The Dobbs Draft of the Leaked Alito Abortion Opinion, Tightened Up and Heavily Copyedited

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 rewritten this opinion with stylistic improvements at the micro level (*e.g.,* deleting a comma) but without changing the argument or moving sections around. My aim is to do "heavy copyediting"--- that is, to fix minor typos as undoubted improvements, but also to suggest more controversial changes (*e.g.,* removing the word "and" from the start of some sentences) that I think are obvious improvements but somebody else might not. The pagination matches the original leaked draft (available in docx or pdf), so some pages are shorter than others.

My main objective at the start, actually, was to drastically reduce the length. To decide whether states should be allowed to regulate abortion or not should not take 90 pages, regardless of which side you're on. I did eliminate 20 pages or so the easy and obvious way--- by deleting Appendix A and Appendix B--- but otherwise, drastic shortening proved harder than I thought. The original *Roe v. Wade* could have been short But an opinion overruling it must deal with the debris *Roe* left behind, explaining why *Roe* was wrong and *Casey* was wrong and how *stare decisis* applies to them. Thus, this particular case does need to be longer than the typical appellate opinion (100-page trial opinions are different and must be tolerated, because trial courts need to be deep in the weeds of the facts for things like bankruptcies or class actions.) So rather than strike paragraphs, I had to rely on Strunk-and-White-ing, tightening up language and deleting words that did not pay for their passage by conveying meaning. I only reduced the length of the opinion proper by about 10%, from 17,000 words to 15,400.

Do not be put off by my aggressive changes to legal punctuation. In a Posneresque attempt to suggest ways to make it clearer ("Goodbye to the Bluebook"), I did things like putting commas outside of quotes (like "this", and not like "this," to follow the British) and replacing "*Id.*, at 32" with "*Idem* at 32". In retrospect, I shouldn't have done that, since it was time-consuming and will be distracting for lawyers. I comment on why I don't like the old punctuation at the end of this document.

I am a professor, so I want to take years writing this. When I wrote my game theory book, I read the whole thing out loud to myself twice to help find roughness in the writing. *Dobbs* is time-sensitive, though, so I'll stop now, and perhaps revise the online version later. I could have done a lot of micro-shortening by eliminating redundant case citation, I think, and "operational shortening" by eliminating redundant argumentation too, perhaps.

I should also add that I am acting as an editor, not an author. I like the opinion a lot, but I do not agree with all of it. I have not changed what I disagree with, though. My aim has

been to help the author say what he intends to say. Also, I realize full well that although Justice Alito is the named author, he is writing a committee document, and so he has been sensitive to the rest of the majority in ways I cannot know. (I just hope he isn't being sensitive to someone's desire for verbose writing*, e.g.,* putting "And" at the start of too many sentences.)

I will post several versions of this redraft: (1) in MS Word, with red font in Change Drafts mode to show where I made changes, (2) in Pdf, and (3) at Substack, which won't have the pagination.

Edited by Eric Rasmusen, May 14, 2022.

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 think that abortion should be allowed under some but not all circumstances. Those within this third group hold a variety of views about the particular restrictions.

For the first 185 years after the adoption of the Constitution each State was permitted to address abortion 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. The opinion 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 (abortion in antiquity) to the plainly incorrect (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 a scheme that might be found in a statute enacted by a legislature.

Under this scheme, each trimester of pregnancy was regulated differently. The most critical line was drawn near the end of the second trimester, when a fetus typically achieved the ability to survive outside the womb, "viability". Although the Court acknowledged that States had a legitimate interest in "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 the viability line, and even abortion supporters have found it hard to defend it. One prominent constitutional scholar wrote that he "would vote for a statute very much like the one the Court ended 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 prohibited abortion at all stages. In the years immediately after, about a third of the States had liberalized their laws, but *Roe* abruptly ended that political process. It struck down the abortion laws of every single State, lax and strict alike, imposing a single set of rules for the entire Nation.[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. 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 and four wanted to overrule *Roe* completely. The remaining three, who jointly signed the controlling opinion, took a third position.[7] They did not endorse *Roe*'s reasoning, and even hinted that they might have "reservations" about whether the Constitution protected a right to abortion,[9] but they concluded that *stare decisis*, which calls for prior decisions to be followed in most instances, required adherence to *Roe*'s "central holding"---that a State may not protect fetal life before "viability'—even if that holding was wrong.[11] Anything less, they said, would undermine respect for the Court and the rule of law.

Oddly enough, *Casey* was no respecter of *stare decisis* except in that "central holding". 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.").

[7] See 505 U.S. at 911 (Stevens, J., concurring in part and dissenting in part) and at 932 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (no change); at 944 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) and at 979 (Scalia, J., concurring in the judgment in part and dissenting in part) (overrule); and at 843 (plurality opinion of O'Connor, Kennedy, and Souter, JJ.) (controlling opinion).

[9] 505 U. S. at 853.

[11] 505 U. S. at 860 (plurality opinion).

overruled *in toto*[12] and *Roe* itself in part. *Casey* threw out *Roe*'s trimester scheme and substituted a new rule, under which States were forbidden to adopt any regulation that imposed an "undue burden" on a woman having an abortion.[14] The decision provided no clear guidance about the difference between burdens "due" and "undue". The three controlling Justices also "called the contending sides of a national controversy to end their national division" and treat the Court's decision as the final word on abortion.[15]

As is now obvious, *Casey* did not achieve that goal. Americans continue to hold passionate and widely divergent views on abortion, and state legislatures have acted accordingly. Some enacted laws allowing abortion, with few restrictions at all stages of pregnancy. Others tightly restricted abortion, even well before viability. In the present case, 26 States have expressly asked this Court to overrule *Roe* and *Casey* and allow them to regulate pre-viability abortions.

Before us now is one such regulation. The State of Mississippi asks us to uphold the constitutionality of a law that prohibits abortion after the fifteenth week of pregnancy, several weeks before a fetus is viable. The State argues that we should reconsider and overrule *Roe* and *Casey* and once again allow each State to regulate abortion as its citizens wish. Respondents and the Solicitor General ask us to

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[12] 505 U.S. at 861, 870, 873 (overruling *Akron v. Akron Center for Reproductive Health,* 462 U.S. 416 (1983), and *Thornburgh v. American College of Obstetricians and. Gynecologists*, 476 U.S. 747 (1986)).

[14] 505 U.S. at 874 (plurality opinion).

[15] *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. *Idem* at 50.

We agree, and 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 Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights 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).

The right to abortion does not fall within this category. Until the 1960's 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 different from any other right this Court has held to fall within the Fourteenth Amendment's protection of "liberty". *Roe*'s defenders characterize the abortion right as similar to 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 calls "an unborn human being".[16]

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

[16] Miss Code Ann. §41-41-191(4)(b).

opinion was based, does not compel 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. Far from bringing about a national settlement of the abortion issue, it and *Casey* 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, Mississippi's Gestational Age Act, Miss. Code Ann. §41-41-191, says:

> 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.[17]

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 permitted "nontherapeutic or elective abortion-on-demand" after the twentieth weeks' gestational age.[18] §2(a). The legislature then found that at five or six weeks

[17] At §4(b). The Act defines "gestational age" as "calculated from the first day of the last menstrual period of the pregnant woman." §3(f).

[18] The 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). A more recent compilation from the Center for Reproductive Rights adds Iceland and Guinea-Bissau to the list. See The World's Abortion Laws, Center for Reproductive Right (Feb. 23, 2021) (as of Jan. 16, 2022).

the 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 hair, fingernails, and toenails begin to form at eleven weeks he “may move about freely in the womb", and at twelve weeks he 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 including Thomas Dobbs, 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). The Fifth Circuit affirmed. 945 F.3d 265 (5th circ. 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*. *Idem* at 50.

II

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

We start with the question that the *Casey* plurality did not consider, the basis for the right, which we will address in three steps. First, we will explain the standard our cases have used in determining whether the Fourteenth Amendment's "liberty" protects a particular right. Second, we will examine whether the right at issue here is rooted in our Nation's history and tradition and is an essential component of "ordered liberty". Finally, we will consider whether the right is supported by other precedents.

II (A) (1)

Constitutional analysis begins with "the language of the instrument", *Gibbons v. Ogden*, 9 Wheat. 1, 186-189 (1824), which is the "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. Therefore, those who claim that it protects such a right must show it is somehow implicit in the text. *Roe*, however, was remarkably loose in its treatment of the text. It held that the abortion right, which is not mentioned in the Constitution, is part of the right to privacy, which is also not mentioned. See 410 U.S. at 152-153. The 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. *Idem* at 152. The Court's discussion left open three ways in which some combination of these provisions could protect abortion. One possibility was that the right was "founded . . . in the Ninth Amendment's reservation of rights to the people". *Idem* at 13. A second was that it was founded in the First, Fourth, or Fifth Amendment or in some combination thereof, 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 been. *Ibid*; see *McDonald v. Chicago*, 561 U.S. 742, 763-766 (2010) (plurality opinion). A third possibility was that the First, Fourth, and Fifth Amendments were irrelevant, and the right was a component of the "liberty" protected by the Fourteenth Amendment's Due Process Clause. 410 U.S. at 153. *Roe* said that the Court

"feels" that the Fourteenth Amendment was the provision that did the work, but its message seems to be that the abortion right could be found somewhere in the Constitution and that its exact location was not of much importance.[19] The *Casey* Court did not defend this unfocused analysis. Instead *Case*y was grounded 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 will discuss this theory below, but before doing so let us briefly address an additional constitutional provision that some *amici* offered as a 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 *Casey* invoked this theory, and it is squarely foreclosed by our precedents, which establish that a State's regulation of abortion, a procedure only one sex can undergo, is nonetheless not a "sex-based" classification, and thus not subject to the "heightened scrutiny" that applies to such classifications. See, *e.g., Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689 (2017). Regulation of a medical procedure only one sex can undergo does not trigger heightened scrutiny unless it is a "mere pretext" that is "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). As the Court has stated, the "goal of preventing abortion" is not "invidiously discriminatory animus against women." *Bray v. Alexandria Women's*

[19] 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.

Health Clinic, 506 U.S. 263, 273-274 (1993). Accordingly, laws regulating abortion are not subject to heightened scrutiny. Rather, they are governed by the same standard of review as other health and safety measures, we will discuss in Part V.

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,

II (A) (2)

The theory that the Fourteenth Amendment's Due Process Clause provides substantive as well as procedural, protection for "liberty" has long been controversial, but our decisions do hold that it protects two categories of substantive rights. The first category consists of rights from 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 apply to the States. See *McDonald*, 561 U.S. at 763-767 & notes 12-13. The second category, the one in question here, consists of a select list of fundamental rights that are only implicit in the Constitution.

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

Timbs v. Indiana, 586 U.S. __ (2019) (slip op. at 3); *McDonald*, 561 U.S. at 764; *Glucksberg,* 521 U.S. at 721 (1997).[22] In conducting this inquiry, courts engage 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), 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. *Idem* 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 Fourteenth Amendment's adoption, 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

[22] See also *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 *idem* 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 of whether the Fourteenth Amendment protects rights expressly set out in the Bill of Rights. 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". *Idem* at 720-721.

Historical inquiries of this nature are essential whenever we are asked to recognize a new "liberty" protected by the Due Process Clause because the term "liberty" alone provides little guidance. "Liberty" is a capacious term. As Lincoln said: "We all declare for liberty; but in using the same word we do not all mean the same thing."[23] In a well-known essay, Isaiah Berlin reported that historians of ideas had catalogued more than 200 different senses in which the term had been used.[24]

In interpreting what is meant by the Fourteenth Amendment's reference to "liberty", we must guard against the natural human tendency to confuse what the Amendment protects with our own ardent views of what should be protected. That is why the Court has long been reluctant to recognize rights 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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[23] 7 The Collected Works of Abraham Lincoln, Address at a Sanitary Fair at 301 (April 18, 1864).

[24] 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*, we 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.

When the Court has ignored the "appropriate 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 decisions such as *Lochner v. New York,* 198 U.S. 45, 25 (1905). The Court must not fall prey to an unprincipled approach. Instead, we must be guided by the history and tradition that map the essential components of our Nation's concept of ordered 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.[25]

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[25] 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*); 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").

II (B) (1)

Until the 1960's, 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. 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.*[26]

Not only was there no support for such a constitutional right, 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 at all stages it was unlawful and could have very serious consequences. 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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[26] See R. Lucas, Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes, 46 N.C. L. Rev. 730 (1968) and 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.

II (B) (2) (*i*)

We begin with the common law, under which abortion was a crime at least after the first felt movement of the fetus in the womb, "quickening", between the 16th and 18th week of pregnancy.[27]

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 (H.G. Richardson & G.0 Sayles eds. 1953).[28]

[27] The exact meaning of "quickening" is subject to 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) with Brief for *Amici Curiae* American Historical Association and Organization of American Historians Br. 6 n. 2 ("quick" consistently meant "the woman's perception of fetal movement"). We need not wade into this debate. It suffices to show that abortion was criminal by at least the 18th week of pregnancy. Moreover, as we will show, during the period surrounding the enactment of the Fourteenth Amendment, the quickening distinction was abandoned and States criminalized abortion at all stages of pregnancy.

[28] 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").

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.” *Idem* 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). 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 “a very heinous misdemeanor” (citing Coke). 1 Blackstone, Commentaries on the Laws of England *129-*130 (7th ed. 1775) (Blackstone).

[At that time “misdemeanor” had a different connotation than today, e.g., “high crimes and misdemeanors”]

English cases dating back to the 13th century corroborate that abortion was a crime. See generally J. Dellapenna, Dispelling the Myths of Abortion History 126 & n.16, 134-142, 188-194 & notes 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.” For that crime and another “misdemeanor”, Beare was sentenced to two days in the pillory and three years’ imprisonment. 2 Gentleman's Magazine 931,932 (Aug. 1732).

Although 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 the "common law's harsh sanctions" for suicide "did not represent an acceptance"). 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". 2 Gentleman's Magazine 932. Similarly, a 1602 indictment (which did not distinguish between pre-quickening and post-quickening) 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 we might call a proto-felony-murder rule. 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). Blackstone explained that to be "murder" a killing had to be done with "malice aforethought, either express or implied". In abortion, the law will imply malice just as it would if a someone intending to kill one person accidentally killed someone else:

> If 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

> 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.[32]

Blackstone and Hale did not state that the rule required that the woman be "with quick child", only "with child". Furthermore, Hale and Blackstone treated abortionists differently from physicians who caused the death of a patient "without any intent of doing any bodily hurt". Hale 429; 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 "unlawful".

In sum, although common law authorities differed on the severity of punishment, none endorsed abortion. Moreover, we are aware of no common law case or authority that even remotely suggests a positive right to abortion at any stage of pregnancy.

II (B) (2) (*ii*)

In this country the historical record is similar. Blackstone's statement that abortion of a

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[32] 4 Blackstone 198-200. 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), in the "most important early American edition of Blackstone's Commentaries", *District of Columbia v. Heller*, 554 U.S. 510, 594 (2008)., Tucker's Blackstone also retained Blackstone's discussion of the proto-felony-murder rule, at 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).[33]

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,

[33] 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).

II (B) (2) (*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,[34] and thus, as one court put it in 1872, "Until 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); *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").

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

[34] 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 *idem* 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").[35] In 1803, the British Parliament made

[35] 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 "discards this doctrine of the necessity of a quickening"); 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. In this country, the vast majority of the States enacted statutes criminalizing abortion at all stages of pregnancy. See the Online Appendix at http://correctplace.gov.org/appendix_put_up.htm (listing state statutory provisions in chronological order). 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.[37] *Ibid.* Of the 9 States that had not yet criminalized abortion at all stages, all but one did so by 1910. *Ibid.*
[Better yet, if the appendix information is available in a brief, cite to the brief.]

The trend in the territories that would become the last 13 States was similar. All criminalized abortion at all stages of pregnancy between 1850 (the Kingdom of Hawaii) and 1919 (New Mexico). *Ibid*; 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*

[37] 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 the Online Appendix.

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.[38]

This overwhelming consensus endured until the day *Roe* was decided, even though by then only a majority—30 States—still prohibited abortion at all stages (except to save the life of the mother). *Roe,* 410 U.S. at 118 & n. 2 (listing States). Although there was some liberalization in which abortions would be allowed, even the liberalizing States still criminalized some abortions, regulating abortion 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).

II (B) (2) (*iv*)

Thus, 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

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[38] 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 this exception.

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." *Glucksberg*, 521 U.S. at 719.

II (B) (3)

Respondents and their *amici* have no persuasive answer to this historical evidence. Neither respondents nor the Solicitor General dispute 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; Oral Arg. Tr. 74-75. Instead, respondents are forced to argue that it does not matter. Brief for Respondents 21. But that flies in the face of the standard we have applied in determining whether an asserted right unmentioned in the Constitution is nevertheless protected by the Fourteenth Amendment. Respondents and *amici* can show no support for the existence of an abortion right before the 1960s—no state constitutional provision, no statute, no judicial decision, no learned treatise, not even a speculative academic article. Their earliest sources are a few district court and state court decisions and a few law review articles from shortly before *Roe*.[39]

[39] See *Roe,* 10 U.S. at 154-155 (collecting cases decided between 1970 and 1973) C. Means, 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); C. Means, 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); R. Lucas, Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes, 46 N.C. L. Rev. 730 (1968).

A few *amici* attempt historical arguments, but they are feeble. 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, that is simply wrong.

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.[40] These articles have been discredited,[41] and it has come to light that even members of Jane Roe's legal team did not regard them as serious

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

[41] For critiques of Means's work, see 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).

scholarship; an internal memorandum characterized him as donning "the guise of impartial scholarship while advancing the proper ideological goals."[42]

The Solicitor General next suggests that history supports an abortion right because the common law's supposed 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."[43] *Idem* 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). In any case, the fact that many States in the early 19th century lacked statutes criminalizing pre-quickening abortion does not mean anyone thought they lacked such authority. When legislatures began to exercise that authority as the century wore on, no one argued that the new statutes violated a fundamental right. That is unsurprising since

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

[43] In any event, *Roe, Casey*, and other related abortion decisions imposed substantial restrictions on a State's capacity to regulate abortions performed even after quickening. See, *e.g., June Medical Services 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 prohibitions on "abortion before viability" unconstitutional); *idem* at 837-899 (holding a spousal notification provisions 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 a physician is willing to certify it is needed due to "emotional needs" or "familial" concerns. *Idem* at 192. See, *e.g., Women's Medical Professional Corp. v. Voinovich,* 130 F.3d 187, 209 (6th Cir. 1997) *cert.* denied, 523 U.S. 1036 (1998); but see *idem* at1339 (THOMAS, J., dissenting from denial of *certiorari*).

common-law authorities had repeatedly condemned abortion and described it as "unlawful" without regard to quickening. See *supra* at__

Another *amicus* brief relied upon by the respondents dismisses the statutes in effect when the Fourteenth Amendment was adopted by suggesting they were enacted for illegitimate reasons. Brief for Respondents 21. According to this account, which is based almost entirely on statements of a single prominent proponent, an important motive was fear that Catholic immigrants would outreproduce Protestants, who were using abortion "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 a right to abortion. 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 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). Inquiries into legislative motives "are a hazardous matter". *O'Brien*, 391 U.S. at 383. Even when legislative motive is backed by statements made by individual legislators, we have been reluctant to attribute those motives to the entire legislative body. "What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it." *Ibid.* Here, claims of legislative motive are not even based on statements by legislators--- just by a few private advocates.

There is ample evidence that the passage of abortion statutes by over three-quarters of the States was 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). 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 state abortion laws based on *amici*'s suggestions about legislative

motive.[44]

[The opinion should really mention the arguments in the Finnis and the Strang amicus briefs, whose logic implies that the states must prohibit abortion. That is just as legitimate a position as that of Roe and Casey, and, indeed, the very logic of Roe and Casey, such as it is, would end up with a universal ban on abortion if used by a Court as anti-abortion in sentiment as those courts were pro-abortion.]

II (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 thus: "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." *Idem* 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 say what they wish about "existence", "meaning", 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 not "ordered liberty."

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[44] Other *amic*i present opposite arguments about motives, *e.g.,* that abortion 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*). It is beyond dispute that *Roe* has had the *effect* suggested: a highly disproportionate percentage of aborted fetuses are black. Center for Disease Control, Abortion Surveillance—United States, 2019, 70 Surveillance Summaries at 20, tbl. 6 (Nov. 26, 2021). For our decision, however, we need not determine the motives of either supporters or opponents of abortion.

Ordered liberty 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 "potential life". *Roe,* 410 U.S. at 150; *Casey*, 505 U.S. at 852. But the people of the various States evaluate those interests differently. Voters in some States may believe that the abortion right should be even more extensive than it is in *Casey.* Voters in other States may wish to impose tighter restrictions based on the belief that abortion destroys an "unborn human being". Miss. Code Ann. §41-41-191(4)(b). The Constitution does not prevent the people's elected representatives from deciding how to evaluate those interests.

Nor does the right to obtain an abortion have a sound basis in precedent. *Casey* relied on cases involving a diverse set of rights: the right to marry someone 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,* 431 U.S. 678 (1977); the right to reside with relatives, *Moore v. East Cleveland*, 431 U.S. 494 1977); the right to decide on 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, *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535 (1942); and the right to not undergo involuntary surgery, forced administration of drugs, etc., *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. Such vague criteria could license fundamental rights to illicit drug use, prostitution, and the like. See *Compassion in Dying v. Washington*, 85 F.3d 1140, 1444 (9th Cir. 1996) (O'Scannlain, J., dissenting from denial of rehearing *en banc*). None of these rights has any claim to being deeply rooted in history. *Idem* at 1440, 1445.

What sharply distinguishes the abortion right from those other rights is something that both *Roe* and *Casey* acknowledged: abortion destroys what those decisions call "potential life" and the Mississippi statute at issue here call "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 decisions cited by *Roe* and *Casey* involved abortion's critical moral question. They are therefore inapposite and they do not support the right to obtain an abortion. By the same token, our conclusion that the Constitution does not confer a right to abortion does not undermine them in any way.

II (C) (2)

We would draw this same critical distinction between the abortion right and other rights even if we accepted *Casey*'s claim 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 *Roe* and *Casey* do not claim that 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 new 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 at this present time in our history, and women will be unable to compete with men in the workplace and 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,[45] that work leave for pregnancy and childbirth are now guaranteed by law in many cases,[46] that the costs of medical care associated with pregnancy are covered by insurance or government assistance;[47] that States have increasingly adopted

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[45] See, *e.g.,* Pregnancy Discrimination Act (1978) codified at 42 U.S.C. §2000e(k) (federal law prohibiting pregnancy discrimination in employment): U.S. 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).

[46] 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).

[47] The Affordable Care Act requires non-grandfathered health plans in the individual and small group markets to cover certain health benefits which include 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, *idem* §18022(c). State Medicaid plans must provide coverage for pregnancy-related services, including but not limited to delivery, and both prenatal and postpartum care, as well as for conditions that might complicate 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;[48] and that a woman who puts her newborn up for adoption today has little reason to fear that the baby will not find a suitable home.[49] They also claim that because of scientific advances, many people now have a new appreciation of fetal life, and that when a pregnant woman and her husband view a sonogram, they typically say that what they see is their son or daughter, "their baby".

Both sides make important policy arguments, but supporters of *Roe* and *Casey* needed to show that this Court has the authority to weigh those arguments and impose abortion regulations on the States. They have failed to make that showing, and we thus return the power to weigh

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[48] 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).

[49] 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) ("Nearly 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 (approximately 3.1 million women between 18 and 49 had ever "taken steps to adopt a child" based on data collected 2015-2019).

the evidence 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 for several reasons. It protects the interests of those who have taken action in reliance on past decisions. *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,* 576 U.S. 446, 455 (2016). It fosters evenhanded decisionmaking, by requiring that like cases be decided in a like manner, which "contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). And it restrains judicial hubris and requires us to carefully consider the judgment of our predecessors. "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), and "is at its weakest when we interpret the Constitution", *Agostini v. Felton*, 521 U.S. 208, 235 (1997). Sometimes it matters more that an issue "be settled than that it be settled right." *Kimble,* 576 U.S. at 455 (quoting *Burnet v. Coronado Oil & Gas,* 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)). But when it comes to 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 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, we must be more willing to reconsider, and if necessary overrule, interpretations of the Constitution than of statutes.

Some of our most important decisions have overruled precedents. We will mention three. In *Brown v. Board of Education*, the Court repudiated the "separate but equal" doctrine that allowed States to maintain racially segregated schools. 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 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. *Idem at* 545. *West Coast Hotel* signaled the demise of an entire line of important precedents that had protected an individual liberty right against 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 v. Bryan*, 264 U.S. 504 (1924) (holding invalid laws fixing the weight of loaves of bread).

Most surprisingly, in *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943), the Court overruled *Minersville School Dist. v. Gobitis,* 310 U.S. 536 (1940) after the lapse of only three years, holding 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 wrong.

On many other occasions, this Court has overruled important constitutional decisions, as the footnote that follows lists in part.[50] Without these decisions,

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[50] 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,* 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 jury *venire*) (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' 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 imminent lawless action) (overruling *Whitney v. California*, 274 U.S. 357 (1927)); *Katz v. United States,* 389 U.S. 347 (1967) (the 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 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 v. Tompkins*, 304 U.S. 64 (1938) (Congress does not have the power to declare substantive rules of common law; a federal court sitting in diversity jurisdiction must apply the state's 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 it is a serious matter, a step not to be taken lightly. Our cases have provide a framework for deciding when a precedent should be overruled, identifying factors that should be considered. *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 the error, the quality of the reasoning, the workability of the rules imposed, the disruptive effect on other areas of the law, and the absence of concrete reliance.

III (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* was one such decision, betraying our commitment to "equality

under law". *Idem* at 562 (Harlan, J., dissenting). It was "egregiously wrong" 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. As 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. The errors do not concern some arcane corner of the law. Rather, the Court imposed its own view of a question of profound moral and social importance that the Constitution unequivocally leaves for the people. *Casey* described itself as calling both sides to resolve their debate, but in doing so, *Casey* necessarily declared a winning side. For those on the losing side, this closed off the possibility of trying to use argument to persuade those who disagreed. The Court short-circuited the democratic process by closing it to anyone 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). *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 democratic process. Justice White later put it this way:

> 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).

III (B)

The quality of the reasoning. Under our precedents, the quality of an opinion's reasoning 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, we explained why *Roe* was incorrectly decided, but that decision was more than just wrong: it stood on exceptionally weak reasoning.

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 upon, matters that have no bearing on the meaning of the Constitution. It disregarded the 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, but did not explain how this scheme could be teased out of the Constitution, the history of abortion laws, or prior precedent. 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 those who agreed with its policy result.

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

III (B)(1) (*i*)

The weaknesses in *Roe*'s reasoning are well-known. Without any grounding in 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 abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician." After that point, a State could "regulate the abortion procedure in ways that are reasonably related to maternal health". 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 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."

This scheme was the Court's own brainchild. Neither party advocated the trimester framework; nor did either party or any *amicus* argue that viability should matter. 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).

III (B) (1) (*ii*)

Not only did the *Roe* scheme resemble the work of a legislature, but the Court made as little effort as in the text of a legislative bill to explain how these rules came about.

Roe featured a lengthy survey of history, but much of it was unconnected to the decision, and history that would have been relevant was omitted. Multiple paragraphs were devoted to ancient civilizations where infanticide was accepted. See *Roe*, 410 U.S. at 130-132. But when it came to the most important historical question—how the States regulated abortion when the Fourteenth Amendment was adopted—the Court said almost nothing. It allowed that States had tightened

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

Roe's failure to mention the overwhelming consensus of state laws in effect in 1868 is striking. 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, and Blackstone, that “it now appears doubtful that abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus”, at 136. This erroneous understanding matters, because at 165 the opinion cited “the lenity of the common law” as one of the four factors that informed its decision.

After surveying history, the opinion spent many paragraphs discussing the views of various private organizations, including a lengthy account of the position of the American Medical Association, the American Public Health Association, and the American Bar Association's House of Delegates. *Idem* at 141, 143, 146. Also noted were a British judicial decision handed down in 1939 and a new British abortion law enacted in 1967. *Idem* at 137-138. The Court did not explain why these sources shed light on the meaning of the Constitution, and none of them advocated anything like the *Roe* trimester scheme.

Finally, *after* history and politics, the Court turned to precedent. Citing a broad array of cases, the Court found support for a

constitutional "right of personal privacy", *idem* at 152, but it conflated two different meanings of the term: the right to shield information from disclosure, and the right to make personal decisions without government interference. See *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). Cases involving the first meaning of "privacy" had no relevance for abortion, and some of the cases using the second meaning involved personal decisions very, very far afield from it. 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 the unmarried). 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 its scheme, it asserted that its rules were "consistent with" (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". *Idem* at 165. Putting aside the second and third factors, which were based on the Court's flawed account of history, what remains are the sort of considerations legislative bodies take into account when they draw lines that accommodate competing interests. The trimester scheme looked like legislation, and the Court provided the sort of explanation that might

be expected for legislation, as opposed to interpretation.

III (B) (1) (*iii*)

What *Roe* did not provide was any policy 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 Court's only explanation was that mortality rates for abortion at that stage were lower than mortality rates for childbirth. *Roe*, 410 U.S. at 163. But the Court did not explain why childbirth mortality rates were the only factor that a State could legitimately consider in ensuring that abortion was safe. 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 wrote, "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 Serv's,* 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).

This arbitrary line has not found much support among scholars of ethics. Among the characteristics offered as essential attributes of personhood are sentience, self-awareness, and the ability to reason.[52] By this logic, it would be an open question whether even post-birth individuals, in particular young children and those afflicted with certain medical conditions, merit protection. But even if one takes the view that personhood begins when a certain attribute is acquired, it is hard to see why viability should mark that point.

[Neglected: the obvious argument for viability is that an alternative to abortion is simply to give birth to the baby, which has relatively low cost to the mother and very high benefit to the baby. This needs dealing with.)

[52] 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: (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").

Moreover, viability depends on factors having nothing to do with the fetus—for example, the state of neonatal care at a particular point in time. Technology constantly is changing the viability line. In the 19th century, a fetus was not viable until 32 or 33 weeks after conception.[53] When *Roe* was decided, viability was gauged at roughly 28 weeks. *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 at 26 weeks but in 1973 they had zero interest in protecting the 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). A 24-week-old fetus may be viable if a woman gives birth in a city with a hospital that specializes in advanced care for very premature babies, but not if the woman lives in a poor and remote area. On what ground could the constitutional status of a fetus depend on whether the pregnant woman could afford a good hospital?

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[53] See W.T. Lusk, Science and the Art of Midwifery 74-75 (1882) (explaining that "with care, the life of a child born within [the eighth month] of pregnancy may be preserved"); *idem* at 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).

If viability is meant to have universal moral significance, how can it be that the fetus viable in a big city must be allowed to live while the identical fetus in a poor rural county may be aborted?

In addition, as the Court once explained, viability is not 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 "gestational age", "fetal weight", the woman's "general health and nutrition", and the "quality of the available 'medical facilities". *Idem* at 395-396. "Only with difficulty" can a physician estimate the probability of a particular fetus's survival. *Idem at* 396. And even if each fetus's probability of survival could be ascertained, what probability should count as "viability"? *Idem* at 396. Is a fetus viable with a 10 percent chance of survival? 90 percent? Can such a judgment be made by a State, or must this Court make it? 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"? *Idem* at 388.

The viability line--- which *Casey* termed *Roe*'s central rule--- makes no sense. It is telling that no State ever used such a line, and almost no other country.[54] The Court thus claimed the imprimatur of the United States Constitution to create a rule that no State, and only one other country in the world, thought appropriate.

[Add to the note on the Netherlands a note to the page in Casey where it calls the viability line "Roe's central rule", and quote that phrase in quotation marks in the text if Casey says literally that.]

III (B) (1) (*iv*)

[How can you have a page break here, even in a draft!]

[54] 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) (as of Jan. 21, 2022).

All in all, *Roe*'s reasoning was exceedingly weak. 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, Solicitor General under President Kennedy, commented that *Roe* "reads 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 weakness, 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* 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, *idem* 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, *idem* 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). 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.

III (B) (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 history. As for precedent, the Court relied on essentially the same body of cases as *Roe*. Thus, with respect to the standard grounds for constitutional decisionmaking—text, history, and precedent—Casey did not even try to bolster *Roe*'s reasoning.

The Court also made no real effort to remedy *Roe*'s 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 provided no principled defense of the viability line. *Idem* at 860, 870-871. Instead, it merely rephrased what *Roe* had said: 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." *Idem* at 870. Why "reason

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

The controlling opinion criticized and rejected *Roe*'s trimester scheme, *idem* at 872, and substituted a new "undue burden" test, but the basis for this test was obscure.

Casey, in short, either rejected or refused to reaffirm important aspects of *Roe's* analysis; it failed to remedy its glaring deficiencies of reasoning; it endorsed *Roe*'s "central holding" while suggesting that a majority of judges thought it dubious; and it imposed a new and problematic test with little grounding in text, history, or precedent.

Instead, the *Casey* Court relied on a novel version of the doctrine of *stare decisis*. See Part III-E, *infra*. This new doctrine bypassed the usual criteria for *stare decisis*, and placed great weight on an intangible form of reliance with little, if any, basis in caselaw or legal reasoning.

III (C)

Workability. A third consideration in deciding whether a precedent should be overruled is whether it 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*

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

III (C) (1)

Problems begin with the very concept of "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,* 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").

The *Casey* plurality tried to put meaning into the undue burden test by setting out three subsidiary rules. 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 *idem* 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). But what does "ample or considerable" mean? Relative to what?

[You might note also that "effect is to place a substantial obstacle" is crazy. Requiring a doctor to do an abortion rather than just a friend or someone you find on Craig's List is a substantial obstacle, but would be allowed by the Constitution as a requirement for most medical procedures. "Purpose" is really what the Casey Court meant.]

This ambiguity is a problem, and the second rule muddies things further. It says 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 *idem* at _ (ROBERTS, C.J., concurring) (slip op. at 5-6).

The third rule complicates the picture even more. Under that rule, "*unnecessary* 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 with each other. It adds a third ambiguous term: "*unnecessary* health regulations". The term "necessary" has a range of meanings, from utterly "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 which applies to health regulations.

All three rules create yet another problem. They require courts to examine a law's effect on a particular woman, but a regulation may have very different impacts on different women because of their place of residence, financial resources, family situation, work and personal obligations, knowledge of fetal development, psychological disposition, and firmness of desire to obtain an abortion. In order to determine whether a regulation presents "a substantial obstacle to a woman", a court needs to know which women it should have in mind and how many of them must find the obstacle "substantial".

Casey provided no answer to these questions. It said a regulation is unconstitutional if it imposes a substantial obstacle "in a large fraction of cases", 505 U.S. at 895, but what does "large" mean? Nor is it clear what the Court meant by "cases". Does it mean cases before the court, or does it include unlitigated occurrences? These ambiguities have caused confusion and disagreement. Compare *Whole Woman's Health v. Hellerstedt,* 579 U.S. 582, __ (2016) (slip op. at 39), with *idem* at _ (ALITO, J., dissenting) (slip op., 24-25 & n. 11.

III (C) (2)

The difficulty of applying *Casey*'s new rules surfaced in *Casey* itself. The controlling opinion found that Pennsylvania's 24-hour waiting period and informed-consent provision did not impose an "undue burden". *Casey*, 550 U.S. at 881-888 (plurality opinion), but Justice Stevens, applying the exact same test, reached the opposite result. *Idem* 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". *Idem* at 964-966 (Rehnquist, C.J., dissenting)

The ambiguity of "undue burden" inevitably 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 it "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). But the Chief Justice—who cast the deciding vote—argued that "nothing about *Casey* suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts". *Idem* at __ (ROBERTS, C.J., concurring) (slip op. at 6). The four Justices in dissent rejected the lead opinion's interpretation of *Casey.* See *idem* at __ (ALITO, J., dissenting, joined in relevant part by THOMAS, GORSUCH, and KAVANAUGH, JJ.) (slip op. at 4); *idem* 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 forecast that the undue-burden standard was "not built to last". *Casey*, 505 U.S. at 965 (Rehnquist, C.J, dissenting in part).

III (C) (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. The Courts of Appeals have disagreed about whether the balancing test from *Whole Woman's Health* correctly states the undue-burden framework.[55] They have disagreed on the legality of parental notification rules.[56]

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[55] Compare *Whole Woman's Health v. Paxton,* 10 F.4th 430, 440 (5th Cir. 2021), *EMW Women's Surgical v. Friedlander*, 978 F.3d 418, 437 (6th Cir. 2020), and *Hopkins v. Jegley*, 968 F.3d 912, 915 (8th Cir. 2020), with *Planned Parenthood of Ind. & Ky. v. Box*, 991 F.3d 740, 751-752 (7th Cir. 2021).

[56] Compare *Planned Parenthood v. Camblos*, 155 F.3d 352, 367 (4th Cir. 1998), with *Planned Parenthood of Ind. & Ky. v. Adams*, 937 F.3d 973, 985-990 (7th Cir. 2019), *certiorari* granted, judgment vacated, 591 U.S. _ (2020), and *Planned Parenthood v.. Miller*, 63 F.3d 1452, 1460 (8th Cir. 1995).

They have disagreed about bans on dilation-and-extraction procedures.[57] They have disagreed about when an increase in the time needed to reach a clinic constitutes an undue burden.[58] And they have disagreed on whether a state may regulate abortions performed because of the fetus's race, sex, or disability.[59]

The Courts of Appeals have experienced particular difficulty in applying the large-fraction-of-relevant-cases test. They have criticized the ambiguous assignment our Court has given them and reached unpredictable results.[60] And they have candidly outlined Casey's many other problems.[61]

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[57] 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 (11th Cir. 2018), and *EMW Women's Surgical v. Friedlander,* 960 F.3d 785, 806-808 (6th Cir. 2020).

[58] Compare *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 541 (9th Cir. 2004), with *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 605 (6th Cir. 2006) and *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 171-172 (4th Cir. 2000).

[59] Compare *Preterm-Cleveland*, 994 F.3d 512, 520-535 (6th Cir. 2021), with *Little Rock Family Planning Serv's v. Rutledge*, 984 F.3d 682, 685-690 (8th Cir. 2021).

[60] See, *e.g., Bristol Reg'l Women's Center v. Slatery,* 7 F.4th 478, 485 (6th Cir. 2021); *Reproductive Health Serv's v. Strange*, 3 F.4th 1240, 1265; *June Medical Serv's v. Gee,* 905 F.3d 787, 814 (5th Cir. 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 (8th Cir. 2017); *McCormack v. Hertzog,* 788 F.3d 1017, 1029-1100 (9th Cir. 2015); compare *Newman,* 305 F.3d at 699 (Coffey, J., concurring), with *idem* at 708 (Wood, J., dissenting).

[61] See, *e.g.*, *Memphis Ctr. for Reproductive Health v. Slatery*, 14 F.4th 408, 451 (6th Cir. 2021) (Thapar, J., concurring in judgment in part and dissenting in part); *Preterm-Cleveland*, 991 F.3d at 521 (6th Cir. 2021); *Planned Parenthood of Ind. & Ky.* 888 F.3d at 313 (Manion, J., concurring in the judgment in part and dissenting in part); *Planned Parenthood of Ind. & Ky. v. Box*, 949 F.3d 997, 999 (7th Cir. 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 (2nd Cir. 2008) (Walker, C.J., concurring); *Planned Parenthood of Rocky Mountains Servs v. Owens,* 287 F.3d 910, 931 (10th Cir. 2002) (Baldock. J., dissenting).

Casey's undue burden test has proven to be unworkable. "Plucked 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" required by *Payne*, 501 U.S. at 821.

III (D)

Effect on other areas of law. Roe and *Casey* have led to the distortion of many important but unrelated legal doctrines. 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,* 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); *idem* 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.[62] They have ignored the Court's third-party standing doctrine.[63] They have disregarded standard *res judicata* principles.[64] They have flouted the ordinary rules on the severability of unconstitutional provisions[65] and that statutes should be read where possible to avoid unconstitutionality.[66] And they have distorted First Amendment doctrines.[67]

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).

III (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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[62] Compare *United States v. Salerno*, 481 U.S. 739, 745 (1981), with *Casey*, 505 U.S. at 895; see also *supra* at ___-___.

[63] 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), *idem* 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).

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

[65] Compare *Whole Woman's Health,* 579 U.S at (slip op. at 36-38), with *idem* at __ (ALITO, J., dissenting) (slip op. at 2).

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

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

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

III (E) (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. We agree that conventional, concrete reliance interests are absent.

III (E) (2)

Unable to find reliance in the conventional sense, the controlling opinion in *Casey* suggested 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 the "ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Ibid.* This notion of reliance 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. We are ill-equipped to assess "generalized assertions about the national psyche". *Casey* at 957 (Rehnquist, C.J., concurring in part and dissenting in part). That form of reliance depends on an empirical question 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. This Court has neither the authority nor the expertise to adjudicate those disputes, and "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).

[I deleted a number of sentences that are unrelated to the issue of reliance.]

III (E) (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 incorrect for reasons already discussed. As even the *Casey* plurality recognized, "abortion 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"). We wish to 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 now address one final argument in *Casey*. It was essentially this: the American people's belief in the rule of law would be shaken if they came to believe this Court decides cases based not on principle, but "social and political pressures". *Casey*, 505 U.S. at 865. There is a special danger that the

public will believe that one or the other decision was made for unprincipled reasons when the Court overrules a "watershed" decision such as *Roe* (at 866-867). The decision would be perceived as having been made "under fire", a "surrender to political pressure" (at 867), so the preservation of public confidence weighs heavily in favor of even a flawed decision (at 869).

This analysis starts out on the right foot but ultimately veers off course. It is indeed important for the public to believe that our decisions are based on principle. We should make every effort to achieve that objective by issuing opinions that carefully detail how the Constitution's provisions, not our personal beliefs, lead to the decision. But we cannot depart from the Constitution in a strategic attempt to persuade a confused public that we are adhering to it. Our decisions must not affected by concern about the public's reaction. *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, *Casey* overreached. Politics is not the business of courts, and courts do not have the experience or the talents to succeed at it. The *Casey* plurality tried to "call the contending sides of a national controversy to end their national division" and to permanently settle the issue of abortion simply by saying

That the matter was closed. *Idem 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*. Decisions are subject to the usual principles of *stare decisis,* under which adherence to precedent is a norm but not a necessity. Otherwise, *Plessy* and *Lochner* would still be law. That is not how *stare decisis* works.

The *Casey* plurality also misjudged the practical limits of this Court's influence in calming troubled political waters. *Roe* failed to end division over abortion. To the contrary, it "inflamed" a national issue that has remained bitterly divisive for the past 50 years. 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.

In trying to move abortion from political debate to the realm of the Constitution, neither decision ended debate. Indeed, in this very 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 should not have been surprising. This Court cannot bring about the resolution of a rancorous national controversy simply by setting out its opinion and telling people to move on. Whatever influence the Court may have on public attitudes must stem from the persuasiveness of our opinions, not as 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 will respond to today's decision. Even if we did know, we could not let that influence our decision. We can only do our job, which is to interpret the law, apply the 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 that regulations on any subject must satisfy.

(V) (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, 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*, 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 it would serve legitimate state interests. *Idem* at 320; *F.C.C. v. Beach Communications,* 508 U.S. 307, 313 (1998); *New Orleans*, 421 U.S. at 303; *Williamson v. Lee Optical of Okla.,* 348 U.S. 483, 491 (1955). These legitimate interests include respect for 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 *idem* at 156-157; *Roe,* 410 U.S. at 150; *cf. Glucksberg*, 521 U.S. at 728-731 (identifying similar interests).

(V) (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 asserts the State's interest in "protecting the life of the unborn". §2(b)(i)(2). The legislature also found that abortions performed after fifteen weeks typically use the dilation and evacuation procedure, and that use of this procedure is "for non-therapeutic or elective reasons a barbaric practice,

dangerous for the maternal patient, and demeaning to the medical profession". §2(b)(i)(8); see also *Gonzales*, 550 U.S. at 135-143. This provides 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.

COMMENTS

(1) Old: *Id*. New*: Idem*

The abbreviation saves only one character and so is not worth doing.

(2) Old: See U.S. 340, at 346 New: See U.S. 340 at 346

The comma is grammatically unnecessary, and distracting.

(3) Old: U. S. New: U.S.

This abbreviation is so common and occurs in so many places were conciseness is useful because it is just for a citation that the space after the period should be deleted.

(4) Old: *Colautti* v. *Franklin* New: *Colautti v. Franklin*

The "v." for versus should be in italics too, partly because it is a pain to have to go in and out of italic mode and partly because "*v.*" abbreviates a Latin word.

(5) Old: CA7 New: 7th Cir.

"CA7" is ugly and it takes a millisecond to comprehend because we think of "the Seventh Circuit Court" in our minds, not "Court of Appeals, Seventh".

(6) Old: It is "right,", but not correct. New: It is "right", but not correct.

This is a hard one. In America, the comma is usually put inside the quotation marks; in Britain it is put outside. Everyone admits that by logic, the comma should be put outside,

but that is not dispositive. "Look" matters too. I think that for single words and short phrases, putting the comma outside the quotation marks also has the better look, since the comma (or period) is proportionally a significant fraction of the length. For long phrases, on the other hand, putting the comma inside as the better look.

(7) Old: "[T]his is it" when quoting "He said that this is it" New: "This is it"

Lawyers and mathematicians and historians want to be precise, but often to be precise is not the same as being clear. Here we have an illustration. The lawyer does not want to falsely quote the original by changing from lower case to upper case. Instead, he falsely quotes by not only capitalizing but adding square brackets. The insider knows this means he is just warning the reader that he has changed the quote. But for anybody, insider or outsider, this is distracting and useless. It is no more important than being careful to use the same font that the original author did, or the same shade of ink. Authors should be allowed to make harmless changes in formatting when quoting, and even to change words when that is in accordance with the quoted author's meaning (e.g., inserting "Africa" for "that country" instead of inserting "[Africa]". Can this be abused? Of course. But someone who would abuse it would also be willing to lie by inserting, say, "[Europe]". What is the gain from adding an extra rule he will break anyway? It is like requiring burglars to leave their phone number at the scene of the crime.

(8) *United States* v. *Carolene Products Co*., New: United States v. *Carolene Products*,

Case names should be as short as possible and close to how they would be said in conversation. This demands some sense of "feel", but "Inc.", "Co.", "LLC" and so forth are never useful.

(9) Old: iv New: (III) (A) (2) (*iv*)

(a) Do not expect the reader to remember what sub-sub-sub section this is a subsection of. It makes skimming difficult. **(b)** The Roman numeral *iv* is easily mistaken for the letters iv. It is Latin, which we italicize ordinarily. To be sure, III is not italicized, but it is not so easily mistaken for letters and it is the top heading, which needs to be bolder, of not bold.

(10) Footnotes should be separate by a blank line. This makes finding them much easier.

(11) Old: "Unlike other rights that this Court has found" New: "Unlike other rights this Court has found"

The word "that" would be omitted in everyday conversation, adds nothing to clarity, and dilutes the meaning intended.

(12) Old: The World's Abortion Laws, Center for Reproductive Right (Feb. 23, 2021) (last accessed Jan. 16, 2022)

New: The World's Abortion Laws, Center for Reproductive Right (Feb. 23, 2021) (as of Jan. 16, 2022)

(a) "as of" has fewer syllables than "last accessed", is anglo-saxon rather than latinate, and has a better meaning (we care what the source looked like at a certain time, not when

some clerk accessed it). **(b)** Readers will be helped if the link is included and clickable, as it would be in a pdf file.