *Williams*, 397 U. S. 471, 484-486 (1970); *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152 (1988). That respect for a legislature's judgment applies even when the laws at issue concern matters of great social significance and moral substance. See, *e.g, Board of Trustees of Univ.*

of Ala. v. *Garrett,* 531 U. S. 356, 365-368 (2001) (“treatment of the disabled"); *Glucksberg,* 521 U. S. at 728 (“assisted suicide"); *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U.S. 1, 32-35, 55 (1973) (“financing public education”).

A law regulating abortion, like other health and welfare laws, is entitled to a “strong presumption of validity.” *Heller*, 509 U. S, at 319. It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests. *Id.*, at 320; *FCC* v. *Beach Communications, Inc.*, 508 U. S. 307, 313 (1998); *New Orleans*, 421 U. S., at 303; *Williamson* v. *Lee Optical of Okla., Inc.* 348 U. S. 483, 491 (1955). These legitimate interests include respect for and preservation of prenatal life at all stages of development, *Gonzales,* 550 U. S., at 157-158; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability. See *id.*, at 156-157; *Roe,* 410 U. S., at 150; cf. *Glucksberg*, 521 U. S., at 728--731 (identifying similar interests).

B

These legitimate interests justify Mississippi's Gestational Age Act. Except “in a medical emergency or in the case of a severe fetal abnormality,” the statute prohibits abortion “if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks.” Miss. Code Ann. §41-41-191(4)(b). The Mississippi Legislature's findings recount the “stages of human prenatal development” and assert, the State's interest in “protecting the life of the unborn.” *Id.* §2(b)(i)(2). The legislature also found that abortions performed after fifteen weeks typically use the dilation and evacuation procedure, and the legislature found the use of this procedure “for non-therapeutic or elective reasons [to be] a barbaric practice,

dangerous for the maternal patient, and demeaning to the medical profession." *Id.* §2(b)(i)(8); see also *Gonzales,* 550 U. S., at 135--143 (describing such procedures). These legitimate interests provide a rational basis for the Gestational Age Act, and it follows that respondents' constitutional challenge must fail.

VI

We end this opinion where we began. Abortion presents a profound moral question. The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives.

The judgment of the Fifth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.